

Brussels, - 1 JUL. 2010
C/2010/ 4310

Dear Lord Roper,

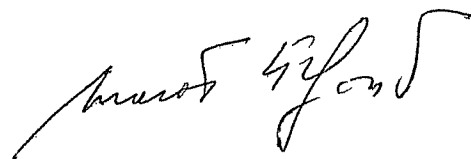
The European Commission would like to thank the House of Lords for its report "The EU's Regulation on Succession" on the Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (COM(2009)154 final).

I take this opportunity to thank the European Union Committee of the House of Lords once again for its continuous interest in this matter and its constructive contribution to the debate. The Commission will take this proposal forward and will carefully consider the view expressed by the Committee in this report.

In line with the Commission's decision to encourage national Parliaments to react to its proposals to improve the process of policy formulation, we welcome this opportunity to respond to your comments. I enclose the Commission's reply and hope you will find this a valuable contribution to your own deliberations.

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

Yours sincerely,



*Lord Roper
Chairman of the European Union Select Committee
House of Lords
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EUROPEAN COMMISSION

COMMENTS OF THE EUROPEAN COMMISSION ON THE REPORT OF THE HOUSE OF LORDS "THE EU'S REGULATION ON SUCCESSION" {COM(2009)154}

As regards the main issues raised in the House of Lords' report, the Commission would like to give the following clarifications:

The proposal on successions concerns a sensitive and highly complex matter on which cross-border cooperation is urgently needed. This proposal, which will bring important benefits to the citizens, has been very carefully prepared during several years, on the basis of public consultations and expert group work.

According to the impact assessment and studies undertaken by the Commission, more and more Europeans take advantage of the internal market. Around 8 million Europeans live today in a Member State other than the one where they were born, and many own property (houses, bank accounts) in more than one EU country. Around 4.5 million people die each year in the EU. It can also be reasonably assumed that around 9-10% of the total number of successions involves an 'international' dimension. The average value of such estates would be around double the value of an average estate (i.e. 274,000 euro), totalling some 123.3 billion euro per annum.

When a person dies, the potential heirs often face complications 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 property's location. The outcome of cross-border successions is therefore often uncertain. This does not match the legitimate expectations of citizens. People making use of their rights to move and own property across the EU should not suffer as a result. The applicable rules should be clear.

The Commission is aware that the proposal presents important changes to the regime currently in place in some Member States. Nevertheless, the public consultation and the impact assessment have shown a very large support for the proposed system.

The impact assessment has clearly shown that a comprehensive instrument covering all matters of jurisdiction, applicable law, recognition and enforcement and a European Certificate of Succession will produce the best results for the citizens. In particular, the extension of the scope of the applicable law to cover the administration of the estate is, in the opinion of the Commission, crucial to bring tangible benefits for citizens in succession matters.

The proposed Regulation aims to guarantee legal certainty and the possibility of persons to plan their successions. For this reason a single criterion, last habitual residence of the deceased, has been introduced to define the jurisdiction of the courts and the applicable law. The proposed Regulation also allows a person to choose the law of his/her nationality as applicable to his/her succession. This possibility is important to allow people to plan their successions beforehand without any negative effects to their mobility in the Union, and allows them to maintain close links to their country of origin.

The Commission strongly believes that the use of the habitual residence as a single connecting factor will bring about legal certainty both with respect to the competent authorities and to the applicable law in cross-border successions and will facilitate the handling of cross-border successions.

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 its recent ruling in 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.

Regarding a possible definition of habitual residence, it has to be borne in mind that this is a factual concept which is very difficult to define. Indeed, during the consultation period many criteria were taken into account, such as duration of the stay, tax ties, etc. However, it resulted from the discussion on this matter in the expert group that each of these criteria while useful in one particular case may be totally irrelevant in another case. It was finally agreed that no definition could be preferred and that it would be better to leave it to the court to decide, taking into account all those factors in order to determine where the centre of the interests of the deceased was. The solution taken in the proposal is the same adopted under the 1961 Hague Convention.

The Commission is open to discuss in the course of the Legislative procedure whether the Regulation itself should set guidelines on the interpretation of the concept of habitual residence

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. This follows from Article 1(3)(j) which excludes the nature of rights *in rem* relating to property. The Commission is open to consider any clarification that may be appropriate in this respect.

As regards the exception provided by Article 22, certain Member States provide for a special succession regime of certain immovables, enterprises or other categories of assets because these assets are destined for a special economic, family or social purpose. This provision aims at ensuring the mutual recognition of the differences in national substantive laws.

The Commission proposal contains rules on residual jurisdiction which aims at ensuring the access to justice when the deceased lived in a third State. The Commission is however open to discuss whether it could be tightened up, if need be, during the negotiations.

Finally, as regards the recognition and enforcement of authentic instruments, it has to be noted that such instruments already circulate freely in the European Union with different degrees of recognition and enforcement pursuant to the existing instruments in civil and commercial and family matters. Furthermore, in civil and commercial matters the exequatur procedure has been abolished for enforceable authentic instruments. Recognition and enforcement of authentic instruments is very important in matters of succession because they constitute the very large majority of documents in the area of succession, where judicial decisions are relatively rare this area in many Member States. As the recitals to the proposed Regulation explain, recognition of authentic instruments means that such instruments enjoy the same evidentiary effect with regard to their contents and the same effects as in their country of origin, as well as a presumption of validity which can be eliminated if they are contested. The Commission is open to clarify this point in the text of the Regulation if needed.

Finally, the Commission is aware that clawback constitutes a very important concern for the United Kingdom. As the House of Lords is aware, clawback is a fundamental part of most Member States' substantive succession laws and the proposed Regulation respects this. The matter of clawback has retained the utmost attention during the preparations of the proposed Regulation. The Commission would like to point out that the risk of clawback is limited in practice, since the laws of United Kingdom will govern the succession in all situations where the deceased was habitually resident in the United Kingdom or where the deceased has opted for the application of the laws of the United Kingdom. The Commission hopes that the important benefits which the Regulation will bring for UK citizens, combined with the taking into account of the functioning of trusts and the administration of assets situated in the United Kingdom, may constitute a basis for further discussions which would ultimately allow the United Kingdom to opt in into the proposed Regulation.