



ASSEMBLY OF THE REPUBLIC
EUROPEAN AFFAIRS COMMITTEE

OPINION

Proposal for a Regulation of the European Parliament and Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of successions and on the introduction of a European Certificate of Succession

COM (2009) 154 final
{SEC (2009) 410}
{SEC (2008) 411}

INTRODUCTORY NOTE

Article 65 EC Treaty states that measures should be taken in the field of judicial cooperation on civil matters where cross-border issues are involved, specifically with the aim of *“improving and simplifying the recognition and enforcement of decisions in civil and commercial matters, including decisions in extrajudicial cases”* and *“promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction”*. Various community instruments have so far been adopted on this basis, albeit without dealing with questions of succession.

The draft regulation under examination here seeks to create an instrument covering questions relating to cross-border successions, namely the applicable law, jurisdiction and recognition and enforcement measures.

WHEREAS

In view of the provisions of the proposal for a regulation, the following questions should be raised:

a) The subsidiarity principle

In the field of regulation of cross-border succession law, the objectives of the proposal for a regulation in question would not be sufficiently met at the level of each of the Member States, and are better met at European Union level.

b) The connecting factor: “the last habitual residence of the deceased”

The explanatory memorandum states that the proposal for a regulation has opted for this connecting factor to determine the applicable law, instead of the law of nationality, as it coincides with the centre of interest of the deceased and often with the place where most of their property is located. However, these arguments do not stand up.



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The fact is that determining the “habitual residence” may raise doubts in situations where the deceased has various residences, without any of these being “habitual”, or in situations where the deceased had as his or her last habitual residence that with which he or she had the least connection.

Finally, the grounds stated in the explanatory memorandum fail to stand up given that there is no guarantee that the “last habitual residence” is in the country where most of the deceased’s property is located.

Moreover, in the Portuguese legal system, Articles 62 and 31, no. 1, of the Portuguese Civil Code require application of the personal statute of the deceased at the time of his death, this being the law of nationality. It should therefore be noted that this proposal for a regulation is divergent from Portuguese legislation as currently in force.

In view of the above, it is considered that the concept of “habitual residence”, if adopted, should reflect the centre of interests of the deceased, and namely that it should be supported by other criteria which allow the proposed objectives to be met, without undermining legal certainty and security.

c) Application of the Public Policy Principle

The explanatory memorandum makes a brief reference to the grounds for Article 27, which regulates the possibility of application of the Public Policy Principle to refuse application of a provision of the applicable law, stating that “*differences between the laws relating to the protection of the legitimate interests of the relatives of the deceased must not be used to justify*” the application of the Public Policy, “*as this would be incompatible with the objective of ensuring the application of a single law to all of the succession property*”.

However, considering that, on the one hand, in addition to regulating succession upon death, Succession Law seeks above all to protect heirs (in particular the closest family members, spouse, children and parents), in both the Roman and German legal traditions, and, on the other hand, considering the legally grounded expectations held by heirs as designated by law [*herdeiros legítimários*]¹ in various European legal systems, the inclusion of paragraph 2 of Article 27 might undermine this situation. Indeed, paragraph 2 of Article 27 expressly excludes the possibility of the courts considering that the reserved portion of the estate falls within the scope of the public policy of the forum.

Moreover, the Portuguese legal system establishes, in Article 22 of the Portuguese Civil Code, that “*the provisions of foreign law indicated by the conflict of laws shall not apply when such application undermines the*

¹ Spouse, descendants and ascendants who are entitled to the *legítima* – which designate the reserved portion of the estate which the testator is not at liberty to dispose of, passing by law to the *herdeiros legítimários*.



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fundamental principles of the international public policy of the Portuguese State". The Portuguese courts have accordingly held² that a foreign law which permits the testator to dispose of his estate without limits to the detriment of his children, in other words to refuse them the *legítima*, is not applicable. It should therefore be noted that also in this respect the proposal for a regulation diverges from Portuguese legislation in force.

In view of the above, it is considered that Article 27 could include, instead of paragraph 2, provisions which would ensure that the fundamental principle, common to a number of European legal systems, to the effect that a reserved portion of the estate [*legítima*] passes to the heirs as designated by law [*herdeiros legítimários*], is not undermined.

CONCLUSION

In view of the considerations set out above and in the light of the opinion from the Committee for Constitutional Affairs, Rights, Freedoms and Guarantees on the *Proposal for a Regulation of the European Parliament and Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of successions and on the introduction of a European Certificate of Succession*, the European Affairs Committee is of the opinion that **the proposal for a regulation in question does not violate the principle of subsidiarity, insofar as the objective in view will be more effectively achieved through community action.**

With regard to the questions raised in the recitals above, the Assembly of the Republic will continue to follow the legislative process for this Proposal for a Regulation, namely by exchanging information with the Government.

São Bento Palace, 17 December 2009

**The Member of Parliament and
Author of the Opinion**

(Ana Catarina Mendes)

The Chairman of the Committee

(Vitalino Canas)

Attached: Report from the Committee for Constitutional Affairs, Rights, Freedoms and Guarantees, drawn up by António Gameiro MP (PS)

² Cfr. Decision of the Lisbon Court of Appeal, 5th May 1992, published in BMJ no. 417.