

Succession study presented to the European Parliament by Dr J Fitchen

Concerning: *The evidentiary effects of authentic acts in the Member States of the European Union, in the context of successions*: IPOL STU (2016) 556935 EN PE 556.935

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Background to the Study

The European Union's Succession Regulation 650/2012 is designed to harmonise the private international law and conflict of laws rules of the participating 25 Member States for matters relating to Successions.

In 22 of these Member States a succession may involve one or more authentic instruments; it is therefore necessary for the Succession Regulation to allow such authentic instruments to produce certain legal effects across national borders.

The Succession Regulation features two provisions (Articles 59 and 60) that allow different legal effects from succession authentic instruments to cross from the Member State of origin (in which they were issued or drawn-up) into the legal systems of the other 24 participating Member States.

Succession authentic instruments are defined by Article 3(1)(i) of the Succession Regulation. If the Member State of origin regards a document as an authentic instrument, and it also fits the Regulation's definitional requirements, it is a succession authentic instrument and may potentially benefit from Article 59.

Article 59 – the subject of this study – requires the other Member States, subject to a narrow public policy exception, to **'accept'** an incoming succession authentic instrument by giving it the same (or very similar) evidentiary effects as those it would enjoy in the Member State of origin.

Such **acceptance** is a new – probably autonomous – legal concept for European Union law and also a new legal concept for domestic laws.

Reason for and Nature of the Study

For Article 59 to function as intended by the Regulation, the authorities in the other Member State must:

- a) Appreciate that **a succession authentic instrument** from another participating Member State has been produced (*and*)
- b) Understand **the nature of the domestic evidentiary effect** of that succession authentic instrument in its Member State of origin (*and then*)
- c) Decide, *subject to the public policy exception*, how best to precisely replicate the domestic evidentiary effects of the incoming succession authentic instrument in their own legal system.

Article 59 of the Regulation provides a framework of rules, but not the information necessary for the authorities in the other Member State to take steps (a - c) above. **Implementing**

Regulation 1329/2014 provides an *optional* standard form **Annex 2** which lists (but does not provide) data potentially required to accompany a cross-border succession authentic instrument into another legal system.

The Study sought to assist steps (a) – (c) by providing information on the types of succession authentic instruments found in each Member State, the different domestic evidentiary effects of such authentic instruments, and any prior indications of the use of public policy regarding foreign authentic instruments in each Member State.

Such assistance is particularly important for Sweden, Finland and Cyprus in which there are no domestic authentic instruments – and hence little experience of dealing with the foreign legal institution represented by an authentic instrument.

Methodology

The University of Aberdeen retained national experts for each of the 25 Member States party to the Succession Regulation.

We asked each expert to complete a detailed questionnaire on an assigned legal system, its domestic use of authentic instruments (if any) and its domestic use (if any) of authentic instruments in the particular context of succession.

We also sought information concerning any prior use of ‘public policy’ (*l’ordre public*) concepts by that Member State to resist the legal effects of incoming authentic instruments.

Additionally, we received extra reports for some legal systems from notaries who kindly agreed (in response to a request by the CNUE and without payment) to supply us with completed questionnaires. This information, from succession practitioners, indicated various practical difficulties with the likely operation of the Succession Regulation.

The report

We extracted the relevant data from each of the national reports (augmenting it with data arising from any available notary report) to present a country by country report of our findings concerning:-

- 1) The types of succession authentic instruments (if any) used domestically in that Member State.
- 2) The nature of the domestic evidentiary effects of succession authentic instrument in the 22 Member States featuring this legal institution.
- 3) Any information concerning the domestic use of a public policy exception (*l’ordre public*) in the context of incoming authentic instruments prior to the introduction of the European Union’s Succession Regulation in that legal system.

Our report organised the findings for each Member State in relation to the data list featured on the **Annex 2** standard form of **Regulation 1329/2014**.

We also made recommendations to improve the existing Succession Regulation concerning cross-border succession authentic instruments.

Our recommendations

- The Article 59 requirement of **acceptance** should not be confused or conflated with earlier domestic or EU concepts of *recognition* previously used for judgments or authentic instruments: e.g. **acceptance** means the cross-border transmission and facilitation of the evidentiary effects of an authentic instrument, **the evidence** so transmitted may thus be challenged or rebutted as evidence in the other Member State if this would be possible in the Member State of origin.
- The proper completion of an **Annex 2** standard form should be strongly encouraged for any succession authentic instrument that is to benefit from Article 59. The presence of an **Annex 2** standard form assists the other Member State in identifying incoming succession authentic instruments.
- Notaries should be reassured that regardless of any potential they may possess under the provisions of the Succession Regulation to act as a court, they always have the competence to issue an Annex 2 standard form concerning an authentic instrument that they drew-up earlier while only exercising their notarial capacity.
- The Annex 2 form should also provide enough detail on the evidentiary effects of a domestic authentic instrument to allow the authorities in the other Member State to properly **accept** it. **As our study shows, this data can be standardised in advance.**
- The abolition of earlier national legalisation procedures by Article 72 of the Succession Regulation should be publicised more widely among the relevant legal professions.

We also suggested that when the Succession Regulation is reviewed it would be advantageous to consider the possibility of empowering authorities in other Member States who receive a succession authentic instrument in accordance with Article 59 to:

- i) require the completion of an Annex 2 form,
- ii) require necessary translations of the authentic instrument and Annex 2 form,
- iii) to request and require assistance from the notary in the Member State of origin.

Thank you for your attention.

END