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GREEN PAPER

Succession and wills

{SEC(2005) 270}

(presented by the Commission)

1. INTRODUCTION

This Green Paper opens a broad-based consultation process on intestate and testate succession where there is an international dimension.

The Commission calls on all interested persons to send their responses and any other useful contributions, no later than 30 September 2005, to the following address:

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Respondents should state whether they object to their responses and observations being put out on the Commission's website.

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TERMS USED

“Deed”: formal document recording a legal fact or act, authenticated by a public authority such as a notary.

“Endorsement (apostille)”: formality provided for by the Hague Convention of 5 October 1961 for the recognition of foreign documents.

“Simultaneous death”: situation where persons who are to inherit from each other (e.g. father and son) die in such circumstances that it is impossible to ascertain which of them died first.

“International jurisdiction”: power of the courts in a particular country to try a case of an international nature.

“Residual jurisdiction”: rules of international jurisdiction not harmonised in the Community.

“Deceased”: the person whose death occasions the succession.

“Exequatur”: formality required in certain countries for recognition and enforcement of a foreign judgment.

“Forum”: court having jurisdiction to hear a case or actually hearing it.

“Agreements as to future successions”: Agreements made before death as to one or more future successions.

“Intestate succession”: succession in the absence of a will.

“Joint wills”: Wills made by two or more persons in the same document, either for the benefit of a third party or for their mutual benefit.

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The adoption of a European instrument relating to successions was among the priorities of the 1998 Vienna Action Plan¹. The Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters² adopted by the Council and the Commission at the end of 2000 provides for an instrument to be drafted. More recently, the Hague Programme³ called on the Commission to present a Green Paper covering the whole range of issues – applicable law, jurisdiction and recognition, administrative measures (certificates of inheritance, registration of wills).

The growing mobility of people in an area without internal frontiers and the increasing frequency of unions between nationals of different Member States, often entailing the acquisition of property in the territory of several Union countries, are a major source of complication in succession to estates.

The difficulties facing those involved in a transnational succession mostly flow from the divergence in substantive rules, procedural rules and conflict rules in the Member States.

Succession is excluded from Community rules of private international law adopted so far. There is accordingly a clear need for the adoption of harmonised European rules.

Most successions are settled on a non-contentious basis. Community legislation dealing exclusively with the designation of courts having jurisdiction in matters of succession and with the recognition and enforcement of their judgments would therefore be insufficient.

To simplify matters for those involved in a transnational succession and to provide an effective response to the practical problems of individual citizens, a Community instrument will also have to deal with the recognition of both judicial and extra-judicial documents (wills, deeds, administrative documents). As full harmonisation of the rules of substantive law in the Member States is inconceivable, action will have to focus on the conflict rules. The Commission concludes that there can be no progress on succession in the Community without the question of the applicable law being settled as a matter of priority.

The first question that arises here concerns the scope of the conflict rules, the core aspect of any legislative initiative with the potential to range extremely widely: validity of wills, status as heir, reserved portion, administration and distribution of the estate, *indivisum*, etc.

The question of the connecting factor will also demand special attention. As is so often the case in private international law, there will be a great temptation to seek “the” connecting factor, the one which will solve all the problems on its own. This might be nationality, which for a long time enjoyed privileged status, or habitual residence, which has now become more fashionable.

But in relation to successions, none of the criteria is without its drawbacks. The deceased’s last domicile, used as a connecting factor, could have the effect of activating a law with which the succession is only tenuously related: for instance, if the deceased did not have the nationality of the country where he died and if most of his property is in another country. Is it therefore worth insisting on seeking a single connecting factor? Would it be preferable to accept a degree of flexibility, even giving the parties’ choice a role to play?

¹ OJ C 19, 23.1.1999.

² OJ C 12, 15.1.2001.

³ See Presidency conclusions, Brussels European Council, 4 and 5 November 2004.

Whatever connecting factor is selected in the future Community instrument for determining the applicable law, there is always the possibility that in certain situations it may not match the legitimate expectations of those involved in the succession. Such expectations are a parameter that must be taken into the equation in the context of a single market in which there is full freedom of movement. A person may, for instance, spend some time in a country without acquiring any property there at all, as ultimately he plans to return to his own country, where his family continue to reside and where his property is. If such a person dies in the country where he resides, there might be good grounds for the succession being governed by the law of the country of his nationality. But connection to the law of the country of his nationality would not be so legitimate if he left his country of origin long ago and resided in a Member State where he has all his family and property ties.

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While the determination of the applicable law is essential, the question of jurisdiction should not be underestimated. In some Member States the courts always have to be involved; in others, they are involved only in complex or contentious successions.

To legislate on jurisdiction, it is first necessary to decide whether there should be a single connecting factor or a degree of flexibility.

Moreover, given that in many Member States the majority of successions are settled outside the courts, sometimes with the support of public bodies or certain legal professions, the possibility of international rules of jurisdiction regarding these bodies or professions must be considered.

When considering all these aspects, a number of specific questions will have to be looked into, such as mutual wills, reserved portions and trusts. This last concept is unknown in most legal systems, but it is in use in a number of Member States.

Lastly, Community legislation in matters of succession must also set out to remove administrative and practical barriers. The establishment of a European certificate of inheritance should be envisaged. This is mentioned explicitly in the Hague Programme, along with registration of wills.

2. CONFLICT OF LAWS

2.1. General questions

The universal nature of the future rules should not be in dispute: confining the application of the harmonised conflict rules to strictly “intra-Community” international situations and excluding those in which there is a third-country element would make life more difficult for individuals and the legal professions.

The first question that arises concerns the system to which the succession should be connected, as the same topics are not necessarily governed by the law of succession in all legal systems. The harmonisation of the conflict rules should come with a definition of what is covered by the law of succession.

Secondly, one or more connecting factors will have to be determined.

And there is the question whether the future Community legislation, looking beyond the determination of heirs and their rights, should extend to the manner in which the estate is actually passed on to the heirs.

Question 1: *What questions should be governed by the law applicable to the succession?*

In particular, should the conflict rules be confined to the determination of heirs and their rights or also cover the administration and distribution of the estate?

Question 2: *What connecting factor should be used to determine the applicable law? Should the same factor apply to the whole range of issues covered by the applicable law or might different criteria apply to different aspects of the succession?*

In particular, should the Community conflict rule distinguish between movable and immovable property? Should there be a role for the law of the country where immovable property is situated?

2.2. Wills and agreements as to future successions

Regarding the validity of wills, the laws of the Member States take a wide range of approaches both to testamentary capacity, the forms of wills, validity in substantive terms, joint wills⁴, agreements as to future successions⁵ and revocability. The conflict rules also differ.

Question 3: *What law should be applicable to:*

- general testamentary capacity?

- validity:

- as to the form of the will?
- as to the substance of the will?
- joint wills?
- agreements as to future successions?
- the revocation of wills?

How should the conflict rule be formulated to take account of changes in connecting factors between the date of the will and the date of death?

2.3. Simultaneous death

The order in which two people who are likely to inherit each other's property die can have an impact on their respective heirs' rights. Where people die in the same incident, some Member States presume that they died at the same time whereas others presume that they died in a

⁴ Wills made by two people in the same document.

⁵ Agreements relating to one or more successions not yet opened.

particular order. If their successions are governed by different laws, it may be impossible to administer them.

Question 4: *How should the question of the possible incompatibility of the laws applicable to the successions of persons dying in the same incident be settled?*

2.4. Choice of law applicable to the succession

Although most Member States of the European Union do not allow the future deceased or his heirs to choose the law applicable to his succession, the question remains worth considering. Whatever connecting factor is selected, the possibility remains that in certain situations it will fail to match the legitimate expectations of the people involved in a succession. A degree of flexibility might therefore be provided.

Question 5: *Should the future deceased (in a testate or intestate succession) be allowed to choose the law applicable to his succession, with or without the agreement of his presumptive heirs? Should the heirs enjoy the same possibility after the succession has been opened?*

Question 6: *If the possibility of choosing the law applicable to the succession is allowed, should the possibilities be limited, and should the procedure for making the choice be determined? If they have not been defined as connecting factors, should the following criteria be accepted: nationality, domicile, habitual residence or other criterion?*

Question 7: *At what time should these connecting factors be operative? Should they be subject to specific conditions (duration, validity on date of death, etc.)?*

Question 8: *Should it be possible to choose the law applicable to joint wills and agreements as to future successions? Should such choice be subject to rules and conditions? If so, how?*

Question 9: *Should a spouse be allowed to choose the law applicable to his/her matrimonial property scheme as the law applicable to his/her succession?*

2.5. Reserved portion of estate

The legal systems of all the Member States protect the near relatives of a deceased person who tries to disinherit them. The protection commonly takes the form of a reserved portion of the estate but the mechanism is not recognised everywhere in the European Union.

Question 10: *Should the application of the reserved portion of the estate be maintained where the law designated by the conflict rule does not recognise the principle or defines its scope differently? If so, how?*

2.6. Trusts created by a testator

Where a trust has an international dimension, the courts and other relevant authorities exercising jurisdiction over it must be able to determine the laws applicable to it. Apart from the settlor's right to choose the applicable law, it might be necessary to devise specific conflict rules for the trust.

Question 11: *Should specific conflict rules be adopted for trusts? If so, what rules?*

2.7. Renvoi

The unification of the conflict rules at Community level will obviate the need for *renvoi* where all the connecting factors are situated in a Member State. But the question will arise when the conflict rules designate the law of a third country.

Question 12: *Should the future Community instrument allow renvoi if the harmonised conflict rules designate the law of a third country? If so, how and within what limits?*

2.8. Preliminary questions

The law applicable to the succession sometimes makes the administration of the succession dependent on a preliminary question – validity of a marriage or partnership, establishment of paternity, etc. – that may fall to be determined by another law.

Question 13: *What conflict rule should be adopted to determine the law applicable to preliminary questions on which the succession may depend?*

3. RULES ON JURISDICTION

The Member States have adopted widely varying criteria: last domicile of the deceased, domicile of the defendant or claimant, situation of certain property, or nationality of the deceased or of one or other of the parties to the litigation. Account should be taken here of a wide variety of interests: those of the heirs presumptive, who sometimes reside in different countries, but also the interests of the various States concerned, particularly where property is located in their territory.

3.1. Choice of a head of jurisdiction

One possibility would be to determine a single court that would have jurisdiction, regardless of the distinction made on the basis of whether the property in the estate is movable or immovable. But, as in the case of the applicable law, more flexible rules could be adopted and there are several ways of going about this.

Question 14: *Is it desirable to determine a single forum in matters of succession? Is it possible to abandon the jurisdiction of the forum situs for immovables? If a general single criterion were to be adopted, what should it be?*

Question 15: *Might the heirs be allowed to proceed in the courts of a Member State other than the one designated by a principal rule on conflict of jurisdiction? If so, under what conditions?*

Question 16: *Where succession proceedings are pending in a Member State, should it be possible to apply to the courts in another Member State where the property is located for provisional and precautionary measures?*

Question 17: *Should the future Community instrument contain provisions allowing a case to be transferred from a court in one Member State to a court in another Member State and, if so, under what conditions?*

The criteria defined in the future instrument might designate a court in a third country. If so, it will not necessarily be desirable to unilaterally waive the jurisdiction of the courts in the Member States if other connecting factors, excluded in the intra-Community context, are relevant for unilaterally demarcating the jurisdiction of these courts in relation to those of third countries. Leaving it for the national legislation of the Member States, by way of “residual jurisdiction”, to answer this question would mean that a common solution could not be found and other conflicts of jurisdiction could emerge.

Let us suppose that the Community criterion of jurisdiction was the deceased’s last domicile. A citizen of Member State A dies in a third country where he settled only recently. All his heirs are in Member State A, and most of his property is in Member State B. Community law (designating the deceased’s last domicile) does not designate any of the Member States, neither A nor B, even though the succession is much more closely connected with these two States than with the third country where the deceased had his last domicile. The *renvoi* to national rules to settle this question could generate a new problem. If Member State A applies the nationality criterion and Member State B applies the criterion of the situation of the property: positive conflict of jurisdiction. Conversely: negative conflict of jurisdiction.

Question 18: *What elements would be relevant in determining the jurisdiction of the courts of the Member States in a situation such as that outlined above?*

Question 19: *Should these special rules of jurisdiction apply also to property situated in the territory of a third country claiming exclusive jurisdiction over it?*

3.2. Procedures for the transfer of immovable property

The transfer of immovable property requires entries in different registers. In certain Member States entries in these registers are made only on the basis of a judgment given or a document issued by a national authority. It could be provided that register entries may be amended on the basis of documents issued in another Member State.

Question 20: *Should the jurisdiction of the authorities for the place where the real property in the succession is situated be reserved where the authorities of another Member State enjoy the principal jurisdiction:*

- *to issue the documents needed for the amendment of the property registers?*
- *to carry out administrative acts and transfer property?*

Question 21: *Is it possible to devise uniform Community documents to be used in all the Member States where property is situated? If so, what existing documents could be standardised? Could certain formalities currently required for the purpose of international successions be abolished or simplified? If so, which ones?*

3.3. Jurisdiction of non-judicial authorities

Given the importance of the functions exercised by non-judicial authorities – notaries or officers of all manner of administrative authorities – heirs might be allowed to handle certain formalities with authorities near to them if they do not reside at the place designated by the principal rule of jurisdiction.

Question 22: *Should it be provided that the harmonised rule of jurisdiction also applies to other authorities likely to be involved with a succession?*

Question 23: *Should it be provided that certain formalities can be performed before the authorities of a Member State other than the one designated by the principal rule of conflict of jurisdiction? Should this possibility be subject to rules and limits?*

3.4. Trusts

Succession being excluded from the scope of Regulation (EC) No 44/2001, there are no Community rules of jurisdiction for litigation in relation to trusts created in wills, which are not covered by the Regulation.

Question 24: *What rules of jurisdiction should be contained in the future Community instrument as regards trusts created in wills?*

4. RULES OF RECOGNITION AND ENFORCEMENT

The future Community legislation must simplify matters for heirs by allowing the recognition and enforcement of documents needed for the recognition of their rights – court judgments, deeds, wills, documents certifying the status as heir, powers conferred on persons acting as executors, etc.

4.1. Recognition and enforcement of judgments

By laying down harmonised rules on the applicable law and jurisdiction, the future legislation will establish a very high degree of mutual trust and obviate the need to maintain intermediate measures for the recognition and enforcement of judgments. But if grounds for refusal were maintained, they should be the same for all Member States.

Question 25: *Can the exequatur for the recognition of judgments be abolished? Or should grounds for refusing to recognise and enforce a judgment be included? If so, what are they?*

Question 26: *Could it be provided that a judgment given in one Member State in a succession case should automatically be recognised and available as the basis for the amendment of property registers in another Member State without formal proceedings? Should Article 21(3) of Regulation (EC) No 2201/2003 be the inspiration?*

4.2. Recognition and enforcement of deeds and wills

In certain Member States, notaries and other authorities prepare deeds to determine the order of succession and administer the estate. Provision must be made for the recognition and enforcement of such deeds.

Consideration must also be given to possible rules applicable to foreign wills, which often cannot have full effect.

Question 27: *Can the same rules on recognition and enforcement be applied to succession-related deeds as to judgments? Would it therefore be possible to imagine that succession-related deeds issued in one Member State could serve as the basis for amending property registers in the other Member States without further formalities? Should Article 46 of Regulation (EC) No 2201/2003 be the inspiration?*

Question 28: *Should there be special rules to facilitate the recognition and enforcement in one Member State of wills made in another Member State?*

4.3. Executors (including trustees for trusts created in wills)

The designation of executors is either optional or compulsory, depending on the Member State. Their designation and their functions, which vary from one system to another, are not always recognised in other Member States.

Regarding the recognition and enforcement of judgments concerning trusts created in wills, there will be the question of the effects of recognising the trusts themselves on the amendment of property registers.

Question 29: *Could consideration be given to automatic recognition in all Member States of the designation and functions of executors? Should provision be made for grounds for challenging their designation and functions?*

Question 30: *Should a certificate be established to certify the designation of the executor and describe his powers? Which person or authority should be responsible for issuing the certificate? What should the certificate contain?*

Question 31: *Would the recognition of trusts created in wills allow trust property and related title documents to be entered in property registers? If not, what provisions would need to be adopted?*

Question 32: *Should provisions be adopted to preserve the application of the reserved portion provided for by the law of succession or another law requiring such protection to be given, despite the existence of a trust? If yes, what provisions?*

5. EVIDENCE OF STATUS AS HEIR: THE EUROPEAN CERTIFICATE OF INHERITANCE

Evidence of status as heir is given in different ways, depending on the legal system. It is essential for heirs to be able to assert their rights and take possession of the property to which they succeed without having to go through further formalities. With harmonised conflict rules, it would be possible to establish a certificate having uniform effects throughout the Community. This would undeniably constitute value added.

Several questions will have to be settled as to the conditions for issuing the certificate, what it should contain and what its consequences should be.

Question 33: *What effects should the certificate have?*

Question 34: *What information should appear on the certificate?*

Question 35: *Which Member State should issue it? Should the Member States remain free to decide which authorities are to issue the certificate or should certain criteria be laid down in the light of the certificate's content and functions?*

6. REGISTRATION OF WILLS

The search for wills, in particular wills made abroad, can be an insurmountable obstacle.

Question 36: *Should provision be made for a scheme for registering wills in all Member States? Should a centralised register be considered?*

Question 37: *What arrangements should be adopted to facilitate access to the national components of the system or the centralised register for the heirs presumptive and the relevant authorities (including their own Member State)?*

7. LEGALISATION

Establishing a European law-enforcement area implies the removal or simplification of formalities.

Question 38: *Would there be any difficulties in abolishing formalities for the legalisation or endorsement (apostille) of succession-related public documents issued in a Member State?*

8. LEGISLATIVE APPROACH

It follows that producing a corpus of Community rules on succession and wills is a particularly vast and complex project.

Question 39: *Can a single, complete instrument be produced? If not, in what order should work proceed and via what stages?*