



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 12 December 2011**

**18475/11**

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**Interinstitutional File:  
2009/0157 (COD)**

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**JUSTCIV 356  
CODEC 2397**

**NOTE**

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from : the Presidency

to : the Council

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No. prev. doc. : 18320/11 JUSTCIV 350 CODEC 2362

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No. Cion prop. : 14722/09 JUSTCIV 210 CODEC 1209

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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  
- General agreement on the text of the Articles

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**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. Informal contacts have been held with the European Parliament throughout the negotiations with a view to reaching a first reading agreement. The European Parliament is expected to adopt its position at first reading in February 2012.
6. A certain number of issues were submitted to the Council (Justice and Home Affairs) on 3 and 4 June 2010 and on 9 and 10 June 2011. On both occasions, the Council approved a set of political guidelines for the future work<sup>1</sup>.
7. The political guidelines approved by the Council on 9 and 10 June 2011 paved the way for substantial progress in the discussions in the Working Party on Civil Law Matters (Succession) and allowed for a redrafting of the most difficult provisions.
8. In the light of that substantial progress the Presidency decided to submit the text of the Articles of the proposed Regulation and some additional elements to Coreper on 2 December 2011 with a view to achieving, at the level of the Council, a general agreement on that text taking into account the additional elements.

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<sup>1</sup> See documents 9703/1/10 REV 1 JUSTCIV 94 CODEC 425 and 11067/11 JUSTCIV 152 CODEC 968.

9. Following the discussions in Coreper on 2 December 2011 a JHA Counsellors meeting was held on 6 December 2011 to examine the still outstanding issues relating to the text of the Articles.
10. Against that backdrop, the Presidency submitted the text of the Articles and the additional elements to Coreper again on 12 December 2011<sup>1</sup>. On that occasion Coreper agreed to leave the question of the administration of the estate for further discussions at technical level and therefore to enter a "pm" under Article 21. In the light of the outcome of Coreper the Presidency submits to the Council a new version of the text of the Articles set out in the addendum to this note with a view to a general agreement on the text accompanied by the suggestions as to how to move forward on the additional elements listed in part II below so as to finalise the negotiations on the proposed Regulation at technical level in the near future<sup>2</sup>.

## **II. ADDITIONAL ELEMENTS**

### **(a) The administration of the estate**

11. The political guidelines adopted by the Council in June 2011 stated that all aspects relating to the administration of the estate in principle would be governed by the law applicable to the succession, but that further reflections were required as regards possible exceptions to that principle<sup>3</sup>. Such reflections have been carried out at technical level and several possible exceptions have been examined.

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<sup>1</sup> See document 18320/11 JUSTCIV 350 CODEC 2362 + ADD 1.

<sup>2</sup> It should be noted that the recitals of the proposed Regulation remain to be finalised at technical level.

<sup>3</sup> See paragraph 21 of document 11067/11 JUSTCIV 152 CODEC 968.

12. The Presidency acknowledges that no workable solution, acceptable to all Member States, has as yet been found and therefore suggests that Article 21 be left empty for the time being in order to allow work to continue at technical level with the aim of reaching an agreement on an exception as soon as possible after the Council on 13 and 14 December 2011.

**(b) Restoration of lifetime gifts ("clawback")**

13. Under the future Regulation, the restoration of lifetime gifts will be governed by the law applicable to the succession. This rule is considered appropriate by the large majority of Member States for which it is important to ensure that a person may not, by way of gifts during his lifetime, dissipate his estate and leave only a reduced estate to be shared out amongst his rightful heirs. Those Member States view the restoration of lifetime gifts as a means to guarantee that all heirs get their due under the law applicable to the succession.
14. A number of Member States have, however, expressed concern with the rule allowing the law applicable to the succession to determine whether or not a lifetime gift should be restored. In their view, this rule creates legal uncertainty for third parties who are not heirs and who have benefited from such gifts during the lifetime of the donor without being able to foresee that the gifts could be clawed back at the death of the donor. Those Member States are of the opinion that the protection of the interests of such third parties requires exceptions to the general rule.
15. The issue is of particular concern to the United Kingdom and Ireland which do not participate in the adoption of the future Regulation, but which might, in the future, decide to participate in the application of the Regulation, in particular if this issue were solved in a satisfactory way.

16. The Presidency is of the opinion that a solution, acceptable to all Member States, should be found for this politically sensitive issue. The Presidency therefore proposes that a political decision be taken to continue the work on an exception to the general rule on the restoration of lifetime gifts, following the general agreement on the text of the Articles, with a view to increasing legal certainty for recipients of such gifts. Such an exception should be carefully crafted and should strike the right balance between, on the one hand, the interests of third parties having benefited from gifts without being aware that the gifts could be clawed back and, on the other hand, the interests of the heirs under the law applicable to the succession.
17. An option for such an exception could be the possibility for a third party having received a gift to oppose a claim for restoration of the gift at the time of the death of the donor if he could not have foreseen such a claim under the law which would have been applicable to the succession of the donor if the latter had died on the day the gift was made. The exception could be combined, if necessary, with a transitional provision. The exception would not apply to heirs having received gifts during the lifetime of the donor.
18. For the time being the Presidency proposes to maintain the current provision on the restoration of lifetime gifts (see Article 19(2)(j) in addendum 1 to this note). If, before the adoption of the Regulation, a solution were to be found as outlined above, concrete provisions would have to be drawn up to supplement the current text.
19. When assessing whether or not to include any new provisions on the restoration of lifetime gifts in the text of the future Regulation, consideration should be given to the fact that such provisions may pave the way for a later acceptance of the Regulation by the United Kingdom and Ireland under Article 4 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice. In this context, the other Member States will however need to be assured that the future Regulation will eventually apply to those two Member States.

### **III. An electronic register for European Certificates of Succession**

20. During the discussions on the proposed Regulation in the Working Party on Civil Law Matters (Succession) calls were made for the electronic registration of European Certificates of Succession and on-line access to them. This would make it easier to use the Certificate and would enhance mutual trust and improve legal certainty. There is however broad consensus in the Working Party that a certain amount of preparatory work relating to the setting up of such register(s) would be needed.
21. Against this backdrop the Presidency suggests that the Council should invite the Commission to launch the necessary reflections on all relevant aspects relating to the need and feasibility of such electronic register(s).

### **IV. CONCLUSION**

22. Council is invited:
- (a) to mark a general agreement on the text of the Articles as set out in addendum 1 to this note<sup>1</sup>;
  - (b) to agree that future work on the exception relating to the appointment and powers of an administrator of the estate or an executor of the will is needed as referred to above in Part II, point (a);
  - (c) to agree that future work on the exception relating to the restoration of lifetime gifts is needed and that such work could be based on the elements referred to above in Part II, point (b); and
  - (d) to invite the Commission to launch the preparatory work referred to above in Part III.

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<sup>1</sup> It being understood that the text of the Articles may still undergo terminological changes in certain language versions and will, in any event, have to be reviewed by the legal/linguistic experts at a later stage.