

DIRECTORATE-GENERAL FOR INTERNAL POLICIES  
**POLICY DEPARTMENT** **C**  
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



**OPINION ON THE PROPOSAL FOR  
A EUROPEAN REGULATION ON  
THE RIGHT OF SUCCESSION  
2009/157(COD) –  
VERSION OF 16 JANUARY 2012**

**EXECUTIVE SUMMARY**





**DIRECTORATE-GENERAL FOR INTERNAL POLICIES**

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND  
CONSTITUTIONAL AFFAIRS**

**LEGAL AND PARLIAMENTARY AFFAIRS**

# **Opinion on the proposal for a European regulation on succession law – Version 2009/157(COD) of 16 January 2012**

## **EXECUTIVE SUMMARY**

### **Abstract**

This opinion deals with the consolidated text of the draft Regulation on succession law in the version dated 10/16 January 2012. The decisions underlying the draft appear to be sound: synchronisation of jurisdiction and applicable law, the decisive significance of the deceased's last place of residence, the principle that the same law is to govern the succession as a whole, and the establishment of a European Certificate of Succession. The draft makes significant improvements on previous versions, in particular as regards conflicts of laws, the enforcement of decisions, the provisions on the European Certificate of Succession, and the extended temporary arrangements. Other aspects, however, need improvement. These are listed individually in the Executive Summary.

This opinion was commissioned by the European Parliament Committee on Legal Affairs.

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## SUMMARY

This opinion deals with the consolidated text of the draft Regulation on succession law in the version dated 10/16 January 2012. The decisions underlying the draft appear to be sound: synchronisation of jurisdiction and applicable law, the decisive significance of the deceased's last place of residence, the principle that the same law is to govern the succession as a whole, and the establishment of a European Certificate of Succession. The draft makes significant improvements on previous versions, in particular as regards conflicts of laws, the enforcement of decisions, the provisions on the European Certificate of Succession, and the extended temporary arrangements. Other aspects, however, need improvement.

### *1. Rules on jurisdiction*

As regards jurisdiction, the link to the last habitual residence of the deceased, which applies according to the specific circumstances of each case, is not readily reconcilable with the principle of clarity of jurisdiction.

Likewise, the possibility of prorogation of the testator's 'jurisdiction of origin' agreed in the Council does not seem entirely consistent. On the one hand, the prorogation requires that the testator's *lex patriae* be chosen, while at the same time requiring the consent of all those involved in the succession procedure. This will not happen – particularly in cases where succession is disputed. For that reason it seems preferable to allow the testator to determine the jurisdiction (while observing the principle of synchrony). Prorogation of the 'jurisdiction of origin' should also be possible if all of those involved wish to handle the question of succession in the local jurisdiction.

The provisions on cooperation between probate courts should be amplified. The rules on *lis pendens* laid down in Article 27 seq. of the Council regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters are not convincing.

### *2. Applicable law*

The linking of applicable law to habitual residence poses problems to the extent that it allows some scope for manipulation. The admission of a limited implied choice of law is to be welcomed. However, its applicability ought perhaps to be clarified by specific examples in the recitals.

The provisions on joint wills require improvement. For the purposes of Article 19d of the consolidated text, joint wills and testamentary contracts are to be treated in the same way. In addition, several Member States apparently prohibit joint wills.

The new version of the transitional provisions has largely turned out well. One welcome feature is that, because of the link to the time at which the will was produced or the choice of law or the gift was made, the regulation will not, as a rule, apply retrospectively to previously completed transactions. However, the text says nothing about the grounds for contesting or revoking wills prior to the regulation's entry into force; provisions on that subject should be added.

### *3. Demarcation in relation to the law applicable to matrimonial property regimes*

It is difficult to reconcile the law on succession with the law applicable to matrimonial property regimes; however, the establishment of uniform areas of responsibility is a pragmatic way to avoid divergent decisions (relating to individual aspects).

One problem from a German perspective is how to reconcile Article 1371 I of the German Civil Code with the system established by the Regulation. Under the draft regulation, however, no isolated provisions may be added. Instead, when implementing the act, the German legislature should explicitly state that Article 1371 I of the German Civil Code is to be classified as an arrangement under the law of succession.

### *4. Demarcation in relation to property and insolvency law*

Article 20a of the consolidated text is to be welcomed inasmuch as it makes the law on succession subject to enforcement rules under property law. However, its scope is too broad. The reason is that the regulation permits enforcement under property law even if inheritance is regulated in different ways because of differences in the laws governing succession. This is a step too far. Instead, succession rules under local law should be applied only if they protect domestic disclosure and formal requirements and are therefore to be classed under the heading of property law. Article 20a should accordingly, be worded in narrower terms.

As regards movable property not subject to registration and outside the scope of Article 20a of the consolidated text, inheritance is to be determined by the law on succession to be invoked under Article 16. The recitals of the European regulation on the succession law should make it clear that the decision whether to classify property as movable or immovable is subject to the laws of the place where the property is situated.

Whereas Article 1(III)(j) of the consolidated text excludes rights *in rem* from the scope of the European regulation on the succession law, the draft regulation protects the types of property law in the Member States (*numerus clausus*). This is expressly to be supported. To ensure the broadest possible applicability of the law on succession, Article 22a of the consolidated text should be interpreted in a broad sense.

The draft does not regulate demarcation in relation to the European regulation on insolvency proceedings. Because the latter regulation does not address the issue of insolvent estates, it is recommended that appropriate demarcation criteria should be included in the recitals of the European regulation on succession law.

### *5. Cross-border enforcement of decisions and public documents*

The replacement of the earlier dynamic reference to the provisions of the Council regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (in the Commission's draft document) with separate arrangements is to be welcomed. However, in the planned provisions, the system currently applying under that regulation has largely been taken over indiscriminately. Provisions that are obsolete or not adequately tailored to the special characteristics of succession issues have thus found their way into the draft.

The (indiscriminate) cross-border enforcement of public documents has been the subject of heated debate. It is welcome news that Article 34 of the consolidated text has abandoned the confusing term 'recognition', even though the new term 'reception' does not seem very meaningful. Essentially, the focus now is on the enforcement of formal evidentiary effect. In view of the heterogeneous evidentiary effects and the variety of public documents in

succession cases, further detail is required in the wording of the regulation. Major restrictions not implied in the wording of the regulation should not be imposed solely by the recitals. The cross-border enforcement of the issuing State's assumptions regarding authenticity and factual matters seems sensible. The position is different as regards further effects extending to an act or a legal relationship set out in the official document. A comparative examination of the laws in the relevant jurisdictions should be carried out before any cross-border enforcement. This would have to take account, in functional and systematic terms, of the various official documents relevant to succession issues and of their evidentiary effect.

It is essential for Article 34 of the consolidated text to be expanded to include accompanying measures. Standard multilingual forms and cross-border cooperation between the relevant courts and authorities (especially in cases of doubt) are necessary in order to make the provision practicable.

#### *6. The European Certificate of Succession (ECS)*

The processing of cross-border succession cases will be made easier in legal practice, in particular as regards evidentiary and legitimating effects. This will also apply to Member States where the concept of a certificate does not exist. One possible option would be to confine the use of the ECS to the cross-border processing of succession cases (in other words when there are assets in different Member States) so as to avoid friction with existing national certificates of succession and similar documents.

The information in Article 41 of the consolidated text must be brought more clearly into line with the legal implications of the certificate (Article 42). It would be possible to divide the certificate into an operative part and an explanatory part in order to clarify the legal effects of the ECS. In addition, it is not clear why the use of the application form is not made mandatory.

The good faith provision (Article 42(III) and (IV) of the consolidated text) can be effective only in conjunction with the facts relevant to acquisition under national law (Article 20a) – some of the good faith provisions contained in Article 42 diverge from national laws and may lead to demarcation problems. At the very least, Member States should be called upon to give an undertaking that their succession laws will refer to the provisions of the European regulation on succession law.

The demarcation between Articles 34 and 42 of the consolidated text is unclear: However, the ECS should largely do away with national certificates in cross-border matters. To that extent, the scope of Article 34 should be restricted.

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## POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

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