
# EUROPEAN NETWORK OF REGISTERS OF WILLS ASSOCIATION (ENRWA)

# "Cross-border Wills" (CroBoWills) Project"

## Final Report

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# PRELIMINARY COMMENT

ENRWA wishes to thank the experts who participated in the “Cross-Border Wills” project and the discussion workshops.

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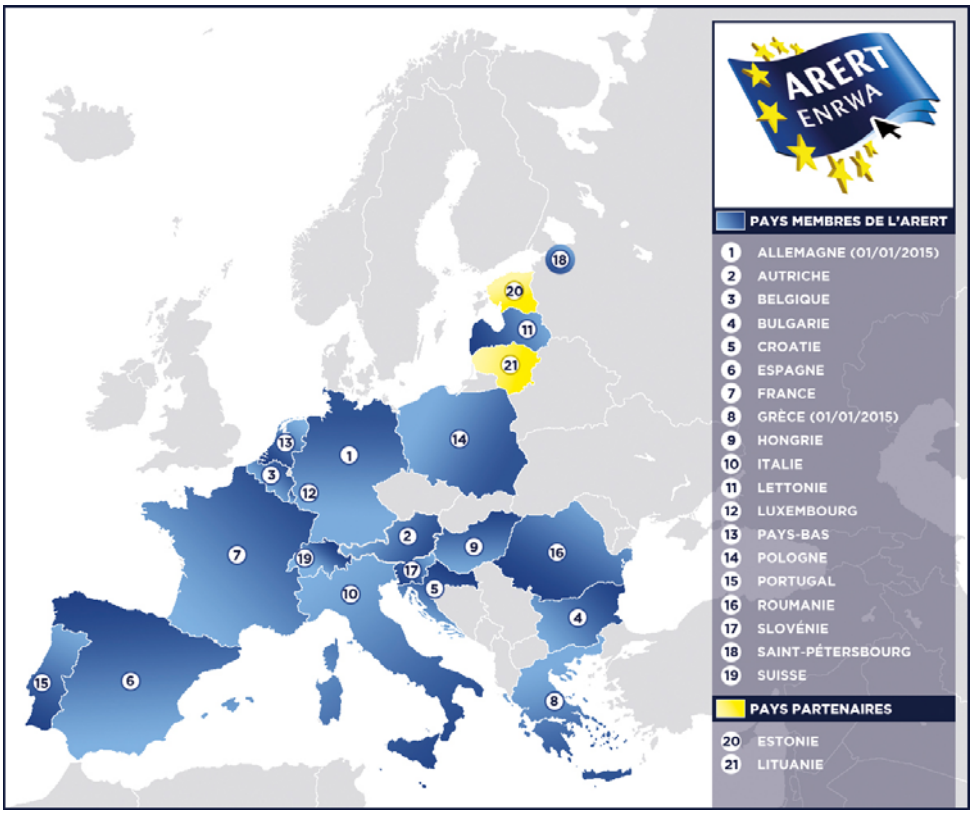
# Introduction

Between December 2012 and November 2014, the European Network of Registers of Wills Association (ENRWA) (1), implemented the "Cross-border Wills" (CroBoWills) project (2).

## 1. The association

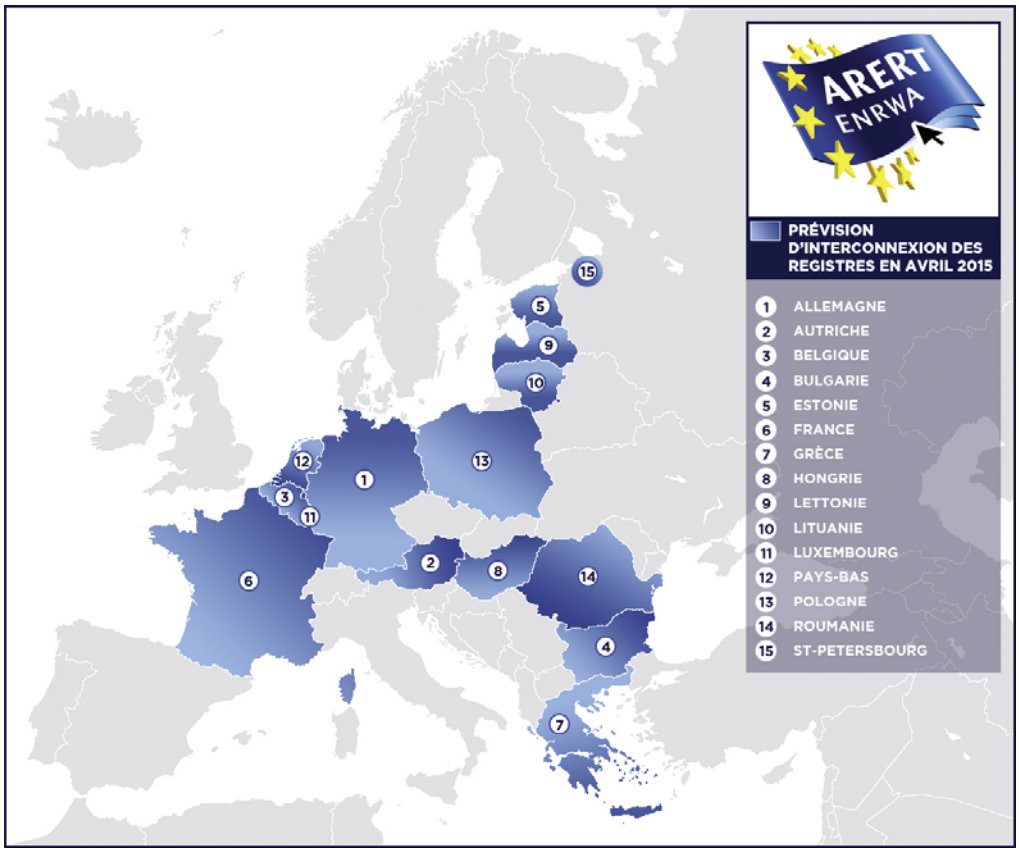
ENRWA is an international not-for-profit association governed by Belgian law. Its main objective is to establish a European network of managers of national registers of wills. It was set up in 2005, on the initiative of the European Notariat, and now has 17 members and two partners. The German and Greek Notariats joined the association on 1st January 2015.




**1. Map of ENRWA members and partners**

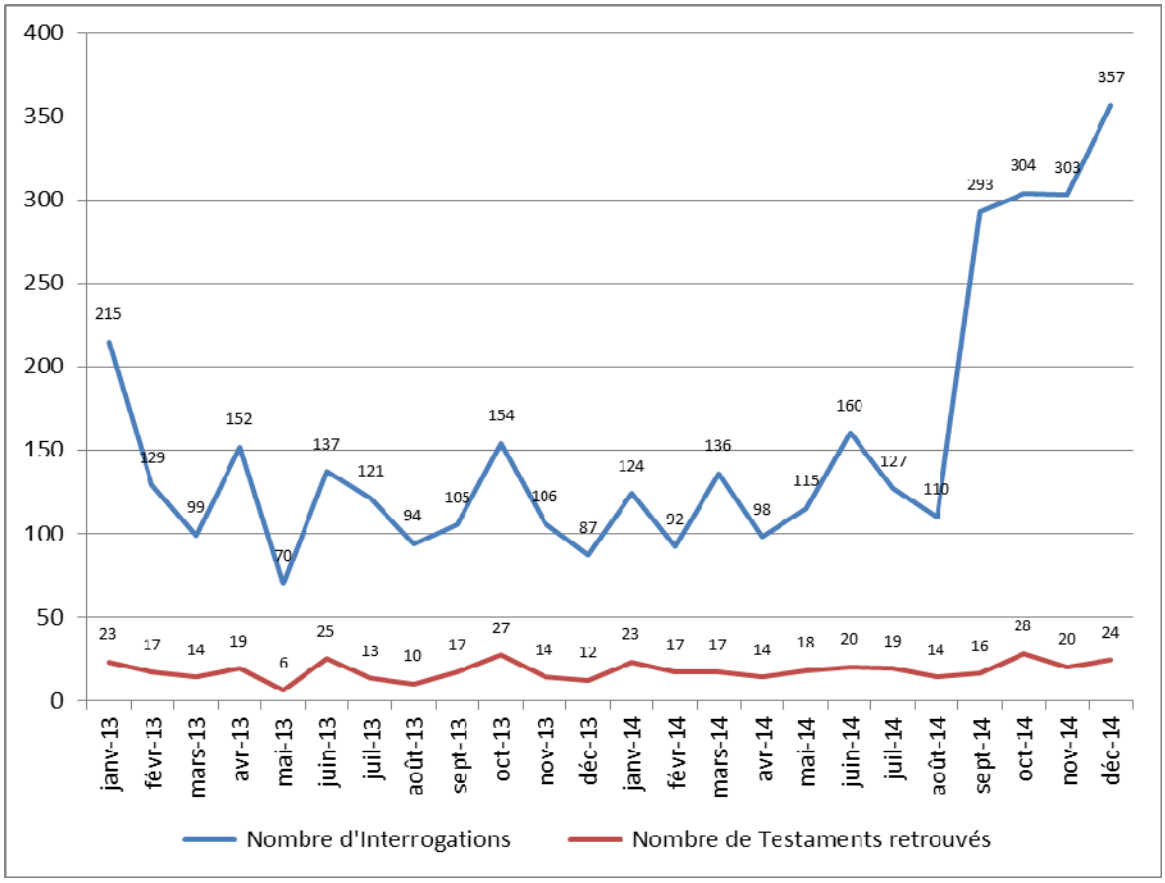
In accordance with the Basel Convention of 16 May 1972 on the Establishment of a Scheme of Registration of Wills, the States that have a register of wills, regardless of whether they are members or partners of ENRWA, can interconnect their registers. The interconnection of these registers forms a network called ENRW (European Network of Registers of Wills). ENRW enables notaries and the legal professionals entrusted with the settlement of successions to search a foreign register via their own national register. The foreign register searched sends its answer to the legal professional entrusted with settling the succession, via the latter's national register. ENRWA thus enables European citizens to locate a will in whichever State the deceased person has deposited it.

At the current time, 15 registers are interconnected via the ENRW platform. The number of will searches is rising steadily and will in all likelihood continue to increase because of the free movement of people and goods within the European Union. Will searches involve a time lag, which can sometimes run to several decades, between the time a will is deposited and the time a search is organised. Therefore, the current mobility of European citizens will only have a significant impact in several years. In order to anticipate this development, it is necessary to establish an efficient network as soon as possible. That is why ENRWA has established a platform to facilitate will searches among the interconnected European registers of wills.




**2. Map of the European Network of Registers of Wills (ENRW)**

Since January 2013, on average 153 will searches have been carried out between the interconnected registers of wills, and this figure is increasing. Every month, dozens of wills are found in a register of wills established in a State other than that which initiated the search. The last testamentary dispositions are found rapidly, since the replies are generally provided the day after the search request is received. On average, 12% of answers are positive, that is to say a will has been found abroad. In 88% of the remaining cases, the legal professional who initiated the search can be certain that a will does not exist in the registers searched, thereby eliminating the risk of the reopening of a succession that has already been settled.




**3. ENRW platform searches between January 2013 and December 2014**

Therefore, ENRW enables interested parties to find a will drawn up or deposited aboard. Such a will would probably not have been the subject of a search in the past, in particular because of a lack of familiarity with the conditions under which foreign registers can be searched and the diversity of such conditions. By facilitating the formalities in this regard, while complying with national legislation, ENRWA helps to increase justice, freedom and security for European citizens, whether they are testators who will have the assurance that their testamentary dispositions will be found after their death, or the deceased's close relatives for whom it will be easier to search for the will.

## 2. The "Cross-border Wills" (CroBoWills) project

The "Cross-border Wills" project was co-financed by the European Commission as part of the "2007–2013 Civil Justice" programme. In line with its commitment to improving the service provided to European citizens confronted with the death of a relative, ENRWA has implemented this project in order to obtain a better understanding of the practices relating to the opening of wills and the communication of their content. Thanks to the ENRW platform for the exchange of information, an increasing number of wills are located in other States. The professionals entrusted with the settlement of a succession will therefore be increasingly called upon to search for the content of wills drawn up or deposited abroad. The entry into force of the regulation on cross-border successions[1] will increase the number of such searches, since this regulation is likely to lead to a single legal professional being entrusted with the settlement of the succession as a whole, regardless of where the estate is located. Therefore, the professional in question will need to be aware of all the provisions of the deceased's will and, if applicable, ascertain where the will is deposited and its content. The "Cross-border Wills" project provided a response to this last concern by identifying and summarising the practices of the 28 Member States regarding the opening of wills and the conditions under which the content of wills is disclosed, in a cross-border context (that is to say when a will is found in a Member State other than that where the person requesting the information is based). The achievement of the project highlighted the absence of any major legal difficulties with regard to communicating the information contained in a will when the succession is completed. All that remains is the practical difficulty of locating the professional with whom the will is deposited, in particular where there is no register of wills. However, obtaining the information contained in a will after the succession has been settled comes too late. In order to avoid the possibility of a succession being reopened due to the emergence of new elements, mentioned in a will located abroad for example, it is important for the legal professional entrusted with the settlement of the succession to have all the

[1] Regulation n°650/2012 of 4 July on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in successions and on the creation of a European Certificate of Succession.

information needed for its settlement. The implementation of the “Cross-border Wills” project has made it possible to identify the remaining obstacles to be overcome in order to facilitate the communication of the information contained in wills in all the Member States of the European Union (I). It will then be possible to overcome these obstacles thanks to the development of a cross-border cooperation network (II).

# I. The obstacles to be overcome to access information

Access to the information contained in wills may pose practical and legal challenges. The existence of a register of wills is often a prerequisite to the communication of information, since if the will is not found it is firstly not possible to communicate the information contained in it (A). Then, the principle of the territoriality of legal systems does not facilitate a rapid exchange of the information contained in wills (B). Lastly, in the majority of Member States, such information can only be communicated to persons demonstrating a legitimate interest; this interest is freely assessed by the legal professional entrusted with the settlement of the succession. If this criterion may seem an obstacle to access to the information contained in a will, it is nevertheless necessary to retain it (C).

## A. The absence of a register of wills

The search for a will is one of the first stages in the settlement of a succession. In the context of the freedom of movement of people and goods, anyone may have drawn up or deposited a will in a foreign country, for example following a real estate purchase in another Member State. Therefore, on that person's death, the professional entrusted with settling the succession must search for all the deceased person's testamentary dispositions in order to obtain a copy of them or, failing that, the information contained in them.

In a cross-border context, the establishment of a cross-border register is therefore especially useful since it represents a more efficient way of searching for a will and ascertaining where it is deposited. However, some Member States do not have a register of wills, which makes such searches very difficult, even impossible when the legal professional is not based in the State where the will search is conducted. For example, Sweden and Finland do not have registers of wills. It is therefore particularly difficult for potential legatees residing abroad to be aware of the opening of the will and its content when they are not in contact with the other heirs and legatees, entrusted in these two States with communicating the information to any interested person. Thus, the absence of a structured register of wills at national level may slow down the settlement.

However, this situation is currently marginal within the European Union, since the majority of the Member States have a centralised register of wills, generally accessible electronically. Moreover, fourteenth of them[2] are interconnected, which facilitates a search for wills abroad.

[2] The European Network of Registers of Wills will have 15 registers in March 2015.

## B. The territoriality of legal systems

The principle of the territoriality of laws has led to their application being restricted to a given territorial area. As a result, although laws and practices envisage fairly regularly the existence of an international element at national level, they rarely stipulate the conditions under which a national instrument is to be used in another Member State, preferring to leave it to the destination country to specify the conditions under which such an instrument may be taken into consideration. Thus, in the case of wills, the time from which a will, its copy, or the information contained in it may be transmitted to another Member State is very rarely considered by the laws and practices of the Member States. Sometimes, national laws provide for wide rules of jurisdiction in matters of succession and do not integrate a cross-border dimension. Generally, in such Member States access to the national register of wills is restricted solely to the civil law notary entrusted by the courts with preparing the settlement of the succession. Said notary is the only person authorised in his or her State, and, consequently in the others, to consult the register of wills. However, in a cross-border context, this person is not necessarily the one that is competent to settle the succession, at least not in its entirety. There is therefore the risk that they may not have access to the information contained in these registers of wills because of the application of national rules. However, if the will is not found, the deceased person's last wishes will not be taken into consideration. Moreover, this situation can lead to a succession being settled by two legal professionals in two different countries, without knowledge of this parallel settlement. This positive conflict of jurisdiction will slow down the liquidation of the estate, and may even lead to the succession being reopened if this situation is discovered belatedly. However, the entry into force of the regulation on cross-border successions should lead to such scenarios being limited, at least for the States bound by this regulation.

## C. The free assessment of legitimate interests

When settling a succession, the communication of the information contained in a will is, in the majority of the Member States of the European Union, subject to the person requesting the information having a legitimate interest, since the content of wills generally falls within the scope of the rules of professional secrecy by which the person holding the will is bound. When the will is kept by a close relative of the deceased person, the same pattern is observed, although there is strictly speaking no obligation of professional secrecy. The only exceptions are the States which treat wills as public documents after the death of the testator, for example Italy, Malta and Portugal.

The person with whom the will is deposited is responsible for assessing whether a legitimate interest exists. This is assessed in an almost identical way in the EU Member States and will generally be considered to apply to the legal heirs and legatees mentioned in the will. As regards the latter, the extract of the will transmitted is generally restricted to the part of the will that concerns them, and not the whole of the will.

The following persons are recognised as having a legitimate interest as heirs and legatees:

- the person who wants to obtain information, for example an heir residing abroad who contacts the professional holding the will directly;
- the person on whose behalf the information is requested. In many States, a legal professional who requests information on behalf of a person who has a legitimate interest is considered as also having a legitimate interest.

On the other hand, it will be more problematic to recognise the legitimate interest of persons who think that they may inherit (such as a distant cousin or a neighbour of the deceased person), the beneficiaries of an initial will who are deprived of their rights by a subsequent will and the deceased person's creditors who would like to ascertain against whom they can consider taking action to recover their debts. If such persons can obtain information, they are not necessarily entitled to receive a copy or even an excerpt of the will.

Some States even go so far as to establish in law an exhaustive list of the persons who are entitled to receive information or a copy of the will. That is the case, for example, of Spain. However, this situation has the drawback of not really being adaptable to the cross-border context, which is rarely taken into consideration in national laws. The procedure for obtaining information can in such cases become complicated, for example because the civil law notary of an heir, not listed by law, cannot request a copy of the will on behalf of his or her client, even if he or she has a good command of the language of the country where the will is located. Therefore, allowing legal professionals to assess freely whether a person has a legitimate interest offers greater flexibility and is more adaptable to the cross-border context than an exhaustive list.

When a person who considers that he or she has a legitimate interest requests a copy of a will and this request is refused, it is generally possible for him or her to apply to the courts for the professional secrecy to be lifted. However, disputes in this area are rare, thereby demonstrating the relevance of this criterion.

Therefore, while the exercising of discretion with regard to a person's legitimate interest may seem to be an obstacle to the communication of information, this flexibility is on the contrary necessary in order to accommodate all family situations. Insofar as the vast majority of successions are settled on a non-contentious basis, this criterion ensures that the personal data of European citizens are protected.

# II. The development of a cross-border cooperation network

In order to improve the efficiency of the settlement of cross-border successions and in particular the aspects relating to the communication of the information contained in a will located abroad, it is essential to develop a cross-border cooperation network between legal professionals, since in most Member States successions are settled in a non-contentious way. In general, therefore, they are entrusted to notaries. Failing that, they may be handled by other legal professionals, such as solicitors, and even sometimes by the heirs themselves. The development of a cross-border cooperation network between all the parties involved in the settlement of successions is, therefore, the most effective way of ensuring that successions are settled rapidly, for the benefit of European citizens. In the context of the development of such a network it is necessary to improve knowledge of laws and practices existing in the Member States of the European Union with regard to the opening of wills and the rules on the communication of their content (A), facilitate networking between these professionals (B) and, lastly, improve exchanges of information between them (C).

# A. Improving knowledge

The legal professionals called upon to settle a cross-border succession are generally not sufficiently familiar with the laws and practices of the other States, in particular the procedures for obtaining information from their European counterparts on the content of a will. It is therefore essential to identify these practices and publicise them in order to improve knowledge of them. In general, knowledge of foreign laws is limited to the laws of neighbouring countries. However, the current context of the free movement of people and goods within the European Union enables Europeans citizens to move freely and buy property anywhere in the EU and therefore, potentially, to register wills with various European registers. This therefore increases the need for information on the rights and practices of the Member States of the European Union with regard to procedures for communicating the content of wills. Therefore, on the basis of a unique survey of the procedures existing in all the Member States, ENRWA has produced factsheets in the form of questions and answers, structured in an identical way for the 28 EU Member States. These factsheets provide the answers to the following questions:

- Who has to be contacted to obtain information about its content?
- Who is entitled to receive the information?
- Is there a particular procedure to be followed?
- By what means can the information be sent?

In order to disseminate this information as widely as possible among legal professionals, as well as among any interested parties, these factsheets are accessible in French, English and German, and are freely downloadable from the ENRWA website.

## B. Closer cooperation between legal professionals

First of all, the discussion workshops organised within the framework of the implementation of the "Cross-border Will" project helped to establish an initial cooperation network between legal professionals specialised in issues relating to the opening of wills and the procedures for communicating their content, in particular in a cross-border context. As these discussion workshops were organised on a geographical basis, they gave experts, generally designated by the national body representing the profession entrusted with the settlement of successions, the opportunity to interact with fellow experts from neighbouring countries. This first network may therefore be activated in the event of questions on the procedure to be followed in a neighbouring country.

Next, it is necessary to establish closer contacts between legal professionals in order to make cross-border cooperation a reality. For anyone wanting to obtain information on the content of a will it is essential to identify the party responsible for settling the succession, whether the said party is a notary, a court or an executor, since it is generally that party that is in a position to communicate such information[3]. At the current time, it is not possible at European level to access this information directly, since the law does not always determine the precise jurisdiction of the party entrusted with settling the succession. In many States, it is the heirs themselves who appoint the civil law notary who will handle the succession. In the current system, the party holding the will is therefore the one that is best placed to provide information on the party responsible for settling the succession, if it transpires that two different parties are involved. It is therefore paramount to ascertain where the will has been deposited. To that end, it is essential to establish a network of reliable "depositories" meeting high quality standards, both as regards their policy for storing data on a long-term basis and the establishment of registration procedures with the aim of achieving constant improvement.

[3] When a succession is settled by the heirs themselves, as is the case in Sweden and Finland if there is no executor ordered by the court, identifying them from another Member State is more problematic.

The best solution for identifying where a will is deposited, when no one knows its location, is to search a foreign register of wills, in particular via the European Network of Registers of Wills (ENRW), which accelerates and facilitates the processing of searches. ENRW delivers the contact details of the "depository" when a will is found in a foreign register.

The use of European directories, such as the European Directory of Notaries, is then particularly useful for supplementing the information delivered by ENRW, for example by providing telephone numbers and possibly an email address, or for finding the contact details of a legal professional who speaks the language of the party initiating the search. Other directories, such as that of lawyers, can be used to obtain the contact details of lawyers practising in the States in which they assist executors in settling a succession[4]. Finding a legal professional who speaks their language can also be useful for European citizens who want to contact a foreign legal professional directly.

Closer cooperation between legal professionals therefore facilitates the development of a practical cross-border cooperation network which in turn facilitates the communication of information on the content of wills, if the requisite conditions are met.

## C. The exchange of information

Once the will has been found, the person entrusted with settling the succession will need to obtain the information contained in it. This exchange of information is generally subject to the demonstration of a legitimate interest. If this is proven, there is no longer any obstacle to the information being communicated. As the vast majority of successions are settled in a non-contentious manner, the voluntary use of an electronic IT tool for cooperation between legal professionals seems timely. The use of this tool must, however, comply with the conditions specified in the different national laws. Thus, the legitimate interest must be

[4] However, the English and Irish systems do not deliver information before the full settlement of the succession and the publication of the will via a "Grant of Probate". Anyone who has been overlooked in the settlement of the succession must then apply to the courts for the succession to be reopened.

established before any information can be communicated, if required by the laws of the State where the will is deposited. The use of an electronic networking platform would help to expedite exchanges between legal professionals and therefore the settlement of successions. However, safeguards need to be put in place with regard to access to this platform, the authentication of its users, the processing of personal data, the observance of professional secrecy and the liability of the parties with regard to the information exchanged. The use of electronic signatures and mechanisms for checking signatures would go some way to addressing these issues.

However, because of their unique national characteristics, some States will certainly not be able to use this electronic information tool. For example, at the current time, the system of mutual legal assistance provides that the information contained in wills can only be communicated to those who request it via their respective Justice Ministries. For them, the use of a cooperation network, via national contact points, is therefore essential. The use of an electronic information tool must not result in “human” cooperation networks being neglected.

# Conclusion

The “Cross-border Wills” project was implemented with the support of the European Commission and ENRWA’s partners and represents the first large-scale project devoted to the procedures for opening wills and communicating their content. It highlighted that the development of a cross-border cooperation network helps to improve exchanges of information between legal professionals. This network is a good illustration of the cooperation that can exist between legal professionals in order to create an area of justice, freedom and security within the EU. It is fully in line with the 2020 commitments of the Notaries of Europe[5] and benefits European citizens, not only deceased persons who will have the assurance that their last wishes will be fully taken into consideration, but also close relatives who will no longer have to travel abroad to obtain information on the content of a will drawn up or deposited abroad. Such a network also fits in with the entry into force of the European regulation on cross-border successions, which determines the applicable law and jurisdiction governing the succession as a whole. This regulation is likely to lead to a single legal professional being entrusted with settling the whole of the succession. Consequently, such legal professional needs to have, inter alia, all the information contained in the will(s) deposited by the deceased person, even when these are located in several Member States. Therefore, the legal professional will be able to use the European Network of Registers of Wills to locate a will drawn up or deposited in another Member State. In the event a will is located, he or she will then be able to ascertain the content of the testamentary dispositions found. With the “Cross-border Wills” project, ENRWA has developed solutions to improve the communication of the information contained in wills

[5] *For 2020 the Notaries of Europe commit*, accessible on http://www.notaries-of-europe.eu/plan2020/index_en.html.

while identifying precisely the elements to be taken into consideration in order to comply with the national laws and practices of the 28 Member States of the European Union.