

Succession and wills

European Parliament resolution with recommendations to the Commission on succession and wills (2005/2148(INI))

The European Parliament,

- having regard to the Green Paper on succession and wills presented by the Commission on 1 March 2005 (COM(2005)0065) and the annex thereto (SEC(2005)0270),
 - having regard to the opinion of the European Economic and Social Committee of 26 October 2005¹,
 - having regard to Article 192, second paragraph, of the EC Treaty,
 - having regard to Rules 39 and 45 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs (A6-0359/2006),
- A. whereas, according to the report drawn up in 2002 by the *Deutsches Notarinstitut* at the Commission's request, between 50 000 and 100 000 transnational successions are opened every year in the European Union,
- B. whereas this estimate will obviously have to be revised upwards in the light of the recent accession of ten new Member States to the European Union and its forthcoming further enlargement,
- C. whereas at present there are significant differences between the Member States' systems of private international law and their respective substantive law on succession and wills,
- D. whereas those differences, in so far as they are capable of making it difficult and expensive for heirs to take possession of the estate, could create obstacles to the exercise of the freedom of movement and the freedom of establishment referred to in Articles 39 and 43 of the EC Treaty and the enjoyment of the right to own property, which is a general principle of Community law²,
- E. whereas it would be advisable to draw up a Community legal instrument relating to private international law on successions and wills, as already called for in the 1998 Vienna action plan³, the programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters⁴, adopted by the Council and the Commission in 2000, the Hague Programme of 4 November 2004 for strengthening freedom, security and justice in the European Union, and the Council and Commission Action Plan implementing the Hague Programme on strengthening freedom,

¹ OJ C 28, 3.2.2006, p. 1.

² Case C-368/96 *Generics (UK) and others* [1998] ECR I-7967, paragraph 79, and the case-law referred to therein.

³ OJ C 19, 23.1.1999, p. 1.

⁴ OJ C 12, 15.1.2001, p. 1.

security and justice in the European Union¹,

- F. whereas the adoption of legislative initiatives dealing with succession and wills would appear to be consistent with the objectives of Community law, which prohibits discrimination on the basis of nationality and aims to foster the social integration of all individuals whose principal residence and centre of interests is situated in one of the Member States, regardless of their nationality,
 - G. whereas, while the harmonisation of the Member States' substantive law on succession and wills falls outside the scope of the European Community's competence, the Community is competent, under point (b) of Article 65 of the EC Treaty, to adopt measures 'promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction',
 - H. whereas, pursuant to the second indent of Article 67(5) of the EC Treaty, any Community act dealing with succession and wills should be adopted in accordance with the procedure referred to in Article 251 of the EC Treaty,
 - I. whereas, when dealing with the subject of succession and wills, it is essential to uphold certain fundamental tenets of public policy which impose limits on testamentary freedom for the benefit of a testator's family or other dependants,
1. Calls on the Commission to submit to Parliament during the course of 2007 a legislative proposal under Article 65, point (b), and Article 67(5), second indent, of the EC Treaty in order to deal with succession and wills; calls for that proposal to be drawn up in the light of interinstitutional discussion and in keeping with the detailed recommendations set out in the annex hereto;
 2. Calls on the Commission, in the context of the current deliberations on the Civil Justice Funding Programme 2007-2013, to launch a call for proposals for an information campaign regarding cross-border wills and succession matters, targeted at legal practitioners in the field;
 3. Calls on the Commission to identify as a priority, within the Civil Justice Funding Programme for 2007-2013, the establishment of a network of civil practitioners to develop mutual confidence and understanding between professionals in this field, share information and develop best practice;
 4. Notes that the recommendations set out in the annex hereto accord with the subsidiarity principle and citizens' fundamental rights;
 5. Considers that the requested proposal has no financial implications for the Community budget;
 6. Instructs its President to forward this resolution and the accompanying detailed recommendations to the Council and the Commission, and to the parliaments and governments of the Member States.

¹ OJ C 198, 12.8.2005, p. 1.

ANNEX

DETAILED RECOMMENDATIONS REGARDING THE SUBSTANCE OF THE REQUESTED PROPOSAL

Recommendation 1 (on the form and minimum content of the instrument to be adopted)

The European Parliament considers that the legislative act to be adopted should aim to regulate succession exhaustively in private international law and at the same time:

- harmonise the rules concerning jurisdiction, the applicable law (the 'conflict rules') and the recognition and enforcement of judgments and public instruments issued abroad, except for the material substantive law and procedural law of the Member States;
- introduce a 'European Certificate of Inheritance'.

Recommendation 2 (on the criteria for establishing jurisdiction and the objective connecting factor)

The European Parliament considers that the legislative act to be adopted should in principle ensure that 'forum' and 'ius' coincide and thus make it less difficult to apply foreign law.

For those reasons, the European Parliament tends to prefer the habitual place of residence as the criterion for establishing both principal jurisdiction and the connecting factor, where habitual residence means either:

- (a) the habitual residence of the deceased at the time of his death, provided that it was his habitual place of residence for at least two years before his death, or, where it was not,
- (b) the place where the deceased had his main centre of interests at the time of his death.

Recommendation 3 (on the freedom of choice to be accorded to individuals)

The European Parliament considers that the legislative act to be adopted should allow a degree of freedom of choice, in particular by permitting:

- the parties concerned to choose, subject to certain conditions, the competent court, along the lines laid down in Articles 23 and 24 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹,
- the testator to choose which law should govern the succession, the law of the country of which he is a national or the law of the country of his habitual residence at the time the choice is made; this choice should be indicated in a statement taking the form of a testamentary clause.

¹ OJ L 12, 16.1.2001, p. 1.

Recommendation 4 (on the law applicable to the form of wills)

The European Parliament is of the opinion that the legislative act to be adopted should lay down specific rules concerning the law applicable to the form of testamentary clauses – which clauses are to be regarded as valid if they are considered as such by the law of the State in which the testator drew them up, or by the law of the State in which the testator had his habitual residence at the time when he drew up the will or died, or by the law of one of the States of which the testator was a national at the time when he drew up the will or died.

Recommendation 5 (on the law applicable to agreements as to future successions)

The European Parliament considers that the legislative act to be adopted should lay down specific rules concerning the law applicable to agreements as to future successions, which should be regulated:

- (a) in the case of one individual's succession, by the law of the State in which that person has his habitual residence at the time the agreement is concluded;
- (b) in the case of several persons' succession, by the laws of each of the States in which each of those persons has his habitual residence at the time the agreement is concluded.

For agreements as to future successions the legislative act to be adopted should also allow some scope for freedom of choice, permitting the parties to agree, by means of an explicit statement, that the agreement as to future successions is to be made subject to the law of the State in which the person or one of the persons involved has his habitual residence at the time when the agreement is concluded or of which he is a national at that time.

Recommendation 6 (on general issues regarding the applicable law)

The European Parliament considers that the legislative act to be adopted should also deal with general issues regarding the applicable law.

In particular, the European Parliament considers that:

- the law specified in the legislative act to be adopted should be competent to cover, regardless of the nature and location of the estate, the whole succession, from the beginning of the procedure to the transmission of the inheritance to the persons entitled;
- the legislative act to be adopted should be *erga omnes*, that is to say, applicable even if the designated law is the law of a third country;
- for the purposes of coordinating the Community system of conflict rules governing succession with those of third countries, the legislative act to be adopted should lay down specific rules concerning *renvoi*, establishing that, where the law applicable to the succession is the law of a third country and that country's conflict rules designate the law of a Member State or the law of another third country which, according to the system of international private law, could also apply its own law to the case in question, the law of that other Member State or, if appropriate, of that other third country, should apply;
- the legislative act to be adopted should specify the ways and means by which the authorities required to apply a foreign law are to ascertain its content, as well as the remedies in the event of failure to ascertain that content;

- the legislative act to be adopted should make the settlement of a preliminary issue subject to the law designated by the relevant conflict rules of the law applicable to the succession, making it clear that the solution will be valid only as regards the proceedings in which the preliminary issue arises;
- the legislative act to be adopted should specify that application of a provision of the applicable law may be ruled out if such application would produce an effect manifestly contrary to the public policy of the forum;
- the legislative act to be adopted should specify that, where a State has two or more systems of law or sets of rules concerning succession and wills applicable in different territorial units, each territorial unit is to be considered as a country for the purposes of identifying the law applicable to the succession. Furthermore, the legislative act to be adopted should specify, with regard to such a State, that:
 - (a) any reference to habitual residence in that State is to be construed as a reference to habitual residence in a territorial unit;
 - (b) any reference to nationality is to be construed as a reference to the territorial unit designated by the law of that State. In the absence of such rules, the reference shall be construed as a reference to the legal system with which the person in question had the closest connection.

Recommendation 7 (on the European certificate of inheritance)

The European Parliament considers that the legislative act to be adopted must aim to simplify the procedures to be followed by heirs and legatees in order to gain possession of the property comprising the estate, particularly by:

- providing for rules of private international law to ensure effective coordination between legal systems with regard to the administration, liquidation and transmission of estates, as well as identification of heirs, with provisions stating: that these aspects of succession, subject to exceptions due to the nature or location of certain assets, are to be regulated by the law applicable to the succession; that if that law provides for the intervention of an authority indicated by the law itself, or appointed pursuant to it, that authority's powers shall be recognised in all the Member States; that, if the law applicable to the succession is the law of a Member State, the powers of such authorities are to extend, unless otherwise specified by the testator, to the whole estate, wherever it may be situated, even if, according to the law applicable to the succession, those powers are confined to movable property; that the measures relating to the activity of those authorities prescribed by the law applicable to the succession may be requested from the courts of the Member State the law of which is applicable to the succession or on the territory of which the deceased person had his habitual residence at the time of his death, or on the territory of which the property comprised in the estate is located;
- introducing a 'European certificate of inheritance' indicating, with binding effect, the law applicable to the succession, the beneficiaries of the estate, the persons responsible for administering the estate and their powers and the property comprising the estate, to be issued by an authority empowered to issue or authenticate official documents under the relevant national legislation.

The certificate, which is to specify the law applicable to the succession, shall be drawn up in accordance with a standard model to be laid down in the legislative act to be adopted and shall constitute appropriate title on the basis of which the acquisition of the property inherited may be entered in a public register of the Member State in which the property is located, without prejudice to compliance with the rules of that Member State on the functioning of such registers and the effects resulting from the information contained therein.

Furthermore, the legislative act to be adopted should ensure protection for third parties acting in good faith who, for valuable consideration, have entered into a contract with the person who appears to be entitled to dispose of the property comprised in the estate on the basis of the certificate, thereby safeguarding the acquisition thereof, unless that person knows that the details given in the certificate are inaccurate or the competent authority has taken steps to revoke or amend the certificate.

Recommendation 8 (on the 'lex loci rei sitae' and the 'reserved portion' principle)

The European Parliament considers that the legislative act to be adopted should:

- ensure the coordination of the law applicable to the succession with the law of the place in which the property is situated, so as to make the latter applicable in particular as regards the procedures for acquiring the property comprised in the estate and any other tangible entitlements thereto, accepting or refusing the succession and the relevant formalities concerning publicity;
- ensure that the law applicable to the succession does not affect the application of any provision of the State where certain immovable property, enterprises or other special categories of assets are located and whose rules institute a particular inheritance regime in respect of such assets on account of economic, family or social considerations;
- ensure that the ability to choose the law applicable does not contravene the fundamental principles of reserving a proportion of the estate for the deceased person's closest relatives laid down by the law objectively applicable to the succession.

Recommendation 9 (on trusts)

The European Parliament points out that the rules on property ownership come under the competence of the Member States, pursuant to Article 295 of the Treaty, and therefore requests that the legislative act to be adopted should not apply to trusts. However, that act should specify that, when a trust is created as a result of death, the fact that the law specified by the instrument in question applies to the succession does not prevent another law from being applicable to management of the trust and that, by the same token, the fact that the law governing the trust applies to it should not prevent the law governing the succession by virtue of the legislative act to be adopted from being applicable to it.

Recommendation 10 (on 'exequatur')

The European Parliament suggests to the Commission that the legislative act to be adopted should, with regard to the recognition and enforcement of decisions, reproduce the system established by Regulation (EC) No 44/2001, which requires 'exequatur' only in the event of a ruling made by the courts in one Member State having to be enforced on the basis of enforcement proceedings in another Member State.

However, if a decision is to be entered in public registers, provision should be made, in view of the widely differing rules in the various Member States, for that decision to be accompanied by a 'certificate of conformity' with public policy and the imperatives of the Member State addressed, issued - in accordance with a standard form - by a local judicial authority.

Recommendation 11 (on public instruments)

The European Parliament considers that it is appropriate to regulate similar effects for public instruments relating to succession, which, in particular, should be recognised in all the Member States, by means of proof of the facts and of declarations by issuing authorities that the instruments were drawn up in their presence, where the law of the Member State of origin so provides.

In accordance with Article 57 of Regulation (EC) 44/2001, the document must meet all the requirements of authenticity laid down in the Member State of origin, and will not be recognised if its recognition would produce an effect manifestly contrary to public policy in the Member State addressed.

Furthermore, when a public instrument is to be entered in public registers it should be specified, as stated in the case of judicial decisions, that the document has to be accompanied by a 'certificate of conformity' with public policy and the imperatives of the Member State addressed, issued - in accordance with a standard form - by the authority competent to draw up the instrument in that country.

Recommendation 12 (on the European network of registers of wills)

The European Parliament hopes that, eventually, a European network of national registers of wills will be set up by linking up existing national registers, to simplify the task of finding and ascertaining the content of a deceased person's will.