Opinion of the European Economic and Social Committee on the 'Proposal for a regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession'

COM(2009) 154 final — 2009/0157 (COD)

(2011/C 44/25)

Rapporteur: **Mr CAPPELLINI**

On 20 November 2009, the Council decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the

Proposal for a regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession

COM(2009) 154 final — 2009/0157 (COD).

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 15 June 2010.

At its 464th plenary session, held on 14 and 15 July 2010 (meeting of 14 July), the European Economic and Social Committee adopted the following opinion by 119 votes with 1 abstention.

1. **Conclusions and recommendations**

1.1 The Committee welcomes the current Commission's proposal and notes, however, that it falls short of the expectations raised by the Green Paper and even further short of the proposals made by the EESC in its opinion of 26 October 2005.

1.2 The Committee considers the Proposal for a Regulation (PR) an important tool for civil society, to increase legal predictability and to facilitate fast and cost-effective solutions of international successions in EU Member States. The EESC draws the Commission's attention to the need to revise the various language versions of the PR and ensure their consistency and use of proper legal terminology.

1.3 The Committee expresses some concerns, in particular on the role of non-EU Members law and on some features of the succession certificate. Such concerns are met by a recommended new Article 26 and a longer term in Art.43, Par.2. A thorough analysis and presentation of this complex document, which is the PR, would require a longer working document, beyond the EESC's ordinary standards.

1.4 The Committee strongly recommends the following changes to be adopted in the PR:

i. insert 'These divergent rules also hinder and delay the exercise of the legitimate heir's right of ownership on the deceased's property' and 'Unilateral action by Member States would be insufficient to achieve all the objectives of the PR' in point 1.2 and point 3.2 of the PR's Explanatory Memorandum (see 3.4.3 and 3.4.4);

ii. insert in Art.1, Par.1 the clarification that the PR applies only to succession 'having an international character' (see 4.1.1);

iii. replace 'subsequent' by 'additional' or 'other than' in Art.21, Par.1, in all languages (see 4.3.8);

iv. replace Art.25 by a new article: 'Universal nature: This Regulation specifies the applicable law even if it is not the law of a Member State' (see 4.3.9);

v. replace Art.26 (Title: 'Renvoi', and not 'Referral') by a new article: 'If the deceased has not chosen a law pursuant to article 17 and the applicable law according to this Regulation is the law of a non-EU Member State and its rules of conflict of laws specify as applicable the law, either of a EU Member State, or of another non-EU Member State which would apply its own law, the law of this other State applies. This article does not apply to agreements as to succession whose connecting factor set forth in Article 18, Par.2 is the law which has the closest links '. (see 4.3.10.1);

vi. insert in Art.27 'manifestly' before 'incompatible' in all languages, and 'international' before 'public policy' at least in French and Italian (see 4.3.11);

vii. replace 'its clauses' by, 'its provisions' in Art.27, Par.2, in all languages (see 4.3.12);

viii. extend to 9 or 12 months the time period in Art.43, Par.2 (see 4.6.1.).

2. **Background**

2.1 The proposal deals with a complex topic which is important to any person having his/her habitual residence (with some extensions in Art.6), regardless of his/her nationality, in the European Union. A Green Paper on succession and wills ([1]) opened a broad based consultation process on intestate and testate international successions.

2.2 The practical importance of the PR as a uniform standard-setting instrument, results from the current variety that EU Member States present in their legal rules with regard to:

a) the determination of the applicable law;

b) the scope of jurisdiction of their tribunals on international wills and successions cases;

c) the conditions under which a judgment given in another EU Member State may be recognised and enforced; and

d) the conditions under which authentic instruments drawn up in another EU Member State may be recognised and enforced.

2.3 For the sake of clarity, the PR aims at providing a uniform regime to these rules, which all belong to private international law and make the outcome of international wills and successions dependant on the law which is applicable to them according to the specific conflict of law rules (contained in the PR) of the forum (a EU Member State). Inversely, the PR is not intended to have *per se* any effect on the domestic substantive law of EU Member States which governs the status, the rights and duties, of the heirs with regard to the property (or estate) of the deceased. Moreover, the European Certificate of Succession established under Chapter VI is not an exception, but concerns evidence of status and provides no uniform domestic substantive provisions on the conditions necessary to acquire such status. More generally, besides this PR, substantive domestic law is not within the competence granted under Art. 65 b of the Treaty.

([1]) COM(2005) 65 final.

3. **General Comments**

3.1 In its Opinion ([2]) on the Green Paper on succession and wills, the EESC has *inter alia*:

a) welcomed the Green Paper, considering that 'it raises fundamental and pressing questions';

b) drawn the Commission's attention 'to taxation issues that might face the heirs to an estate located in two or more countries'; and

c) expressed openly its interest by observing that 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'.

3.2 This EESC's declaration of interest for the issue of wills and successions, which was declared 'one of major interest for the citizens of Europe', needs to be updated, four years after the analysis of the Green Paper, with regard to the structure and the concrete provisions proposed by the Commission in its PR.

3.3 *Current PR's Potential and Stakeholders*

3.3.1 It should be noted that the EESC invited the Commission in its opinion ([3]) to consider taxation issues and expressed interest in 'greater (…) fiscal certainty'. However, in view of the PR's scope, under the narrow competence granted by Article 65 of the Treaty, the PR addresses the private international law aspects of wills and successions, and is not intended to have a direct effect on the law of Member States related to the fiscal aspects of international wills and successions.

3.3.2 While wills, if any, are made before death and may be revoked by the testator until then, and rules on succession apply right after death, both wills and successions are effective and operate legally not before death, and govern its patrimonial consequences. The PR thus concerns anyone, any category of stakeholders in civil society.

3.3.3 However, for the sake of clarity with regard to its scope of application, it should be noted that the PR:

a) applies only to those wills and successions which present an international character - the latter not being defined in the PR - and not to the much more numerous purely domestic successions; and

([2]) OJ C 28, 3.2.2006, p. 1.
([3]) OJ C 28, 3.2.2006, p. 1.

b) applies to individuals, i.e. to natural persons, but not to legal entities of private or public law.

3.4 *Objectives and Subsidiarity Principle*

3.4.1 Certainly the uniform and binding nature of an EU Regulation upon EU Member States, their domestic legislation and courts, explains the fact that the PR will increase substantially legal predictability on all the topics it regulates. This effect represents the direct added-value of the PR. Ensuring quality and accurate drafting of its provisions is a priority.

3.4.2 The stated objective 'to eliminate all the obstacles to the free movement of persons' should not lead to disregard the fact that whether or not an individual has the status of 'heir' and has legal 'rights' on the property of the deceased in a EU Member State, are questions to be answered by not private international provisions (which is the subject-matter of the PR), but the relevant substantive provisions of the domestic applicable law on wills and successions of EU Member States. The PR implies no change in this regard as it does not uniform such substantive provisions. Following the entry into force of the Treaty of Lisbon, the proposal's explanatory memorandum should be revised and, where appropriate, amended. The EESC reiterates the call it has made on the positions of the United Kingdom, Ireland and Denmark, to the effect that these Member States state their willingness to implement this regulation.

3.4.3 This being clarified, - point 1.2 of the PR's Explanatory Memorandum contains an accurate statement ('Today, such persons are therefore faced with considerable difficulties in asserting their rights with regard to an international succession') and a less convincing and far-reaching conclusion, extended to the right of ownership ('These divergent rules also prevent the full exercise of private property law'). Instead, milder terms, such as 'These divergent rules also hinder and delay the exercise of the legitimate heir's right of ownership on the deceased's property', seem more accurate and suitable.

3.4.4 In the statement 'Unilateral action by Member States would therefore run counter to this objective' the terms 'run counter' are over-stated. If EU Member States so desire, they can, regardless the Regulation, pursue at least the objective of a uniform determination of the applicable law, by ratifying the 1989 Hague Convention on Succession. The EESC believes that milder terms, such as 'Unilateral action by Member States would be insufficient to achieve all the objectives of the PR ', seem more suitable.

4. **Specific Comments**

4.1 *Chapter I Scope and Structure*

4.1.1 The PR is intended to cover wills and successions which have an international character, but provides no definition of such a character. A reference to the application of the PR only to 'situations having an international character' is to be included in the PR for sake of clarity.

4.1.2 As reflected in its title, the PR covers both jurisdiction (Chapter II) and recognition and enforcement of decisions (Chapter IV), i.e. those two branches of private international law which, with the exception of the rules on applicable law, are the subject of Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereafter 'Regulation No 44/2001'), which excludes from its scope wills and successions. This gap explains the importance of the decision taken to have the PR cover, and provide uniform rules for, all three branches of private international law, i.e. applicable law, jurisdiction and the recognition and enforcement of judgments, on international successions.

4.2 *Chapter II Jurisdiction*

4.2.1 Chapter II (Articles 3-15) is on 'Jurisdiction' and applies to all courts in the Member States, and to non-judicial authorities only where necessary.

4.2.2 General jurisdiction is granted to the courts of the Member State on whose territory the deceased had his/her habitual residence at the time of death. Clearly, there is no condition of nationality. It should be observed that also the general EU regime on jurisdiction, or lex generalis, which is Regulation (EC) No 44/2001, grants general jurisdiction on the basis of domicile, leaving aside any consideration on nationality.

This general jurisdiction under the PR applies to (deceased) EU nationals but also to non EU nationals, if they had their habitual residence at the time of their death in an EU Member State.

4.2.3 In cases where the habitual residence of the deceased at the time of death is not located in a Member State, the courts of a Member State have nevertheless a 'residual jurisdiction' in a number of cases, which extend the jurisdiction of tribunals of EU Member States far beyond the simple case where the habitual residence of the deceased at the time of death is located in a Member State. Nationality is not a condition for the purposes of general jurisdiction, but becomes ground of residual jurisdiction.

4.2.4 The courts in the Member State in which the property is located have no general jurisdiction per se under the PR. One partial exception exists with regard to the transmission of the property, its recording or transfer in the public register.

4.3 *Chapter III Applicable Law*

4.3.1 Chapter III provides uniform rules (Articles 16-28) on the applicable law. The general rule is that the law applicable to the succession as a whole is that of the State in which the deceased had his/her habitual residence at the time of his/her death. No other condition, such as nationality, applies. No distinction is drawn between movable and immovable property.

4.3.2 To be noted that the conflict of law rules of the PR, to be applied by EU Member States courts, specifies the applicable law regardless whether the State of the applicable law is an EU Member State or not (Art.25).

4.3.3 Traditionally, private international law recognises 'party autonomy', i.e. the possibility for the parties to choose any applicable law in contractual matters. Under the PR a person may choose the law to govern the succession as a whole, but he/she may choose only the law of the State whose nationality he/she possesses.

4.3.4 For the sake of legal predictability, such choice must be expressly determined and included in a declaration in the form of a disposition of property upon death.

4.3.5 A different topic, not to be confused with the choice of law to govern the succession as a whole, is 'Agreements as to succession'. An agreement regarding a person's succession shall be governed by the law which, under the PR, would have been applicable to the succession of that person in the event of his/her death on the day on which the agreement was concluded. *Favor validitatis* alternative connecting factors are used.

4.3.6 From both a comparative and uniform law perspective, a very important issue is the scope of the applicable law. The PR extends the scope of the applicable law as to govern the succession as a whole, from its opening to the final transfer of the inheritance to the beneficiaries. The rationale is clearly to include as many as possible legal issues under one and only applicable law, with a view to increasing legal predictability and reducing the complex and time-consuming consultation of more than one (often foreign) law(s). The PR offers a long and non-exhaustive list of issues to be governed by the applicable law, thus including also non-listed issues of the succession, from its opening to the final transfer of the inheritance to the beneficiaries.

4.3.7 The applicable law governs the succession as a whole, from its opening to the final transfer of the inheritance to the beneficiaries, but it is no obstacle to the application of the law of the State in which the property is located where, for the purposes of acceptance or waiver of the succession or a legacy, it stipulates formalities subsequent to those laid down in the law applicable to the succession.

4.3.8 With regard to this provision, it is recommended to seek clarification as to whether in Art. 21, Par.1, in the part of the sentence 'formalities subsequent to those', 'subsequent' (i.e. occurring after) is the proper term, or what is intended is rather 'additional' or 'other' ('formalities'). It is submitted that 'additional' or 'other' would be preferable in the context of the provision.

4.3.9 The EESC is of the opinion that the terminology used in the provision on 'Universal nature' (Art 25) should clearly reflect only what Chapter III of the future Regulation actually does: specifying an applicable law. A simpler and preferable terminology would thus be: 'Universal nature: This Regulation specifies the applicable law even if it is not the law of a Member State'.

4.3.10 Leaving the choice of his national law by the deceased aside (Art.17), the Regulation generally applies the law of the forum, the court of the EU Member State in which the deceased had his/her habitual residence at the time of his/her death. However, under residual jurisdiction (Art.6) the law of a non-EU Member State may apply. In such cases, it is necessary to prevent that the Regulation defeats the unity of connecting factors that may already exist with some non-EU Member States (unity which is beneficial to any deceased and his heirs) and confers competence to a national legal system that does not see itself, from its own perspective, applicable to a specific succession. In order to ensure this need, and a better and balanced coordination between EU and non-EU Member States, it is recommended to replace the current Art.26 (Title: 'Renvoi', and not 'Referral') with the following article:

4.3.10.1 'If the deceased has not chosen a law pursuant to article 17 and the applicable law according to this Regulation is the law of a non-EU Member State and its rules of conflict of laws specify as applicable the law, either of a EU Member State, or of another non-EU Member State which would apply its own law, the law of this other State applies. This article does not apply to agreements as to succession whose connecting factor set forth in Article 18, Par.2 is the law which has the closest links '.

4.3.10.2 This new provision adapts to the Regulation ([4]) and attempts to improve ([5]) a similar provision which was retained in the important Hague Convention on Succession for the same necessity, i.e. 'because most delegations (…) recognised it as an attempt not to destroy unity where it already exists' ([6]). Furthermore, the flexibility that this provision (new Art.26) grants is in line with the law and practice on 'renvoi' in some non-EU Member States, as for instance the U.S.A ([7]).

The fact that Regulations 'Rome I' and 'Rome II' have excluded radically any provision on 'renvoi' simply reflects the fact that their subject matter (contractual and non-contractual obligations) is very different from succession matters. Such exclusion in Rome I and II is not *per se* a serious argument to exclude the new Art.26 recommended above, which is key and beneficial in successions matters both, to any deceased and his heirs, and to a more balanced coordination of connecting factors between EU and non-EU Member States.

4.3.11 A traditional but nevertheless key provision is Art. 27 on public policy. Following a rather standardised use, it is recommended that 'manifestly' be inserted before 'incompatible with the public …' in all languages of the Regulation, and 'international' be inserted before 'public policy' at least in French and Italian (and where appropriate in other languages). Innovative and useful is the specifically tailored to succession matters exclusion of this device 'on the sole ground that its clauses regarding the reserved portion of an estate differ from those in force in the forum'.

4.3.12 In Art.27 par.2, the English version 'its clauses regarding' is not identical to the French version 'ses modalités concernant'. It is recommended that 'its provisions' (regarding etc.) be retained, in all languages of the Regulation.

4.4 *Chapter IV Recognition and Enforcement*

4.4.1 Following the model of Regulation (EC) No 44/2001, Chapter IV of the PR entails Articles 29-33 on recognition.

4.4.2 A simplification of international successions in Europe will result from the principle that a decision given in an EU Member State pursuant to the PR is recognised in the other Member States without any special procedure being required.

4.4.3 The decision given in a Member State is not subject to any review as to its substance in the Member State where recognition is sought, and is not recognised only in four cases.

4.5 *Chapter V Authentic Instruments*

4.5.1 An additional substantial simplification of international successions will result by the fact that the authentic instruments formally drawn up or registered in a Member State, which are common in successions matters, are recognised under the PR in the other Member States.

4.6 *Chapter VI European Certificate of Succession*

4.6.1 The European Certificate of Succession introduced by the PR constitutes proof of the capacity of heir or legatee and of the powers of the executors of wills or third-party administrators. It is recommended that the time period be extended to 9 or 12 months in Art.43 Par. 2.

4.6.2 The model application form should be simplified and the unnecessary information requested in 4.7 deleted.

Brussels, 14 July 2010.

The President
of the European Economic and Social Committee
Mario SEPI

([4]) And thus extends the operation of 'renvoi' from non- to EU Member States.

([5]) By excluding its operation not only in case of *Professio iuris* (Art.17), but also with regard to connecting factors of a different nature and methodology (exception clauses, as the law which has the closest links, in Art.18, Par.2.

([6]) Waters Report, p.553, Proceedings of the Sixteenth Session, 3 to 20 October 1988, T.II, Hague Conference of Private International Law, 1990. Art.4, Convention on the Law Applicable to Succession to the Estates of Deceased Persons. (1 August, 1989). Also P.Lagarde, La nouvelle Convention de la Haye sur la loi applicable aux successions, RCDIP 1989, p.249 (258).

([7]) With regard to Art.4 of the Hague Convention, E.F.Scoles, The Hague Convention on Succession, AJCL 1994 p.85, (113).