

II

(Preparatory Acts)

EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

421st PLENARY SESSION, HELD ON 26 AND 27 OCTOBER 2005

Opinion of the European Economic and Social Committee on the Green Paper on succession and wills*(COM(2005) 65 final)**(2006/C 28/01)*

On 1 March 2005 the European Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the *Green Paper on succession and wills*.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 21 September 2005. The rapporteur was Mr Retureau.

At its 421st plenary session, held on 26 and 27 October 2005 (meeting of 26 October), the European Economic and Social Committee adopted the following opinion by 118 votes with 2 abstentions.

1. The Commission's proposals

1.1 In compliance with the Hague Programme (2001), the Commission is presenting a consultative Green Paper on succession and wills outlining the subject's international aspects:

- applicable law,
- jurisdiction and mutual recognition of judicial decisions and instruments,
- administrative measures, deeds or administrative documents, and the mutual recognition thereof,
- measures simplifying formalities at European level: certificates of inheritance and registration of wills.

1.2 Transnational succession presents specific difficulties and obstacles for beneficiaries due to the diversity of substantive laws, procedural rules and rules on conflict of laws in force in each Member State.

1.3 The Green Paper therefore proposes that the European Union should consider the possibility of adopting substantive rules and rules governing jurisdiction, applicable law and mutual recognition not only for court judgments but also for administrative decisions and documents concerning wills and succession. Such rules would also apply when the international component of the succession involves a non-EU country.

2. The Committee's general comments

2.1 At international level, there are three Hague Conventions on succession and wills, as well as another on trusts:

- The Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions (concluded on 5 October 1961, entered into force on 5 January 1964) Parties: Germany, Austria, Belgium, Denmark, Spain, Estonia, Finland, France, Greece and Luxembourg. This convention has also come into force in other Member States, such as the Netherlands, the United Kingdom and Sweden (ratifications), Ireland and Poland (accessions) and Slovenia (as a successor of the former Yugoslavia).
- The Convention concerning the International Administration of the Estates of Deceased Persons (concluded on 2 October 1973, entered into force on 1 July 1993). This has come into force in some Member States, such as Portugal (ratification), the Slovak Republic and the Czech Republic (as successors of the former Czechoslovakia).
- The Convention on the Law applicable to Succession to the Estates of Deceased Persons (concluded on 1 August 1989, not yet in force but already ratified by one Member State, the Netherlands).

— The Convention on the Law applicable to Trusts and on their Recognition (concluded on 1 July 1985, entered into force on 1 January 1992). Parties: Italy and Luxembourg. This convention has also come into force in other Member States, such as the Netherlands, the United Kingdom (ratifications) and Malta (accession).

2.2 A UNIDROIT Convention providing a Uniform Law on the Form of an International Will was concluded in Washington on 26 October 1973 and came into force on 9 February 1978. The EU Member States parties to the Convention are Belgium, Cyprus, (Czechoslovakia), France, (The Holy See), Italy, the United Kingdom, Slovenia, and several non-EU countries including the United States and the Russian Federation. This convention provides for an international system of registration and a standard form for accomplishing this.

2.2.1 The Member States which are parties to the 1972 Basel Convention on the Establishment of a Scheme of Registration of Wills, concluded under the auspices of the Council of Europe but open for accession to non-member states, are Belgium, Cyprus, Estonia, France, Italy, Lithuania, Luxembourg, the Netherlands, Portugal and Spain.

2.3 The Hague Conventions concern jurisdiction and applicable law, the UNIDROIT Conventions concern substantive law on matters with an international dimension. Only the international provisions on the form of wills and on their registration on an international register currently have a sufficiently significant number of ratifying or contracting parties.

2.4 The matter under consideration concerns a fundamental human right, namely a specific form of property rights transfer following a person's death. EU legislation as regards competence, applicable law and mutual recognition for successions with an international component should take the form of a regulation.

2.5 In view of the subject's complexity, the Commission's aims and proposals are ambitious, but also pertinent and vital for the internal market. Many individuals are affected. In order to make the regulation more effective and avoid any clashes between rules or decisions taken by different states, it would be advisable to include as many issues as possible in the scope of the rules concerning conflicts of law, always making them functionally and essentially subordinate to the issue of succession (avoid adding, for example, issues which are basically matters for the legal arrangements concerning real rights).

2.6 The economic importance of having EU rules is undeniable, especially with regard to the transfer of SME assets in Europe, in order to ensure continuity following the death of an entrepreneur — an issue that is also important for employment and competitiveness in Europe.

2.7 Amendments should be considered to rules that, in some countries, prohibit agreements as to future successions or

the appropriation of a portion of an inheritance for a specific use. This should be done in the countries concerned and encouraged by the EU with the aim of improving the harmonisation of substantive law and ensuring the continuity of businesses and farmholdings that would otherwise have to be liquidated when the time came to share them among several heirs.

2.8 In view of the profound differences between existing national laws despite certain recent developments, and in view of the small number of countries that have ratified the relevant international conventions, the Committee agrees with the Commission that it would currently be impossible to formulate uniform substantive law on international succession and wills that could be applied throughout the European Union. The working themes and priorities put forward are appropriate since progress in these areas would already solve many of the practical difficulties encountered by the relevant beneficiaries, notaries, administrations, courts and members of the legal profession.

2.8.1 Other paths can also be explored taking into account international law, which Member States could be asked to take into consideration for ratification or for accession to certain conventions (form of wills, applicable law, international will, national and international registration).

2.8.2 The law of succession and wills in Romano-Germanic legal systems has long been marked by attitudes towards inheritance that are extremely outdated in many respects. The deceased's⁽¹⁾ estate was considered to represent a form of continuity through one's heirs. The law of succession now tends increasingly towards contractualisation. Following a trend set in Germany and Switzerland, France is in the process of adopting succession law reforms granting the deceased and his heirs a greater role in settling succession, including greater guarantees for continuity of business.

2.8.3 On the other hand, extremely liberal systems that enable the testator to disinherit some of his bodily heirs without justification are being increasingly challenged, as demonstrated by the ever-growing body of litigation in this area.

2.8.4 Respecting certain historical and sociological specificities in different legal systems does not exclude the possibility that, in the long term, a greater level of standardisation, or at least a higher degree of convergence, will finally come into existence in Europe, thereby facilitating the execution and settlement of international wills. This process could be accelerated by creating a European will and a sufficiently open and liberal instrument on applicable law. The hypothesis of having Community provisions of substance could also be studied, in the context of an acceptance of '*professio juris*'⁽²⁾, as an alternative to one or more of the applicable national laws.

⁽¹⁾ Footnote not necessary in English text.

⁽²⁾ Choice, by the testator, of the law applicable to his succession.

2.9 The Committee would point out that Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 constitutes a source of inspiration. Articles 21(3) and 46 of Regulation No 2201/2003, in particular, are relevant sources and, at the very least, set precedents in family law that contribute to determining the substance of the proposed legislative provisions ⁽³⁾.

2.10 The Committee therefore welcomes the Green Paper and considers that it raises fundamental and pressing questions. The EESC will endeavour to find answers to these questions, basing itself on the European citizens' best interests and taking into consideration their growing mobility and the major migrations that have already taken place in the past.

2.11 It would be appropriate to begin by dealing with the form of wills, international jurisdiction, and resolving conflict of law issues relating to applicable law, the registration of wills, as well as the mutual recognition of rulings by the courts and other competent authorities and endorsement, areas where precedents have already been set in European and international law.

2.12 The EESC feels that a unitary system (single law of succession and single set of rules governing inheritances) is preferable to having various scattered rules for settling a succession; however, for practical reasons, this principle should be subject to exceptions in certain cases, particularly for buildings or certain types of property (ships, aircraft, goodwill, etc.) located abroad.

2.13 Certain matters, such as agreements as to future successions or trusts, remain under national jurisdiction ⁽⁴⁾; but those concerning the recognition without exequatur of court decisions, which may or may not give rise to dispute in matters of succession, residual jurisdiction, recognition of decisions and documents issued by public or private extra-judicial authorities or registration in national land registers on the basis of the European certificate of inheritance, should be included under the proposed European legislation.

3. Comments on specific questions raised in the Green Paper

3.1 A regulation on successions similar to the above-mentioned Council Regulation No 2201/2003 would not be sufficient to solve the problems presented by international successions. In fact, most successions are not contentious and problems that arise in the absence of any contention must also be addressed. Furthermore, the courts are sometimes involved in settling non-contentious issues in certain countries, or for specific matters.

⁽³⁾ OJ L 338, 23.12.2003.

⁽⁴⁾ Trusts created by a testator are not recognised in many continental countries; moreover, some of these countries consider the reserved portion of estate or the reporting of donations as being of a public nature. This encourages attempts to circumvent the inheritance laws, particularly as regards buildings located on the territory of these countries.

3.2 Needless to say, the Community instrument should regulate matters raised previously concerning the determination of the forum or fora having jurisdiction and the recognition of court decisions, but it should also consider the possibilities of regulating:

- testate successions: conditions for the validity of wills (form, substance, testamentary capacity, limits on the freedom to bequeath) reserved portions, anomalous successions, agreements as to future successions (authorised or prohibited), reserved portions, trusts, status as heir,
- intestate and testate succession: status as heir and portions of an estate, rules governing *indivisum*, the administration and distribution of the estate etc.,
- in addition to the recognition of court decisions (and possible exceptions of public order), the recognition of extra-judicial documents concerning non-contentious succession settlements: wills, deeds and other administrative documents or the international jurisdiction of the relevant public officials and members of the legal profession,
- as for the connecting factors to be considered when determining jurisdiction, a certain degree of flexibility would appear to be required to ensure compliance with the testator's choice of applicable law or, alternatively, the law that the beneficiaries would be reasonably entitled to consider as applicable (place of testator's nationality, habitual residence, death, the place where the will was drafted and deposited or the place where the bulk of the estate is located ...).

3.3 The Committee is in favour of the EU's Hague Programme insofar as it provides for the creation of a 'European certificate of inheritance' and a system for registering wills. Member States will have to determine which authority is authorised to issue such certificates and set up a centralised national registry if one does not already exist. A central register for the Community (or for Europe in the sense of the Council of Europe, provided that the Member States which have not already done so were asked to ratify the Convention of Basel) should be created and courts, notaries, and other officials authorised under the applicable national law should have access to the information deposited with the central register (at least, to find out on the basis of the deceased's name and his date of birth, in which Member State or third country, on what date, and with which authority the will has been deposited in order to request a copy from the aforementioned national authority).

3.3.1 The European registration system must, whatever happens, be compatible with the Basel Convention and the Washington Convention, since several Member States are already parties to them and since the draft EU legislation may also concern successions involving third countries.

3.4 Once status as heir has been established and the estate has been administered and distributed, administrative formalities should be as straightforward as possible. The Committee would be in favour of mutual recognition for all acts and documents issued by officials recognised under local law, and the direct registration in a land register (or with the appropriate authority for registering title to real estate) of title to property as well as any easements, mortgages, or other possible encumbrances that might burden the estate in question under the applicable national law.

3.5 The Committee would draw the Commission's attention to taxation issues that might face the heirs to an estate located in two or more countries. It is important to avoid any problems that might arise in regard to double taxation on part or all of the estate, which could have a confiscating effect in some successions or which could create inequalities amongst heirs depending on the nature of the goods they have each inherited. Stock will have to be taken of the rules applying to international successions in the Member States in order to establish which countries raise taxes on goods and assets situated outside their territory, compare rates and propose fair solutions to be submitted to the relevant countries. The Commission might possibly consider proposing a model convention against double taxation in respect of international successions, between the Member States.

3.6 Should a European will be based on the model of the Washington Convention's international will; and should European registration, as foreseen in the Basel Convention, be extended to international registration? This might encourage more countries to ratify the Washington and Basel Conventions and provide better guarantees for the beneficiaries of international wills involving not only Member States but also third countries. The Committee recommends that the Commission's work should follow this course because Member States are already familiar with these conventions, either because they have ratified them or because their public officials or courts have already dealt with wills and registrations subject to these legal systems.

3.7 Were this hypothesis to become reality, the European will would be recognised in its form by all national legal systems. European law must not allow simple matters of form to undermine the universal principle that recognises respect for the testator's intentions (*favor testamenti*) within the limits permitted by applicable law.

3.8 Specific Community rules are essential so that this legislation applies to all cases of successions under the jurisdiction of two or more Member States, or even of third countries, including those which are parties to international conventions, so as to guarantee the application of Community law in all circumstances (Community 'special law' would then have precedence over international law).

4. Other questions raised

4.1 The Green Paper raises 39 main questions, which are broken down into sub-questions. The EESC will not attempt to address all these at this preliminary stage but would urge the Commission to consult individually each of the organisations representing members of the legal profession concerned by each of the topics considered by the Green Paper.

4.2 The EESC will restrict itself to presenting possible responses to a number of questions that it believes to be of particular significance. The overall approach adopted will focus on compliance with the conventions of the Hague, Basel, and Washington in order to ensure that the European rules are as standardised as possible, the future perspective being to achieve a legal consensus that is broadly acceptable to as many Member States and third countries as possible.

4.3 The connecting factors laid down in the Hague Convention of 1961 on conflict of laws relating to the form of testamentary dispositions should at least be retained since they offer sufficient diversity, making it possible, in most cases, to recognise the applicability of the law under which the will was made.

4.4 In the spirit of recent and ongoing reforms in continental Europe, the interests of legally incapacitated (minors or adults) or severely disabled heirs should be specifically safeguarded if a possible extension of the contractualisation of wills or the heirs' choice of applicable law modifies the reserved portion regime or creates inequalities amongst heirs. Greater flexibility for the testator or the beneficiaries should not undermine existing provisions in any of the applicable laws that afford these heirs the highest degree of protection (see questions 5 and 10 in the Green Paper).

4.5 Actions taken by one of the heirs or his representative in administering the succession in a country where an executor need not be appointed should not constitute implicit acceptance of the succession without the benefit of inventory.

4.6 Consideration should be given to the option of the heirs accepting a succession up to the limit of the claims on the inheritance, and to that of a pact between heirs or a heritage contract providing for an unequal division for legitimate purposes (continued operation of a farm or business, advantage for an heir with a mental or physical disability), and to agreements providing for an equal division between children from different marriages or natural children if applicable law does not organise such equality, or to an heir passing on his rights to his own direct descendants, bearing in mind the increase in life expectancy.

4.7 The testator should also be allowed, subject to certain limits, to choose which law should be applicable to his estate, for example that of his nationality (or one of his nationalities), or that of his usual place of residence.

4.8 Finally, the EESC believes that the Commission's excellent comparative work should be pursued and developed. It should be regularly updated on the Community website and translated into an adequate number of languages to ensure its general usefulness for members of the legal profession, public officials, administrators, and courts dealing with international successions. It should also be structured to include a chapter-by-chapter synthesis clarifying the general principles for European citizens wishing to draft a will with international scope or for their heirs.

4.9 The EESC awaits with interest the results of the consultations already carried out by the Commission or those still to come; it hopes that a general line of approach and more concrete legislative proposals can then be submitted to it for an opinion, and proposes then to examine them in detail, since it considers the issue of wills and successions to be one of major interest for the citizens of Europe; their hopes for a simplification of formalities, greater legal and fiscal certainty and a speedier settlement of international successions, which they expect from a Community initiative, must not be disappointed, whether the circumstances be those of private individuals, businesses, farms or other economic activities where the entrepreneurs or owners wish to ensure continuity after their demise.

Brussels, 26 October 2005.

The President
of the European Economic and Social Committee
Anne-Marie SIGMUND

Opinion of the European Economic and Social Committee on the Current situation and prospects for traditional energy sources — coal, oil and natural gas — in a future energy mix

(2006/C 28/02)

On 10 February 2005, the European Economic and Social Committee, acting under Rule 29(2) of its Rules of Procedure, decided to draw up an opinion on the *Current situation and prospects for traditional energy sources — coal, oil and natural gas — in a future energy mix*.

The Section for Transport, Energy, Infrastructure and the Information Society, which was responsible for preparing the Committee's work on the subject, adopted its opinion 1 September 2005. The rapporteur was Mr Wolf.

At its 421st plenary session, held on 26-27 October (meeting of 26 October 2005), the European Economic and Social Committee adopted the following opinion by 119 votes to 1, with 3 abstentions.

The EESC has recently adopted a number of opinions⁽¹⁾ on energy issues. Since by far the largest share of energy supply still comes from the fossil fuels: coal, oil and natural gas, and the question of resources and the release of greenhouse gases associated with their use has been the subject of political discussion, the present opinion evaluates these 'classic' fuels.

This should be followed by an opinion on 'The EU's Energy Supply: Strategy for an Optimum Energy mix' which builds on and summarises the findings of the series.

The strategic aim of this series of opinions, which an opinion on renewable energy sources and the present opinion bring to a conclusion, is to provide a solid basis for establishing realistic options for a future energy mix.

⁽¹⁾ See Promoting renewable energy: Means of action and financing instruments (OJ C 108 of 30.4.2004); The issues involved in using nuclear power in electricity generation (OJ C 112 of 30.4.2004); Fusion energy (OJ C 302 of 7.12.2004) and The use of geothermal energy (OJ C 110 of 30.4.2004).

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