



EUROPEAN COMMISSION

Brussels, 19 AVR. 2010
C/2010/ 2292

Dear President,

Thank you very much for the Opinion of the Austrian Bundesrat 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}.

While welcoming the favourable opinion of the Austrian Bundesrat on this proposal, the Commission would like to briefly address some clarifications in the attached document and hopes that these will provide satisfactory answers on the main concerns expressed in your Opinion.

I look forward to developing our policy dialogue further in the future.

Yours sincerely

Maroš Šefčovič
Vice-President of the European Commission

Herrn Erwin Preiner
Präsident des Bundesrates
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EUROPEAN COMMISSION

COMMENTS OF THE EUROPEAN COMMISSION ON AN OPINION FROM THE EU COMMITTEE OF THE AUSTRIAN FEDERAL COUNCIL

COM(2009)154 – 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.

With respect to the subsidiarity and proportionality principles, the Commission refers to the impact assessment which accompanies the current proposal. This assessment contains both the qualitative and quantitative data which the Bundesrat is requesting (*SEC(2009)410 final*).

The proposal does not touch national substantive or procedural law on succession or any national property law. This is clear from the scope of the proposed Regulation which only deals with jurisdiction, applicable law, recognition and enforcement and creates a European Certificate of Succession. National substantive and procedural laws continue to apply with all their specificities. Regarding property law the Member States are by no way obliged to recognise concepts of ownership which are not known in the Member State where the property is located.

The purpose of the Regulation is to make citizens' and practitioners' life easier. More and more people live or own property in other Member States. When a person dies, the potential heirs (children, spouse, etc.) often face complicated situations due to the intricacies of so-called cross-border successions. This results in lengthy proceedings and high legal costs in trying to obtain their inheritance. This complexity also makes it difficult for someone to have a clear view of how his/her succession will be dealt with. The problem is that today various national laws can apply to the same cross-border succession. In addition, the authorities of different Member States may be competent to settle the succession depending on the location of assets. The outcome of cross-border successions is therefore often uncertain. This does not match the legitimate expectations of citizens and is the reason why the Commission has presented the proposal whose aim is to treat successions coherently under a single law and by one single authority, to improve legal certainty in cross-border successions, to avoid parallel proceedings and conflicting judicial decisions and to ensure mutual recognition of decisions relating to succession in the EU.

Habitual residence is the most common and modern connecting factor used in private international law concerning successions. It coincides with the centre of interest of the deceased and often with the place where most of the property is located. It favours integration into the Member State of habitual residence and avoids any discrimination regarding persons

who are resident there without possessing the relevant nationality. In accordance with established case law of the European Court of Justice, the concept of "habitual residence" is to be interpreted in an autonomous manner, independently from the meaning of such concept or related concepts in national law. The interpretation of the concept by national courts is subject to control by the European Court of Justice, which gradually establishes guidelines for the interpretation. In the recent case C-523/07 of 2 April 2009, the Court has interpreted the concept for the first time in the area of civil justice. Such guidelines will help the courts in the Member States when applying this autonomous concept, which in general seems to be applied without major difficulties. Obviously, the Commission is open to discuss with the Council and the European Parliament whether the Regulation itself should set guidelines on the interpretation of the concept, if necessary by way of a definition, and whether a fall-back may be necessary in exceptional situations.

Article 22 of the proposed Regulation ensures the application of mandatory rules under national law concerning family farms and certain other special categories of assets. The application of such rules must be ensured even by foreign authorities handling the succession. The mutual trust created by the harmonised conflict rule allows to permit a free circulation of the decision in all the Member States.

The Commission will further analyse together with the Austrian Ministry of Justice whether the concept in Austrian law of "Schenkung auf den Todesfall" falls under the definition of agreement as to succession in Article 2(c), whether it can in certain cases be regarded as a will or whether it is excluded from the scope of application of the proposed Regulation in Article 1(3)(f).

Articles 38 and 40 of the proposed Regulation include procedural rules on the issuance of the European Certificate of Succession. The Commission has estimated that these rules are both appropriate and sufficient to guarantee an appropriate and fair procedure. However, the Commission is open to discuss other or additional procedural standards together with the Council and the European Parliament.

The transitional provisions in the proposed Regulation reflect traditional solutions in private international law instruments (see, for instance, the 1989 Hague Convention on the law applicable to succession to the estates of deceased persons). The Commission will carefully assess together with the Council and the European Parliament the advantages and disadvantages of such provisions.

The Commission takes note of the suggestion made by the Bundesrat that the heirs could benefit from the European Certificate of Succession when the deceased dies before entry into application of the Regulation. Since the European Certificate of Succession is closely linked with the proposal's provisions on jurisdiction and applicable law, it seems difficult to advance the entry into application of one part of the Regulation only. Nevertheless, the Commission will keep the suggestion in mind in the discussions with the Council and the European Parliament.

Recital 19 of the proposed Regulation explains that the validity of the form of disposition of property upon death is not covered by the Regulation and that Member States which have ratified The Hague 1961 Convention are bound by this Convention. Formal validity of dispositions upon death is also excluded in Article 19(2)(k).

The proposed Regulation applies to successions to the estates of deceased persons meaning all forms of transfer of property as a result of death, be it by voluntary transfer, in accordance with a will or an agreement as to succession, or a legal transfer of property as a result of death {Articles 1(1) and 2(a)}. Questions regarding the matrimonial property regime and the property regime applicable to relationships which are deemed to have comparable effects to marriage are excluded from the scope (Article 1(3)(d)). In the majority of cases marriage contracts do not deal with matters included in the scope of application of the Regulation. However, it has to be estimated case by case whether a marriage contract includes provisions falling under the scope of the proposed Regulation.

The Commission has estimated that one year would be appropriate time between the entry into force and the date of application of the Regulation.