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THE EUROPEAN UNION**

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NOTE

from : Presidency
to : Council

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Subject : 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
- Political guidelines for the future work

I. INTRODUCTION

1. By letter of 16 October 2009 the Commission transmitted to the Council a 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.
2. The United Kingdom and Ireland have made no notification under Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and will therefore not take part in the adoption and application of the proposed Regulation.

3. In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark does not take part in the adoption of the proposed Regulation and will not be bound by it or subject to its application.
4. The Working Party on Civil Law Matters (Succession) has examined the proposed Regulation at regular meetings since the transmission of the Commission proposal.
5. The proposed Regulation is subject to the ordinary legislative procedure. The time is not yet ripe for formal negotiations with the European Parliament with a view to reaching a first reading agreement, but informal contacts have been held for information purposes.
6. A certain number of issues were submitted to the Council (Justice and Home Affairs) on 3 and 4 June 2010. On that occasion, the Council approved a set of political guidelines for the future work¹.
7. In the light of the discussions since June 2010, and in particular the examination of a series of thematic issues during the second half of 2010 and the first half of 2011, the Presidency is of the opinion that it is necessary to submit once more the file to the Council for political guidance on a number of key issues in order to pave the way for substantial progress to be made on the proposed Regulation.
8. To that end, the Presidency submitted some draft political guidelines presented as a compromise package to Coreper at its meeting on 25 May 2011.
9. Coreper re-examined the compromise package at its meeting on 1 June 2011 on the basis of a new text.

¹ See document 9703/1/10 REV 1 JUSTCIV 94 CODEC 425.

II. THE DRAFT POLITICAL GUIDELINES TO BE APPROVED BY THE COUNCIL

10. The draft political guidelines submitted to the Council consist of a selected number of key issues which are being presented as a compromise package in the Annex to this note. Indeed, the Presidency is of the opinion that those key issues are closely linked from a political perspective and that the solutions to be found for each of them would necessarily have to be seen as a whole.
11. The Annex only lists issues which call for a position to be taken at political level at this stage. It does not cover issues on which a large consensus exists, such as for instance the issue of recognition and enforceability of decisions.
12. Neither does it cover the elements which might be needed to enable the United Kingdom and Ireland to notify their wish under Article 4 of the Protocol on the position of those two Member States to be bound by the Regulation once it has been adopted. The Presidency wishes to highlight that the delegations of the United Kingdom and Ireland are participating actively in the debate in the Working Party and have thereby indicated a strong interest in the future instrument. It will have to be seen at a later stage to what extent the future Regulation can meet the concerns of the two Member States¹.

III. CONCLUSION

13. The Council is invited:
 - to approve the compromise package set out in the Annex to this note as the political guidelines for the future work on the proposed Regulation in matters of succession.

¹ Those concerns are to a certain extent shared by Cyprus.

COMPROMISE PACKAGE

Draft political guidelines for the future work

A. Succession law /property law

1. The necessary delineation between succession law and property law for the purposes of the application of the future Regulation will be made by way of a clear exclusion in Article 1 of the relevant property law aspects. Those property law aspects are the following:
 - (a) the nature of rights *in rem*,
 - (b) the requirements for any recording of a right in a register, including the check that those requirements are met, and
 - (c) the effects of the recording of a right in a register or of any equivalent publicising.

- (i) *The nature of rights in rem*

2. It will be explained in a recital that the exclusion of the nature of rights *in rem* entails that a Member State will not be required to recognise a right *in rem* relating to property subject to registration in that Member State if the right *in rem* in question is not known in its property law.

3. The future Regulation will contain a provision indicating clearly that Member States, to the extent possible, will have to adapt an unknown right *in rem* to the closest equivalent national right. It will be for each Member State to determine which authority will be responsible for that adaptation. A recital will be inserted to provide guidance to those Member States which do not currently operate with any form of adaptation.

A cooperation between the authorities of the respective Member States (that of the succession procedure and that of the registration) will be foreseen for situations where the nature and the content of the unknown right *in rem* need to be clarified.

(ii) *The requirements for any recording of a right in a register*

4. The requirements for the recording in a register of a right subject to registration will be excluded from the scope of the future Regulation. This means that it will be the law of the Member State in which the register is kept which determines under what conditions and how the recording must be carried out and which authorities are in charge of checking that all requirements are met and that the documentation presented is sufficient.
5. It is essential, in order to avoid duplication of documents, that the registration authorities accept such documents drawn up in another Member State by the competent authorities whose circulation will be foreseen by the future Regulation. They may however ask for such additional documents to be presented which are required under the law of the register.
6. To ensure that the documents from another Member State presented by the applicant, to the greatest extent possible, contain all the information required for the purposes of registration, fact sheets listing all the documents or information usually required in each Member State will be introduced. Such facts sheets will be foreseen only for the registration of immovable property and only for information purposes.

(iii) *The effects of the recording of a right in a register or of any equivalent publicising*

7. The effects of the recording of a right in a register or of any equivalent publicising will be excluded from the scope of the future Regulation and will be determined by the law of the Member State in which registration takes place.

Therefore, if registration of property in a Member State is declaratory in effect, that will continue to be the effect of the registration of any succession property located in that Member State. Likewise, if registration of property in a Member State is constitutive in effect, that will continue to be the effect of the registration of any succession property located in that Member State. Thus, if the acquisition of a right requires the recording in a register under the law of the Member State in which the property is located, the moment of such acquisition will be governed by the law of that Member State. In the cases where the registration is declaratory in effect it will be the law of the Member State in which the property is located which determines how the transfer of property is registered.

(iv) *The sharing-out of the estate*

8. The sharing-out of the estate will be included in the scope of the applicable law under Article 19.

B. Habitual residence and the applicable law

9. The habitual residence of the deceased at the time of death will be the general connecting factor determining jurisdiction under Chapter II and determining the law applicable to the succession under Chapter III.
10. Two recitals will be inserted in the future Regulation to provide guidance to any authority called upon to determine the habitual residence of the deceased at the time of death.

The first recital will read along the following lines:

"This Regulation provides that the general connecting factor for the purposes of determining both jurisdiction and the applicable law is the habitual residence of the deceased at the time of death. In order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation. "

The second recital will list some complex examples and will read along the following lines:

"In certain cases, determining the deceased's habitual residence may prove complex. Such a case might arise, in particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case, the deceased might, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin. Other complex cases might arise where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of those States, the nationality or the location of the assets might be a special factor in the overall assessment of all the factual circumstances."

11. An escape clause will be inserted as paragraph 2 in Article 16. That escape clause will read along the following lines:

"Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State."

A recital will be inserted to explain the exceptional nature of the escape clause and provide guidance on its application.

C. Notaries and the application of Chapter II

12. A provision will be inserted in Chapter I stating clearly that the future Regulation will not affect the current internal organisation in the Member States with respect to the type of authority which has competence to deal with succession matters. In those Member States where competence to deal with succession matters currently lies outside the courts (for instance with notaries) this will continue to be the case. Likewise, those Member States which currently operate with a judicial system will continue to do so.
13. The rules of jurisdiction in Chapter II will be applicable to courts. They will also be applicable to such other authorities and legal professionals which exercise judicial functions, act by delegation of power by a court or act under the control of a court.¹ All such other authorities and legal professionals will have to meet the requirements listed in the definition of "court" in Article 2(2) of Regulation (EC) No 4/2009 on Maintenance Obligations. Their decisions will circulate as court decisions under Chapter IV.

¹ It remains to be ascertained whether all the provisions of Chapter II can be applied by such other authorities and legal professionals.

14. For transparency reasons and to help practitioners in the practical application of the future Regulation the Member States will be under the obligation to include information on the authorities competent to deal with succession matters when they provide the required information on their legislation and procedures under Article 46.
15. In order to ensure the appropriate coordination between the different competent authorities of the Member States in situations where the deceased had made a choice of law the future Regulation will contain one or more provisions which will allow:
- (a) the parties to conclude a choice of court agreement in favour of the courts of the Member State of the chosen law. Those courts could then be seised by the parties on the basis of such a choice of court agreement and exercise jurisdiction on that ground;
 - (b) the transfer of a case from one court to another along the lines of what is foreseen in Article 5 of the draft text¹;
 - (c) the court seised *ex officio* to close or stay the proceedings at the request of at least one of the parties with the consent of all the others so as to enable the parties to settle the succession amicably outside the courts in the Member State of the chosen law.

However, further reflections are needed on the exact details.

16. The future Regulation will ensure, to the extent possible, that there will be no parallel amicable out-of-court procedures in different Member States and no parallel judicial proceedings and amicable out-of-court procedures in different Member States.

¹ See document 18096/10 JUSTCIV 238 CODEC 1560 EJUSTICE 139.

D. Formal validity of dispositions of property upon death

17. The future Regulation will contain provisions on the law applicable to the formal validity of all dispositions of property upon death (wills, joint wills and agreements as to succession) which are made in a written form.
18. The objective is to have the same connecting factors as those of the 1961 Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions. The admissibility of joint wills and agreements as to succession will be a question of substantive validity for the purposes of the future Regulation.
19. Those Member States which are party to the 1961 Hague Convention will be allowed to continue to apply the Convention under a provision to that effect which will be inserted in Article 45. Those Member States which have made reservations under the Convention should however consider withdrawing their reservations.
20. Specific concerns on circumvention of the law can be further analysed.

E. The administration of the estate

21. All aspects relating to the administration of the estate will be within the scope of the future Regulation. In principle, all these aspects will be governed by the law applicable to the succession under Article 19. However, further reflections are required as regards possible exceptions to that principle.

F. Other aspects of the applicable law

(i) Public policy (ordre public)

22. The future Regulation will allow a Member State to refuse the application of a provision of the law designated as the law applicable to the succession when such application is manifestly incompatible with its public policy (*ordre public*). Paragraph 2 of Article 27 on public policy (*ordre public*) will be deleted.

23. The protection of reserved shares remains a fundamental element of the future Regulation.

(ii) States with more than one legal system

24. The future Regulation will provide that where a Member State comprises several territorial units each of which has its own system of law or a set of rules concerning succession to the estate of a deceased person, the internal conflict of laws rules of that Member State will determine the relevant territorial unit whose system of law or set of rules will govern the succession.

G. Authentic instruments

25. Authentic instruments in succession matters drawn up in a Member State will be accepted in other Member States under the future Regulation, unless such acceptance is manifestly contrary to the public policy (*ordre public*) of those Member States.

26. Without prejudice to paragraph 31, the future Regulation will ensure that an authentic instrument will have the same evidentiary effects ("force probante") in another Member State as it has in the Member State in which it was drawn up or the most comparable effects. Third party protection connected with acts and decisions in matters of succession requires further technical analysis. In this respect, it may be useful to distinguish, in particular, between, on the one hand, the protection of the third party delivering assets of the estate to a beneficiary of the succession and, on the other hand, the protection of the third party acquiring assets of the estate from a beneficiary of the succession.
27. As regards the conditions for the acceptance of an authentic instrument in another Member State, a distinction should be made between, on the one hand, the legal acts or other relationships included in the instrument and, on the other hand, the form of the instrument and other facts officially recorded therein. The first group of elements, *i.e.* the "content" of the instrument, in so far as it relates to the legal act contained therein or to the succession related legal relationships as authenticated by the notary, is governed by the law applicable to the succession. Conversely, the requirements for the "authenticity" of the instrument with regard to the form and the officially recorded elements should be subject to the law governing the activities of the notary concerned.
28. Any challenge relating to the "authenticity" will be made before the competent authority in the Member State of origin, where applicable in accordance with the procedures foreseen by the law of that Member State. On the other hand, any challenge relating to the "content" of the instrument will be made before the court having jurisdiction under Chapter II of the future Regulation. This should however not prevent any other court before which the validity of the instrument is raised as an incidental question to rule on the matter in the context of other proceedings pending before it.

29. A provision will be inserted providing a harmonised legal consequence of a challenge of an authentic instrument. The future Regulation will indicate that an authentic instrument which has been challenged cannot produce any extra-territorial effect as regards the matter being challenged as long as the challenge is pending before the competent court or authority in the relevant procedure.
30. To make life easier for the legal practitioners in the Member State where an authentic instrument is presented, in particular in those Member States which do not operate with authentic instruments in succession matters, the future Regulation will provide for a non-mandatory standard form to accompany the instrument for information purposes. That standard form will be filled in by the authority drawing up the authentic instrument and will list the effects of the authentic instrument as they exist in the Member State of origin.
31. An authentic instrument which is enforceable in the Member State of origin will be declared enforceable in another Member State in accordance with the procedure foreseen for decisions in the future Regulation. The declaration of enforceability may be refused or revoked only if enforcement of the authentic instrument is manifestly contrary to public policy (*ordre public*) in the Member State in which it is presented.

H. The European Certificate of Succession

32. The future Regulation will create a European Certificate of Succession.
33. This European Certificate of Succession will be a *sui generis* legal instrument which will produce uniform legal effects in all Member States.

34. The Certificate will be issued in the Member State where jurisdiction to deal with the succession case lies under Chapter II in compliance with the law applicable to the succession pursuant to Chapter III. It will be for each Member State to determine under its own law which authority will be competent to issue the Certificate on its territory, but the issuing authority will have to respect certain important guarantees as regards procedure to be determined in the future Regulation.
35. The Certificate will be a document which will enable the person designated therein as heir, legatee, executor or administrator to exercise the rights and/or powers indicated in the Certificate as established under the law applicable to the succession.
36. Any person who, in good faith, acts on the basis of the information certified in the Certificate will be deemed to be released from his obligations. Similar third party protection will be granted to a person who, in good faith, acquires property from a person designated in the Certificate as being authorised to dispose of such property, without prejudice to the effects of the recording which will be excluded from the scope of the future Regulation (see part A, point *(iii)*).
37. The Certificate will, depending on the purpose for which it was issued, constitute a valid document for the recording of property in the register of the Member State in which the property is located, without prejudice to the effects of the recording which will be excluded from the scope of the future Regulation (see part A, point *(iii)*). If the information in the Certificate is not complete, the competent authority could indicate to the person applying for registration how the lacking information can be provided.