ASSEMBLEIA DA REPÚBLICA

COMISSÃO DE ASSUNTOS EUROPEUS

Exmº Senhor
Deputado Osvaldo de Castro
Presidente da Comissão Parlamentar de Assuntos Constitucionais Direitos
Liberdades e Garantias

N/Refª N.U. 332781

S/Refª Data Of. nº **02 /4ª-20.1 - CAE** Data **13-11-2009**

ASSUNTO: **Teste de subsidiariedade da COSAC** – *Proposta de Regulamento do Parlamento Europeu e do Conselho relativo à competência, à lei aplicável, ao reconhecimento e execução das decisões e dos actos autênticos em matéria de sucessões e à criação de um certificado sucessório europeu* (COM 2009/154 e SEC 410 e 411)

A COSAC, dando continuidade à prática seguida nos últimos anos, decidiu, na sua XLII reunião havida em Estocolmo nos dias 5 e 6 de Outubro de 2009, a realização de um novo teste de subsidiariedade sobre a seguinte proposta:

- Proposta de Regulamento do PE e do Conselho *relativo à competência, à lei aplicável, ao reconhecimento e execução das decisões e dos actos autênticos em matéria de sucessões e à criação de um certificado sucessório europeu* (COM 2009/154 e SEC 410 e 411).

Este exercício, que pretende testar as novas disposições do Tratado de Lisboa (num prazo de 8 semanas), iniciou-se no passado dia 21 de Outubro e o prazo-limite para o envio do parecer da AR para as Instituições da União Europeia é o próximo dia 17 de Dezembro.

Assim, venho enviar à Comissão a que V. Ex.ª preside os referidos documentos para elaboração de Parecer, solicitando a melhor compreensão e cooperação possível em relação aos prazos a observar.

A este respeito, realço o facto de ser necessário traduzir os documentos a serem elaborados no âmbito deste processo de escrutínio, pelo que seria da maior utilidade que a CAE pudesse ter conhecimento da pronúncia da Comissão a que V. Ex.ª. preside até ao dia 11 de Dezembro.

Neste contexto, junto se envia o referido documento para elaboração de Parecer, agradecendo antecipadamente toda a colaboração prestada.

Apresento a V. Ex.ª os meus melhores cumprimentos,

O PRESIDENTE DA COMISSÃO,

(Vitalino Canas)

Anexo: o mencionado

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 14.10.2009
SEC(2009) 411 final

COMMISSION STAFF WORKING DOCUMENT

Accompanying 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 successions and on the introduction of a European Certificate of Succession

SUMMARY OF THE IMPACT ASSESSMENT

{COM(2009) 154 final)
{SEC(2009) 410}

1. PROCEDURAL ISSUES AND THE CONSULTATION OF INTERESTED PARTIES

The Impact Assessment has been prepared on the basis of a Study (hereinafter "the external study")[1] which was undertaken for the Commission by an external contractor with the input of the Inter-service Steering Group convened by the Directorate General Justice, Freedom and Security. Representatives of the Directorates-Generals Enterprise and Industry, Internal Market and Services and Taxation and Customs Union, as well as the Secretariat General and the Legal Service of the Commission participated.

The Impact Assessment was informed by a "Study on Conflict of Law of Succession in the European Union", prepared by the German Notary Institute in November 2002[2], which confirmed the existence of practical problems in devolution of estates and drafting of wills in cross-border successions. It was also informed by the analysis of the 60 responses[3] to the Commission's Green Paper *on Succession and wills* [COM(2005) 65] on March 1, 2005[4]. Finally it was informed by the work of an expert group (PRM III/IV) set up by the Commission and made up of experts acting independently of the Member States, representing the different legal traditions of the EU. A public hearing on the applicable law on successions was held in 2006.

2. PROBLEM DEFINITION

2.1. The causes of the current problems

The outcome of international successions in the EU often does not meet the expectations of those who die. In addition the rights of (potential) heirs, persons formally or otherwise related to the deceased, private and public creditors, etc. are not fulfilled.

Although their harmonisation remains outside the competence of the European Community, it is important to understand that the starting point for the problems currently faced by citizens are the national substantive rules on successions which diverge widely between the Member States.

2.1.1. Divergences in national substantive rules on successions

1. The shares that the family members inherit vary widely.

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1 EPEC, Impact Assessment Study on Community Instruments on Successions and Wills, under framework contract No DG BUDG No BUDG06/PO/01/Lot no.2, ABAC 101908, available at the following website: […].

2 http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm.

3 Available at: http://ec.europa.eu/justice_home/news/consulting_public/successions/news_contributions_successions_en.htm.

4 Available at: http://europa.eu/scadplus/leg/en/lvb/l116017.htm.

2. While all Member States recognize testaments, some Member States accept more elaborate instruments to plan successions (e.g. j**oint and reciprocal wills**) which are not recognised in all Member State.

3. All Member States except for the UK (specifically, England and Wales) grant a **compulsory share of the inheritance to close family members**, regardless of any testamentary dispositions by the deceased.

4. The procedural rules governing succession differ among Member States.

5. The **rights of unmarried or same-sex partners** vary widely between the Member States.

2.1.2. Negative consequences faced by citizens

Problem 1 - Difficulties for citizens to predict which country and body has competence to handle the succession. The authorities of two ore more Member States may accept to handle the same succession (positive conflict of jurisdiction) or none of them might accept to handle it (negative conflict of jurisdiction). Even once citizens have identified the Member State the authorities of which have competence, they often do not know which body is competent in this Member State (court, notary, public administration).

Problem 2 - Conflicting laws applicable to the same succession. In matters of private law, a court is not obliged to apply the law of its own country. Member States therefore have rules to decide the law of which country should be applied to which case ("conflict of laws rules"). In matters of successions, these rules differ from one Member State to the other. Since the authorities of several Member States may be competent to deal with a given succession, they might come to different results as regards the question "what belongs to whom". This situation creates legal uncertainty, prevents efficient estate planning and the mutual recognition of judgments between Member States.

Problem 3 - Insufficient (limited) freedom of choice of law for the testator. When a citizen taking advantage of the Internal market is aware of the differences in substantive succession law and in the conflict of laws rules, he/she may wish to get around this by drawing up a will and choosing a single law applicable to his/her entire estate. However, most Member States do not yet allow a person to choose the law applicable to his/her succession[5].

Problem 4 - Restricted recognition and enforcement of decisions and documents. A judgment given by a court in one country is not automatically recognised and enforced in another country the courts of which may render a conflicting judgment on the same question. There is also a lack of recognition and enforcement of documents prepared by notaries and other authorities.

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[5] No choice of law admitted in Austria, Cyprus, France, Greece, Ireland, Latvia, Lithuania, Luxembourg, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Czech Republic. Information is unavailable for Hungary, Malta and Northern Ireland.

Problem 5 - Restricted recognition of the status as an heir or as an administrator/executor. Currently there are various types of evidence to prove the status as an heir or an administrator of a succession in the Member States. Documents executed in one Member State are normally not automatically recognised in other Member States. This gives rise to duplication of procedures to prove one's status as an heir or administrator in the country where the property is situated and additional costs and time delays.

Problem 6 – Difficulties identifying wills abroad. Even in purely national cases, it is not always easy for heirs to know whether the deceased had established a will. This question is even more problematic for citizens looking for a will abroad. This situation triggers severe time delays and greater cost, and uncertainty as to whether other heirs will step forward.

2.2. Size of the problems

It is difficult to assess the scope of the problems identified due to lack of relevant statistics and limited empirical data. The consultations show however that practical importance of the legal insecurity faced by citizens.

Around 4.5 million people die each year in the EU. Assuming that the value of the average estate is about 137,000 euro (about 5.5 times the average per capita gross national income), then the total value of the estates per annum would be 646 billion euro.

It can also be reasonably assumed that around 9-10% of the total number of successions (ca. 450,000) 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.

These estates are liable to problems. Even if resolved in a reasonable manner the costs of legal fees might be from 2% (2.466 bn. euro) to as much as 5% of the total value of international successions (6.165 bn. euro). An average of 3% (3.699 bn. euro) of the value of estates can be considered realistic. Moreover, the costs of delays, which may be measured in terms of years rather than months, might be of the same order of magnitude.

Addressing the problems could thus generate, as calculated by the external contractor, benefits to EU citizens of in the order of some 4 bn. euro per annum.

3. OBJECTIVES

The overall objective of the Proposal is to contribute to the creation of a genuine European area of civil justice in the field of successions.

The general, specific and operational objectives are summarised in the following table:

Overview of general, specific and operational objectives

General objectives	Specific objectives	Operational objectives
• To allow citizens to efficiently plan and to organise their succession in advance in a cross border context • To increase the likelihood that the rights of potential heirs, persons formally or otherwise related to the deceased, private and public creditors etc. are respected in an efficient way	To achieve a situation where parallel proceedings do not occur and where different substantive laws are not applied to the same international succession	To adopt common rules on jurisdiction To adopt common rules on applicable law
	To provide a (limited) choice of law for the testator	To introduce harmonised rules providing a limited choice of law to the testator
	To ensure the recognition of rights, relevant acts and decisions regarding successions.	To harmonise rules on the recognition and enforcement of judgments, other decisions and authentic acts / deeds To ensure recognition of the powers of administrators/executors To ensure recognition of the status as an heir
	To increase the accessibility of information on the existence of wills abroad	To create a European system for registering wills and obtaining information on the existence of wills abroad.

4. POLICY OPTIONS

4.1. Description of the policy options

The policy options have been split into two different sets, in order to take account of the different options to be considered (see table below).

Definition of policy options that address problems caused by national legislative differences concerning successions with transnational elements (Policy Option A)

No common EU level action

- Policy Option A.1: Status quo

EU legislative action

- Policy Option A.2: Harmonisation of jurisdiction rules and introduction of rules on automatic recognition and enforcement of judgments, other decisions and authentic acts/deeds
- Policy Option A.3: Harmonisation of conflict of law rules
- Policy Option A.4: Harmonisation of conflict of law rules and introduction of a European Certificate of Heir and Executor / Administrator in transnational successions
- Policy Option A.5: Harmonisation of conflict of law rules and jurisdiction rules
- Policy Option A.6: Harmonisation of conflict of law rules and jurisdiction rules, and introduction of rules on automatic recognition and enforcement of judgments, other decisions and authentic acts/deeds (A.2 plus A.3)

- Policy Option A.7: Harmonisation of conflict of law rules and jurisdiction rules, and introduction of rules on automatic recognition and enforcement of judgments, other decisions and authentic acts/deeds, and introduction of a Certificate of Heir and Executor / Administrator in transnational successions (A.2 plus A.4)

Non-legislative action

- Policy Option A.8: Establishment of a database / knowledge management system on conflict of laws, jurisdiction rules and competent bodies
- Policy Option A.9: EU wide information campaign on succession (legislation and existing / forth-coming instruments)

Definition of policy options that address problems of identifying wills abroad (Policy Option B)

No common EU level action

- Policy Option B.1: Status quo

EU level action (legislation and funding)

- Policy option B.2: Commission Recommendation on the establishment of interconnected national registers of wills and organisation of information campaigns.
- Policy option B.3 Compulsory establishment of interconnected national registers of wills.
- Policy option B.4 Establishment of a central EU Register of wills.

Non-legislative action

- Policy Option B.5: Creation of a webpage on existing registers of wills and national rules.
- Policy Option B.6: National information campaigns on wills (legislation and existing / forth-coming instruments)

4.2. Comparison of the options

Table 1 provides a comparison of the 'ratings' of the nine A policy options.

Table 2 compares the ratings of the six B policy options.

The policy options are categorised according to their potential to meet the objectives defined above in section 5, with ten checkmarks (√√√√√√√√√√) indicating that an option fully meets all objectives.

Table 1 – Comparison of ratings of policy options A									
Objective/costs	**Policy Option A.1** **(Status quo)**	**Policy Option A.2** **(Jurisdiction rules & recognition)**	**Policy Option A.3** **(C-O-L rules)**	**Policy Option A.4** **(C-O-L rules & certificate)**	**Policy Option A.5** **(C-O-L rules & jurisdiction rules)**	**Policy Option A.6** **(A.2 plus A.3)**	**Policy Option A.7** **(A.2 plus A.4)**	**Policy Option A.8** **(Database)**	**Policy Option A.9** **(National information campaigns)**
To achieve a situation where parallel proceedings do not occur and where different substantive laws are not applied to the same international succession	*0*	√√	√√√√	√√√√√	√√√√√√	√√√√√√√	√√√√√√√√	√	√
To provide a (limited) choice of law for the testator	***0***	***0***	√√√√√	√√√√√	√√√√	√√√√√√√√	√√√√√√√√	***0***	***0***
To ensure the recognition of: (i) Judgments, other decisions and authentic acts / deeds on international successions; (ii) The powers of administrators/executors; and, (iii) The status as an heir	***0***	√√√√√	√√	√√√√√	√√√	√√√√√√√	√√√√√√√√	***0***	***0***
To increase the accessibility of information on the existence of wills abroad	***0***	***0***	–	–	–	–	–	***0***	***0***
Total score:	**0**	**7**	**11**	**18**	**10**	**25**	**30**	**1**	**1**
Economic effects	Present: 4 bn euro/year; potential doubling of costs in 10 years.	Costs savings: Max 10%	Costs savings: Max 15%	Costs savings: Max 15%	Costs savings: Max 15%	Costs savings: Max 20%	Costs savings: Max 30%	Costs savings: Insignificant	Costs savings: Insignificant

Table 2 – Comparison of ratings of policy options B						
Objective/costs	**Policy Option B.1** **(Status quo)**	**Policy Option B.2** **(EC Recommendation on interconnected national registers & info campaigns)**	**Policy Option B.3** **(Compulsory establishment of national registers of wills that are interconnected)**	**Policy Option B.4** **(EU central register of wills)**	**Policy Option B.5** **(Webpage on national registers of wills and national rules)**	**Policy Option B.6** **(National information campaigns)**
To achieve a situation where parallel proceedings do not occur and where different substantive laws are not applied to the same international succession	***0***	√√	√√√	√√√√	√	√
To provide a (limited) choice of law for the testator	***0***	***0***	***0***	***0***	***0***	***0***
To ensure the recognition of: (i) Judgments, other decisions and authentic acts / deeds on international successions; (ii) The powers of administrators /executors; and, (iii) The status as an heir	***0***	√	√	√	***0***	***0***
To increase the accessibility of information on the existence of wills abroad	*0*	√√	√√√	√√√√	√	√
Total score	**0**	**5**	**7**	**9**	**2**	**2**
Economic effects	Present: 4 bn euro/year; potential doubling of costs in 10 years.	Costs savings: Max 1-2%	Costs savings: Max 1-2%	Costs savings: Max 2%	Costs savings: Insignificant	Costs savings: Insignificant

4.3. The preferred option

In the light of the assessment in Table 1 and 2 the preferred option is a combination of Policy options A7 and B.2. The first would address current problems as well as possible and lead to the greatest cost reductions (maximum 30%). Indeed, it is in effect the most ambitious option and so therefore represents further development of the options identified in terms of the challenges that it is designed to address. Although Policy option B.2 does not receive the highest rating, it is the preferred option on the basis that the identification of wills is primarily a national problem and is likely to remain such even in the long term and because it is not compulsory to register wills (which means that the register can only confirm that no will was registered, not that no will exists). This analysis is confirmed by stakeholders.

4.4. The potential scale and nature of impacts of the preferred option

The preferred policy options would eliminate the potential for conflicts of jurisdiction. It would allow for a faster finalisation of the succession, as the competent authorities would no longer have to deal with potentially contradictory national rules to identify the substantive law governing the question of who inherits. The introduction a limited choice of law for the testator would allow citizens to better plan their succession

The recognition of the status of an heir or the powers of executors/administrators and decisions would be ensured. As a consequence, legal fees and time delays would be reduced.

The Commission Recommendation would speed up Member States' creation of registers of wills that are compatible and interoperable, facilitating the identification of wills in other Member States. Information campaigns could lead a higher number of citizens to draw up wills and register them, speeding up the succession proceedings, and thereby lead to less delay and decreased legal costs. However, the positive impact of the register may be limited because there would be no obligation to register wills.

Overall, the preferred option would increase the likelihood that the rights of all persons involved in the succession would be fulfilled in an effective and efficient way.

The preferred policy option respects the fundamental rights of the Charter of Fundamental Rights of the European Union.

4.5. The costs of the preferred option

In summary, the preferred option could lead to cost reductions of up to an estimated 32% of the costs of € 4 bn. caused by the current problems, i.e. € 1.3 billion.

The process of adoption and implementation of the preferred option would create **financial costs** both at the EU level and at national level, mainly costs for administrative work to produce the necessary legislation, the costs for establishing and running a register of wills and for information campaigns.

Although the preferred option through harmonisation of applicable law would result in a reduction of fees for **legal professionals**, it would nevertheless also increase their turnover in view of the rise in value of legacies and the increasing numbers of international cases. In addition, the new rules will improve predictability for citizens. It is likely that more of them will wish to organise their succession in advance, therefore using the services of legal

professionals. Within the legal profession, as with every other professional service, there are always market changes, and the magnitude of those associated with the preferred option is likely to be small and gradual[6].

Since rules on taxation are expressly excluded from the scope of the proposed Regulation, the preferred option would be **tax neutral.** It would therefore not entail any changes to the Member States' national legislation on inheritance taxation. This is because the rules determining which Member State is competent to collect inheritance taxes on a given succession (resulting, in general, from bilateral conventions), are totally independent from those rules determining the civil law governing this succession.

The preferred option would potentially have indirect implications on the amount of inheritance tax revenue collected by a given Member State (e.g. for a bank account, if, under the law applicable today the heir is a person living in Member State A, whereas, under the law applicable under the future Regulation, the heir is located in Member State B, Member State A will not longer be able to collect inheritance taxes). However, these effects would be marginal and indirect.

The proposed Regulation does not contribute to reducing the complexities of tax systems applicable to international successions and to preventing citizens of being subject to double taxation. Indeed, it is clearly impossible, for legal and political reasons, to modify the existing regime in the framework of the present Regulation. Inheritances in a cross-border context can then give rise to mismatches between national taxation regimes which can result in double taxation or discrimination. The Commission intends to bring forward a communication to address these issues during 2010.

4.6. EU added value

The preferred option would generate significant EU added value. It has the potential to promote trust in the internal market and facilitate mobility of EU citizens. The problems addressed are in part a consequence of the internal market, if they are not solved, the trust in the EU internal market and the EU area of freedom, security and justice without internal borders may be damaged. Cross-border successions are both more costly and time-consuming for citizens than national successions. The preferred option would facilitate the life of the modern and mobile EU citizen.

5. MONITORING AND EVALUTION

In order to monitor the effective implementation of the Regulation as well as the success of the Recommendation on the creation of interconnected registers of wills and the information campaigns, regular evaluation and reporting by the Commission will take place. The external study contains many useful suggestions on potential monitoring and evaluation instruments and concrete indicators that will be taken into consideration by the Commission.

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[6] See also Annex 4 for more information.

COMISSÃO DAS COMUNIDADES EUROPEIAS

Bruxelas, 14.10.2009
COM(2009) 154 final

2009/0157 (COD)

Proposta de

REGULAMENTO DO PARLAMENTO EUROPEU E DO CONSELHO

relativo à competência, à lei aplicável, ao reconhecimento e execução das decisões e dos actos autênticos em matéria de sucessões e à criação de um certificado sucessório europeu

{SEC(2009) 410}
{SEC(2009) 411}

EXPOSIÇÃO DE MOTIVOS

1. Contexto da proposta

1.1. Contexto geral

O artigo 61.º do Tratado que institui a Comunidade Europeia (a seguir designado "Tratado") prevê a criação progressiva de um espaço comum de liberdade, de segurança e de justiça, nomeadamente através da adopção de medidas no domínio da cooperação judiciária em matéria civil. O artigo 65.º do Tratado menciona expressamente medidas que visam "melhorar e simplificar o reconhecimento e a execução das decisões em matéria civil e comercial, incluindo as decisões extrajudiciais", bem como "promover a compatibilidade das normas aplicáveis nos Estados-Membros em matéria de conflitos de leis e de jurisdição". Os numerosos instrumentos já adoptados com esta base, nomeadamente o Regulamento (CE) n.º 44/2001[1], excluem as sucessões do seu âmbito de aplicação.

A adopção de um instrumento europeu em matéria de sucessões constava já das prioridades do Plano de Acção de Viena[2] de 1998. O Programa da Haia[3] convidou a Comissão a apresentar um instrumento que cobrisse todas as questões relacionadas com esta matéria: lei aplicável, competência e reconhecimento, medidas administrativas (certificados de herdeiros, registo de testamentos). Em conformidade com as conclusões da avaliação de impacto, a questão do registo dos testamentos será objecto de uma iniciativa posterior da Comunidade.

1.2. Justificação e objectivos da proposta

A importância das sucessões transfronteiriças na União Europeia foi salientada no relatório de avaliação de impacto anexo à presente proposta. A diversidade tanto das normas de direito substantivo, como das normas de competência internacional ou referentes à lei aplicável, a multiplicidade das autoridades a que uma sucessão internacional pode ser submetida, bem como a fragmentação das sucessões que pode advir destas regras divergentes, constituem um obstáculo à livre circulação das pessoas na União. Actualmente as pessoas vêem-se confrontadas com grandes dificuldades para exercer os seus direitos no âmbito de uma sucessão internacional. Estas normas divergentes constituem também um obstáculo ao pleno exercício do direito de propriedade privada que, segundo a jurisprudência constante do Tribunal de Justiça, faz parte integrante dos direitos fundamentais cujo respeito é assegurado pelo Tribunal[4]. A presente proposta destina-se a permitir às pessoas que residem na União Europeia organizar antecipadamente a sua sucessão e garantir eficazmente os direitos dos herdeiros e/ou legatários e das outras pessoas ligadas ao falecido, bem como dos credores da sucessão.

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1 JO L 12 de 16.1.2001, p. 1.

2 JO C 19 de 23.1.1999.

3 Ver Conclusões da Presidência, Conselho Europeu de Bruxelas, 4 e 5 de Novembro de 2004.

4 TJCE, acórdão de 28 de Abril de 1998 no processo C-200/96 - *Metronome Musik*, Colectânea 1998, p. I-01953; acórdão de 12 de Julho de 2005 nos processos C-154 e 155/04 - *Alliance for Natural Health e outros*, Colectânea 2005, p. I-06451.

2. Resultado das consultas – avaliação de impacto

A preparação da presente proposta foi antecedida de uma ampla consulta dos Estados-Membros, das outras instituições e do público. A Comissão recebeu um "Estudo sobre as sucessões internacionais na União Europeia", realizado pelo Instituto Notarial alemão em Novembro de 2002[5]. O seu Livro Verde sobre as sucessões e testamentos[6], publicado em 1 de Março de 2005, suscitou cerca de 60 respostas e foi seguido de uma audição pública em 30 de Novembro de 2006[7]. Um grupo de peritos denominado «PRM III/IV», criado pela Comissão em 1 de Março de 2006[8], reuniu-se sete vezes entre 2006 e 2008, tendo a Comissão organizado uma reunião de peritos nacionais em 30 de Junho de 2008. As contribuições recebidas confirmam a necessidade de um instrumento comunitário neste domínio e apoiam a adopção de uma proposta que abranja, entre outras questões, a lei aplicável, a competência, o reconhecimento e execução das decisões e a criação de um certificado sucessório europeu[9]. A adopção deste instrumento contou com o apoio do Parlamento Europeu[10] e do Comité Económico e Social Europeu[11]. A Comissão realizou uma avaliação de impacto, que é apresentada em anexo à proposta.

3. Elementos jurídicos da proposta

3.1. Base jurídica

O n.º 5 do artigo 67.º do Tratado prevê que o Conselho adopte as medidas previstas no artigo 65.º segundo o procedimento de co-decisão referido no artigo 251.º do Tratado, com exclusão "dos aspectos referentes ao direito da família".

Em primeiro lugar, convém sublinhar que a grande maioria dos Estados-Membros, com excepção dos países nórdicos, considera o direito sucessório uma matéria distinta do direito da família, pelo facto de os seus aspectos patrimoniais serem preponderantes. Mesmo a nível do direito substantivo, existem grandes diferenças entre as duas matérias. A principal finalidade do direito sucessório consiste em definir as regras de devolução da sucessão, bem como em regular a transmissão da própria sucessão. Contrariamente ao direito sucessório, o direito da família tem como objecto reger sobretudo as relações jurídicas ligadas ao casamento e à vida conjugal, à filiação e ao estado civil das pessoas. A sua função social consiste principalmente em proteger os laços familiares. Além disso, contrariamente ao direito da família, no âmbito do qual a vontade dos indivíduos é praticamente irrelevante e em que a grande maioria das relações é regida por normas de ordem pública, o direito sucessório é uma matéria em que a vontade do titular dos direitos assume grande importância.

Existe portanto uma autonomia suficiente entre estes dois ramos do direito civil para estas matérias poderem ser tratadas separadamente. Além disso, como se trata de uma excepção, as instituições devem continuar a interpretar e aplicar de forma restritiva o segundo travessão do

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5 http://www.successions.org.

6 COM (2005) 65, http://europa.eu/scadplus/leg/en/lvb/l116017.htm.

7 http://ec.europa.eu/justice_home/news/consulting_public/successions/news_contributions__en.htm.

8 JO C 51 de 1.3.2006, p. 3.

9 http://ec.europa.eu/justice_home/news/consulting_public/successions/contributions/summary_contributions_successions_fr.pdf

10 Resolução de 16.11.2006, P6_TA(2006)0496.

11 Parecer de 26.10.2005, JO C 28 de 3.2.2006, pp. 1-5.

n.º 5 do artigo 67.º do Tratado. Por conseguinte, esta excepção não é aplicável ao presente regulamento em matéria de sucessões.

As instituições comunitárias dispõem de uma certa margem de apreciação para determinar se uma determinada medida é necessária para o bom funcionamento do mercado interno. A presente proposta visa suprimir todos os entraves à livre circulação das pessoas decorrentes das diferenças entre as normas dos Estados-Membros que regem as sucessões internacionais.

3.2. Princípio da subsidiariedade

Os objectivos da proposta só podem ser alcançados sob a forma de normas comuns em matéria de sucessões internacionais, que devem ser idênticas para garantir aos cidadãos a segurança jurídica e previsibilidade. Consequentemente, uma acção unilateral dos Estados-Membros seria contrária a este objectivo. Existe uma Convenção da Haia sobre a lei aplicável às sucessões (a seguir denominada "Convenção"), que nunca chegou a entrar em vigor[12]. A Convenção da Haia de 5 de Outubro de 1961 sobre os conflitos de leis em matéria de forma das disposições testamentárias foi ratificada por 16 Estados-Membros. Seria desejável que os restantes Estados-Membros ratificassem a referida convenção no interesse da Comunidade.

Todas as consultas e estudos realizados demonstraram a dimensão dos problemas abordados na presente proposta.

3.3. Princípio da proporcionalidade e escolha do instrumento

A proposta limita-se ao estritamente necessário para alcançar os seus objectivos. Não harmoniza nem o direito das sucessões, nem os direitos reais dos Estados-Membros. Também não afecta a fiscalidade dos Estados-Membros no que se refere às sucessões. Por conseguinte, as sucessões internacionais podem continuar a dar origem a incoerências entre os regimes nacionais de tributação, delas podendo resultar duplas tributações ou discriminações. A Comissão tenciona apresentar uma comunicação na qual abordará estas questões em 2010.

A necessidade de segurança jurídica e de previsibilidade exige regras claras e uniformes e impõe a escolha do regulamento. Estes objectivos ficariam comprometidos se os Estados-Membros dispusessem de uma margem de apreciação no âmbito da aplicação das normas.

4. Comentário dos artigos

4.1. Capítulo I: Âmbito de aplicação e definições

Artigo 1.º

O conceito de «sucessão» deve ser interpretado de modo autónomo e engloba todos os aspectos de uma sucessão, designadamente a devolução, a administração e a liquidação.

A exclusão dos direitos e bens criados ou transferidos por meios diferentes da sucessão por morte cobre não só as formas de «propriedade conjunta» reconhecidas na *common law*, mas também todas as formas de liberalidades do direito civil.

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[12] Convenção da Haia de 1.8.1989 sobre a lei aplicável às sucessões por morte.

A excepção prevista em relação ao *trust* não constitui um obstáculo à aplicação à sucessão da lei que a rege por força do presente regulamento.

A alínea j) precisa que o regulamento é aplicável à aquisição por via sucessória de um direito real relativo a um bem, mas não ao conteúdo de tal direito. O regulamento não afecta o «*numerus clausus*» dos direitos reais dos Estados-Membros, a qualificação dos bens e direitos e a determinação das prerrogativas do titular de tais direitos. Por conseguinte, em princípio a constituição de um direito real não reconhecido na lei do lugar em que se situa o bem não é válida. A lei sucessória não pode ter como consequência introduzir no Estado do lugar em que se situa um bem um desmembramento ou uma modalidade do direito de propriedade que este não reconhece. Por exemplo, não pode ser introduzido o usufruto num Estado que não reconheça este conceito. Em contrapartida, a excepção não é aplicável à transferência por via sucessória de um direito real reconhecido no Estado-Membro em que se situa o bem.

É igualmente excluída a publicidade dos direitos sobre os bens, nomeadamente o funcionamento do registo predial e os efeitos da inscrição ou não inscrição nesse registo.

Artigo 2.º

Tribunal: De uma forma geral, as sucessões são resolvidas fora dos tribunais. No presente regulamento o conceito de tribunal é utilizado em sentido lato e abrange outras autoridades sempre que estas exerçam uma função que releve da competência dos tribunais, nomeadamente por delegação, o que inclui nomeadamente os notários e os secretários dos tribunais.

4.2 Capítulo II: Competência

Artigo 4.º

As regras de competência dos tribunais relativas às sucessões variam consideravelmente de um Estado-Membro para outro. Esta situação pode dar origem a conflitos positivos, sempre que os tribunais de vários Estados se declarem competentes, ou a conflitos negativos, nos casos em que nenhum tribunal se considere competente. A fim de evitar estas dificuldades aos cidadãos, é necessária uma norma uniforme. A competência do Estado-Membro da última residência habitual do falecido é a mais generalizada entre os Estados-Membros e coincide muitas vezes com a localização dos seus bens. Estes tribunais serão competentes para decidir sobre todos os aspectos da sucessão, quer se trate de um processo gracioso quer contencioso.

Artigo 5.º

O reenvio para um tribunal melhor colocado não deve ser automático no caso de o falecido ter escolhido a lei de outro Estado-Membro. O tribunal competente deve ter em conta, nomeadamente, os interesses do falecido, dos herdeiros, legatários e credores, bem como a sua residência habitual. Esta regra permitirá sobretudo encontrar uma solução equilibrada para as situações em que o «de cujus» residia há pouco num Estado-Membro diferente do da sua nacionalidade e em que a sua família permaneceu no seu Estado-Membro de origem.

Artigo 6.º

Nas situações em que o falecido tinha a sua residência num Estado terceiro, esta regra garante o acesso à justiça para os herdeiros e credores comunitários, quando a situação apresente conexões estreitas com um Estado-Membro devido à presença de um bem.

Artigo 9.º

As conexões estreitas entre o estatuto sucessório e o estatuto real exigem uma competência excepcional dos tribunais do Estado-Membro do lugar onde se situa um bem, sempre que a lei deste último Estado-Membro exija a intervenção dos seus tribunais. No entanto, esta competência é estritamente limitada aos aspectos de direitos reais da transmissão do bem.

4.3. Capítulo III: Lei aplicável

Artigo 16.º

Um regime unitário

As desvantagens do chamado sistema de «separação», no âmbito do qual a sucessão mobiliária está sujeita à lei do domicílio do falecido e a sucessão imobiliária à lei do Estado onde se situa o bem, foram evidenciadas nas consultas. Este sistema cria várias massas sucessórias, cada uma delas sujeita a uma lei diferente que determina de modo diverso os herdeiros e a sua quota-parte respectiva, bem como a partilha e a liquidação da sucessão. O regulamento opta por um sistema unitário que permite que a sucessão seja regida por uma só lei, sendo assim evitados estes inconvenientes. Um regime unitário permite também aos testadores planificarem a repartição equitativa dos seus bens entre os seus herdeiros, independentemente do lugar onde se situem esses bens.

Elemento de conexão: a lei da última residência habitual do falecido

O regulamento opta por esta lei, em vez da lei da nacionalidade, dado que a mesma coincide com o centro de interesse do falecido e, muitas vezes, com o lugar onde se encontra a maior parte dos seus bens. Esta conexão é mais favorável à integração no Estado-Membro de residência habitual e evita qualquer forma de discriminação relativamente às pessoas que aí residem sem serem nacionais desse Estado. As normas de conflitos de leis de vários Estados-Membros optaram pela lei da residência habitual e todos os instrumentos modernos, nomeadamente a Convenção, fizeram esta mesma escolha.

Artigo 17.º

Todos os sistemas jurídicos dos Estados-Membros dispõem de mecanismos destinados a garantir a subsistência dos familiares mais próximos do falecido, principalmente mecanismos de reserva legitimária. Todavia, os testadores nacionais de um Estado-Membro onde as doações entre vivos são irrevogáveis podem confirmar a respectiva validade escolhendo como lei aplicável à sua sucessão a lei nacional. Um dos objectivos centrais do regulamento consiste em garantir o respeito destes mecanismos. Ao permitir ao testador escolher uma lei, era necessário um compromisso entre as vantagens dessa escolha, como a segurança jurídica e a maior facilidade na planificação da sucessão, e a protecção dos interesses legítimos dos familiares mais próximos do falecido, nomeadamente do cônjuge e dos filhos sobrevivos. Por esta razão, o regulamento só permite ao testador escolher a lei do Estado da sua nacionalidade, norma que deve ser apreciada em relação à regra geral que conduz à aplicação da lei do lugar da residência. Esta opção permite ao testador que tenha beneficiado da liberdade de circulação oferecida na União, mas que pretenda manter relações estreitas com o seu país de origem, preservar estes laços culturais através da sua sucessão. O Parlamento Europeu também preconizou esta solução.

Exclusão de outras opções: O regulamento afastou a possibilidade de escolher como lei aplicável à sucessão a lei aplicável ao regime matrimonial do testador. Tal disposição teria permitido escolhas múltiplas sempre que, no âmbito dos regimes matrimoniais, os cônjuges beneficiem de uma maior flexibilidade na escolha da lei aplicável, o que estaria em contradição com os objectivos acima referidos.

Artigo 18.º

É indispensável prever normas sobre a lei aplicável aos pactos sucessórios e aos testamentos de mão comum, a que se recorre em certos Estados para organizar, por exemplo, a transferência de uma empresa e permitir ao cônjuge supérstite beneficiar do património comum.

Artigo 21.º

Este artigo visa, nomeadamente, ter em conta as especificidades dos sistemas jurídicos de *common law*, como o de Inglaterra, no âmbito dos quais os herdeiros não assumem directamente os direitos do «de cujus», sendo a sucessão administrada por um administrador nomeado e controlado pelo juiz.

Artigo 22.º

Devido à sua finalidade económica, familiar ou social, certos imóveis, empresas ou outras categorias de bens são objecto de um regime sucessório especial no Estado-Membro em cujo território se encontram situados, que é conveniente respeitar. Esse regime especial está previsto, por exemplo, para as explorações agrícolas familiares. Esta excepção requer uma interpretação restritiva, com vista à sua compatibilidade com o objectivo geral do presente regulamento. Não é aplicável, nomeadamente, ao regime de «separação» ou à reserva legitimária.

Artigo 27.º

O recurso à ordem pública deve revestir um carácter excepcional. Uma diferença entre as leis relativas à protecção dos interesses legítimos dos familiares mais próximos do falecido não pode justificar a sua intervenção, já que seria incompatível com o objectivo de garantir a aplicação de uma única lei a todos os bens da sucessão.

4.4. Capítulo IV: Reconhecimento e execução

As disposições do presente capítulo inspiram-se nas regras correspondentes do Regulamento (CE) n.º 44/2001. Está previsto o reconhecimento de todas as decisões e transacções judiciais, a fim de concretizar o princípio do reconhecimento mútuo em matéria de sucessões, que assenta no princípio da confiança mútua. Os motivos de não reconhecimento foram portanto reduzidos ao mínimo necessário.

4.5. Capítulo V: Actos autênticos

Perante a importância prática dos actos autênticos em matéria de sucessões, o presente regulamento deve assegurar o respectivo reconhecimento, a fim de permitir a sua livre circulação. Este reconhecimento significa que gozam da mesma força probatória plena e integral quanto ao teor do acto registado e aos factos nele inscritos do que a força de que se revestem os actos autênticos nacionais ou, ao mesmo título que no seu país de origem, da

presunção de autenticidade, bem como do carácter executório dentro dos limites fixados pelo presente regulamento.

4.6. Capítulo VI: Certificado sucessório europeu

A fim de permitir uma resolução rápida de uma sucessão internacional, o presente regulamento introduz um certificado sucessório europeu. Para facilitar a sua circulação na União, é conveniente adoptar um modelo uniforme de certificado e designar a autoridade com competência internacional para o emitir. A coerência com as regras de competência quanto ao mérito exige que o mesmo tribunal seja competente para decidir da sucessão.

Este certificado não substitui os certificados existentes em determinados Estados-Membros. No Estado-Membro da autoridade competente, a prova da capacidade sucessória e dos poderes de um administrador ou executor da sucessão efectua-se, por conseguinte, segundo os procedimentos internos.

2009/0157 (COD)

Proposta de

REGULAMENTO DO PARLAMENTO EUROPEU E DO CONSELHO

relativo à competência, à lei aplicável, ao reconhecimento e execução das decisões e dos actos autênticos em matéria de sucessões e à criação de um certificado sucessório europeu

O PARLAMENTO EUROPEU E O CONSELHO DA UNIÃO EUROPEIA,

Tendo em conta o Tratado que institui a Comunidade Europeia e, nomeadamente, a alínea c) do seu artigo 61.º, bem como o segundo travessão do n.º 5 do seu artigo 67.º,

Tendo em conta a proposta da Comissão[13],

Tendo em conta o parecer do Comité Económico e Social Europeu[14],

Deliberando nos termos do procedimento previsto no artigo 251.º do Tratado,

Considerando o seguinte:

(1) A Comunidade fixou o objectivo de manter e desenvolver um espaço de liberdade, de segurança e de justiça. A fim de criar gradualmente esse espaço, a Comunidade deve adoptar medidas no domínio da cooperação judiciária em matéria civil que tenham incidência transfronteiriça, na medida do necessário ao bom funcionamento do mercado interno.

(2) Nos termos da alínea b) do artigo 65.º do Tratado, essas medidas devem visar, nomeadamente, promover a compatibilidade das normas aplicáveis nos Estados-Membros em matéria de conflitos de leis e de jurisdição.

(3) Na sua reunião de Tampere de 15 e 16 de Outubro de 1999, o Conselho Europeu aprovou o princípio do reconhecimento mútuo das sentenças e outras decisões das autoridades judiciais enquanto pedra angular da cooperação judiciária em matéria civil e solicitou ao Conselho e à Comissão que adoptassem um programa de medidas destinadas a dar execução ao referido princípio.

(4) Em 30 de Novembro de 2000, o Conselho adoptou o projecto de programa de medidas destinadas a aplicar o princípio do reconhecimento mútuo das decisões em matéria civil e comercial[15]. Esse programa descreve as medidas de harmonização das normas de conflitos de leis destinadas a facilitar o reconhecimento mútuo das decisões judiciais. Prevê a elaboração de um instrumento relativo às sucessões e testamentos,

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13 JO C […] de […], p.[..]
14 JO C […] de […], p.[..]
15 JO C 12 de 15.1.2001, p. 1.

matéria excluída, nomeadamente, do Regulamento (CE) n.° 44/2001 do Conselho, de 22 de Dezembro de 2000, relativo à competência judiciária, ao reconhecimento e à execução de decisões em matéria civil e comercial[16].

(5) O Conselho Europeu, reunido em Bruxelas em 4 e 5 de Novembro de 2004, adoptou um novo programa intitulado «Programa da Haia: reforço da liberdade, da segurança e da justiça na União Europeia»[17]. Este programa sublinha a necessidade de adoptar, até 2011, um instrumento sobre o direito das sucessões, que aborde, nomeadamente, a questão dos conflitos de leis, a competência judicial, o reconhecimento mútuo e a execução de decisões neste domínio, uma certidão europeia de direitos sucessórios e um mecanismo que permita precisar se um residente na União Europeia fez uma declaração das suas últimas vontades ou deixou um testamento.

(6) É conveniente facilitar o bom funcionamento do mercado interno suprimindo os entraves à livre circulação de pessoas que actualmente se defrontam com dificuldades para exercerem os seus direitos no âmbito de uma sucessão internacional. No espaço europeu de justiça, os cidadãos devem ter a possibilidade de organizar antecipadamente a sua sucessão. É necessário garantir eficazmente os direitos dos herdeiros e legatários e das outras pessoas ligadas ao falecido, bem como dos credores da sucessão.

(7) Para alcançar estes objectivos, o presente regulamento deve agrupar as disposições sobre a competência judicial, a lei aplicável, o reconhecimento e a execução das decisões e dos actos autênticos neste domínio, bem como sobre o certificado sucessório europeu.

(8) O âmbito de aplicação do presente regulamento deve abranger todas as questões civis relativas a uma sucessão por morte, ou seja, todas as formas de transferência de propriedade por morte, independentemente de se tratar de um acto voluntário de transferência, sob a forma de testamento ou de pacto sucessório, ou de uma transferência de propriedade imposta pela lei.

(9) A validade e os efeitos das liberalidades estão cobertos pelo Regulamento (CE) n.º 593/2008 do Parlamento Europeu e do Conselho, de 17 de Junho de 2008, sobre a lei aplicável às obrigações contratuais (Roma I)[18]. Devem por isso ser excluídas do âmbito de aplicação do presente regulamento, tal como sucede com outros direitos e bens criados ou transferidos por meios diferentes da sucessão. No entanto, é a lei sucessória determinada em aplicação do presente regulamento que deve precisar se uma liberalidade ou outra forma de disposição *inter vivos* com efeito de direito real imediato pode dar lugar à obrigação de colação ou de redução ou ser tida em conta no cálculo das quotas-partes da herança segundo a lei sucessória.

(10) Se bem que o presente regulamento deva abranger o modo de aquisição de um direito real relativo a um bem corpóreo ou incorpóreo, tal como previsto na lei aplicável à sucessão, a lista exaustiva ("*numerus clausus*") dos direitos reais que podem existir no direito nacional dos Estados-Membros, regida em princípio pela *lex rei sitae*, deve relevar das normas nacionais de conflitos de leis. Também deve ser excluída do

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16 JO L 12 de 16.1.2001, p.1.
17 JO C 53 de 3.3.2005, p. 1.
18 JO L 177 de 4.7.2008, p. 6.

âmbito de aplicação do regulamento a publicidade destes direitos, nomeadamente o funcionamento do registo predial e os efeitos da inscrição ou não inscrição neste registo, aspectos igualmente regidos pela lei local.

(11) Para ter em conta as diferentes formas de resolver uma sucessão nos Estados-Membros, o presente regulamento deve definir a competência dos tribunais entendidos em sentido lato, incluindo a competência das autoridades não judiciais quando exerçam uma função jurisdicional, nomeadamente por delegação.

(12) Tendo em conta a mobilidade crescente dos cidadãos europeus e a fim de promover uma boa administração da justiça na União Europeia e assegurar uma conexão real entre a sucessão e o Estado-Membro que exerce a competência, o presente regulamento deve prever a competência dos tribunais do Estado-Membro da última residência habitual do falecido para o conjunto da sucessão. Pelas mesmas razões, o presente regulamento deve permitir ao tribunal competente, a título excepcional e em certas condições, o reenvio do processo para o tribunal do Estado de que o falecido era nacional, se este estiver melhor colocado para conhecer do processo.

(13) A fim de facilitar o reconhecimento mútuo, não deve ser prevista qualquer outra remissão para as normas de competência do direito nacional. Por conseguinte, é necessário determinar no presente regulamento os casos em que um tribunal de um Estado-Membro pode exercer uma competência subsidiária.

(14) Para facilitar as diligências dos herdeiros e legatários que vivem num Estado-Membro diferente daquele cujos tribunais são competentes para regular a sucessão, o regulamento deve autorizá-los a fazer as declarações relativas à aceitação ou ao repúdio da sucessão na forma prevista pela lei do Estado da sua residência habitual e, se for caso disso, perante os tribunais desse Estado.

(15) Dada a estreita ligação entre o estatuto sucessório e o estatuto de direitos reais, o regulamento deve prever a competência excepcional dos tribunais do Estado-Membro do lugar onde se situa o bem sempre que a lei desse Estado-Membro exija a intervenção dos seus tribunais para adoptar medidas abrangidas pelos direitos reais relativas à transmissão desse bem e à sua inscrição no registo predial.

(16) Para um funcionamento harmonioso da justiça convém evitar que sejam proferidas decisões incompatíveis em dois Estados-Membros. Para tal, o presente regulamento deve prever regras processuais gerais inspiradas no Regulamento (CE) n.° 44/2001.

(17) Para que os cidadãos possam tirar proveito, com toda a segurança jurídica, das vantagens oferecidas pelo mercado interno, o presente regulamento deve permitir-lhes conhecer antecipadamente a lei aplicável à sua sucessão. Devem ser introduzidas normas de conflitos de leis harmonizadas para evitar que sejam proferidas decisões contraditórias nos Estados-Membros. A regra principal deve assegurar que a sucessão é regida por uma lei previsível, com a qual apresente uma conexão estreita. Para garantir a segurança jurídica, esta lei deve abranger todos os bens da sucessão, independentemente da sua natureza ou do lugar em que se encontrem, de modo a evitar as dificuldades decorrentes da fragmentação da sucessão.

(18) O presente regulamento deve aumentar a possibilidade de os cidadãos organizarem antecipadamente a sua sucessão, permitindo-lhes escolher a lei aplicável. Esta escolha

deve ser delimitada com precisão, a fim de respeitar as expectativas legítimas dos herdeiros e legatários.

(19) A validade das disposições por morte quanto à forma não é abrangida pelo regulamento. Nos Estados-Membros que ratificaram a Convenção da Haia de 5 de Outubro de 1961 sobre os conflitos de leis em matéria de forma das disposições testamentárias, essa validade é regida pelas disposições da Convenção.

(20) Para facilitar o reconhecimento dos direitos sucessórios adquiridos num Estado-Membro, a norma de conflitos de leis deve favorecer a validade dos pactos sucessórios admitindo critérios de conexão alternativos. As expectativas legítimas dos terceiros devem ser preservadas.

(21) Na medida em que tal seja compatível com o objectivo geral do presente regulamento e a fim de facilitar a transferência de um direito real adquirido com base na lei sucessória, o presente regulamento não deve opor-se à aplicação de certas normas imperativas da lei do lugar onde se situa um bem enumeradas exaustivamente.

(22) Devido à sua finalidade económica, familiar ou social, certos imóveis, empresas ou outras categorias de bens são objecto de um regime sucessório especial no Estado-Membro em cujo território se encontram situados. O presente regulamento deve respeitar esse regime especial. Não obstante, esta excepção à aplicação da lei sucessória exige uma interpretação restritiva para poder ser compatível com o objectivo geral do presente regulamento. A excepção não visa, em especial, a norma de conflitos de leis que sujeita os bens imóveis e os bens móveis a leis diferentes, nem a reserva sucessória.

(23) As diferenças entre, por um lado, as soluções nacionais quanto ao direito do Estado de receber uma herança vaga e, por outro, o tratamento das situações em que se desconhece a ordem do falecimento de uma ou várias pessoas, podem conduzir a resultados contraditórios ou, pelo contrário, à ausência de solução. O presente regulamento deve prever um resultado coerente, respeitando simultaneamente o direito material dos Estados-Membros.

(24) Em circunstâncias excepcionais, por considerações de interesse público os tribunais dos Estados-Membros devem ter possibilidade de afastar a lei estrangeira quando a sua aplicação num caso específico seja contrária à ordem pública do foro. No entanto, os tribunais não devem poder aplicar a excepção da ordem pública para afastar a lei de outro Estado-Membro ou recusar reconhecer ou executar uma decisão já proferida, um acto autêntico, uma transacção judicial ou um certificado sucessório europeu estabelecidos noutro Estado-Membro, quando tal seja contrário à Carta dos Direitos Fundamentais da União Europeia, em especial ao seu artigo 21.º, que proíbe qualquer forma de discriminação.

(25) À luz do seu objectivo geral, isto é, o reconhecimento mútuo das decisões proferidas nos Estados-Membros em matéria de sucessões por morte, o presente regulamento deve prever normas relativas ao reconhecimento e à execução das decisões, inspirando-se no Regulamento (CE) n.º 44/2001 e adaptando-as, se for caso disso, às exigências específicas da matéria abrangida pelo presente regulamento.

(26) Para ter em conta as diferentes formas de regular as questões relativas às sucessões nos Estados-Membros, o presente regulamento deve assegurar o reconhecimento e a

execução dos actos autênticos. No entanto, os actos autênticos não podem ser equiparados a decisões judiciais no que se refere ao seu reconhecimento. O reconhecimento dos actos autênticos significa que têm o mesmo valor probatório quanto ao teor do acto e os mesmos efeitos que no seu país de origem e que gozam de uma presunção de validade que pode ser afastada em caso de contestação. Por conseguinte, esta validade pode ser sempre contestada perante um tribunal do Estado-Membro de origem do acto autêntico, nas condições processuais definidas por esse Estado-Membro.

(27) Uma resolução rápida, acessível e eficaz das sucessões internacionais na União Europeia implica a possibilidade de o herdeiro, o legatário, o executor testamentário ou o administrador provarem facilmente e sem necessidade de um procedimento contencioso a sua qualidade nos Estados-Membros onde se situam os bens da sucessão. Para facilitar a livre circulação desta prova na União Europeia, o presente regulamento deve introduzir um modelo uniforme de certificado sucessório europeu e designar a autoridade competente para a emitir. A fim de respeitar o princípio da subsidiariedade, este certificado não deve substituir os procedimentos internos nos Estados-Membros. O regulamento deve precisar a articulação com esses procedimentos.

(28) Os compromissos internacionais assumidos pelos Estados-Membros justificam que o presente regulamento não afecte as convenções internacionais em que sejam partes um ou mais Estados-Membros na data da sua adopção. A coerência com os objectivos gerais do presente regulamento exige, contudo, que entre Estados-Membros o regulamento prevaleça sobre as convenções.

(29) Para facilitar a aplicação do presente regulamento, convém prever a obrigação de os Estados-Membros comunicarem certas informações sobre o seu direito sucessório no âmbito da Rede Judiciária Europeia em matéria civil e comercial, criada pela Decisão 2001/470/CE do Conselho, de 28 de Maio de 2001[19].

(30) As medidas necessárias à aplicação do presente regulamento devem ser aprovadas nos termos da Decisão 1999/468/CE do Conselho, de 28 de Junho de 1999, que fixa as regras de exercício das competências de execução atribuídas à Comissão[20].

(31) Convém, nomeadamente, habilitar a Comissão para adoptar qualquer alteração dos formulários previstos no presente regulamento mediante o procedimento previsto no artigo 3.º da Decisão 1999/468/CE.

(32) Sempre que o conceito de "nacionalidade" sirva para determinar a lei aplicável, convém ter em conta o facto de certos Estados, cujos sistemas jurídicos assentam na *common law*, utilizarem o conceito de "domicílio" e não de "nacionalidade" como critério de conexão equivalente em matéria de sucessões.

(33) Atendendo a que os objectivos do presente regulamento, a saber, a livre circulação das pessoas, a organização antecipada pelos cidadãos europeus da sua sucessão num contexto internacional e os direitos dos herdeiros e legatários e das outras pessoas ligadas ao falecido, bem como dos credores da sucessão, não podem ser

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19 JO L 174 de 27.6.2001, p. 25.
20 JO L 184 de 17.7.1999, p. 23.

suficientemente realizados pelos Estados-Membros e podem, pois, devido à dimensão e aos efeitos do presente regulamento, ser melhor realizados a nível comunitário, a Comunidade pode tomar medidas em conformidade com o princípio da subsidiariedade consagrado no artigo 5.º do Tratado. Em conformidade com o princípio da proporcionalidade consagrado no mesmo artigo, o presente regulamento não excede o necessário para alcançar aqueles objectivos.

(34) O presente regulamento respeita os direitos fundamentais e observa os princípios reconhecidos pela Carta dos Direitos Fundamentais da União Europeia, nomeadamente o seu artigo 21.º, que proíbe a discriminação em razão, designadamente, do sexo, raça, cor ou origem étnica ou social, características genéticas, língua, religião ou convicções, opiniões políticas ou outras, pertença a uma minoria nacional, riqueza, nascimento, deficiência, idade ou orientação sexual. O presente regulamento deve ser aplicado pelos tribunais dos Estados-Membros respeitando estes direitos e princípios.

(35) Em conformidade com os artigos 1.º e 2.º do Protocolo relativo à posição do Reino Unido e da Irlanda anexo ao Tratado da União Europeia e ao Tratado que institui a Comunidade Europeia, [o Reino Unido e a Irlanda comunicaram o desejo de participarem na adopção e aplicação do presente regulamento]/[sem prejuízo do artigo 4.º do Protocolo, o Reino Unido e a Irlanda não participam na adopção do presente regulamento, não ficando por ele vinculados nem sujeitos à sua aplicação].

(36) Em conformidade com os artigos 1.º e 2.º do Protocolo relativo à posição da Dinamarca, anexo ao Tratado da União Europeia e ao Tratado que institui a Comunidade Europeia, a Dinamarca não participa na adopção do presente regulamento, não ficando por ele vinculada nem sujeita à sua aplicação.

ADOPTARAM O PRESENTE REGULAMENTO:

Capítulo I

Âmbito de aplicação e definições

Artigo 1.º
Âmbito de aplicação

1. O presente regulamento é aplicável às sucessões por morte. Não é aplicável às matérias fiscais, aduaneiras e administrativas.

2. Para efeitos do presente regulamento, entende-se por "Estado-Membro" qualquer Estado-Membro, excepto a Dinamarca [, o Reino Unido e a Irlanda].

3. São excluídos do âmbito de aplicação do presente regulamento:

   (a) O estado das pessoas singulares, bem como as relações familiares e as relações com efeitos comparáveis;

(b) A capacidade jurídica das pessoas singulares, sob reserva do n.º 2, alíneas c) e d), do artigo 19.º;

(c) O desaparecimento, a ausência e a morte presumida de uma pessoa singular;

(d) As questões abrangidas pelo regime matrimonial, bem como pelo regime patrimonial aplicável às relações que tenham efeitos comparáveis ao casamento;

(e) As obrigações de alimentos;

(f) Os direitos e bens criados ou transferidos sem ser no âmbito da sucessão por morte, tais como as liberalidades, a propriedade conjunta de várias pessoas com reversibilidade a favor da pessoa sobreviva, os planos de reforma, os contratos de seguros e as disposições análogas, sob reserva do n.º 2, alínea j), do artigo 19.°;

(g) As questões relativas ao direito das sociedades, como as cláusulas contidas nos actos constitutivos e nos estatutos das sociedades, associações e pessoas colectivas que fixam o destino das quotas aquando da morte dos seus membros;

(h) A dissolução, extinção e fusão de sociedades, associações e pessoas colectivas;

(i) A constituição, funcionamento e dissolução de *trusts*;

(j) A natureza dos direitos reais sobre um bem e a publicidade desses direitos.

Artigo 2.º
Definições

Para efeitos do presente regulamento, entende-se por:

(a) "Sucessão por morte", qualquer forma de transferência de propriedade por morte, quer se trate de um acto voluntário de transferência, sob a forma de testamento ou de pacto sucessório, quer de uma transferência de propriedade por morte imposta por lei;

(b) "Tribunal", qualquer autoridade judicial ou qualquer autoridade competente dos Estados-Membros que exerça uma função jurisdicional em matéria de sucessões. São equiparadas aos tribunais as outras autoridades que exercem, por delegação do poder público, funções que relevam da competência dos tribunais, tal como previstas no presente regulamento;

(c) "Pacto sucessório", um acordo que confira, altere ou retire, com ou sem contrapartida, direitos na sucessão futura de uma ou mais pessoas que sejam partes no acordo;

(d) "Testamento de mão comum", o testamento redigido por duas ou mais pessoas no mesmo acto, a favor de um terceiro e/ou a título de disposição recíproca e mútua;

(e) "Estado-Membro de origem", o Estado-Membro no qual foi proferida a decisão, aprovada ou concluída a transacção judicial ou exarado o acto autêntico, consoante o caso;

(f) "Estado-Membro requerido", o Estado-Membro no qual é requerido o reconhecimento e/ou a execução da decisão, da transacção judicial ou do acto autêntico;

(g) "Decisão", qualquer decisão proferida em matéria de sucessões por um tribunal de um Estado-Membro, independentemente da designação que lhe é dada, tal como acórdão, sentença, despacho judicial ou mandado de execução, bem como a fixação pelo secretário do tribunal do montante das custas do processo;

(h) "Acto autêntico", um acto que tenha sido formalmente redigido ou registado como tal e cuja autenticidade:

– esteja associada à assinatura e ao conteúdo do acto autêntico, e

– tenha sido atestada por uma autoridade pública ou outra autoridade habilitada para o efeito pelo Estado-Membro de origem;

(i) "Certificado sucessório europeu", o certificado emitido pelo tribunal competente em aplicação do Capítulo VI do presente regulamento.

Capítulo II

Competência

Artigo 3.º
Tribunais

As disposições do presente capítulo são aplicáveis a qualquer tribunal dos Estados-Membros, mas só se aplicam às autoridades não judiciais quando necessário.

Artigo 4.º
Competência geral

Sob reserva do disposto no presente regulamento, são competentes para decidir em matéria de sucessões os tribunais do Estado-Membro em cujo território o falecido tinha a sua residência habitual no momento do óbito.

Artigo 5.º
Reenvio para um tribunal melhor colocado para conhecer do processo

1. Sempre que o falecido tenha escolhido a lei de um Estado-Membro para regular a sua sucessão em conformidade com o artigo 17.º, o tribunal que deve conhecer do processo em conformidade com o artigo 4.º, a pedido de uma das partes e se considerar que os tribunais do Estado-Membro cuja lei foi escolhida estão melhor colocados para decidir da sucessão, pode suspender o processo e convidar as partes a apresentarem um pedido aos tribunais desse Estado-Membro.

2. O tribunal competente em conformidade com o artigo 4.º fixa um prazo para o processo ser submetido aos tribunais do Estado-Membro cuja lei foi escolhida, em conformidade com o n.º 1. Se o processo não for submetido à apreciação desses tribunais durante esse prazo, o tribunal a que o processo foi submetido continua a exercer a sua competência.

3. Os tribunais do Estado-Membro cuja lei foi escolhida declaram-se competentes no prazo máximo de oito semanas a contar da data em que lhes foi submetido o processo em conformidade com o n.° 2. Nesse caso, o tribunal junto do qual o processo foi submetido em primeiro lugar declina imediatamente a sua competência. Caso contrário, continua a exercer a sua competência o tribunal junto do qual o processo foi submetido em primeiro lugar.

Artigo 6.º
Competências residuais

Sempre que a residência habitual do falecido no momento do óbito não esteja situada num Estado-Membro, são competentes os tribunais de um Estado-Membro pelo facto de alguns dos bens da sucessão estarem situados nesse Estado-Membro e por:

(a) O falecido ter tido a sua residência habitual anterior no referido Estado-Membro e essa residência ter durado pelo menos até cinco anos antes de o processo ser submetido ao tribunal; ou se tal não se verificar,

(b) O falecido possuir a nacionalidade desse Estado-Membro aquando do óbito; ou, se tal não se verificar,

(c) Um herdeiro ou legatário ter a sua residência habitual no referido Estado-Membro; ou, se tal não se verificar,

(d) O pedido dizer unicamente respeito a esses bens.

Artigo 7.º
Pedido reconvencional

O tribunal perante o qual o processo está pendente por força dos artigos 4.º, 5.º ou 6.º é igualmente competente para examinar o pedido reconvencional, desde que este seja abrangido pelo âmbito de aplicação do presente regulamento.

Artigo 8.º
Competência para aceitar ou repudiar a sucessão

Os tribunais do Estado-Membro em cujo território se situa a residência habitual do herdeiro ou do legatário são igualmente competentes para receber declarações relativas à aceitação ou repúdio da sucessão ou de um legado ou declarações destinadas a limitar a responsabilidade do herdeiro ou do legatário quando estas devam ser feitas perante um tribunal.

Artigo 9.º
Competência dos tribunais do lugar onde se situa um bem

Sempre que a lei do Estado-Membro do lugar onde se situa um bem exija a intervenção dos seus tribunais para adoptar medidas abrangidas por direitos reais relativas à transmissão desse bem, ao seu registo ou à sua transferência no registo predial, são competentes para tomar tais medidas os tribunais desse Estado-Membro.

Artigo 10.º
Submissão do processo a um tribunal

Para efeitos do presente capítulo, considera-se que o processo foi submetido a um tribunal:

(a) Na data em que foi apresentado ao tribunal a petição que determina o início da instância ou um acto equivalente, desde que o requerente não tenha posteriormente deixado de tomar as medidas que lhe incumbem para que seja feita a citação ou notificação do requerido; ou

(b) Se o acto tiver de ser citado ou notificado antes de ser apresentado ao tribunal, na data em que for recebido pela autoridade responsável pela citação ou notificação, desde que o requerente não tenha posteriormente deixado de tomar as medidas que lhe incumbem para que o acto seja apresentado ao tribunal.

Artigo 11.º
Verificação da competência

O tribunal de um Estado-Membro perante o qual tenha sido introduzido um processo para o qual não seja competente por força do presente regulamento declara oficiosamente não ter competência.

Artigo 12.º
Verificação da admissibilidade

1. Quando o requerido com residência habitual num Estado que não seja o Estado-Membro onde foi intentada a acção não comparecer, o tribunal competente deve suspender a instância enquanto não for demonstrado que o requerido foi devidamente citado e notificado do acto introdutório da instância, ou acto equivalente, com tempo suficiente para poder deduzir a sua defesa, ou que foram efectuadas todas as diligências nesse sentido.

2. É aplicável o disposto no artigo 19.º do Regulamento (CE) nº 1393/2007 do Parlamento Europeu e do Conselho, de 13 de Novembro de 2007, relativo à citação e à notificação dos actos judiciais e extrajudiciais em matérias civil e comercial nos Estados-Membros[21], em vez do disposto no n.º 1 se o acto introdutório da instância, ou acto equivalente, tiver sido transmitido de um Estado-Membro para outro em execução do referido regulamento.

3. Quando não forem aplicáveis as disposições do Regulamento (CE) n.º 1393/2007, aplica-se o disposto no artigo 15.º da Convenção da Haia de 15 de Novembro de 1965, relativa à citação e à notificação no estrangeiro dos actos judiciais e extrajudiciais em matéria civil ou comercial, se o acto introdutório da instância, ou acto equivalente, tiver sido transmitido para o estrangeiro em execução desta convenção.

Artigo 13.º
Litispendência

1. Quando forem introduzidas acções com o mesmo pedido e a mesma causa de pedir entre as mesmas partes perante tribunais de diferentes Estados-Membros, o tribunal onde a acção foi introduzida em segundo lugar suspende oficiosamente a instância até ser determinada a competência do tribunal onde a acção foi introduzida em primeiro lugar.

2. Quando estiver estabelecida a competência do tribunal onde a acção foi introduzida em primeiro lugar, o segundo tribunal declara-se incompetente em favor daquele.

Artigo 14.º
Conexão

1. Quando estiverem pendentes em tribunais de diferentes Estados-Membros pedidos conexos, o tribunal onde a acção foi introduzida em segundo lugar pode suspender a instância.

2. Se esses pedidos estiverem pendentes em primeira instância, o tribunal onde a acção foi introduzida em segundo lugar pode igualmente declinar a sua competência, a pedido de uma das partes, se o tribunal onde a acção foi introduzida em primeiro lugar for competente para conhecer dos pedidos em questão e a sua lei permitir a respectiva apensação.

3. Para efeitos do presente artigo, consideram-se conexos os pedidos ligados entre si por um nexo tão estreito que há interesse em que sejam instruídos e julgados simultaneamente para evitar soluções que possam ser inconciliáveis se as causas forem julgadas separadamente.

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[21] JO L 324 de 10.12.2007, p. 79.

Artigo 15.º
Medidas provisórias e cautelares

As medidas provisórias ou cautelares previstas na lei de um Estado-Membro podem ser requeridas às autoridades judiciais desse Estado-Membro, mesmo que, por força do presente regulamento, um tribunal de outro Estado-Membro seja competente para conhecer do mérito da causa.

Capítulo III

Lei aplicável

Artigo 16.º
Regra geral

Salvo disposição em contrário do presente regulamento, a lei aplicável ao conjunto da sucessão é a lei do Estado onde o falecido tinha residência habitual no momento do óbito.

Artigo 17.º
Liberdade de escolha

1. Uma pessoa pode escolher como lei para regular toda a sua sucessão a lei do Estado de que é nacional.

2. A designação da lei aplicável à sucessão deve ser expressa e constar de uma declaração que revista a forma de uma disposição por morte.

3. A existência e a validade quanto ao fundo do consentimento relativamente a essa designação são reguladas pela lei designada.

4. A alteração ou a revogação pelo seu autor da designação da lei aplicável deve preencher os requisitos formais aplicáveis à alteração ou à revogação de uma disposição por morte.

Artigo 18.º
Pactos sucessórios

1. Um pacto relativo à sucessão de uma só pessoa é regido pela lei que, por força do presente regulamento, seria aplicável à sucessão dessa pessoa no caso de morte no dia em que o acordo foi celebrado. Se, nos termos dessa lei, o pacto não for válido, será todavia admitida a sua validade se esta for contemplada pela lei que no momento do óbito é aplicável à sucessão por força do presente regulamento. O pacto é então regido por essa lei.

2. Um pacto relativo à sucessão de várias pessoas só é válido quanto ao mérito se essa validade for admitida pela lei que, em aplicação do artigo 16.º, seria aplicável à sucessão de uma das pessoas em caso de morte no dia em que o acordo foi celebrado.

Quando o contrato for válido segundo a lei aplicável à sucessão de uma só dessas pessoas, aplica-se esta lei. Quando o contrato for válido segundo a lei aplicável à sucessão de várias dessas pessoas, o pacto é regido pela lei com a qual apresente uma conexão mais estreita.

3. As partes podem designar como lei reguladora do seu acordo a lei que a pessoa ou uma das pessoas cuja sucessão está em causa teria podido escolher por força do artigo 17.º.

4. A aplicação da lei prevista no presente artigo não prejudica os direitos de qualquer pessoa que não seja parte no pacto e que, por força da lei designada nos artigos 16.º ou 17.º, tenha um direito à legítima ou outro direito de que não possa ser privada pelo autor da sucessão.

Artigo 19.º
Âmbito da lei aplicável

1. A lei designada nos termos do Capítulo III regula toda a sucessão, desde a sua abertura até à transmissão definitiva da herança aos herdeiros ou legatários.

2. Esta lei rege, nomeadamente:

(a) As causas, o momento e o lugar da abertura da sucessão;

(b) A vocação sucessória dos herdeiros e legatários, incluindo os direitos sucessórios do cônjuge supérstite, a determinação das quotas-partes dessas pessoas, as obrigações que lhes são impostas pelo falecido, bem como os outros direitos sobre a sucessão resultantes do óbito;

(c) A capacidade sucessória;

(d) As causas específicas da incapacidade de alienar ou receber a herança;

(e) A deserdação e a indignidade sucessória;

(f) A transmissão dos bens e direitos que compõem a sucessão aos herdeiros e legatários, incluindo as condições e os efeitos da aceitação da sucessão ou do legado ou do seu repúdio;

(g) Os poderes dos herdeiros, dos executores testamentários e outros administradores da sucessão, nomeadamente a venda dos bens e o pagamento dos credores;

(h) A responsabilidade pelas dívidas da sucessão;

(i) A quota-parte disponível, a legítima e as outras restrições à liberdade de dispor por morte, incluindo as atribuições retiradas da sucessão por uma autoridade judicial ou outra autoridade a favor de pessoas próximas do falecido;

(j) A colação e a redução das liberalidades, bem como a sua consideração no cálculo das quotas da herança;

(k) A validade, a interpretação, a alteração e a revogação de uma disposição por morte, com excepção da sua validade quanto à forma;

(l) A partilha da herança.

Artigo 20.º
Validade quanto à forma da aceitação ou do repúdio

Sem prejuízo do disposto no artigo 19.º, a aceitação da sucessão ou de um legado ou o seu repúdio, ou uma declaração destinada a limitar a responsabilidade do herdeiro ou do legatário é igualmente válida se respeitar as condições da lei do Estado onde esse herdeiro ou legatário tem residência habitual.

Artigo 21.º
Aplicação da lei do lugar onde está situado um bem

1. A lei aplicável à sucessão não impede a aplicação da lei do Estado do lugar onde está situado o bem, desde que essa lei prescreva, para a aceitação da sucessão ou de um legado ou o seu repúdio, formalidades posteriores às prescritas pela lei aplicável à sucessão.

2. A lei aplicável à sucessão não impede a aplicação da lei do Estado-Membro do lugar onde está situado o bem:

(a) Sempre que esta subordine a administração e a liquidação da sucessão à nomeação de um administrador ou de um executor testamentário por uma autoridade desse Estado-Membro. A lei aplicável à sucessão rege a determinação das pessoas, tais como os herdeiros, legatários, executores testamentários ou administradores, que podem ser encarregadas da administração e da liquidação da sucessão;

(b) Sempre que esta subordine a transmissão definitiva da herança aos herdeiros ao pagamento prévio dos impostos relativos à sucessão.

Artigo 22.º
Regimes sucessórios especiais

A lei aplicável por força do presente regulamento não prejudica os regimes sucessórios especiais a que determinados imóveis, empresas ou outras categorias especiais de bens estão sujeitos pela lei do Estado-Membro em que se situam devido à sua finalidade económica, familiar ou social quando, segundo essa lei, o regime for aplicável independentemente da lei que rege a sucessão.

Artigo 23.º
Comorientes

Sempre que duas ou mais pessoas cujas sucessões são regidas por leis diferentes morram em circunstâncias que não permitam determinar a ordem dos óbitos e que essas leis regulem esta

situação mediante disposições incompatíveis entre si ou não a regulem, nenhuma destas pessoas tem direito à sucessão da outra ou das outras.

Artigo 24.º
Herança vaga

Sempre que, segundo a lei aplicável por força do presente regulamento, não houver herdeiros nem legatários instituídos por uma disposição por morte, nem qualquer pessoa singular que possa ser considerada sucessível, a aplicação da lei assim determinada não impede que um Estado-Membro ou uma instituição designada pela lei desse Estado-Membro tenha o direito de se apropriar dos bens da sucessão situados no seu território.

Artigo 25.º
Aplicação universal

A lei designada pelo presente regulamento é aplicável, mesmo que não seja a de um Estado-Membro.

Artigo 26.º
Remissão

Quando o presente regulamento determina a aplicação da lei de um Estado, entende-se que visa as normas jurídicas em vigor nesse Estado, com exclusão das normas de direito internacional privado.

Artigo 27.º
Ordem pública

1. Só pode afastar-se a aplicação de uma disposição da lei designada pelo presente regulamento se for incompatível com a ordem pública do foro.

2. Em especial, a aplicação de uma disposição da lei designada pelo presente regulamento não pode ser considerada contrária à ordem pública do foro apenas porque as suas modalidades relativas à legítima são diferentes das disposições vigentes no foro.

Artigo 28.º
Sistemas não unificados

1. Sempre que um Estado englobe várias unidades territoriais, tendo cada uma delas as suas próprias normas jurídicas em matéria de sucessões por morte, cada unidade territorial é considerada um Estado para efeitos da determinação da lei aplicável por força do presente regulamento.

2. Um Estado-Membro em que diferentes unidades territoriais têm as suas próprias normas jurídicas em matéria de sucessões não é obrigado a aplicar o presente regulamento aos conflitos de leis que digam exclusivamente respeito a essas unidades territoriais.

Capítulo IV

Reconhecimento e execução

Artigo 29.º
Reconhecimento das decisões

As decisões proferidas em aplicação do presente regulamento são reconhecidas nos outros Estados-Membros, sem necessidade de recurso a qualquer procedimento.

Em caso de contestação, qualquer parte interessada que invoque o reconhecimento de uma decisão a título principal pode pedir, nos termos do procedimento previsto nos artigos 38.º a 56.º do Regulamento (CE) n.º 44/2001, o reconhecimento da decisão. Se o reconhecimento for invocado a título incidental perante um tribunal de um Estado-Membro, este é competente para dele conhecer.

Artigo 30.º
Motivos de não reconhecimento

Uma decisão proferida não é reconhecida nos seguintes casos:

(a) Se o reconhecimento for manifestamente contrário à ordem pública do Estado-Membro requerido, tendo presente que o critério da ordem pública não pode ser aplicado às normas de competência;

(b) Se o acto introdutório da instância, ou acto equivalente, não tiver sido citado ou notificado ao demandado em tempo útil e de modo a poder defender-se, a menos que o demandado não tenha recorrido da decisão, embora tivesse possibilidade de o fazer;

(c) Se for incompatível com uma decisão proferida entre as mesmas partes no Estado-Membro requerido;

(d) Se for incompatível com outra decisão proferida anteriormente noutro Estado-Membro ou num Estado terceiro entre as mesmas partes, numa acção com o mesmo pedido e a mesma causa de pedir, quando a decisão proferida anteriormente reúna as condições necessárias para ser reconhecida no Estado-Membro requerido.

Artigo 31.º
Ausência de revisão quanto ao mérito

As decisões estrangeiras não podem, em caso algum, ser objecto de revisão quanto ao mérito.

Artigo 32.º
Suspensão da instância

O tribunal de um Estado-Membro a que seja pedido o reconhecimento de uma decisão proferida noutro Estado-Membro pode suspender a instância se a decisão for objecto de recurso ordinário.

Artigo 33.º
Força executória das decisões

As decisões proferidas num Estado-Membro que aí sejam executórias e as transacções judiciais são executadas nos outros Estados-Membros em conformidade com os artigos 38.º a 56.º e com o artigo 58.º do Regulamento (CE) n.° 44/2001.

Capítulo V

Actos autênticos

Artigo 34.º
Reconhecimento dos actos autênticos

Os actos autênticos exarados num Estado-Membro são reconhecidos nos outros Estados-Membros, salvo no caso de a sua validade ser contestada segundo os procedimentos previstos no Estado-Membro de origem e desde que esse reconhecimento não seja contrário à ordem pública do Estado-Membro requerido.

Artigo 35.º
Força executória dos actos autênticos

Os actos autênticos exarados e com força executória num Estado-Membro são, mediante requerimento, declarados executórios noutro Estado-Membro, em conformidade com o procedimento previsto nos artigos 38.º a 57.º do Regulamento (CE) n.º 44/2001. O tribunal perante o qual é interposto um recurso por força dos artigos 43.º e 44.º deste regulamento só recusa ou revoga uma declaração de força executória se a execução do acto autêntico for manifestamente contrária à ordem pública do Estado-Membro requerido ou se estiver pendente num tribunal do Estado-Membro de origem do acto autêntico uma acção referente à sua validade.

Capítulo VI

Certificado sucessório europeu

Artigo 36.º
Criação de um certificado sucessório europeu

1. O presente regulamento introduz um certificado sucessório europeu, que constitui a prova da qualidade de herdeiro, de legatário e dos poderes dos executores testamentários ou terceiros administradores. Este certificado é emitido pela autoridade competente nos termos do presente capítulo, em conformidade com a lei aplicável à sucessão por força do Capítulo III do presente regulamento.

2. O recurso ao certificado sucessório europeu não é obrigatório. O certificado não substitui os procedimentos internos. Todavia, os efeitos do certificado também são reconhecidos no Estado-Membro cujas autoridades o emitiram por força do presente capítulo.

Artigo 37.º
Competência para emitir o certificado

1. O certificado é emitido a pedido de qualquer pessoa que tenha a obrigação de justificar a qualidade de herdeiro, de legatário e os poderes de executor testamentário ou terceiro administrador.

2. O certificado é emitido pelo tribunal competente do Estado-Membro cujos tribunais sejam competentes por força dos artigos 4.º, 5.º e 6.º.

Artigo 38.º
Conteúdo do pedido

1. O requerente de um certificado sucessório europeu deve indicar, através do formulário cujo modelo consta do Anexo I e desde que disponha de tais informações, os seguintes dados:

   (a) Informações relativas ao falecido: apelido, nome(s) próprio(s), sexo, estado civil, nacionalidade, número de identificação se disponível, endereço da última residência habitual e data e lugar do óbito;

   (b) Informações sobre o requerente: apelido, nome(s) próprio(s), sexo, nacionalidade, número de identificação se disponível, endereço e grau de parentesco ou vínculo com o falecido;

   (c) Os elementos de facto ou de direito que justificam o seu direito sucessório e/ou o seu direito de administrar e/ou de executar a sucessão. Se tiver conhecimento de uma disposição por morte, o requerente anexa ao pedido uma cópia da referida disposição;

(d) Se substitui outros herdeiros ou legatários e, em caso afirmativo, a prova do seu óbito ou de qualquer outro acontecimento que os impeça de se apresentarem à sucessão;

(e) Se o falecido celebrou uma convenção matrimonial; em caso afirmativo, o requerente deve anexar ao seu pedido uma cópia da referida convenção;

(f) Se tem conhecimento da existência de qualquer contestação relativa aos direitos sucessórios.

2. O requerente deve provar a exactidão das informações fornecidas mediante a apresentação de documentos autênticos. No caso de não ser possível apresentar estes documentos ou de a sua apresentação acarretar dificuldades desproporcionadas, são admitidos outros meios de prova.

3. O tribunal competente toma as medidas adequadas para se assegurar da veracidade das declarações efectuadas. Sempre que o seu direito interno o permita, o tribunal exige que estas declarações sejam feitas sob juramento.

Artigo 39.º
Certificado parcial

Pode ser pedido e emitido um certificado parcial que ateste:

(a) Os direitos de cada herdeiro ou legatário e a quota-parte que lhes cabe;

(b) A devolução de um bem determinado, quando seja admitida pela lei aplicável à sucessão;

(c) A administração da sucessão.

Artigo 40.º
Emissão do certificado

1. O certificado só é emitido se o tribunal competente considerar provados os factos apresentados para fundamentar o pedido. O tribunal competente emite o certificado sem demora.

2. O tribunal competente, em função das declarações do requerente, dos actos e dos outros meios de prova por este apresentados, procede oficiosamente às investigações necessárias à verificação dos factos e à obtenção de provas posteriores que considere oportunas.

3. Para efeitos do presente capítulo, os Estados-Membros permitem o acesso dos tribunais competentes dos outros Estados-Membros, nomeadamente ao registo civil, aos registos dos actos ou factos relativos à sucessão ou ao regime matrimonial da família do falecido e aos registos prediais.

4. O tribunal que emite o certificado pode notificar para comparecerem as pessoas interessadas e os eventuais administradores ou executores e proceder a publicações destinadas a convidar outros eventuais herdeiros a fazerem valer os seus direitos.

Artigo 41.º
Conteúdo do certificado

1. O certificado sucessório europeu é emitido recorrendo ao formulário cujo modelo consta do Anexo II.

2. O certificado sucessório europeu inclui as seguintes indicações:

   (a) O tribunal que o emitiu, os elementos de facto e de direito com base nos quais este tribunal se considera competente para emitir o certificado, bem como a data de emissão;

   (b) Informações relativas ao falecido: apelido, nome(s) próprio(s), sexo, estado civil, nacionalidade, número de identificação se disponível, endereço da última residência habitual, data e lugar do óbito;

   (c) As eventuais convenções matrimoniais celebradas pelo falecido;

   (d) A lei aplicável à sucessão por força do presente regulamento e as circunstâncias de facto e de direito com base nas quais a lei foi determinada;

   (e) Os elementos de facto e de direito dos quais decorrem os direitos e/ou os poderes dos herdeiros, legatários, executores testamentários ou terceiros administradores: sucessão legal e/ou testamentária e/ou decorrente de pactos sucessórios;

   (f) Informações sobre o requerente: apelido, nome(s) próprio(s), sexo, nacionalidade, número de identificação se disponível, endereço e grau de parentesco ou vínculo com o falecido;

   (g) Se for caso disso, indicação da natureza da aceitação da sucessão relativamente a cada herdeiro;

   (h) Se houver vários herdeiros, a quota-parte que cabe a cada um deles, bem como, se for caso disso, a lista dos bens ou direitos que cabem a um determinado herdeiro;

   (i) A lista dos bens ou direitos que cabem aos legatários por força da lei aplicável à sucessão;

   (j) As restrições ao direito do herdeiro por força da lei aplicável à sucessão em conformidade com o Capítulo III e/ou com as disposições contidas no testamento ou no pacto sucessório;

   (k) A lista de actos que o herdeiro, legatário, executor testamentário e/ou administrador pode realizar sobre os bens da sucessão por força da lei aplicável à mesma.

Artigo 42.º
Efeitos do certificado sucessório europeu

1. O certificado sucessório europeu é reconhecido de pleno direito em todos os Estados-Membros no que se refere à prova da qualidade dos herdeiros e dos legatários e dos poderes dos executores testamentários ou dos terceiros administradores.

2. Presume-se que o conteúdo do certificado corresponde à verdade em todos os Estados-Membros durante o seu período de validade. Presume-se que quem o certificado designar como herdeiro, legatário, executor testamentário ou administrador é titular do direito sucessório ou dos poderes de administração indicados no certificado e que não existam condições nem restrições para além das que aí são referidas.

3. Qualquer pessoa que pague ou entregue bens ao titular de um certificado habilitado a realizar tais actos por força do certificado fica isento de responsabilidades, a menos que tenha conhecimento de que o conteúdo do certificado não é autêntico.

4. Considera-se que qualquer pessoa que adquiriu bens sucessórios da titular de um certificado habilitado a dispor do bem por força da lista anexa ao certificado os adquiriu a uma pessoa com poderes para deles dispor, a menos que tenha conhecimento de que o conteúdo do certificado não é autêntico.

5. O certificado constitui um título válido para a transcrição ou inscrição da aquisição sucessória nos registos públicos do Estado-Membro onde se situam os bens. A transcrição é feita segundo as modalidades estabelecidas pela lei do Estado-Membro sob cuja autoridade o registo é mantido e produz os efeitos previstos nessa lei.

Artigo 43.º
Rectificação, suspensão ou anulação do certificado sucessório europeu

1. O original do certificado é conservado pelo tribunal que o emitiu, que entrega uma ou mais cópias ao requerente ou a qualquer pessoa que demonstre possuir um interesse legítimo.

2. As cópias entregues produzem os efeitos previstos no artigo 42.º durante um período limitado de três meses. Decorrido este prazo, os titulares do certificado ou outras pessoas interessadas devem solicitar uma nova cópia ao tribunal que o emitiu para poderem invocar os seus direitos sucessórios.

3. Mediante pedido de um interessado dirigido ao tribunal que emitiu o certificado ou oficiosamente pela referida autoridade, o certificado pode ser objecto:

   (a) De rectificação, em caso de erro material;

   (b) De uma inscrição na margem relativa à suspensão dos seus efeitos, se a sua autenticidade for contestada;

   (c) De anulação, se se determinar que o certificado sucessório europeu não corresponde à realidade.

4. O tribunal que emitiu o certificado anota na margem do original a sua rectificação, a suspensão dos seus efeitos ou a sua anulação e notifica esse facto ao(s) requerente(s).

Artigo 44.º
Vias de recurso

Cada Estado-Membro organiza as vias de recurso contra a decisão de emissão ou não emissão, rectificação, suspensão ou anulação de um certificado.

Capítulo VII

Disposições gerais e finais

Artigo 45.º
Relações com as convenções internacionais existentes

1. O presente regulamento não prejudica a aplicação das convenções bilaterais ou multilaterais de que um ou mais Estados-Membros sejam partes na data da adopção do presente regulamento e que digam respeito a matérias por ele regidas, sem prejuízo das obrigações dos Estados-Membros por força do artigo 307.º do Tratado.

2. Não obstante o disposto no n.º 1, o presente regulamento prevalece, entre os Estados-Membros, sobre as convenções e acordos que digam respeito às matérias por ele regidas e nos quais os Estados-Membros sejam partes.

Artigo 46.º
Informações disponibilizadas ao público

No âmbito da Rede Judiciária Europeia em matéria civil e comercial, os Estados-Membros fornecem uma descrição da legislação e dos procedimentos nacionais relativos ao direito das sucessões, bem como os textos pertinentes, tendo em vista a sua disponibilização ao público. Os Estados-Membros comunicam qualquer alteração posterior destas disposições.

Artigo 47.º
Alteração dos formulários

Qualquer alteração dos formulários referidos nos artigos 38.º e 41.º é adoptada em conformidade com o procedimento consultivo a que se refere o n.º 2 do artigo 48.º.

Artigo 48.º
Comité

1. A Comissão é assistida pelo Comité instituído pelo artigo 75.º do Regulamento (CE) n.º 44/2001.

2. Sempre que se faça referência ao presente número, são aplicáveis os artigos 3.º e 7.º da Decisão 1999/468/CE, em conformidade com o disposto no seu artigo 8.º.

Artigo 49.º
Cláusula de reexame

O mais tardar em […], a Comissão apresenta ao Parlamento Europeu, ao Conselho e ao Comité Económico e Social Europeu um relatório relativo à aplicação do presente regulamento. Se for caso disso, o relatório é acompanhado de propostas de adaptação.

Artigo 50.º
Disposições transitórias

1. O presente regulamento é aplicável às sucessões das pessoas falecidas após a data da sua aplicação.

2. Quando o falecido tiver designado a lei aplicável à sua sucessão antes da data de aplicação do presente regulamento, essa designação é considerada válida, desde que respeite as condições referidas no artigo 17.º.

3. Quando as partes num pacto sucessório tiverem designado a lei aplicável a esse pacto antes da data de aplicação do presente regulamento, essa designação é considerada válida, desde que respeite as condições referidas no artigo 18.º.

Artigo 51.º
Entrada em vigor

O presente regulamento entra em vigor no vigésimo dia seguinte ao da sua publicação no *Jornal Oficial da União Europeia*.

O presente regulamento é aplicável a partir de [um ano após a sua entrada em vigor].

O presente regulamento é obrigatório em todos os seus elementos e directamente aplicável nos Estados-Membros, em conformidade com o Tratado que institui a Comunidade Europeia.

Feito em Bruxelas, em

Pelo Parlamento Europeu
O Presidente

Pelo Conselho
O Presidente

CÓPIA AUTENTICADA
Pela Secretária-Geral,

Jordi AYET PUIGARNAU
Director da Secretaria

ANEXO I: PEDIDO PREVISTO NO ARTIGO 38.º DO REGULAMENTO

PEDIDO DE CERTIFICADO SUCESSÓRIO EUROPEU

(Artigos 36.º e seguintes do regulamento […] do Parlamento Europeu e do Conselho relativo às sucessões[22])

1. Estado-Membro

BE □ BG □ CZ □ DE □ EE □ [IE □] EL □ ES □ FR □ IT □ CY □ LV □ LT □ LU □ HU □ MT □ NL □ AT □ PL □ PT □ RO □ SI □ SK □ FI □ SE □ [UK □]

2. Dados do falecido

2.1. Apelido:

2.2. Nome(s) próprio(s):

2.3. Sexo:

2.4. Estado civil:

2.5. Nacionalidade:

2.6. Número de identificação*:

2.7. Data do óbito:

2.8. Lugar do óbito:

Endereço da sua última residência habitual:

2.9. Rua e número / caixa postal:

[22] JO L […]

2.10. Localidade e código postal:

2.11. País:

3. Dados do requerente

3.1. Apelido:

3.2. Nome(s) próprio(s):

3.3. Sexo:

3.4. Nacionalidade:

3.5. Número de identificação*:

3.6. Rua e número / caixa postal:

3.7. Localidade e código postal:

3.8. Tel.:

3.9. Endereço electrónico:

3.10. Grau de parentesco ou vínculo com o falecido*:

*se aplicável

4. Informações complementares:

4.1. Elementos de facto ou de direito que justificam um direito sucessório:

4.2. Elementos de facto ou de direito que fundamentam o direito de executar e/ou de administrar a sucessão:

4.3. O falecido tomou disposições a aplicar em caso de morte? sim ☐ não ☐

Em caso de resposta afirmativa, anexar as disposições em causa. *

4.4. O falecido celebrou uma convenção matrimonial? sim ☐ não ☐

Em caso de resposta afirmativa, anexar a convenção matrimonial. *

4.5. Está a substituir outro herdeiro ou legatário? sim ☐ não ☐

Em caso de resposta afirmativa, anexar a prova do seu óbito ou do evento que os impede de se apresentarem à sucessão.*

4.6. Tem conhecimento da existência de qualquer contestação relativa aos direitos sucessórios? sim ☐ não ☐

Em caso de resposta afirmativa, fornecer informações relativas a essa contestação. *

4.7. Fornecer, em anexo, uma lista de todas as relações do falecido, precisando o seu apelido, nome(s) próprio(s), natureza da relação com o falecido, data de nascimento, nacionalidade e endereço.

*Fornecer documentos autênticos ou cópias autenticadas, na medida do possível.

Declaro solenemente que estas informações correspondem à verdade, tanto quanto é do meu conhecimento.*

Data:

Assinatura:

* N.º 3 do artigo 38.º, no caso de as declarações serem feitas sob juramento.

ANEXO II: CERTIFICADO SUCESSÓRIO EUROPEU PREVISTO NO ARTIGO 41.º

CERTIFICADO SUCESSÓRIO EUROPEU

(Artigos 41.º do regulamento […] do Parlamento Europeu e do Conselho relativo às sucessões[23])

1. Estado-Membro do tribunal que emite o certificado

BE □ BG □ CZ □ DE □ EE □ [IE □] EL □ ES □ FR □ IT □ CY □ LV □ LT □ LU □ HU □ MT □ NL □ AT □ PL □ PT □ RO □ SI □ SK □ FI □ SE □ [UK □]

2. Informações sobre o tribunal

2.1. Tribunal competente por força do seguinte artigo do regulamento:

Artigo 4.º ☐ Artigo 5.º ☐ Artigo 6.º ☐

2.2. Pessoa a contactar:

2.3. Endereço:

3. Dados do falecido

3.1. Apelido:

3.2. Nome(s) próprio(s):

3.3. Sexo:

3.4. Estado civil:

[23] JO L […]

3.5. Nacionalidade:

3.6. Número de identificação*:

3.7. Data do óbito:

3.8. Lugar do óbito:

Endereço da sua última residência habitual:

3.9. Rua e número / caixa postal:

3.10. Localidade e código postal:

3.11. País:

3.12. Convenções matrimoniais:

3.13. Lei aplicável à sucessão:

4. Dados do requerente

4.1. Apelido:

4.2. Nome(s) próprio(s):

4.3. Sexo:

4.4. Nacionalidade:

4.5. Número de identificação*:

4.6. Rua e número / caixa postal:

4.7. Localidade e código postal:

4.8. Tel.:

4.9. Endereço electrónico:

4.10. Grau de parentesco ou vínculo com o falecido*:

*se aplicável

5. Prova da qualidade de herdeiro

5.1. Este documento fornece a prova da qualidade de herdeiro sim ☐ não ☐

5.2. Lista dos herdeiros:*

Apelido	Nome(s) próprio(s)	Data de nascimento	Quota-parte da sucessão	Restrições

*****se necessário, juntar uma folha suplementar.

5.3. A aceitação da sucessão está eventualmente sujeita a condições (por exemplo, a benefício de inventário)? sim ☐ não ☐

Em caso de resposta afirmativa, precisar numa folha em anexo a natureza da condição e respectivos efeitos.

5.4. Lista dos bens ou direitos que cabem a um determinado herdeiro:*

Apelido	Nome(s) próprio(s)	Indicação do bem ou direito

***se necessário, juntar uma folha suplementar.

6. Prova da qualidade de legatário

6.1. Este documento fornece a prova da qualidade de legatário sim ☐ não ☐

6.2. Lista dos legatários:*

Apelido	Nome(s) próprio(s)	Data de nascimento	Direito(s) ou bem ou bens que cabem ao legatário por força da disposição por morte

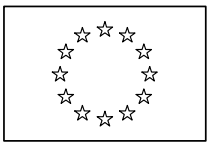
*****se necessário, juntar uma folha suplementar.

7. Prova da qualidade de administrador e/ou de executor

7.1. Este documento fornece a prova da qualidade de administrador sim ☐ não ☐

7.2. Este documento fornece a prova da qualidade de executor sim ☐ não ☐

7.3. Precisar a natureza dos direitos do administrador e/ou do executor, a base jurídica destes direitos e uma lista indicativa dos actos que pode realizar por força dos seus direitos:



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 14.10.2009
SEC(2009) 410 final

COMMISSION STAFF WORKING DOCUMENT

Accompanying 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 successions and on the introduction of a European Certificate of Inheritance

Impact Assessment

{COM(2009) 154 final)
{SEC(2009) 411}

TABLE OF CONTENTS

Lead DG: Justice, Freedom and Security

1. INTRODUCTION

More and more European citizens take advantage of the Internal market, live in another Member State and have family members or own property (houses, bank accounts) in more than one Member State. Upon their death, their potential heirs often face great difficulty, long delays and high legal costs in trying to obtain their inheritance. Worse, many rightful heirs, particularly the most vulnerable, do not receive all of their inheritance. The process is protracted, expensive and stressful.

The causes of this problem are complex. Succession law varies considerably between the Member States. National legal systems are often in conflict with one another, which results in multiple legal proceedings taking place in more than one Member State for the same succession. Judgments, the powers of administrators or executors of wills, and status as an heir in one Member State are often not recognised in others. In addition, unless the testator registers his will, or at least informs his potential heirs, notary or legal practitioner that he has made a will, there is no obvious means for potential heirs to find out whether the testator made a will before his or her death.

This is a cross-border problem which affects a large and growing proportion of citizens in the European Union. Member States and stakeholders have therefore urged action at EU level to address it.

2. PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

2.1. Legal basis, political mandate and existing instruments

At its meeting of 15 and 16 October 1999 in Tampere (Finland), the European Council called for the development of a genuine European Area of Justice in which individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States.

Although much progress has been made towards the creation of a genuine European Area of Civil Justice*[1], successions have not, so far, been covered in this progress. In particular, they are excluded from the most important legal instrument in the field of civil judicial cooperation, the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (so-called "Brussels I" Regulation)[2].

The adoption of a European instrument relating to successions was already among the priorities of the Vienna Action Plan adopted by the Council and the Commission in 1998[3]. The Programme of measures for implementation of the principle of mutual recognition of

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1 Legal terms marked by "*" are explained in the glossary contained in Annex 1.
2 Regulation (EC) No 44/2001 of 22 December 2000, OJ C 12, 15.1.2001.
3 OJ C 19, 23.1.1999.

decisions in civil and commercial matters[4] adopted by the Council and the Commission at the end of 2000 provides for an instrument to be drafted on succession. Finally, the Hague Programme adopted by the European Council of 4-5 November 2004 called on the Commission to present a Green Paper on succession covering a range of issues – applicable law, jurisdiction and recognition and administrative measures (certificates of inheritance, registration of wills).[5]

2.2. Organisation and timing

The Commission's Work Programme for 2008[6] included the adoption of a proposal for a regulation on successions and wills[7] as a priority initiative. A road map was prepared for this strategic initiative.

The Commission commissioned an external study (hereinafter "the external study") to support the preparation of the Impact Assessment.[8] The problems, objectives and policy options assessed were based on the outcome of the consultations and the expertise brought together by the Commission to prepare the present initiative (see point 2.3 hereafter) as well as contributions from the contractor.

This report also incorporates comments submitted during two meetings of the inter-service steering group on September 9 and December 9 2008 at which representatives of the Directorates-Generals Enterprise and Industry, Internal Market and Services and Taxation and Customs Union, as well as the Secretariat General and the Legal Service of the Commission participated.

This Impact Assessment was reviewed by the Impact Assessment Board (IAB). The recommendations for improvements have been accommodated in this revised version of the report. In particular, the following changes were made: (i) additional explanations on the reasons why other alternative elements have been discarded; (ii) clarification on the cross-linkages with the taxation of successions; (iii) reference to methodology on the evaluation of the instruments including indicators.

2.3. Consultation and expertise

To better understand the *status quo*, the Commission commissionned a "Study on Conflict of Law of Succession in the European Union", prepared by the Deutsches Notarinstitut (German Notary Institute) in November 2002[9].

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4 OJ C 12, 15.1.2001.

5 See Presidency conclusions, Brussels European Council, 4 and 5 November 2004.

6 http://ec.europa.eu/atwork/programmes/docs/clwp2008_en.pdf.

7 Although the Commission proposal for a Regulation will be entitled "successions upon death" instead of "successions and wills", the question of wills will be addressed in this proposal. From a legal perspective it is obvious that wills are part of succession law.

8 EPEC, Impact Assessment Study on Community Instruments on Successions and Wills, under framework contract No DG BUDG No BUDG06/PO/01/Lot no.2, ABAC 101908, available at the following website: […].

9 http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm.

Since this study confirmed the existence of practical problems in devolution of estates and drafting of wills in cross-border successions, the Commission decided to launch an in-depth reflection and debate with all relevant stakeholders on the architecture of a future Community initiative. It therefore presented a Green Paper *on Succession and wills* (COM(2005)65 final) on March 1, 2005,[10] launching a public debate on successions with an international dimension.

The Commission received approximately 60 written contributions from Member States, non-governmental organisations, academia, bars and law societies. All contributions, including the opinions by the European Parliament, the Economic and Social Committee and the Committee of Regions have been published on the JLS website[11].

Following a call for proposal, the Commission set up an expert group (PRM III/IV) composed of experts acting independently of the Member States, including several notaries, and representing the different legal traditions of the EU to assist the Commission in its work on a future legislative proposal on successions. Seven meetings of the Expert Group took place between 2006 and 2008, and a public hearing on the question of the applicable law on succession was held on 16 November 2006. In addition, the Commission consulted national experts on a preliminary draft proposal for a regulation on successions upon death between June and November 2008.

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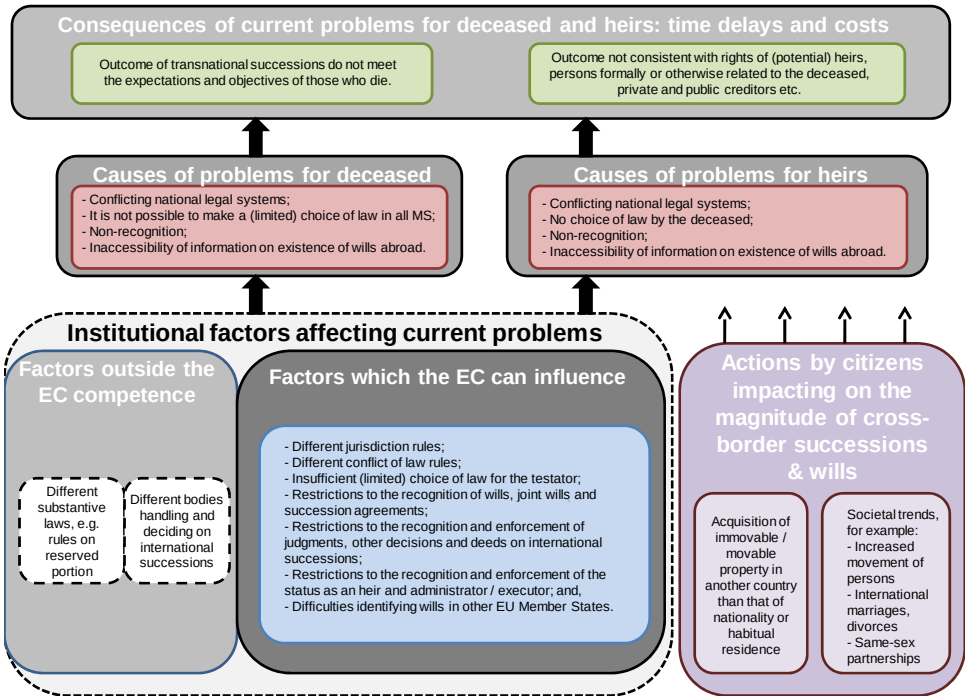
10 Available at: http://europa.eu/scadplus/leg/en/lvb/l16017.htm.

11 Available at: http://ec.europa.eu/justice_home/news/consulting_public/successions/news_contributions_successions_en.htm.

3. PROBLEM DEFINITION

The following figure outlines the current problems and factors influencing these problems prepared on the basis of available information from desk research and stakeholder consultations. The different elements are developed further in the following sections.

Figure 1 - Outline of problems and factors influencing them



3.1. The causes of the current problems (the drivers)

The outcome of international successions in the EU often does not meet the expectations and objectives of those who die. In addition the rights of (potential) heirs, persons formally or otherwise related to the deceased, private and public creditors, etc. are not being fulfilled.

This initiative aims to address the problems and factors behind this situation. The starting point for outlining the problems currently faced by citizens are the national substantive* rules on successions which diverge widely between the Member States. Some of the most significant problems in the area of successions are caused by those divergences in national substantive rules, the most important of which will be briefly outlined in the following section. While their harmonisation remains outside the competence of the European Community, it is nevertheless important to have an understanding of these differences and what this entails for citizens.

3.1.1. Divergences in national substantive rules on successions

Some of the main differences between substantive rules which have given rise to difficulties for the citizens are as follows:

1. If a person dies intestate*, i.e. without a will, the inheritance is divided according to substantive* succession rules. The **shares that the family members inherit vary widely**, depending on which national law is applied to the succession. In particular the division of the inheritance between a spouse and children is handled very differently. For example, while English law in practice leads to the spouse receiving the majority if not all of the inheritance, French law in some cases grants the spouse merely a quarter of the inheritance, with the remaining three quarters inherited by the children of the deceased.

2. All Member States recognize **testaments**. Some Member States furthermore provide for more elaborate instruments to plan successions, namely **joint and reciprocal wills* as well as succession agreements***.[12] A joint and reciprocal will, unlike a testament that can be revoked or modified at any point in time, cannot be unilaterally changed and can bind the surviving spouse even after the death of the partner. Similarly, a succession agreement, which can be concluded between a testator and any third party, can limit a testator's right to modify his or her last will after the conclusion of the agreement. As many Member States, especially the Romance legal orders, place particular emphasis on the free will of the testator, reciprocal wills or succession agreements may not be recognized.

3. All Member States except for the UK (specifically, England and Wales) grant a **compulsory share of the inheritance to close family members**, regardless of any testamentary dispositions by the deceased. This share, the "statutory reserve", can amount to between 25 and 100% of the inheritance, depending on the applicable law and the number of remaining family members, and also varies widely between the Member States.

4. The **procedural rules governing succession** are very different between Member States. While in some Member States all possessions of the deceased become the property of his or her heirs automatically upon death, in other Member States the estate is managed by an administrator and transferred to the heirs after their shares have been established and any inheritance tax has been paid.

5. The **rights of unmarried or same-sex partners**, as compared to those of spouses, vary widely between the Member States. While England, the Netherlands, Spain and Germany treat a registered same-sex partner like a spouse in most respects, other Member States that do not provide for same-sex marriage or registered partnerships as a consequence do not have any rules granting a share of the inheritance to the registered partner. Even in some Member States that have a registered partnership, the inheritance rights of a registered partner are non-existent or very limited in scope. For example, the surviving

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[12] Joint and reciprocal wills are accepted in, e.g., Denmark, Sweden, the UK, Germany, Austria and Lithuania (in the last three states, between spouses only). Succession agreements exist only in Austria, Germany, Denmark and the UK. Some other Member States provide for alternative solutions, e.g. a contractual promise of a gift between spouses in case of death (France, Belgium, Portugal, the Netherlands and Luxemburg).

partner of a French PACS is entitled by law only to a habitation right as regards a home shared with the deceased partner.

Given these differences, it is evident that the results of a succession vary widely, depending on which national law is applied. As mentioned above, these results can also diverge from the expectations of the deceased and the heirs.

To address these issues, the Member States have set up their own rules to define the competence of their authorities and the applicable law in international succession cases. However, as these rules also vary widely from Member State to Member State and have not always been adapted to the mobile life style of European citizens taking advantage of the Internal market, they create further problems for those citizens, in particular due to the lack of predictability of the applicable law (problem 2). Consequently, citizens suffer from a very low level of legal certainty.

3.1.2. Problem 1 - Problems relating to the determination of which country and body is competent to handle the case

Difficulties for citizens to predict which country has competence to handle the international jurisdiction and positive and negative conflicts of jurisdiction. Citizens have difficulties predicting which Member State's authorities are competent to handle an international succession. The authorities of two ore more Member States may accept to handle the same succession (positive conflict of jurisdiction*) or, on the other hand, none of them might accept to handle it (negative conflict of jurisdiction*).

This situation mainly occurs due to the fact that the Member States have adopted widely varying criteria for determining the competence of their courts in an international succession. Many take the last habitual residence of the deceased as connecting factor, others the nationality of the testator.[13] But other connecting factors exist: in cases of contentious litigation (e.g. because of a dispute among potential heirs), the habitual residence of the parties, the location of the property or the nationality of the parties may be used. Some Member States even allow a choice of jurisdiction by the parties in case of a dispute between (potential) heirs.

Beside different connecting factors, there are other rules on international procedure which differ among Member States, thus increasing the risk of positive or negative conflicts of jurisdiction: e.g. the power of courts/judges to declare themselves incompetent (i.e. not having jurisdiction) on their own motion or on request of the parties, including the UK mechanism of *forum non conveniens** or the rules on lispendence*.

These different rules lead to a situation where the competent bodies of different countries may accept to decide on the same succession and even on the same question, which may

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[13] Nationality as a connecting factor is used in the laws of Austria, Germany, Spain, Greece, Hungary, Italy, Poland, Portugal, Romania (for movable property), Slovenia, Sweden and the Czech Republic. Habitual residence is used in Belgium (movables), Bulgaria (movables), Cyprus (movables), Denmark, Estonia, Finland, France (movables), Luxembourg (movables), Ireland, Lithuania, the Netherlands and the UK (England and Wales; Scotland: for movables only).

lead to contradictory decisions, even more since each of the courts may then apply a different law (see 3.1.3). This diversity also favours the phenomenon of *forum shopping** : parties involved in an international succession case may try to bring their claims before the courts of a certain Member State, because they will apply substantive succession law which is particularly favourable for them.

Difficulties for citizens to predict which body or court will handle the case. Even once citizens have identified the Member State the authorities of which have competence to handle the succession, they often do not know which body is competent in this Member State. In many Member States, the majority of successions are settled outside the courts, sometimes with the support of public bodies or certain legal professions (mainly notaries); courts are involved only in complex or contentious successions. In other Member States, the courts always have to be involved. Furthermore, in some countries, only one court is competent, whereas in other countries the plaintiff has an option to choose between several courts. This makes it difficult for citizens to predict what body or court will actually handle their case.

3.1.3. Problem 2 – Conflicting laws applicable to the same succession in different Member States

It must be borne in mind that, in matters of private law, a court is not obliged to apply the law of its own country; it may also apply the rules of law of another country.[14] For this reason, Member States have adopted their own rules to decide which law of which country should be applied to which case, called conflict of laws rules*.

At present, the Member States have different conflict of laws rules in matters of successions. Since the authorities of several Member States may be competent to deal with a given succession (see point 3.1.2), these authorities might come to different results as regards the question "what belongs to whom", which is not only a major factor of legal uncertainty, but has serious consequences on the estate planning and the mutual recognition of judgments between Member States.

The main existing discrepancies between the conflict of laws rules of the Member States are the following.

Different connecting factors in the conflict of laws rules. The connecting factors used in the conflict of laws rules of the Member States to determine the law applicable to succession are quite different. In particular, there is a striking difference between Member States which apply the law of the last habitual residence of the deceased and others who follow the principle of nationality.[15]

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[14] For example, for the succession of a national of Member State A living in Member State B, the courts of Member State B might conclude that the succession is governed by the substantive laws of Member State A. The application of a foreign law may be problematic itself. However, this problem is not specific to successions.

[15] For a list of which Member State uses which connecting factor, please see n. 13 above. Even if two Member States apply the same rules to determine the applicable law, they can nevertheless come to a different result because of their respective solutions on *renvoi* (situation in which the conflict of

> **Example**: a French citizen whose last habitual residence was in Germany dies, leaving movable property (e.g. bank accounts, shares) in both countries. The authorities of both Germany and France would have competence to handle the case (cf. point 3.1.2). Applying their own national conflict of laws rules, the German authorities would apply French succession law to identify the heirs, whereas the French authorities would apply the German rules. As a further consequence, conflicting judgments will be given by French and German courts with regard to the succession of the same deceased person, and recognition will be denied to the French judgment in Germany as being in contradiction to the German judgment, and *vice versa*.

Distinction between unitary systems and systems of separate conflict rules for movable and immovable property. Seventeen Member States have unitary systems where all succession property (i.e. both movable and immovable property) wherever it is located, is subject to a single law (e.g. the Austrian succession law determines the heirs of both the bank account in Luxembourg and the house in Granada). Ten Member States have systems where movable and immovable goods can be subject to different laws if they are located in different countries. According to this system, immovable property is governed by the law of the country where it is located, whereas movables are subject to the general connecting factor (mainly nationality or last habitual residence). The application of the law of the country in which the immovable property is located makes it easier to transfer ownership of the property, but makes it more difficult to organise succession of the entire estate and to draft wills.[16]

> **Example**: An Italian citizen dies in England, leaving a house there. English courts will apply English succession law (law of the place of location). Italian courts would apply Italian succession law to the whole estate including the house in England.

Difference in the treatment of the administration* and the distribution* of the estate. Further difficulties arise from the fact that the administration of the estate is part of succession law in civil law countries, governed by the law applicable to the succession, whereas it is part of the national procedural law in common law countries.

Different scope of application of the conflict of laws rules relating to successions in the Member State. The fact that the delimitation between succession law on the one hand and other laws (family law, property law, company law) is drawn in a different way in the Member States also makes it difficult to know which law is applicable, and can lead to contradictory decisions.

> **Examples**: The law of the last country of residence (Member State A) provides that the surviving spouse automatically becomes life tenant of all property owned by her husband, including the holiday residence in Member State B, whereas the law of Member State B stipulates that such a life tenancy can only be arranged by a written contract. As a consequence, the spouse will have difficulties enforcing her rights in Member State B.

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laws rules of Member State A call for the application of the law of country B. The conflict of laws rules of Member State B, however, provide for the application of the law of Member State A or of a third State).

[16] In addition, the distinction between movable property and immovable property is not the same in all Member States, which can lead to the application of different laws for a given property even among those Member States which have the split system, when it is qualified as being movable in one Member State and as being immovable in another Member State.

3.1.4. Problem 3 - Insufficient (limited) freedom of choice of law for the testator

When a citizen taking advantage of the Internal market is aware of the differences in substantive succession law and in the conflict of laws rules in the Member States and is also aware of the resulting problems, he/she may wish to get around this by drawing up a will and choosing a single law applicable to his/her entire estate irrespective of the location of the property. However, most Member States do not yet allow the future deceased to choose the law applicable to his/her succession[17]. Those Member States which give a choice also introduce limitations, varying from one country to the other, as regards in particular the laws which may be chosen (in general, law of habitual residence or of nationality, in one Member State the law of the matrimonial property regime)[18], the property for which such choice is allowed (movable or immovable property) and the form of the choice.

Due to these limitations, in practice, no Member States allows citizens to choose a single law governing the whole succession. This may cause particular problems for those citizens that take advantage of their freedom of movement in the EU. When such persons make a will and then change their country of residence, they are often unaware that this change may mean that their will no longer has the expected effects, since it may become subject to a different law. But even when these citizens are aware of this fact, they have no possibility to avoid these consequences by choosing the law of their former habitual residence as governing their succession. The only alternative is to draw up a will which satisfies the requirements of all Member States concerned, which is nearly impossible in practice.

3.1.5. Problem 4 - Restricted recognition and enforcement* of judgments, non-contentious decisions and notarial deeds**

A judgment given by a court in one country is not automatically recognised and enforced in another country the courts of which may render a conflicting judgment on the same question. Although the mutual recognition of judgments within the EU is a cornerstone of the objective to create a genuine European area of civil justice, succession matters are expressly excluded from the scope of the instruments adopted so far, in particular the Brussels I Regulation. This question is therefore regulated either by bilateral conventions or by the national procedural laws of the Member States. As a consequence, there are still grounds for non-recognition of judgments and non-contentious decisions given in another Member State. In certain Member States, notaries or other authorities prepare deeds to determine the order of succession and to provide for the administration of the estate. There is currently a lack of provision for the recognition and enforcement of such deeds.

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[17] No choice of law admitted in Austria, Cyprus, France, Greece, Ireland, Latvia, Lithuania, Luxembourg, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Czech Republic. Information is unavailable for Hungary, Malta and Northern Ireland.

[18] Although Belgium grants a limited choice, this choice is not valid if the result is to deprive one of the heirs of his/her rights to a reserved portion to which he/she would be entitled according to the succession law normally applicable.

3.1.6. Problem 5 - Restricted recognition of the status as an heir or as an administrator/executor

Lack of automatic recognition of certificates on the status as an heir. Currently there are various types of evidence to prove the status as an heir in the Member States. Documents concerning one's status of an heir executed in one Member State are at present normally not automatically recognised in other Member States. This gives rise to duplication of procedures to prove one's status as an heir in the country where the property is situated and additional costs and time delays; often heirs are required to initiate new proceedings to obtain a document attesting their status as heir, when in fact such a document has already been issued in another Member State. For example, Luxembourg banks are often faced with the question of the legal value of a German *Erbschein* or a French *acte de notoriété*; in case of non-recognition, the heirs are required to initiate new proceedings before a Luxembourg court to obtain a second proof of their status.

Lack of automatic recognition of the status as administrator/executor with the power to dispose of the estate. The designation of an administrator of the succession or of the executor of a will is either optional or compulsory, depending on the law of the Member State in question. In a few Member States (United Kingdom and Ireland) it is compulsory to appoint an administrator or executor to handle matters of succession. In the majority of Member States this is merely an option and it is upon the moment of the death of a person that the heirs become owners of the deceased's property. The problems faced by citizens are twofold: (i) citizens of those Member States where heirs become owners of the property upon the death of a person see their rights to administer the property refused in those Member States which require the intervention of an administrator or executor; (ii) administrators appointed under the rules of one Member State see their rights refused in a Member State where the property is located.

3.1.7. Problem 6 – Difficulties identifying wills abroad

Even in cases which are purely internal to one Member State, it is not always easy for heirs to know whether the deceased had established a testament, especially in those Member States which authorize handwritten wills with no requirements as regards registration. This question is even more problematic for citizens looking for a will abroad: in ideal cases, the testator warns his relatives or notary that he/she drafted a will in another country. If this is not the case, the heirs and the professionals involved have to investigate if the testator has a will in one of the countries with which he was connected. This situation causes extra work for the legal professionals and triggers severe time delays, uncertainty as to whether wills exist that may change the completion of the succession of the deceased, whether other heirs will step forward, etc. The procedures become extended and complex which in turn results in greater costs.

3.2. Negative consequences faced by Union citizens (the problem)[19]

As outlined above in section 3.1, there is a risk that the outcome of successions with an international element does not match the legitimate expectations of the deceased and the heirs. In particular, the divergent rules may result in the following issues that will be addressed in more detail in the following sections:

- a person who was not expected or intended to inherit the estate may do so; conversely, a person who was intended or expected to inherit may fail to do so;
- the shares of the estate can deviate in size from what was intended or expected;
- heirs face long delays in obtaining their inheritance;
- heirs face significantly higher costs; and
- EU citizens face difficulties in attempting to plan their succession.

We have been unable to collect hard data as regards the extent of these problems; however, each of these problems, the importance of which was confirmed by the stakeholders interviewed for the preparation of the external study, is illustrated by a concrete example in the following section. Further details on all examples by practitioners cited in this section may be found in Annex 8 of the external report.

3.2.1. An intended or expected heir may fail to inherit, or an unintended or unexpected person may inherit

Under the present rules, there is a high risk that an intended or expected heir may fail to inherit or that an unintended or unexpected person may inherit. The practical result can be unfair, e.g. when it leads to discrimination among siblings.

> **Example**: A Spanish father living in Spain owns two houses of equal value, one located in London, the other in Spain. He made a will, leaving the first house to his son, the second to his daughter. Upon his death, the two houses are treated separately, the succession of the first being subject to English law, the succession of the second to Spanish law. Under Spanish law, which provides for an equal statutory reserve for all children of the deceased, the son could claim a share in the house in Spain. Since English law does not provide for such statutory reserve, the daughter would not be allowed to do the same for the house in London. As a consequence, brother and sister could be treated in an unfair manner although their father had wanted to treat them equally.

In addition, sometimes the problem of failing to inherit despite legitimate expectations is faced by children because the ability of minors to own property varies from Member State to Member State.

> Registered partners in particular suffer from not seeing their legitimate expectations achieved in situations in which they do not receive a share of the

[19] While this report focuses on EU citizens, the benefits of any measures taken would extend to any foreign resident in a Member State.

estate because their partnership is not recognized by the national law applicable to the succession. Accordingly, that law will not provide for rights of inheritance for the registered partner.

Similar cases were cited in particular by English, German and Dutch practitioners.

A particular issue arises in relation to the English substantive law of succession, which, as mentioned above, does not provide a statutory share to close family members of the deceased. In case of an Englishman who has made important gifts during his lifetime (gift *intra vivos**), the change of applicable law following the move to another Member State can lead to unexpected results.

Example: An Englishman has invested most of his wealth in a collection of modern art paintings, which he gives away to a museum. Shortly thereafter, he moves to France, where he eventually marries a French woman, and the couple have two children who are also French citizens. When the father passes away years later, the children under the applicable French law of succession are entitled to a statutory share of the inheritance, which in this example would amount to ⅔ of the estate. For the purposes of calculating the value of that share, the value of the estate of the deceased including all gifts made during his lifetime is calculated. Assuming that the value of the collection of paintings amounts to ½ of the estate's total value, the statutory share cannot be satisfied by the remaining assets in the estate. In this case, the children can bring a so-called "claim for reduction" against the museum, forcing it to pay the remaining 1/6 of the estate to complete the statutory share of the children.

3.2.2. Shares of the inheritance may be different to what was intended or expected

The share of the inheritance can be smaller or larger than was originally expected.

Example: A Lithuanian couple has drawn up a joint and reciprocal will, naming the surviving spouse as the heir to the entire estate and the couple's three children as the heirs of that surviving spouse. If that couple e.g. owns a vacation home in France, the French courts will refuse to recognize the surviving spouse as the heir as they do not accept joint and reciprocal wills. Accordingly, French rules will apply. The surviving spouse receives – at his or her choice – either ¼ of the estate or the usufruct of the entire estate. The rest of the estate goes to the children.

Problems can also arise due to the fact that the protection of the surviving spouse can be governed either by family law or by succession law, or by a combination of the two. Since almost all conflict of laws rules differentiate between family law and succession law, it may be that different national substantive rules apply to questions of family law and questions of succession law. Depending on the combination, this can lead either to an unintended decrease (the spouse is protected neither by succession nor by family law) or increase (the spouse is protected by both succession and family law) in the spouse's share of the estate. Examples of such cases were cited by Swedish, Dutch and Spanish practitioners.

3.2.3. Heirs may face long delays in obtaining their inheritance

When the deceased owned property in another Member State, heirs are faced with two main problems. First, they have to prove to the authorities in the second Member State that they are the rightful heirs, which may be difficult in particular if a joint and reciprocal will

not recognized by the second Member State. Secondly, they have to find out about and follow the correct procedures to transfer ownership of the property from the deceased to themselves, e.g. effecting the necessary changes in the land register. An English practitioner cited the example of a client who had to wait two years to settle her inheritance. The non-recognition of decisions and other acts also frequently leads to long delays, as reported by several practitioners. Similarly, the failure to recognize the authority of an administrator/executor causes delays. One practitioner cited the example of a Spanish bank which did not recognise the powers of a Swedish administrator/executor; it took three years before it was possible to access the account.

The legal uncertainty can also lead to an increased risk of dispute amongst the potential heirs. In the case of contentious procedures, practitioners estimate that it may take up to 10 years or more to settle the inheritance, depending on the efficacy of the relevant national legal system.

3.2.4. International aspects lead to significant increase in costs

Successions with international aspects also tend to be much more costly, in particular due to the legal uncertainty faced by the heirs. As the national rules on jurisdiction and the applicable law diverge, it can be difficult to establish which Member State's authorities are competent to handle the succession and which national law applies. Depending on the national competence rules, the authorities in several Member States might consider themselves to be competent (positive conflict of jurisdiction) or, conversely, no Member State's authorities may find themselves competent (negative conflict of jurisdiction). Furthermore, some Member States' conflict of laws rules provide for the application of different national laws depending on the location of the estate ("scission"* of the estate).

Accordingly, in cross-border cases, legal professionals estimate that costs are twice or three times as high as in national cases due to the necessity to seek advice from lawyers, notaries and tax advisers in more than one country. Costs also increase compared to national successions due to additional court costs, witnesses, expert opinions, etc. An English practitioner estimates that, while the costs of a purely national succession might amount to 2% of the estate, a transnational succession would cost the heirs approximately 5% of the estate.[20] A German practitioner cited an example involving property in Spain which cost the heirs € 10,000 more than it would have absent the international element.

These problems are especially difficult for persons with limited financial means, since the legal procedures need to be financed in advance of acquiring the estate, which, as seen above, may take many years. An English legal practitioner estimated that the legal fees for a complicated succession may start at 20,000 Euros. Such an upfront investment can be difficult to finance and can deter potential heirs from even pursuing their rights to the inheritance.

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[20] For more information, see Annex 8 of the external study.

3.2.5. Planning of international succession is difficult

As explained in section 3.1.4, the divergent national substantive and conflict of laws rules pose a challenge for a Union citizen attempting to plan his or her succession in advance, if that succession contains an international element. As most national legal systems currently do not offer any possibility of choosing the law applicable to the succession, the applicable law often cannot be determined in advance. Furthermore, legal professionals in England and Germany cited examples of succession plans that had been voided by a later change in habitual residence of the citizen.

3.3. Scope of the problem

According to the external study, around 4.5 million people die each year in the EU. For successions without an international dimension, it is assumed that the value of the average estate is about € 137,000. Accordingly, the total value of the estates per annum would amount to € 646 bn.

This study currently estimates that about 1 in 10 (that is, about 450,000) successions in the EU have an international dimension. This international dimension, as outlined above, can arise for example due to the existence of movable or immovable property of the deceased in another Member State, due to the deceased's having a nationality other than that of the Member State in which he or she was resident or simply due to the fact that the potential heir lives in another Member State than the last habitual residence of the deceased.

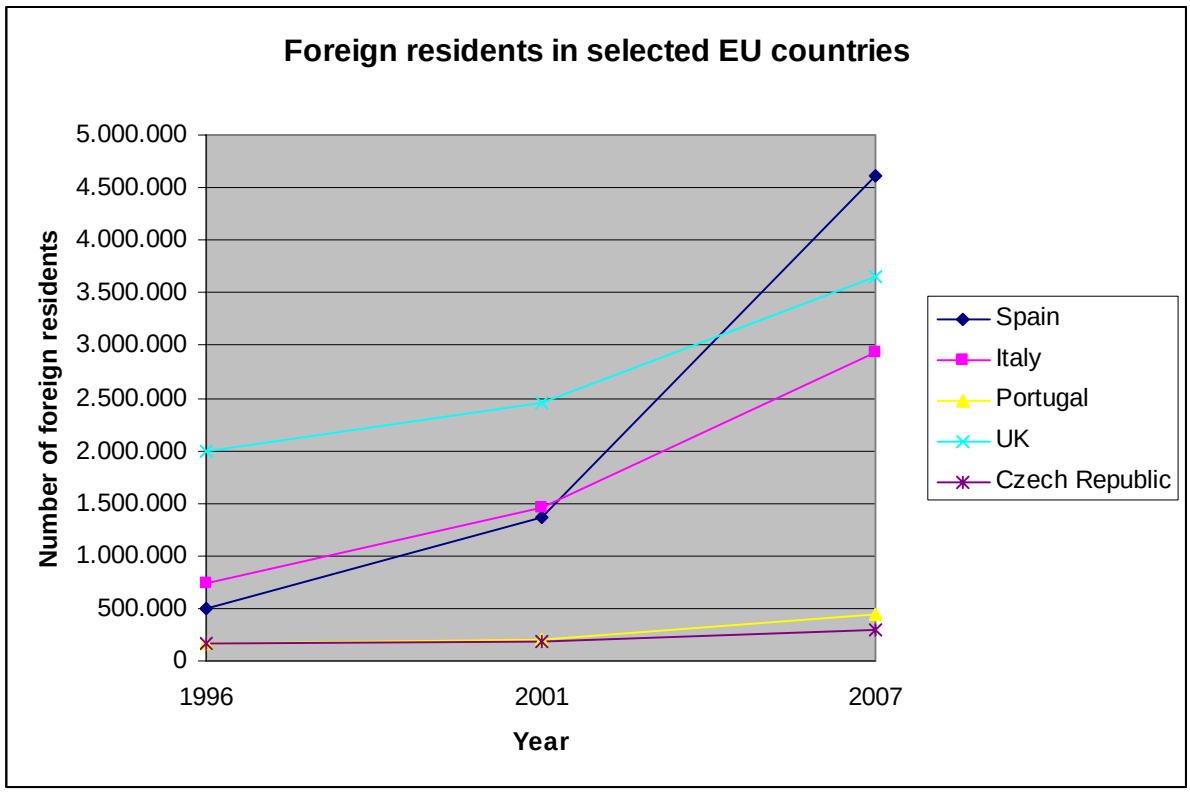
The likelihood of an international element to the succession rises with the value of the estate. A wealthy person is more likely to have e.g. an account or a second home in another Member State. It is therefore estimated that the average value of estates with an international dimension would amount to around double the value of an average estate (i.e. € 274,000), totalling approximately € 123.3 bn euro per annum.

These estates are liable to problems. Even if resolved in a reasonable manner, the costs of legal fees according to estimates by practitioners might amount to between 2% (€ 2.466 bn) and 5% of the total value of international successions (€ 6.165 bn). An average of 3% (€ 3.699 bn) of the value of estates can be considered realistic. Moreover, the costs of delays, which may be measured in terms of years rather than months, might be of the same order of magnitude. Addressing the problems giving rise to the need for legal advice beyond the flat rate norm for a ‘straightforward’ national will and the associated delays could thus generate benefits to EU citizens in the order of € 4 bn per annum.

The heirs are not only faced with legal uncertainty, increased costs and time delays. Depending on the financial situation of a potential heir and the value of the expected shares, the succession may prove to be altogether too costly for the heir. Practitioners cited examples of heirs who were forced to renounce rights to a succession because their enforcement in a foreign Member State would have been too expensive. The complications arising out of such an international connection add to the distress already experienced by many heirs in dealing with the succession of a loved one.

The magnitude of the problem is very likely going to increase in the future, as the number of EU citizens taking advantage of the internal market and the mobility it affords is on the rise continuously. As is evidenced by Eurostat data, while the number of foreign residents stagnates in a few Member States, it increases continuously in others:[21]

Figure 2 – Residents from other Member States in selected EU countries



Further arguments explaining why the magnitude of the problem is likely to increase over the next years are set out in Annex 2.

4. NEED FOR ACTION AT EU LEVEL

The problems outlined above are due to the cross-border nature of succession. National law alone can therefore not solve the problems, and action at Community level is needed. In the absence of such action, there are a number of factors that might lead to an increase in the scale of the problem.

[21] Source: Eurostat statistic "Population par citoyenneté".

4.1. How would the problem evolve, all things being equal?

Given the increased numbers of international marriages, the growing numbers of complex extended and same sex family relations and the rising propensity of estates to include immovable and movable property located in more than one Member State, the costs to EU citizens would probably increase beyond the estimated 4 bn euro per annum without policy changes. Indeed, in view of these developments, a doubling of costs within a period of ten years is not unlikely, particularly as there has been a marked recent increase in foreign property ownership within the EU that is unlikely to level off. Furthermore it has been reported that the incidence of wills being contested has increased, partly because the value of individual successions has increased, leading to greater costs and delays for heirs.

However, other developments also need to be taken into account with regard to the evolution of the problem. It is by no means certain that there will be an increase in the value of estates in successions; indeed there are several tendencies that could reduce it. Firstly, people are living longer and staying active until a much later age. There is evidence that the 'baby boom' generation who have enjoyed high incomes and accumulated wealth may choose to consume it during their retirement years and give less priority to leaving a legacy to their heirs. Secondly, the elderly often incur high health care costs in the years shortly before their death that may, depending of course on the insurance and social security arrangements applying, diminish their wealth. Thirdly, individuals may choose, for tax, altruism or other reasons to give away (parts of) their wealth during their lifetime.

Taking into account these trends and the forecasts as regards the scope of the problem (section 3.3 and Annex 2), in balance it can be expected that problems will get worse at least in the short term; it is reasonable to estimate that the costs of international successions will double within a period of ten years.

4.2. Legal framework in place

As already mentioned, successions are excluded from all instruments adopted so far at EU level in matters of civil judicial cooperation. The problems outlined above are also unlikely to be eliminated by a concerted action of the Member States, e.g. by means of an international convention. Although there have been three Hague Conventions on questions of succession alone, only the first one of 1961, which harmonises the conflict of laws rules relating to the form of testamentary dispositions, has been widely ratified by the Member States[22]. Another convention, dealing with the problem of the administration of the succession, of 1973, was ratified only by a few Member States,[23] and a convention on the

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[22] Hague Convention of 5 October 1961 on the Conflict of Laws Relating to the From of Testamentary Dispositions, in force in the following Member States: Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Poland, Portugal, Slovenia, Spain, Sweden, UK.

[23] Hague Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons; in force in the following Member States: Czech Republic, Italy, Luxembourg, Netherlands, Portugal, Slovakia, UK.

law applicable to the successions of 1989 has never entered into force due to an insufficient number of ratifications by the contracting States[24].

However, national and international action has begun with a view to alleviating the problem of identifying wills in other countries. In 1972, the members of the Council of Europe signed the Basel Convention on the establishment of a scheme of registration of wills.[25] In the past few years, those Member States that previously did not have a register of wills have begun to create such registers. 22 Member States presently have registers of wills at a national or regional level, and two (Bulgaria and Latvia) are in the process of establishing registers.[26] In order to facilitate the exchange of information on the existence of wills, a system for connecting registers of wills has been developed by the European Network of Registers of Wills Association (ENRWA). ENRWA was started by the Slovenian, French and Belgian notary associations in 2005 and is open to all states able to respect the Basel Convention principles and certain other requirements. The following Member States have joined the network to date: Romania, the Netherlands, Portugal, Italy, Bulgaria and Latvia. Moreover, the following additional countries have expressed their intentions to join the ENRWA: Austria, Greece, Luxembourg, Hungary, Poland, the Czech Republic and Slovakia. They will likely become members during the first semester of 2009. The notary associations of Estonia, Germany and Spain are also considering joining the ENRWA but, due to national particularities, are still in the process of investigating the modalities.

Two other key factors influence the success of this trend: the first is the extent to which wills are actually registered. The second factor is whether information from these registers can be obtained efficiently, quickly and at low cost. Ideally, every will would be registered and the registers would be interlinked, allowing a quick search via e.g. a search form. At the moment, the ENRWA requires its members to nominate a contact point in their respective state to deal with inquiries regarding wills. Beyond this contact person system, no connection between the registers exists at this point in time.

4.3. Does the EU have the power to act?

Treaty base. Since the entry into force of the Amsterdam Treaty, the competence of the European Community to act in the area of conflict of laws rules is governed by Article 61(c) of the EC Treaty. Under Article 67 EC, as amended by the Treaty of Nice, the Regulation is to be adopted in accordance with the co-decision procedure of Article 251 EC. Article 65(b) furthermore provides: "*Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market, shall include*: *… promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction*".

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24 Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons; this Convention has never entered into force.

25 Available at: http://conventions.coe.int/Treaty/en/Treaties/Html/077.htm.

26 No information available for Malta.

As outlined above, it is evident that the differences in the conflict of laws and jurisdiction rules create significant obstacles to the free movement of persons and the freedom of establishment. They also impede the full enjoyment of the citizens' right to private property, which according to the established case law of the European Court of Justice (ECJ) forms an integral part of the fundamental rights safeguarded by the Court.[27] Accordingly, there is a need for action at Community level.

Title IV of the EC Treaty, which is the basis for the matters covered by this proposal, does not apply to Denmark by reason of the Protocol applicable to it. Nor does it apply to Ireland and the United Kingdom, unless those countries exercise their right to opt into this initiative as provided by the Protocol annexed to the Treaty.

Necessity test (subsidiarity). The solution to the problems outlined above cannot be adequately attained by the Member States alone, which cannot lay down uniform Community rules, and can therefore, by reason of its effects throughout the Community, be better achieved by action at Community level.

As outlined above in Section 4.2, it is also unlikely that a concerted action by the Member States would make Community action unnecessary, as evidenced by the failed Hague Conventions. Accordingly, Community action is required.

The Community can take measures in accordance with the subsidiarity principle set out in Article 5 of the Treaty. The measures respect the proportionality principle set out in that Article, by increasing certainty in the law without requiring harmonisation of the substantive rules of domestic law. They therefore go no further than necessary. Purely national successions are not affected by this initiative.

Point 6 of the Protocol on the application of the principles of subsidiarity and proportionality provides that "*Other things being equal, directives should be preferred to regulations.*.". For this proposal, however, the Regulation would seem to be preferable as its provisions lay down uniform rules on the applicable law that are detailed, precise and unconditional and require no measures for their transposal into domestic law. If the Member States enjoyed some room for manoeuvre in transposing, the uncertainty as to the law which the aim is to abolish would be restored (see Section 6.3). Regulations have, in the vast majority of cases, been the preferred instrument for mutual recognition in civil law.

5. OBJECTIVES

The overall objective of the Proposal is to contribute to the creation of a genuine European area of civil justice in the field of successions upon death.

The general, specific and operational objectives are summarised in the following table:

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[27] ECJ, Judgment of 3 December 1998, Case C-368/96 – *Generics (UK)*, ECR 1998 I-07967; Judgment of 28 April 1998, Case C-200/96 – *Metronome Musik*, ECR 1998 I-01953.

Overview of general, specific and operational objectives		
General objectives	**Specific objectives**	**Operational objectives**
• To allow citizens to efficiently plan and to organise their succession in advance in a cross border context • To increase the likelihood that the rights of potential heirs, persons formally or otherwise related to the deceased, private and public creditors etc. are respected in an efficient way	To achieve a situation where parallel proceedings do not occur and where different substantive laws are not applied to the same international succession	To adopt common rules on jurisdiction To adopt common rules on applicable law
	To provide a (limited) choice of law for the testator	To introduce harmonised rules providing a limited choice of law to the testator
	To ensure the recognition of rights, relevant acts and decisions regarding successions.	To harmonise rules on the recognition and enforcement of judgments, other decisions and authentic acts / deeds To ensure recognition of the powers of administrators/executors To ensure recognition of the status as an heir
	To increase the accessibility of information on the existence of wills abroad	To create a European system for registering wills and obtaining information on the existence of wills abroad.

6. DESCRIPTION OF POLICY OPTIONS

6.1. Definition of policy options

The policy options have been split into the following two different sets, in order to take account of the different options to be considered (see table below):

- **Policy options A**: Options that address problems caused by national legislative differences concerning devolution of succession with transnational elements (nine different options have been identified); and,
- **Policy options B**: Options that address problems of identifying wills abroad (six different options have been identified).

The preferred option can combine options from both of these sets.

Definition of policy options that address problems caused by national legislative differences concerning successions with transnational elements (Policy Options A)

No common EU level action

- Policy Option A.1: Status quo

EU legislative action

- Policy Option A.2: Harmonisation of jurisdiction rules and introduction of rules on automatic

recognition and enforcement of judgments, other decisions and authentic acts/deeds

- Policy Option A.3: Harmonisation of conflict of law rules
- Policy Option A.4: Harmonisation of conflict of law rules and introduction of a European Certificate of Heir and Executor / Administrator in transnational successions
- Policy Option A.5: Harmonisation of conflict of law rules and jurisdiction rules
- Policy Option A.6: Harmonisation of conflict of law rules and jurisdiction rules, and introduction of rules on automatic recognition and enforcement of judgments, other decisions and authentic acts/deeds (A.2 plus A.3)
- Policy Option A.7: Harmonisation of conflict of law rules and jurisdiction rules, and introduction of rules on automatic recognition and enforcement of judgments, other decisions and authentic acts/deeds, and introduction of a Certificate of Heir and Executor / Administrator in transnational successions (A.2 plus A.4)

Non-legislative action

- Policy Option A.8: Establishment of a database / knowledge management system on conflict of laws, jurisdiction rules and competent bodies
- Policy Option A.9: EU wide information campaign on succession (legislation and existing / forth-coming instruments)

Definition of policy options that address problems of identifying wills abroad (Policy Options B)

No common EU level action

- Policy Option B.1: Status quo

EU level action (legislation and funding)

- Policy option B.2: Commission Recommendation on the establishment of interconnected national registers of wills and organisation of information campaigns.
- Policy option B.3 Compulsory establishment of interconnected national registers of wills.
- Policy option B.4 Establishment of a central EU Register of Wills.

Non-legislative action

- Policy Option B.5: Creation of a webpage on existing registers of wills and national rules.

- Policy Option B.6: National information campaigns on wills (legislation and existing / forth-coming instruments)

6.2. Description of policy options

6.2.1. Policy options A addressing problems caused by national legislative differences concerning successions with transnational elements

Policy Option A.1 - Status quo. Under this policy option there would be no common EU legislative action.

Policy Option A.2 - Harmonisation of jurisdiction rules and introduction of rules on automatic recognition and enforcement of judgments, other decisions and authentic acts/deeds. This option would imply EU legislative action in terms of a Regulation establishing harmonised rules on jurisdiction and recognition and enforcement of judgments, other decisions and authentic acts/deeds. The Regulation would establish one unique head of jurisdiction, i.e. the court of the deceased's last habitual residence, which would have competence for the whole succession (movable and immovable property).[28] Like the Brussels I Regulation, this Regulation would also include rules on lis-pendence* and other procedural rules.[29] Following the example of the Brussels I Regulation, the instrument would introduce rules on recognition and enforcement. The general rule would be automatic recognition of judgments and other decisions given in one Member State in matters of successions in all other Member States. The partial or total refusal would be allowed in exceptional cases only[30]. As regards enforcement, the general rule would be that a judgment given in one Member State and enforceable in that Member State would be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there (see Article 38 Brussels I Regulation).

Policy Option A.3 - Harmonisation of conflict of laws rules on successions upon death. This option consists of adopting harmonised conflict of laws rules to ensure that the whole succession (movable and immovable property) is governed by a single law, the law of the deceased's last habitual residence. The testator would also be allowed to choose instead the law of his or her nationality. These rules could also lead to the application of the law of a third state. The applicable law would not only govern the determination of the

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28 The courts of the Member State in which immovable property is located might also be granted jurisdiction, not to rule on succession as such, but with regard to property rights which are often linked.

29 E.g. a rule allowing the competent court to send the case before a more closely connected court.

30 Article 34 Brussels I Regulation and Article 22 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ("Brussels II bis") contain four grounds for refusing to recognise foreign judgments: (i) if such a judgment is manifestly contrary to the public policy of the Member State of recognition; (ii) in case of violation of the rights of the defending party; (iii) if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought; (iv) if it is irreconcilable with an earlier judgment given in another State, provided that this earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

heirs and their respective shares, but also any obligation to restore or account for gifts made during lifetime, the statutory share, administration and distribution of the estate. In practice, this would mean that an administrator nominated in one Member State would also be allowed to act in other Member States.

Policy Option A.4 - Harmonisation of conflict of laws rules and introduction of a Certificate of Inheritance and Executor / Administrator in transnational successions. Under this option, in addition to the establishment of harmonized conflict of laws rules (see Policy Option A.3 above for description), a European Certificate of Inheritance and/or of Administrator/Executor would be introduced. This certificate, which would be based on a harmonised form included with the legislative measure, would serve as proof of heirship and/or of the power of administration in all Member States, allowing the heir or administrator to manage and eventually distribute the estate. The Regulation would also specify the conditions under which third parties can rely upon the content of the certificate.

Policy Option A.5: Harmonisation of conflict of law rules and jurisdiction rules. This option consists of a combination of Policy Option A.3 with a more limited version of Policy Option A.2, namely, an establishment of one single head of jurisdiction at the last habitual residence of the deceased, which would have competence for the entire succession.

Policy Option A.6: Harmonisation of conflict of law rules and jurisdiction rules, and introduction of rules on automatic recognition and enforcement of judgments, other decisions and authentic acts/deeds. This option, which is slightly wider in scope than Policy Option A.5, entails a combination of Policy Options A.2 and A.3 described above.

Policy Option A.7: Harmonisation of conflict of law rules and jurisdiction rules, and introduction of rules on automatic recognition and enforcement of judgments, other decisions and authentic acts/deeds, and introduction of a Certificate of Inheritance and Executor / Administrator in transnational successions. This option represents a further increase in scope, combining Policy Options A.2 and A.4 described above.

Policy Option A.8: Establishment of a database / knowledge management system on conflict of law, jurisdiction rules and competent bodies. This non-legislative option would entail the creation and maintenance of a database providing information on the various national rules governing applicable law and jurisdiction, as well as on the relevant competent authorities in the Member States. Such a database would be accessible via the Internet and could be linked to from the European Judicial Network's website[31] or the e-Justice portal[32].

Policy Option A.9: EU-wide information campaign on succession (legislation and existing/forthcoming instruments). This option, which is also non-legislative in nature, could consist of a combined EU and national initiative to inform EU citizens of the

[31] http://ec.europa.eu/civiljustice/.
[32] http://www.ejustice.eu.com/.

various national rules governing successions. It could either be run as an independent initiative or as part of a larger EU information campaign.

6.2.2. Policy options B addressing problems of identifying wills abroad

Policy Option B.1 - Status quo. The Community could refrain from taking any action to facilitate identifying wills abroad.

Policy Option B.2 - Commission Recommendation on the establishment of interconnected national registers of wills and organisation of information campaigns. This option would entail the adoption of a Recommendation encouraging the Member States to establish national registers for wills where such a register does not yet exist, and to provide for a connection between the individual national registers for ease of obtaining information on the existence of a will in another Member State. This connection could be provided via the European Network of Registers of Wills Association (ENRWA) described above in Section 4.2. Concurrently, the Recommendation would encourage the Member States to run a publicity campaign informing the public about the existence of the registers and the benefits of registering wills would be conducted.

Policy option B.3 - Compulsory establishment of interconnected national registers of wills. Under this option, the EU would adopt a directive requiring all Member States to establish national registers of wills and connect to the other registers, e.g. via the ENRWA system. The Community could furthermore provide funding to assist transnational cooperation.

Policy option B.4 - Establishment of a central EU Register of Wills. The EU could create a central EU register by means of adopting a regulation. EU citizens would then be able to register their wills using a standard form available in all 23 official languages, e.g. via the Internet. An administrative office would have to be set up to manage the database and provide help to users. Information on the existence of a will would only be given upon proof of death of the person in question.

Policy Option B.5 - Creation of a webpage on existing registers of wills and national rules. This is a non legislative action. The webpage would provide contact information for the existing registers of wills as well as information on national rules governing succession. It could be included in the e-Justice portal.

Policy Option B.6 - National information campaigns on wills (legislation and existing/forthcoming instruments). This is another non legislative action which could either be adopted on its own merits to inform citizens about the current legal situation or in combination with other options.

6.3. Discarded policy options

Another option is the ratification of the 1989 Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons,[33] eventually in combination with other measures. However, this option was discarded since experts and stakeholders agree on the shortcomings of this Convention with regard to the harmonisation of the law applicable to an international succession. These shortcomings have led to the fact that, almost 20 years after its signature, the Convention has yet not entered into force. It results from the consultations that Member States do not intend to ratify it. In addition, the flaws of this convention cannot be remedied by combining these rules with other measures, such as harmonisation of jurisdiction rules or rules on recognition and enforcement since Member States would not accept to tackle the latter without having harmonised rules on applicable law. Therefore this option has also been discarded.

With regard to the policy options which imply EU legislative action, theoretically either a Regulation or a Directive is possible. For this proposal, however, the Regulation would seem preferable since its provisions lay down uniform rules on the applicable law that are detailed, precise and unconditional and require no measures for their transposition into domestic law (see Section 4.3). If the Member States enjoyed some room for manoeuvre in transposing, the uncertainty as to the applicable law which the aim is to abolish would be restored and the defined objectives would not be met. The same solution is suggested with regard to the establishment of a European Register of wills if policy option B.4 on a European central register will be followed, because such Register should be based on the same rules in all Member States. By contrast, for the compulsory establishment of interconnected national registers of wills (policy option B.3), a directive would be the preferable legal instrument since Member States would be required to establish a national register.

6.4. Alternative elements which could have formed part of policy options A

As concerns the definition of policy options A, *theoretically* it would also be possible to assess other options. Most of these options would have consisted of isolating different elements of option A (e.g. an instrument proposing harmonisation of jurisdiction rules only or the introduction of a European certificate as to successions only). The reasons why these options alone do not solve the problems faced by citizens and have, as a consequence, been discarded are outlined in the external study.

The definition of the options overall involves a large number of rather specific elements. Details of such specific elements may be extremely important for the effects of legislation (compare e.g. the word ‘should’ to ‘may’). It was however decided to assess only "full" policy options that already combine selected elements, in particular as several good sources of information on the ‘preferred’ alternative elements are available, i.e. the 2002 Study, the Green Paper responses and the work of the Expert Group. The individual relative advantages of alternative elements are not assessed since this would not only provide an artificial picture of the potential impacts, but worse; it would not provide a

[33] Available at: http://www.hcch.net/index_en.php?act=conventions.text&cid=62.

correct picture of the results of adopting various individual elements. Furthermore, in view of the vast number of theoretical possibilities to combine different elements, it is not practically feasible to assess all potential combinations of alternative elements.

To illustrate these challenges, take the example of "habitual residence" as the unique connecting factor for conflict of laws rules, which can be combined into at least 480 'realistic' proposals.[34] Furthermore, five of the total nine identified policy options include conflict of laws rules, i.e. these elements can also be combined with the alternative elements of the other options (jurisdiction and recognition, European Inheritance Certificate, etc.).

Hence, given that some of these alternative elements are very sensitive from a political point of view, the reasons for which they have been preferred to others, which have been discarded, need to be explained.[35]

The use of habitual residence as a unique connecting factor rather than nationality. Habitual residence, favoured by the majority of stakeholders, corresponds to the practical needs of the large majority of successions: in general, it is the place where most of the assets, the heirs and the creditors are located. Should there be closer links to the country of nationality, the proposed Regulation provides for an exception. It could be argued that nationality would provide more legal certainty as it is easily ascertainable and that the use of habitual residence would allow for abuse of the system (citizens could change habitual residence in order to avoid the reserved portion). Hence, not only is the risk of abuse very limited (there is only one Member State in which there is no protection in the form of reserved portion), but there are several other reasons why nationality has been discarded: further rules would be needed in the more and more frequent cases of deceased having two or more nationalities; it is inappropriate if the deceased has settled in a Member State of which he is not a national and has lived there for many years; it is not in line with the principles of the Internal market which aims at abolishing discriminations among citizens living in a same Member State. For all these reasons the trend in national legislation also tends towards replacing nationality by habitual residence.[36]

Introducing a unitary system rather than a system of separate conflict rules for movable and immovable property. Although ten Member States have a system where

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34 Alternatives that could have been considered include, amongst others, the possibility to choose nationality instead of habitual residence as the unique connecting factor; to introduce a hierarchy of connecting factors in the order habitual residence, nationality, or the other way around. All of these alternative elements can furthermore be combined with a (limited) choice of law, which would change the impacts of the alternative elements. The testator could e.g. be enabled to choose the applicable law on the basis of habitual residence or nationality; or, additionally, of the matrimonial property regime. This choice of law could in turn be restricted to prevent decrease of the statutory reserve. To examine all these options would have meant analysing more than 400 possible combinations. Please also see the external study for more detail on the discarded policy options.

35 Section 7.7 further develops the advantages and drawbacks of the preferred alternative elements.

36 Habitual residence is used by the Hague Convention and at least 12 Member States: Belgium (movables), Bulgaria (movables), Cyprus (movables), Denmark, Estonia, Finland, France (movables), Luxembourg (movables), Ireland, Lithuania, the Netherlands and the UK (England and Wales; Scotland: for movables only).

movable and immovable property can be subject to different laws if they are located in different countries, this solution would perpetuate a situation where citizens would need to take into account the often conflicting rules of different substantive national laws on successions. The general and specific policy objectives would not be met. This view is shared by the legal professionals consulted who unanimously reject a split system.[37]

Providing for a (limited) choice of law for the testator. The protection of compulsory inheritance right for the benefits of close family members (in particular children) could be a reason for refusing any choice of law to the testator. However, this risk of abuse is very limited given that such compulsory rights are known by all Member States except one, which therefore have legislation to prevent the deceased from circumventing those compulsory inheritance rights.[38] To the opposite, in the consultations some stakeholders wish a larger choice for the testator (including, for example, the law of the matrimonial property regime). However, this solution is not compatible with the solutions in place in the Member States where choice of law, if any, is very limited. A large choice would also increase the risk that the protection of compulsory inheritance rights is undermined. As a consequence, only a limited choice of law can realise the overall objectives of the present initiative.

Inclusion of the administration of a succession into the scope of the future Regulation. In the consultations some Member States question any solution which would modify the regimes governing the administration of a succession, either because they fear the instrument might affect their regime of transfer of the estate's assets or because they want to safeguard their inheritance tax collection schemes. Yet, the instrument will not govern property rights which are outside the scope of Community competences. In addition, the Commission proposal contains a specific rule to preserve national mandatory rules relating to the nomination of an administrator and tax collections schemes. As a consequence, the limitation of the scope goes far beyond the legitimate requests of Member State and would prevent the present initiative to fulfil its objectives in respect of citizens who need to proof their status as an heir or as an administrator/executor in another Member State.

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37 See Annex 17 of the external study "Legal professionals' views on alternative elements of the policy options.

38 Accordingly, if the future deceased gives away a large part of the estate as a gift to a third party, this gift could potentially be subject to a claim for reduction in very exceptional circumstances. Nevertheless, one Member State (United Kingdom for England and Wales), whose law does not know such claims for reduction, has expressed concerns as regards the effects of an EU instrument on the validity of lifetime gifts made by the deceased.

7. ANALYSIS OF THE IMPACTS OF THE POLICY OPTIONS

7.1. Impact of the Policy Options addressing problems caused by national legislative differences concerning successions with transnational elements (Policy Options A)[39]

Policy Option A.1 - Status quo. (i) Objectives to achieve: This option would not meet the objectives outlined above. Member States may make changes to their national legal systems on their own initiative, but it is unlikely that these will be made in view to streamline the country's rules with other EU Member States' rules to facilitate international succession. On the contrary, the situation would worsen in view of the trends of EU citizens' increasing international connections; negative effects are likely to become aggravated for citizens. More serious problems could in the long term reduce citizens' trust in the EU internal market and European citizenship. **(ii) Fundamental Rights**: Maintaining the *status quo* would mean that the fundamental right to property according to Article 17 of the European Charter of Fundamental Rights and Article 1 of Protocol 1 to the European Convention on Human Rights, which includes the right of heirs of property inherited from a deceased person on the basis of a will or intestate succession, is not fully operative with regard to property situated in another Member State. Even if the right of the heir to the estate has been acknowledged by the courts of the Member State in which the heir is habitually resident, this judgment may not help to enforce his right to property in another Member State. Furthermore the fundamental rights in Articles 20 and 21 (equality before the law, non-discrimination) would not be fully respected if the *status quo* was maintained, because heirs living in the Member State where certain property of the deceased person is situated may have advantages compared to heirs living abroad. In particular, discrimination on the basis of nationality of the different heirs is possible as jurisdiction in succession matters is still, in the domestic law of many Member States, dependent on the nationality of the deceased or the heir. With regard to Article 24 on the rights of the child, the negative consequences of the status quo in cross-border successions (time delays, cost increases) are aggravated if minors are amongst the heirs, since they are unable to protect their legal interests themselves, but need to be represented by a guardian who has to be paid in addition to the lawyers. **(iii) Social effects**: The problems experienced by the economically disadvantaged and by children are likely to remain and even become more severe as costs are likely to rise in view of increasing international connections. With regard to the present problems experienced by citizens who have concluded a civil/registered partnership in one Member State, the situation may improve as their status and rights may be recognised in more countries than at present. **(iv) Financial cost:** The option itself would not imply any financial costs to the EU or other public authorities. **(v) Economic effects**: Legal professionals will be able to charge more for increasingly complicated cases due to links to two or more countries. Time delays and costs, including reduction of the value of assets, will become worse.

Policy Option A.2 - Harmonisation of jurisdiction rules and introduction of rules on automatic recognition and enforcement of judgments, other decisions and authentic acts/deeds. (i) Objectives to achieve: Overall, this option would only lead to limited

[39] The external study contains a more detailed analysis of the impact of each policy option.

positive effects. Even though it is likely to reduce the number of problems, it is unlikely that Member States will accept that the State of the deceased's last habitual residence has exclusive jurisdiction as regards their own nationals and over the estate located in their territory without harmonisation of the applicable law. As a consequence, several jurisdictions would still be competent to handle the case at the same time, with varying outcomes, which would also have negative effects with regard to the recognition of judgments. **(ii) Fundamental Rights:** By reducing slightly the number of problems, thus creating a positive economic impact, this option would promote fundamental rights to a greater extent than the *status quo*. **(iii) Social effects**: There would be minor improvements compared to the present situation for economically disadvantaged persons and children as costs for legal advice and assistance could slightly decrease. **(iv) Financial costs:** Costs for administrative work to produce the necessary legislation at EU level and legislative changes at national level. Effective enforcement would require some minor expenditure on awareness rising. **(v) Economic effects:** This option would imply some limited cost savings, estimated to a maximum of 5% of the costs currently pertaining due to the problems addressed. It would in particular lead to cost savings in those cases where only one Member State has jurisdiction. Costs would decrease for heirs as it would not be necessary to prove that they are indeed heirs by bringing proceedings in another Member State. Furthermore, the option would also lead to cost reductions in Member States requiring exequatur* of foreign decisions; such proceedings would no longer be necessary. Overall, the option would, however, not achieve the objectives.

Policy Option A.3 - Harmonisation of conflict of law rules. (i) Objectives: The policy option would have some limited positive impacts with regard to achieving the objectives. Several jurisdictions could still handle the case (i.e. the problem of parallel proceedings would remain), but they would all apply the same conflict of law rules and, as a result, (normally) the same substantive succession law and the introduction of choice of law would help citizens to better organise their succession. However, due to varying interpretation of the concept of habitual residence, different laws may still be applied by the courts of different Member States in the short term (which will be reduced in the long term through case law/rulings by the ECJ).[40] Furthermore, different law may still be applied to a succession due to different requirements to pleading and proof of foreign law. Finally, the same law may also be applied slightly different in different countries due to difficulties in applying foreign law. In certain cases the policy option may help. In particular, it may prevent the phenomenon of forum shopping (at present heirs may try to get the succession handled by a certain jurisdiction depending on what law the court will apply, i.e. depending on what law has the best outcome for them). But since there are no rules on recognition and enforcement, heirs may have to go through the same procedures in another Member State. Problems due to lack of recognition of the powers of administrator's/ executors would remain, slowing down the administration and distribution of the estate. **(ii) Fundamental Rights**: With increased legal certainty and a lower risk that the outcome of the succession differs among Member States, the enforcement of the rights of citizens in other Member States is improved. Due to the introduction of a choice

[40] A reference for a preliminary ruling is already pending before the ECJ: ECJ, Case C-523/07 – Applicant A – Reference for a preliminary ruling from the Korkein hallinto-oikeus (Finland) lodged on 23 November 2007.

of law, a child may in some rare cases lose a reserved portion; this is not likely to happen very often in practice, depending on the extent to which the testator is allowed to choose the law applicable to his/her succession. **(iii) Social effects:** The positive impact mainly consists of the increase in legal certainty and the resulting economic consequences. It may in many cases help to avoid litigation between family members, such litigation being a particular strain for vulnerable parties and children. The positive economic effect of this option for those citizens who have entered into civil partnerships there will be greater certainty with regard to the outcome in terms of whether the rights of civil partners (as heirs) are recognised or not[41]. **(iv) Financial costs:** Financial costs for administration would be very low for the introduction of new rules. The introduction of the unitary succession system and of habitual residence as dominant connecting factor as well as the admission of limited choice would tend to decrease costs for applying foreign law, to a differing extent in different Member States. **(v) Economic effects:** Cost savings would amount to maximum 10% due to decreased legal uncertainty. There would be cost reductions for citizens in terms of reduced legal fees, in particular in those cases when the deceased made a choice of law. Moreover, costs would also be reduced as legal professionals would not need to look into other countries' conflict of law rules. However, there would still be costs due to non-recognition. With regard to increased costs for citizens, in those countries where citizens have to prove foreign law (e.g. in the United Kingdom) costs would be higher than at present when laws of other countries, in particular third countries, are applied (for example, if the deceased had his/her habitual residence in China, Chinese law would be applied, which the citizen would need to 'prove' unless a choice of law of the nationality of the deceased had been made).

Policy Option A.4 - Harmonisation of conflict of law rules and introduction of a Certificate of Inheritance and Executor / Administrator in transnational successions. (i) Objectives to achieve: Although this option would not fully achieve the objectives, it would have some advantages compared to the current situation. In addition to the positive impact of option A.3, the key benefits of this option are that it would reduce current problems in terms of time delays and costs by speeding up the administration and devolution of the estate if the executor/administrator is allowed to act in the entire EU, and the heirs obtain a certificate proving in all Member States that they are, indeed, the rightful heirs. However, if there is no harmonisation of jurisdiction rules there will still be parallel proceedings. As a result, certificates may be issued in different countries. **(ii) Fundamental rights and (iii) Social effects:** Slightly improved compared to option A.3 due to positive economic effects.[42] **(iv) Financial costs:** In addition of those of option A.3, those Member States that currently do not have a certificate would need to introduce it. There would be a small administrative cost for issuing the certificate in those Member States. This may however, be offset by a court fee. **(v) Economic effects:** Cost savings would amount to maximum 15% due to decreased legal uncertainty.

Policy Option A.5 - Harmonisation of conflict of law rules and jurisdiction rules. **(i) Objectives to achieve:** The same jurisdiction rules would be applied across all Member States, which would create some increased legal certainty with regard to which country

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41 Except if the "ordre public" clause is applied.

42 See the external study for more detail.

will handle the case and the outcome thereof, in particular as conflict of law rules would also be harmonised. Moreover, if jurisdiction rules are harmonised, there will be less conflicting proceedings. However, as recognition and enforcement is still based on bilateral agreements or on national law, proceedings may still take place in different Member States. Furthermore, normally harmonisation of jurisdiction rules is only a means to facilitate the national recognition and enforcement of decisions between Member States; none of the existing Conventions or Regulations harmonise jurisdiction rules without also harmonising recognition and enforcement of decisions. **(ii) Fundamental rights and (iii) Social effects**: Similar to options A.3., A.4 and A.5. **(iv) Financial costs:** Administrative costs more or less similar to the added costs of options A.2 plus A.3. **(v) Economic effects:** As for policy option A.4 cost reductions can be expected to be maximum 15%.

Policy Option A.6 - Harmonisation of conflict of law rules and jurisdiction rules, and introduction of rules on automatic recognition and enforcement of judgments, other decisions and authentic acts/deeds (A.2 plus A.3). (i) Objectives to achieve: This option is more advantageous than the previous options as it combines the three main legal elements used to handle international successions at present (jurisdiction rules, conflict of law rules and rules on recognition and enforcement). Harmonised jurisdiction rules that provide exclusive jurisdiction to a Member State in combination with rules on recognition and enforcement would significantly reduce the scope for parallel and conflicting proceedings or lack of proceedings. Even if an exclusive jurisdiction of only one Member State would not be introduced, the harmonised jurisdiction rules would lead to very few possibilities for parallel proceedings. Predictability of the outcome of the international succession would be greatly improved in those cases where a choice of law was made by the deceased. The choice is likely to be recognised in other Member States due to the rules on automatic recognition and enforcement. This option would therefore be beneficial for heirs (and deceased/testators) in that the succession could be finalised faster, in particular in those cases where the deceased had made a choice of law, as proceedings may be quicker. With regard to the disadvantages of the option, due to the lack of a certificate of administrator/executor it is not certain that an administrator/executor could exercise his/her powers in other Member States under this option. **(ii) Fundamental rights and (iii) Social effects**: Slightly improved compared to option A.6. **(iv) Financial costs:** Administrative costs more or less similar to option 1.5. **(v) Economic effects:** The option would lead to cost reductions of maximum 20% and would be a great improvement to the current situation in terms of achieving the objectives.

Policy Option A.7 - Harmonisation of conflict of law rules and jurisdiction rules, and introduction of rules on automatic recognition and enforcement of judgments, other decisions and authentic acts/deeds, and introduction of a Certificate of Inheritance and Executor / Administrator in transnational successions (A.2 plus A.4). On the basis of the assessment of the policy options, option A.7 is the preferred one as it would address most of the current problems and lead to the greatest cost reduction (maximum 30%). It is the most ambitious policy option and, correspondingly, goes furthest in terms of the challenges it is designed to address. The following table presents its impact in a more detailed manner than for the other options:

Table - Summary assessment of Policy Option A.7		
Objective to be achieved/ problem addressed	***Anticipated impact effectiveness (rated from – to √√√√√√√√√)***[43]	***Explanation of rating and aspects of the policy option necessary to achieve impact***
To achieve a situation where parallel proceedings do not occur and where the same substantive law is applied to the entire international succession	√√√√√√√√√	This option would introduce harmonised jurisdiction rules and conflict of law rules, with habitual residence as the sole connecting factor. Apart from an EU wide succession system where all countries have the same substantive rules, this option best addresses the problems. Harmonised jurisdiction rules that provide exclusive jurisdiction to a Member State in combination with harmonised conflict of law rules and rules on recognition and enforcement and a common certificate of heir (see below) would significantly reduce the scope for parallel and conflicting proceedings or lack of proceedings. Despite the harmonised conflict of law rules, challenges may arise in achieving a unified definition of "habitual residence". In this respect, legal certainty would increase in the longer term (e.g. through case law/rulings by the ECJ). A reference for a preliminary ruling regarding the interpretation of the concept of habitual residence, which is also used in other Community instruments, is currently pending before the ECJ.[44]
To provide a (limited) choice of law for the testator	√√√√√√√√√	This option would provide the testator with a limited choice of the applicable law as part of the conflict of law rules, which would be recognised across the EU and would facilitate planning of the succession. Moreover, the succession would be finalised faster, as proceedings will be quicker and rules will be much clearer with regard to who is the heir (and proving this).
To ensure the recognition of: • Judgments, other decisions and authentic acts / deeds on international successions; • The powers of administrators/ executors; and, • The status as an heir	√√√√√√√√√	This option would introduce rules on automatic recognition and enforcement of judgments, other decisions and authentic acts/deeds. It would also include the introduction of a European Certificate of inheritance and Executor/Administrator. Problems with regard to the recognition of the powers of executors/administrators and decisions would be solved. Problems in relation to recognition or enforcement of judgments/decisions concerning the determination of the heirs are likely to be resolved. Moreover, the powers of executors/administrators would be recognised, thus facilitating administration and distribution, and legal fees and time delays would be reduced. This option would in particular be beneficial for the heirs as implementation and administration would be improved (with regard to the proceedings as well as the outcome of the proceedings).
To increase the accessibility of information on the existence of wills abroad	–	More citizens may draw up wills in order to take advantage of the possibility to choose the applicable law. Despite the current developments in the Member States which are establishing and interconnecting registers of wills, the problems in relation to obtaining information on the existence of a will abroad may therefore increase at least in the short term.
Fundamental rights: Article 17 – Right to property Article 20 – Equality before	**Article 17 – Right to property**: The right to property would be reinforced. First, testators would enjoy a greater freedom in planning their succession and would have greater security that their intentions would be carried out; secondly, by introducing a faster and more coordinated process, heirs would receive their part of the succession more quickly, and cases of heirs having to give up rights to an inheritance due to legal complexity and pre-emptively high costs would be reduced if	

43 Maximum of 10 checkmarks indicates that the option fully meets the objective(s).

44 ECJ, Case C-523/07 – Applicant A – Reference for a preliminary ruling from the Korkein hallinto-oikeus (Finland) lodged on 23 November 2007.

Table - Summary assessment of Policy Option A.7		
Objective to be achieved/ problem addressed	***Anticipated impact effectiveness (rated from – to √√√√√√√√√)***[43]	***Explanation of rating and aspects of the policy option necessary to achieve impact***
the law Article 21 – Non-discrimination Article 24 – The rights of the child	not eliminated. **Article 20 – Equality before the law:** The measure would have a positive impact on equality before the law, as the same law would be applied across the EU regardless of jurisdiction and forum shopping would be avoided. **Article 21 – Non-discrimination**: For same-sex couples, the measure would improve the possibility to dispose of their property to the benefit of their partner regardless of where they have their habitual residence. **Article 24 – The rights of the child**: Children are typically involved in succession cases as heirs rather than deceased or testators. As a consequence, the measures under this option which improve the legal situation of heirs would have at the same time positive impacts on children. The introduction of a right of the testator to choose the law applicable to his succession in cross-border cases may in some cases weaken the legal position of children even if such choice is very limited (nationality or habitual residence). For instance, a child being entitled to a reserved position of the estate under the law of deceased's last habitual residence (e.g. French law) may lose such a reserved portion if the testator has validly opted for the application of a law which does not recognise a reserved portion of children (e.g. English law). However, the negative impacts of such a limited choice of law on children would only occur in rare cases (most Member States recognise a reserved position of children of the deceased), and are outweighed by considerable positive effects in most cases (in particular increase of legal certainty, avoidance of legal disputes over conflict of law issues, costs savings etc.). Legal practitioners have confirmed that parents only very rarely give their children inheritance of a value which is lower than the reserved portion. Whether the option would lead to positive effects for a child of a non-married couple or of a same-sex couple to have its rights in cross-border successions recognised in other Member States is doubtful, since preliminary questions concerning who qualifies as an heir (e.g. spouse, children, close relatives, etc.) are not included in the option. Subject to the case law of the European Court of Human Rights, the determination of who is a 'child' of the deceased (e.g. whether a child born out of wedlock is a 'child' of the deceased parent or whether the child of a same-sex couple is the child of both parents) would therefore still be governed by the national conflict of law rules on family law of the jurisdiction seized. Harmonisation of substantive family law would be required to enforce the right of these children in Member States where such rights are not, or not to the same extent, recognised as in other Member States. This is, however, outside the Community's competence.
Social effects	There would be considerable benefits for economically disadvantaged persons and children as legal fees would be lower than at present. The positive impacts of the Regulation on the situation of children mainly consist of increased legal certainty in cross-border successions and the resulting economic consequences (decrease of costs, enforcement of hereditary rights without time delays etc.). As a rule, this will also have a 'social impact' on children, because it may in many cases help to avoid litigation between family members, such litigation being a particular strain on children. The option would lead to positive effects for same-sex couples. The determination of who qualifies as an heir if the deceased dies intestate is left to the national substantive law and lies outside the Community's power to act; however, a same-sex couple would be free, within certain limits, to choose the law applicable to their succession and could thus in certain cases ensure the application of a law that recognizes the inheritance rights of the surviving partner.[45]
Legislative effects	***Jurisdiction rules, recognition and enforcement*** The adoption of the Regulation would lead to changes of national legislation concerning issues not indicated in the Regulation (e.g. which court/authority locally would need to handle the case, what type of court/authority etc.). The Regulation will also only establish the basic principles on recognition and enforcement of foreign decisions; the details of the enforcement procedure will be determined by the Member States but in

45 The proposal's impact on the rights of the children of such couples are mentioned under "Fundamental Rights".

Table - Summary assessment of Policy Option A.7		
Objective to be achieved/ problem addressed	***Anticipated impact effectiveness (rated from – to √√√√√√√√√)***[43]	***Explanation of rating and aspects of the policy option necessary to achieve impact***
	most cases will likely not differ from the procedures already in place today. ***Conflict of law rules.*** No national additional rules are normally necessary; the Regulation would be directly applicable in all Member States. Member States may have to modify or abolish a few rules in order to ensure a smooth integration of the Regulation into their national legal system. ***Certificate.*** For those countries who at present do not issue certificates of inheritance, this would entail some legislative changes to introduce the relevant procedure; for those Member States that already have certificates, the procedures may have to be adapted slightly to take into account the uniform EU format.	
Essential accompanying measures	***General.*** Training of legal professionals (e.g. lawyers, judges, notaries, solicitors) and judicial cooperation. ***Certificate.*** Clear template for the certificate(s). It would need to be determined if there would be fixed costs for obtaining a certificate across the EU (for example, a fee would be charged rather than having to pay a proportion of the property, as currently is the case in e.g. Germany, where the certificate is used for taxation purposes).	
Financial costs	***General.*** Costs for administrative work to produce the necessary legislation at EU level. This is estimated to be the equivalent of one Full Time Equivalent Commission official during one year. Training of legal professionals to ensure judicial cooperation. ***Jurisdiction rules.*** Costs to establish the necessary additional changes of national legislation in the Member States with regard to the harmonised jurisdiction rules, e.g. what court/authority would need to handle the case, and enforcement. ***Applicable law.*** Financial costs for administration would be low for the introduction of the new rules; costs would be similar to the costs for the introduction of the Rome I and II Regulations. ***Certificate.*** The Member States that currently do not have a certificate would need new legislation to identify what body should issue the certificate and what proceedings would lead to it. There would also be a small administrative cost of issuing the certificate in those countries that do not have a certificate at the moment. This may be weighed up by a court fee.	
Economic effects	This option would lead to cost reductions of maximum 30% of the costs currently pertaining due to the problems addressed by the policy option. These cost savings would be a result of clearer rules on which jurisdiction will handle the case, that the same law is normally applied independent of jurisdiction and that the outcome of the succession not only is the same across the EU, but also is recognised across the Union and that heirs can prove their rights.	
Benefits and advantages	This option would solve most of the problems experienced at present, which can be solved without amending national substantive laws.	
Disadvantages and risks	The political feasibility of the option; it is the most far-reaching option of those identified and therefore could potentially give rise to more political opposition than a less ambitious measure.	

Policy Option A.8: Establishment of a database / knowledge management system on conflict of law, jurisdiction rules and competent bodies. (i) Objectives to achieve: If citizens are more aware that another country may have jurisdiction over (parts of) their succession and that another country's law may be applied with different outcomes than expected, they would be (slightly) better prepared and may e.g. seek legal advice. However, the database would need to be regularly updated and translated, and not all

citizens have access to Internet-based systems (in particular older generations). Benefits would be very limited; it is unlikely that they would outweigh the costs for establishing and running the system. In particular, the option would not solve any of the current problems due to legal differences; at its best it would only make citizens more aware of the consequences resulting from them. **(ii) Fundamental rights**: Insignificant impacts due to very limited positive effect on legal certainty. **(iii) Social effects**: Economically disadvantaged citizens may be able to access information which they would otherwise not have been able to obtain (due to high costs for legal advice). However, not all these citizens are likely to have access to Internet-based systems. In addition, due to the technical complexity of this subject matter, it is likely that not all citizens are able to understand the full impact of the different legal rules. **(iv) Financial costs:** Administrative costs for creating and regularly updating the knowledge management system. Little or no income from users. **(v) Economic effects:** Very limited positive impact due to reduction of costs for legal advice for those citizens involved in relatively simple cases.

Policy Option A.9: EU wide information campaign on succession (legislation and existing / forth-coming instruments). (i) Objectives to achieve: As with policy option A.8, national information campaigns could at its best make citizens better aware that the outcome of their succession may be different than expected if they have property in another Member State. The campaign would not allow citizens to check the outcome of their specific case (which the database/knowledge management system would), but it may reach a wider audience than the database/knowledge management system. Also similar to option A.8, it would not solve any of the current problems due to legal differences; it would only make citizens more aware of the consequences resulting from them. Benefits would be very limited; it is unlikely that they would outweigh the costs for establishing the and running the campaigns.**(ii) Fundamental rights and (iii) Social effects**: Similar to option A.8**. (iv) Financial costs:** 5,000,000 € minimum, depending on the duration and the media chosen. **(v) Economic effects:** Similar to option A.8.

7.2. Impact of the policy options that that address problems of identifying wills abroad (Policy options B)

Policy Option B.1 - Status quo. **(i) Objectives to achieve**: Due to the ongoing trend of establishing registers of wills and interconnecting these, it is likely that wills could be identified abroad more easily in the future than at present, which will have a small positive impact on the occurrence of parallel and conflicting proceedings or lack of proceedings. However, the positive impact will be very limited. First, even though most countries are currently establishing registers of wills, most benefits will not be experienced until the long term (since wills registered now may not be executed until in many years time). Second, as not all wills are registered, even the possibility to check whether a will is registered in another country will not lead to legal certainty concerning whether a will exists or not. Finally, stakeholder consultations have pointed to current problems with regard to searching for wills in other countries; this is on the basis of names at present and there are problems e.g. with regard to names written in another alphabet and what name to search for (maiden name, name as married etc.). This may improve in the short term, but all related problems are unlikely to be possible to solve until the long term. **(ii) Fundamental rights**: If wills are identified to a higher degree, the right to property is

promoted. This policy options includes exchanges information concerning the existence of wills may lead to issues with regard to the protection of personal data (Article 8 of the Charter). The European Network of Registers of Wills Association (ENRWA) is a notary-based system set up in 2005 which according to stakeholders is a secure repository of personal data. Also with regard to the individual registers of wills, and exchanges of data outside of the ENRWA system, according to the individual registers, personal data is protected. **(iii) Social effects:** In practice, disadvantaged citizens who do not seek advice from notaries might be unaware of the possibility to register wills. **(iv) Financial costs:** There would be no financial costs to the EU of this option. The costs for establishing and maintaining registers of wills would continue to be borne at national or local level, or even at organisational level (notary organisations). Citizens would bear some of the costs, as the current systems are based on a fee for registering wills as well as searching for wills. The initial costs for setting up a register of wills vary greatly between Member States[46]. As far as interconnection costs are concerned, the Belgian register of wills indicated that the costs of the creation of interconnection with the French register amounted to 95,000 euro. **(v) Economic effects:** The positive economic effects relative to the problems addressed will be extremely limited. The economic effects will mainly be experienced by individual citizens (time delays may be decreased, fees to legal professionals to identify wills abroad may be decreased, but in particular it would be less likely that the inheritance be given to the 'wrong' heirs) and legal professionals (easier searches for wills abroad). For the general economy, it is not particularly relevant who the individual heir is; what is relevant is if undue time delays with regard to the succession can be avoided (as wills would be identifable faster than at present).

Policy option B.2 – Commission Recommendation on the establishment of interconnected national registers of wills. **(i) Objectives to achieve:** Similar to the *status quo*, if more Member States establish registers of wills which are interconnected, it is likely that wills can be identified abroad to a higher extent in the future than at present, which will have a small positive impact on the occurrence of parallel and conflicting proceedings or lack of proceedings, as well as allowing citizens to know they may inherit. A Commission Recommendation may speed up the process of Member States establishing registers of wills that are compatible and may be interconnected. It may also lead to that some Member States that otherwise would not have established a register will do so. Therefore, this option scores higher than status quo. However, even though registration of wills would be encouraged, this would still not be compulsory. This means that although registers would be available in a higher proportion of EU Member States, a confirmation that no will has been registered would not mean that no will exists. **(ii) Fundamental rights and (iii) Social impacts:** Similar to option B.1. European wide information campaigns could make a larger group of citizens aware of the benefits of registering wills. **(iv) Financial costs:** Similar to option B.1 plus costs for administrative work to produce Recommendation. **(v) Economic effects**: This option would lead to maximum 1-2% reduction of costs due to current problems.

[46] See Annex 3 for more detailed figures as regards the costs for running a register in the different Member States who have done so.

Policy option B.3 - Compulsory establishment of interconnected national registers of wills and organisation of information campaigns. (i) Objectives to achieve: Compared to the two previous options, under this option Member States would be obliged not only to create registers of wills, but to ensure that they are compatible with registers of wills in other countries and could be interconnected. If more wills are identified, the risk of parallel and conflicting proceedings is reduced. However, citizens would still not be obliged to register their wills, which reduces the positive effects of the option. **(ii) Fundamental rights and (iii) Social impacts:** Similar to option B.1. On the other hand, if a will has been registered, reduced legal fees to legal professionals related to identifying a will may mean that economically disadvantaged groups may have improved possibilities to access their (potential) inheritance. **(iv) Financial costs:** Similar to option B.1 plus costs for administrative work to produce a Directive. **(v) Economic effects**: Similar to policy option B.2, this option would also lead to maximum 1-2% reduction of costs due to current problems.

Policy option B.4: Establishment of a central EU Register of Wills. (i) Objectives to achieve: If more wills are identified, the risk of parallel and conflicting proceedings is reduced. However, positive impacts would not be much greater than the previous option B.3; both options would merely mean that it is possible to register wills across the EU. In the short term (and with great likelihood also in the long term), the register would need to co-exist with national registers. Indeed, according to stakeholders consulted, registering and identifying wills is at present primarily a national problem, even though the proportion of wills that concern cross-border successions is likely to increase. **(ii) Fundamental rights and (iii) Social impacts:** Similar to option B.4. **(iv) Financial costs:** The establishment of a central register, which would co-exist with national registers, would amount to 120 million €. It can be assumed that the costs would be reimbursed by those registering and requesting information. **(v) Economic effects**: Similar to policy option B.2, this option would also lead to maximum 1-2% reduction of costs due to current problems.

Policy Option B.5 - Creation of a webpage on existing registers of wills and national rules. **(i) Objectives to achieve:** The option may lead to some positive impacts in that slightly more citizens may become aware that registers of wills exist, and it could facilitate the work of legal professionals. It would, however, not solve any problems. Indirectly, it could potentially promote the establishment of registers in those countries that currently do not have any (as it would become obvious which countries have and which ones do not have registers), but positive impacts on reducing current problems can be expected to be insignificant. The option may at the best be used as an information tool by legal practitioners and may have some minor positive impacts on the awareness of citizens. **(ii) Fundamental rights and (iii) Social impact:** Those citizens who are currently most likely to make wills (older citizens) may not have access to Internet. **(iv) Financial costs:** Costs for information campaigns at national level. **(v) Economic effects**: Insignificant.

Policy Option B.6 - National information campaigns on wills (legislation and existing / forth-coming instruments). (i) Objectives to achieve: This policy option would only lead to minor positive impacts as some citizens that would otherwise not have made and registered a will are likely to draw up and register a will, which would lead to a minor

reduction of parallel and conflicting proceedings (or lack of proceedings). It would, however, not solve any problems. Furthermore, not all countries have registers of wills at present, which means that in some countries there would be no positive impacts at all. (ii) **Fundamental rights and (iii) Social impact**: Minor positive effects on some citizens that would otherwise not have made a registered will. **(iv) Financial costs:** Costs for information campaigns at national level. **(v) Economic effects**: Insignificant.

8. COMPARING THE OPTIONS

8.1. Comparison of policy options and justification of choosing the preferred option

Table 8.1 provides a comparison of the 'ratings' of the nine policy options A (policy options that address problems caused by national (legislative) differences concerning devolution of international successions) elaborated in section 6.2.1.

Table 8.2 compares the ratings of the six policy options B (policy options that address problems of identifying wills abroad), elaborated in section 6.2.2.

The policy options are categorised according to their potential to meet the objectives defined above in section 5, with ten checkmarks (√√√√√√√√√√) indicating that an option fully meets all objectives.

As regards policy options A, on the basis of the assessments of the policy options, the **preferred option is Policy Option A.7** as it would address current problems as effectively as possible and lead to the greatest cost reductions (maximum 30%).

As regards policy options B, on the basis of the assessments of the policy options, the **preferred option is Policy Option B.2** (Commission Recommendation) even though it does not receive the highest rating. In comparison, option B.4 (EU central register of wills), which received the highest ranking, would be significantly more costly without providing substantially higher benefits. It takes account of the fact that the identification of wills is to a certain extent a national problem and is likely to remain such even in the long term (despite the trend towards citizens having increasing cross-border links). This preference is also in line with the rating made by the stakeholders.

Table 8.1 – Comparison of ratings of policy options A									
Objective/costs	**Policy Option A.1** **(Status quo)**	**Policy Option A.2** **(Jurisdiction rules & recognition)**	**Policy Option A.3** **(C-O-L rules)**	**Policy Option A.4** **(C-O-L rules & certificate)**	**Policy Option A.5** **(C-O-L rules & jurisdiction rules)**	**Policy Option A.6** **(A.2 plus A.3)**	**Policy Option A.7** **(A.2 plus A.4)**	**Policy Option A.8** **(Database)**	**Policy Option A.9** **(National information campaigns)**
To achieve a situation where parallel proceedings do not occur and where different substantive laws are not applied to the same international succession	***0***	√√	√√√√	√√√√√√	√√√√√√√	√√√√√√√√	√√√√√√√√√	√	√
To provide a (limited) choice of law for the testator	***0***	***0***	√√√√√	√√√√√√	√√√√√	√√√√√√√√	√√√√√√√√√	***0***	***0***
To ensure the recognition of: (i) Judgments, other decisions and authentic acts / deeds on international successions; (ii) The powers of administrators/executors; and, (iii) The status as an heir	***0***	√√√√√	√√	√√√√√	√√√	√√√√√√√	√√√√√√√√√	***0***	***0***
To increase the accessibility of information on the existence of wills abroad	***0***	***0***	–	–	–	–	–	***0***	***0***
Total score:	**0**	**7**	**11**	**18**	**10**	**25**	**30**	**1**	**1**
Economic effects	Present: 4 bn euro/year; potential doubling of costs in 10 years.	Costs savings: Max 10%	Costs savings: Max 15%	Costs savings: Max 15%	Costs savings: Max 15%	Costs savings: Max 20%	Costs savings: Max 30%	Costs savings: Insignificant	Costs savings: Insignificant

Table 8.2 – Comparison of ratings of policy options B						
Objective/costs	**Policy Option B.1** **(Status quo)**	**Policy Option B.2** **(EC Recommendation on interconnected national registers & info campaigns)**	**Policy Option B.3** **(Compulsory establishment of national registers of wills that are interconnected)**	**Policy Option B.4** **(EU central register of wills)**	**Policy Option B.5** **(Webpage on national registers of wills and national rules)**	**Policy Option B.6** **(National information campaigns)**
To achieve a situation where parallel proceedings do not occur and where different substantive laws are not applied to the same international succession	***0***	√√	√√√	√√√√	√	√
To provide a (limited) choice of law for the testator	***0***	***0***	***0***	***0***	***0***	***0***
To ensure the recognition of: i) Judgments, other decisions and authentic acts / deeds on international successions; ii) The powers of administrators/executors; and, iii) The status as an heir	***0***	√	√	√	***0***	***0***
To increase the accessibility of information on the existence of wills abroad	***0***	√√	√√√	√√√√	√	√
Total score	**0**	**5**	**7**	**9**	**2**	**2**
Economic effects	Present: 4 bn euro/year; potential doubling of costs in 10 years.	Costs savings: Max 1-2%	Costs savings: Max 1-2%	Costs savings: Max 2%	Costs savings: Insignificant	Costs savings: Insignificant

9. THE PREFERRED OPTION

This section describes the preferred option and the expected impacts of the preferred policy option, which is a combination of policy options A.7 and B.2.

9.1. The preferred option and its effects

The preferred option is, in brief:

> The harmonisation of conflict of law rules and jurisdiction rules, the introduction of rules on automatic recognition and enforcement of judgments, other decisions and authentic acts/deeds, the introduction of a European Certificate of Inheritance (including Executor/Administrator powers) in transnational successions and a Commission Recommendation on the establishment of interconnected national registers of wills and organisation of information campaigns.

As outlined above, this option would involve EU action in the form of:

- The adoption of a **Regulation** on the harmonisation of conflict of law rules and jurisdiction rules, the introduction of rules on automatic recognition and the enforcement of judgments, other decisions and authentic acts/deeds, the introduction of a Certificate of Heir and Executor / Administrator in transnational successions; and,

- The issuing of a **Recommendation** on the establishment of interconnected national registers of wills and organisation of information campaigns.

The preferred option consists of the following elements:

- The harmonisation of jurisdiction rules;

- The harmonisation of applicable law rules, including the introduction of a limited choice of law for the testator;

- Establishing rules on recognition and enforcement of judgments, other decisions and authentic acts/deeds;

- The creation of a European Certificate of heir and administrator/executor; and,

- The adoption of a Commission Recommendation on the establishment of interconnected registers of wills and the organisation of information campaigns.

Further details of the preferred option's elements are outlined in the external study.

9.2. The preferred option’s achievement of the objectives

As indicated in the assessment of the individual policy options, this option addresses the problems as identified above better than any of the other options :

- Risk of parallel proceedings and application of different substantive laws to the same international succession;

- Insufficient (limited) choice of law for the testator;

- Non-recognition of:

  – Judgments, other decisions and authentic acts/deeds on international successions;

  – powers of administrators/executors; and,

  – heirship.

- Inaccessibility of information on the existence of wills abroad.

Harmonised jurisdiction rules that provide exclusive jurisdiction to a Member State, in combination with harmonised conflict of law rules and rules on recognition and enforcement and a common certificate of inheritance, would eliminate the potential for conflicts of jurisdiction.

The introduction of unified conflict of law rules would allow for a faster finalisation of the succession, as the competent authorities would no longer have to deal with different and potentially contradictory national conflict of law rules to identify the substantive law governing the question of who inherits. The introduction of rules on a limited choice of law for the testator would allow citizens to better plan and organise their succession in advance.

Problems with regard to the recognition of powers of executors/administrators and decisions would be reduced. As these powers would be recognised abroad, legal fees and time delays would be reduced. Problems in relation to recognition or enforcement of judgments/decisions concerning the determination of the heirs are also likely to be resolved. This, in combination with the recognition of powers of administrators/executors, means that implementation and administration would be optimized (with regard to the procedures as well as their outcome).

Furthermore, the Commission Recommendation may speed up Member States' creation of registers of wills that are compatible and interoperable, which would facilitate the identification of wills in other Member States. The information campaigns could lead a higher number of citizens to draw up wills and register them than at present. As a consequence, more wills would be registered and subsequently identified than at present. This will have a certain positive impact in terms of speeding up the succession proceedings, and thereby lead to less delay and decreased legal costs. However, the

positive impact of the register may be limited because there would be no obligation to register wills.[47]

Overall, the preferred option would increase the likelihood that the rights of the testator, potential heirs and persons formally or otherwise related to the deceased, private and public creditors etc. would be fulfilled in an effective and efficient way. The option would also increase the likelihood that the objectives of the future deceased/testator are met.

The preferred policy option respects the fundamental rights of the Charter of Fundamental Rights of the European Union.

9.3. Economic impacts

In sum, the preferred option could lead to cost reductions of up to an estimated 32% of the costs of € 4 bn caused by the current problems, i.e. € 1.3 billion.[48]

9.3.1. Financial costs and benefits

The process of adoption and implementation of the preferred option would create financial costs both at the EU level and on the national level, mainly costs for administrative work to produce the necessary legislation at EU and at national level, the costs for establishing and running a register of wills and for information campaigns. For a detailed analysis of these costs and corresponding benefits of the preferred option, see the external study.

9.3.2. Impact on the legal profession

On the one hand, the preferred option, through its harmonisation of the applicable law, would result in a reduction of fees for legal professionals who would charge less for complicated cases. On the other hand, if the value of legacies and the number of international cases increase as projected, the overall volume of successions work would probably also increase. As indicated above, there is also evidence of a rising number of contested cases. In addition, the new rules will improve predictability for citizens. It is likely that more of them will wish to organise their succession in advance, therefore using the services of legal professionals. Within the legal practice, as with every other professional service, there are always market changes, and the magnitude of those associated with the preferred option is likely to be small and gradual.[49]

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47 Accordingly, a confirmation from a register that no will has been registered would not mean that no will existed. There may also be problems searching for wills of citizens in other countries due to, for example, name changes or names in another alphabet.

48 The establishment of interconnected national registers of wills and the related information campaigns would contribute up to 2% of these costs reductions. The remainder of the costs savings would be a result of clearer rules on jurisdiction; the identical applicable law regardless of jurisdiction; the outcome of the devolution of the succession not only being identical, but also recognised across the EU; and of heirs being able to prove their rights.

49 See also Annex 4 for more information.

9.3.3. Impact on taxation

The preferred option would be tax neutral in so far as it would not entail any changes to the Member States' national legislation on inheritance taxation, which are expressly excluded from the scope of the proposed Regulation. This is because the rules determining which Member State is competent to collect inheritance taxes on a given succession are totally independent from those rules determining the civil law governing this succession: the first will continue to result from national taxation law, including bilateral conventions on double taxation, whereas the latter will be harmonised by the future Regulation.

> **Example**: Under the future Regulation, a Dutch couple living in Spain and owing a house there, would be allowed to choose Dutch law as the law applicable to the civil aspects of their successions. However, since the future Regulation will not impact on the rules on inheritance taxes, the surviving spouse will, in principle, still be subject to Spanish inheritance taxes.

Hence, the preferred option would potentially have implications on the amount of inheritance tax revenues collected by a given Member State. For movable property (e.g. a bank account), if, under the law applicable under national rules, the heir is the son of the deceased living in Member State A, whereas, under the law applicable under the future Regulation, the heir is a charity located in Member State B, Member State A will not longer be able to collect inheritance taxes. These effects would accordingly be marginal and indirect (also see Annex 5).

As a consequence, the proposed Regulation does not contribute to reducing the complexities of tax systems applicable to successions with transnational elements. In particular, it does not prevent citizens who take full advantage of the Internal market of being subject to double taxation or[50] to taxation rules which do not fit their legitimate expectations. Indeed, it is clearly impossible, for legal and political reasons, to modify the existing regime in the frame of the present Regulation.

9.4. Potential draw-backs/risks and sensitive elements

Potential risks and politically sensitive elements include:

- The use of habitual residence as a unique connecting factor rather than nationality.
- The extent to which citizens take advantage of the possibility to make a choice of law and register wills.
- The inclusion of the administration of the succession in the scope of the instrument.
- The treatment of compulsory inheritance rights.
- The political feasibility of adopting a system of exclusive jurisdiction.

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[50] This section does not come back on the draw-backs and risks of those alternative elements which have already been developed in section 6.4.

- To what extent registers of wills are established and interconnected.

The **extent to which citizens take advantage of the possibility to make a choice of law and register wills** will impact the benefits and level of costs reductions. The more citizens choose the applicable law, make a will and register this, the greater the benefits will be. At present the tradition of drawing up wills vary between Member States; whereas it is common in some countries (e.g. United Kingdom), in others it is far from standard practice. The proportion of citizens who take the possibility to make a choice of law (in a will) may therefore vary between Member States. It is likely that the proportion would increase in the long term.

Adopting **a system of exclusive jurisdiction** may be problematic for some of the Member States that currently have a split system based partly on the location of immovable property.[51] However, their concerns relate mostly to their respective systems of land and other property registers, whose accuracy needs to be safeguarded. The preferred measure would not affect these systems; to acquire ownership of the property in question, the heir would still have to comply with any registry requirements of the Member State in which the property is situated.

Finally, as concerns the **establishment of interconnected national registers of wills and related information campaigns**, the Recommendation would not impose any legal obligations on Member States. The positive impacts on citizens are therefore not certain.

9.5. Fundamental Rights, EU added value and proportionality

9.5.1. Fundamental rights

See the description in the table above in Section 7 (Policy Option A.7).

9.5.2. Proportionality

Measures taken have to be proportionate to the size and extent of the problems addressed. The preferred option respects the proportionality principle. It concerns only cases with cross-border elements. It would not harmonise substantive laws, but merely aim to achieve a situation where parallel proceedings are avoided and different substantive laws are not applied to the same international succession. As outlined above, benefits and savings largely outweigh its costs and disadvantages. Accordingly, the preferred option would ensure the harmonious co-existence of different national substantive laws.

9.5.3. European added value

The preferred option has the potential to promote trust in the internal market and facilitate mobility of EU citizens. The problems addressed by the preferred option are in part a consequence of the internal market. At the same time, if they are not solved, the trust in

[51] In their responses to the Green Paper, six Member States (FR, LU, IT, PL, UK and SK) indicated that a single forum in matters of succession should **not** be appointed. Four Member States (NL, ES, SE, LV) were **in favour** of the establishment of a single forum.

the EU internal market and the EU area of freedom, security and justice without internal borders may be damaged. Because of EU citizens' increasing cross-border links, higher numbers of citizens are likely to be affected by problems in the future. Cross-border successions are both more costly and time-consuming for citizens than national successions. Some transnational successions are never finalised due to complications. By ensuring a smoother devolution of international successions, the preferred option would facilitate the life of the modern and mobile EU citizen.

10. MONITORING AND EVALUATION

In order to monitor the effective implementation of the Regulation as well as the success of the Recommendation on the creation of interconnected registers of wills and the information campaigns, regular evaluation and reporting by the Commission will take place. To fulfil these tasks, the Commission will prepare regular evaluation reports on the application of the Regulation, based on consultations of Member States and stakeholders. Regular expert meetings will also take place to discuss implementation problems and exchange best practices between Member States in the framework of the European Judicial Network. The Commission will also monitor the creation and the utilisation of the wills registers and the use of certificates of inheritance to track the success of the measures in facilitating the life of the Union citizens. The external study contains many useful suggestions on potential monitoring and evaluation instruments and concrete indicators that will be taken into consideration by the Commission.

ANNEX 1 - Glossary

Term	Definition
Administration of a succession	Depending on the national law, the succession may not pass directly into the ownership of the heirs, but first be administered by a heir or a third party. The Administrator frequently pays all taxes on the inheritance before distributing it or manages the estate while the question of who has which rights to the inheritance is solved.
Civil justice / civil law	Law that governs the relationships between private individuals, as opposed to the relationship between the State and the individual (also used as a term for the continental legal orders, as opposed to *common law*).
Conflict of laws rules	A set of rules that govern which national → substantive law is applied to a given situation. They frequently use broad categories ("Succession", "Marriage", "Divorce", "Contracts" etc.). See Rome I and Rome II for examples.
Deceased	Person whose death occasions the succession.
Deed	Formal document recording a legal fact or act, authenticated by a public authority such as a notary.
Distribution of a succession	The act of transferring ownership of individual items of a succession to the heirs and legatees.
Enforcement	The act of a judicial authority by which a judgment or administrative order is put into practice (e.g. a judgment ordering a debtor to pay 100 euros may be enforced by attaching the requisite sum in a bank account of the debtor's and then disbursing it to the creditor).
Exequatur	Procedure which is formally required in certain countries for recognition and enforcement of a foreign judgment.
Forum	A judicial body, e.g. court.
Forum non conveniens	[Latin, 'inconvenient forum'.] This doctrine is employed when the court chosen by the plaintiff (the party suing) is inconvenient for witnesses or poses an undue hardship on the defendants, who must petition the court for an order transferring the case to a more convenient court.
Intestate succession	Succession in the absence of a will. The heirs are determined by the rules of law.
Intestacy	The quality of being or dying having made no valid will

Term	Definition
Gifts *inter vivos*	[Latin, 'between the living'.] transfer between living persons (also: transaction *inter vivos*).
International jurisdiction	Power of the courts in a particular country to try a case.
Jurisdiction - positive conflict of j. - negative conflict of j.	The power, right, or authority to interpret and apply the law, usually exercised by a court or another authority. A positive conflict of jurisdiction arises when more than one court or authority has jurisdiction by virtue of its laws; a negative conflict of jurisdiction arises when no court or authority deems itself competent for an issue. These conflicts can occur due to non-harmonized rules on international jurisdiction.
Legatee	Beneficiary of a testamentary disposition (who might not have inherited anything by virtue of the application of the default legal rules on succession in the absence of a testament, e.g. a friend, a housekeeper etc.).
lex rei sitae	[Latin] The law of the state in which an item (often immovable property) is located.
Lispendence	[Latin, 'pending suit'] Situation in which at the moment when one court or authority is seized, another court or authority is already in the process of examining a dispute.
Reciprocal wills	Wills made by two or more persons in the same document, either for the benefit of a third party or for their mutual benefit. They are forbidden in some Member States because they can limit the testators' testamentary freedom by binding them to the agreement.
Recognition	The act of accepting a judgment or other act of sovereignty of another state as if it had been issued by an authority of one's own state.
Scission	Situation in which the succession is not governed by one and the same set of → substantive rules, but where one part of the succession is governed by the law of one state and another part by the law of another state. This situation arises frequently with respect to immovable property (apartments etc.), where the current conflict of law rules call for the application of the → *lex rei sitae*.
Substantive rules of law	The legal rules governing the substance of the matter, i.e. in this context the questions of who inherits, how the succession is divided up, etc., as opposed to e.g. the conflict of law rules, which govern the technical question of which state's set of substantive rules is applied.

Term	Definition
Succession agreements	Agreements made before death relating to one or more future successions, usually in exchange for a service or good provided by a third party who in turn will receive a share of the succession. Often used in planning SME transfers to the next generation.

ANNEX 2 - The magnitude of international successions and wills

To assess the general current situation, especially the scale of successions with cross-border elements and scale of legal activity dealing with successions, estimates have been made of the following (as far as possible):

- The number of successions and wills in the EU;
- The number of cross-border successions within the EU involving (a) a deceased who lived in a Member State different from his/her its state of origin or (b) a succession involving properties (e.g. bank accounts or immovable property) distributed in more than one Member State;
- The number of successions in which the competent authority (e.g. court, administrator or notary) applies laws of other EU Member States.
- The number of successions in which the competent authority (e.g. court, administrator or notary) applies laws of third countries.
- The value/amount of all these successions in the EU (in euro);
- The number of cases where foreign law is not applied on the basis of 'ordre public' concerning (a) other EU Member States; and, (b) third countries.
- The number of legal professionals involved by Member States and the turnover which cross-border successions represent for these professionals (by group of professionals).

The estimates are based on statistical data, results from relevant surveys and information obtained from national authorities, professional bodies and individual legal professionals. While efforts have been made to substantiate the estimates with data from as many countries as possible in order to maximise its robustness and soundness, useful data were received only from a limited number of Member States. Estimates have been made on available information. It is clearly outlined what data have informed what estimations.

1. Estimated number of successions and wills in the EU

Exact data on the overall **number of successions** were not given by the stakeholders contacted. However, it was estimated by survey respondents that this number comes very close to the number of all deceased adults in the given Member State. In case of death, a succession procedure is launched if the deceased owned or is assumed to have owned property, which applies to almost all adults.

According to Eurostat figures, the total number of persons deceased in 200652 was 4,744,852 persons in the EU27 (see Table 2.2 for individual country figures). The number of successions launched in the EU can be estimated to correspond to the number of

[52] 2005 for the UK and 2004 for Italy.

deceased persons who were aged 18 or more at the point of their death (the age of majority is 18 in the Member States of the European Union53), which was 4,703,286 in 2006 (99.1% of all deceased).

The succession procedure of the deceased covered by Eurostat statistics is not necessary launched in the EU, as the main connecting factor of the deceased might have connected him/her to a third country. Accordingly, successions of deceased EU nationals who resided in third countries (and thus not appearing in the mortality statistics) might be launched in the EU.

An estimated 29 million citizens (corresponding to 6% of the EU population in 2006) are currently living outside the borders of the EU. This indicator, however, strongly overestimates the number of deaths abroad where a succession would nevertheless be launched in the EU. Many of these citizens work or live abroad only temporarily and may return to their country of origin at a later stage.

Table 1 – EU nationals residing in third countries

Country	Population (2006)	Citizens living outside the EU	Citizens abroad / population
Austria	8,265,925	450,000	5.4%
Estonia	1,344,684	27,000	2.0%
Finland	5,255,580	85,000	1.6%
France	62,998,773	778,654	1.2%
Germany	82,437,995	1,000,000	1.2%
Ireland	4,209,019	1,700,000	40.4%
Italy	58,751,711	1,727,234	2.9%
Netherlands	16,334,210	700,000	4.3%
Poland	38,157,055	3,742,000	9.8%
Slovakia	5,389,180	414	0.0%
Slovenia	2,003,358	450,000	22.5%
Spain	43,758,250	1,500,000	3.4%
United Kingdom	60,425,786	11,298,163	18.7%
Subtotal	**389,331,526**	**23,458,465**	**6.0%**

53 With the exception of Scotland, where the age of maturity is 16, but this has been disregarded in the analysis.

Table 1 – EU nationals residing in third countries			
Country	**Population (2006)**	**Citizens living outside the EU**	**Citizens abroad / population**
EU27 total	**493,007,893**	**29,705,296**	**6.0%**

Source: Eurostat (population figures), Member State authorities (data or estimates on the number of nationals living outside the EU)

The estimations of the **number of wills** in the EU27 are based on information supplied by national registers of wills (registers of wills in 9 Member States have sent data or estimates), on survey data from the UK and Germany[54] concerning the proportion of adult population who draw up a will (36% and 25.8%, respectively) and Eurostat data on the number of adult population (18+).

Available data show large differences across Member States concerning the share of adult population who has drawn up a will. The figures range from approximately 36% in the UK (survey data) to as few as around 1.1% in Hungary (estimates based on the number of wills registered[55]), their average being around 24%. Based on this figure and on Eurostat numbers on the number of adults (396,125,456 on January 1, 2006), around 97 million wills are estimated to exist in the EU today.

Figures and estimates are provided by country in Table 2.

54 UK: a 2007 study by the National Consumer Council, interviewing 2,673 adults in England and Wales; Germany: a survey of 1,424 adults made by TNS Infratest in August 2007, commissioned by the Deutsches Forum für Erbrecht e.V.

55 It should be noted that the proportion of wills not registered may be in fact much higher in Hungary than the 66% (arithmetic average of UK, IT, ES), thus the proportion of adult population with a will.

Table 2 – Number of wills							
Member State	**Total population ('000), 2006**	**Population 18+ years ('000), 2006**	**Total number of wills registered***	**Proportion of registered wills/ adult population**	**Overall proportion of wills that are not registered**	**Number of wills altogether (registered & unregistered)**	**Number of all wills / adult population**
UK	**60,623**	**47,218**	**30,000**	0.1%	99.8%	16,998,525	**36%****
FR	**63,195**	**48,840**	**16,603,034**	34%	*0%*	*16,603,034*	*34%*
BE	**10,548**	**8,332**	**2,440,000**	29%	*0%*	*2,440,000*	*29%*
PT	**10,584**	**8,576**	**2,300,000**	27%	*0%*	*2,300,000*	*27%*
DE	**82,376**	**67,881**	*11,490,027*	*17%*	*66%*	*17,513,192*	**25.8%****
LT	**3,394**	**2,684**	**191,934**	7%	*66%*	*558,075*	*21%*
IT	**58,941**	**48,710**	**1,842,000**	4%	**77%**	**8,008,696**	16%
CY	**773**	**592**	**29,442**	5%	*66%*	*85,607*	*14%*
ES	**44,116**	**36,076**	**2,435,601**	7%	**20%**	**3,044,501**	8%
HU	**10,071**	**8,151**	**30,000**	0.4%	*66%*	*87,229*	*1.1%*
Subtotal / Average	**344,623**	**277,060**	*37,392,038*	*13%*	*45%*	*67,638,859*	*24%*
AT	**8,282**	**6,658**	*898,593*	*13%*	*45%*	*1,625,475*	*24%*
BG	**7,699**	**6,371**	*859,787*	*13%*	*45%*	*1,555,278*	*24%*
CZ	**10,269**	**8,360**	*1,128,206*	*13%*	*45%*	*2,040,825*	*24%*
DK	**5,437**	**4,217**	*569,111*	*13%*	*45%*	*1,029,472*	*24%*
EE	**1,344**	**1,079**	*145,623*	*13%*	*45%*	*263,419*	*24%*
FI	**5,266**	**4,152**	*560,338*	*13%*	*45%*	*1,013,601*	*24%*
GR	**11,148**	**9,179**	*1,238,762*	*13%*	*45%*	*2,240,810*	*24%*

Table 2 – Number of wills							
Member State	**Total population ('000), 2006**	**Population 18+ years ('000), 2006**	**Total number of wills registered***	**Proportion of registered wills/ adult population**	**Overall proportion of wills that are not registered**	**Number of wills altogether (registered & unregistered)**	**Number of all wills / adult population**
IE	**4,262**	**3,173**	*428,238*	*13%*	*45%*	*774,644*	*24%*
LU	**473**	**366**	*49,373*	*13%*	*45%*	*89,312*	*24%*
LV	**2,288**	**1,860**	*251,008*	*13%*	*45%*	*454,051*	*24%*
MT	**406**	**318**	*42,867*	*13%*	*45%*	*77,543*	*24%*
NL	**16,346**	**12,752**	*1,721,070*	*13%*	*45%*	*3,113,261*	*24%*
PL	**38,141**	**30,293**	*4,088,375*	*13%*	*45%*	*7,395,505*	*24%*
RO	**21,588**	**17,271**	*2,330,837*	*13%*	*45%*	*4,216,276*	*24%*
SE	**9,081**	**7,114**	*960,039*	*13%*	*45%*	*1,736,625*	*24%*
SI	**2,007**	**1,649**	*222,513*	*13%*	*45%*	*402,506*	*24%*
SK	**5,391**	**4,255**	*574,271*	*13%*	*45%*	*1,038,805*	*24%*
Subtotal / Average	**149,429**	**119,065**	*16,069,010*	*13%*	*45%*	*29,067,406*	*24%*
Total EU27	**494,052**	**396,125**	*53,461,048*	*13%*	*45%*	*96,706,265*	*24%*

*Figures in **bold** indicate data obtained from national registers of wills, Eurostat or surveys. Figures not in bold are derived figures. Figures in italics are GHK estimates based on available data (averages) or qualitative information.*

** Reference year 2007 or 2008; ** 2007 survey results*

While the estimates show that around 76% of the EU population had not drawn up a will, available information suggests that the **ratio of intestate deceases** is actually much lower than that. This is explained by the fact that the propensity of citizens to draw up a will strongly increases with their age. The ratio of deceased citizens who had a will is therefore much higher (in 2006, 85.1% of all deceased in the EU27 were at least 60 years old, and 79.6% were at least 65 years old at the time of death).

The German survey showed that 48.1% of citizens above 60 had drawn up a will (as compared to the average for the total adult population; 25.8%). The respective figure in the UK study was 70% of 65+ year olds in England and Wales (as compared to 36% for the adult population). These numbers have been used as a proxy indicator for the proportion of deaths that are not intestate. Also, estimates made by the Spanish register of wills showed that around 70-75% of all successions in Spain are based on a will, while somewhat surprisingly, the estimates put the proportion of adult population in Spain who have a will to as few as 8% only (this is, however, swiftly increasing as the number of new wills registered per annum is high: it exceeded 600,000 in 2007).

The weighted average of the three above figures (with estimated number of successions per annum, i.e. the number of deceased individuals aged 18+ years as weights) is 60.4%, which has been used as an estimation for the proportion of successions within the EU27 that are not intestate[56]. The corresponding number of wills that are executed per annum is around 2.8 million (2,839,385), and the number of intestate successions is around 1.9 million (1,863,901). An additional 42,000 minors die per annum, for whom it has been assumed that no succession procedure is launched.

2. Estimated number of cross-border successions within the EU

Legal professionals estimated the proportion of cross-border successions to be between 1% and 25% of all successions-related cases, 12.5% on average. Extrapolating this result to all successions within the EU27 would arrive at a number of about 588,000 cases (587,911) per year.

Table 3 – Estimations of international successions

Country of respondent	UK1	UK2	SE	ES	HU	LV	LT	Average
Proportion of successions with cross-border elements	25%	15%	25%	10%	10%	1%	1-2%	*12.5%*

This figure may, however, be overestimating the actual numbers, as the legal professionals asked were likely to have some international contacts and clientele, and since rich, big

[56] Data were received from Italy (58,000 wills 'published' per annum) and the United Kingdom (22,303 successions in 2007 where a will was available) which are not consistent with the estimations made, however, these data were also found to be in conflict with the proportion of adults who had drawn up a will and therefore they were disregarded.

countries with a higher propensity to invest abroad were over-represented in the sample. Other approaches were therefore necessary to validate or refine these results.

Successions with cross-border elements may mostly occur because the deceased:

- Held a foreign nationality, or
- Held property abroad.

Successions of foreign nationals, foreign wills

Statistical data on the **citizenship of deceased residents** of EU Member States are not available. However, the proportion of foreign nationals amongst the deceased can be estimated by using, as a proxy indicator, the proportion of foreign population above 60 years; the age group accounting for most (85.1%) of deceases in the EU27 (the national statistics forwarded to Eurostat include individuals who reside permanently in the given Member State, irrespective of their nationality).

The proportion of population with foreign citizenship has been increasing in the EU over the last decades. In 2007, around 28.9 million of the EU Member State inhabitants (5.8% of the total population) were non-nationals. The majority of them were citizens of another Member State (3.8%), but around 10.2 million (2.1%) held citizenship of a third country[57].

This population with foreign citizenship is still relative young. Amongst above-60-year-olds their proportion is only 2.7% (based on Eurostat data available for 14 Member States). It can therefore be assumed that the number of successions concerning foreign citizens deceased in EU Member States, which are thus likely to involve cross-border elements, is about 125,000 (124,816), 2.7% of all deceased adults.

[57] I.e. - in case of multiple citizenship – that they did not hold citizenship of the Member State they resided in nor of another EU Member State.

Table 4 – Proportion of foreign citizens in the Member States					
Geographical coverage / Share of population	**Total population**	**Nationals**	**Foreigners**		
			Total	**EU27**	**Third countries**
EU27					
Total (in '000), 2007	495,127	466,213	28,914	18,754	10,159
As % of total population	100.0%	94.2%	5.8%	3.8%	2.1%
14 Member States[58]					
As % of total population	100.0%	94.3%	5.7%	2.0%	3.7%
Population above 60 years	100.0%	97.3%	2.7%	1.3%	1.3%
Population below 60 years	100.0%	93.5%	6.5%	2.2%	4.3%

As regards future developments, a significant upward trend is expected. The proportion of foreign nationals is around 6.5% for the below-60-year-old cohort. A share of these foreign nationals may move back to their country of citizenship at a later age, but the number of foreign nationals deceasing in the EU is in any case expected to rise in the next decades.

Data on the **number of 'foreign wills'** are only available from three Member States and show marked differences. The figures from Italy and Spain suggest that foreign nationals do not tend to draw up wills and register them in the Member States they reside in. Only 0.11% of registered wills were drawn up by foreign nationals. However, the register of wills in Cyprus reported that over 50% of all wills registered are those of foreign nationals. The weighted average of the figures is 0.46%, whilst the weighted average of foreign wills within new wills registered per annum is 0.33%. Extrapolating this to the EU27, a (very) broad estimate of about 246,000 foreign wills registered is obtained, and about 7,100 new foreign wills per annum. Also, registers of wills reported an increase in the number of foreign wills.

[58] Member States for which age breakdown was available, representing 53.4% of the total population of the EU27.

Table 5 – Number and proportion of foreign wills						
Member State	**Total number of wills registered**	**Number of foreign wills registered in the country**	**Foreign wills/stock of wills (%)**	**Number of new wills registered per annum**	**Number of foreign wills registered in country per annum**	**New foreign wills/total new wills (%)**
IT	1,842,000	1,997	0.11%	26,030	100	0.38%
ES	2,435,601	2,639	0.11%	608,902	600	0.10%
CY	29,442	14,979	50.9%	1,500	1,400	93.3%
Average of 3 Member States	4,307,043	19,615	0.46%	636,432	2,100	0.33%
EU27 (estimate)	53,461,048	245,921	0.46%	2,161,034	7,131	0.33%

The proportion of wills that **involve a cross-border element** is likely to be higher than the proportion of cross-border successions in general since the population drawing up wills is on average more wealthy than the part of the population who do not make wills, and these citizens' successions are therefore more likely to involve international elements. Using the average of estimates made by legal professionals concerning the proportion of cross-border successions of all successions (12.5%), of the 97 million wills drawn up, around 12 million (12,088,000) wills can be estimated to involve a cross-border element. These wills may not have had an international element when they were drawn up, but only first after they were made (as the testator moved, opened an account and/or acquired property abroad).

Foreign property

Foreign property includes figures on portfolio investments and housing that were obtained from national statistic offices and central banks. While it was not possible to take full stock of financial assets and other property that EU citizens have abroad, it was clear that the trend is significantly increasing.

For example, the Swedish Tax Authority reported that the number of immovable property abroad declared in tax statements increased in just two years (from 2004 to 2006) from 2,344 to 3,624 (by 54,6%), while its value increased from 1.64 bn SEK (177 million euro) to 2.99 bn SEK (327 million euro), i.e. by 82.3%. The actual figures are expected to be even higher, as this information is supplied to the Swedish Tax Authority by residents on a voluntary basis only.

Based on the above it can be estimated that though successions involving cross-border elements is likely to be somewhat less than the on average 12.5% indicated by legal practitioners (it can be estimated that in 2006 around 9-10% of all successions, corresponding to around 450,000 successions, involved cross-border elements), the trend is clearly increasing. This follows from two main reasons:

- The proportion of inhabitants with foreign citizenship was relatively low amongst the elderly (2.7% in the age group above 60 in 14 Member States in 2007 for which data was available), but their proportion is much higher in the younger generations (6.5% for below-60-year-olds), and inhabitants with foreign citizenship are more likely to trigger successions with a cross-border dimension. The proportion of non-nationals is continuing to grow in the future as a result of continued immigration from third countries and the increasing significance of relocations within the EU, e.g. because of job prospects or cross-border marriages and partnerships.

- The proportion of EU citizens who own property abroad is increasing rapidly. This involves mostly financial assets (such as shares, bonds, bank accounts) and real estates. With increased liberalisation of the movement of capital in the internal market and with third countries and increased wealth (in the EU and globally), the share of EU citizens who have such foreign assets and the number of third-country nationals who have assets in the EU will continue to rise.

The assumption that the number of cross-border successions would increase is also supported by legal professionals; all professionals who commented on this reported that this was the case (be it a slight or significant increase).

Certain Member States and regions are already, and will be in the future, more affected by cross-border successions than others. These are in particular those countries where the population has a higher proportion of foreign nationals and has a higher level of income (which usually correlates with an increased level of investments abroad).

On the basis of the proportion of non-nationals in the various EU Member States and level of income (GDP/capita in Purchasing Power Standard (PPS)), ratings have been made for the EU27 in order to get an indication of what countries are likely to be more affected by international successions than others. It must, however, be emphasised that this rating does not take into account the extent to which citizens actually have movable and immovable property abroad as such data were not available by country.

Table 6 – Proportion of non-nationals and level of income by Member State					
Country	**Proportion of non-nationals, 2007**	**Score 1***	**GDP/capita in PPS**	**Score 2***	**Total score****
Austria	10.0%	xxx	31,600	xxx	6
Belgium	8.8%	xxx	29,700	xxx	6
Ireland	10.5%	xxx	37,100	xxx	6
Luxembourg	41.6%	xxx	68,900	xxx	6
Cyprus	15.2%	xxx	23,200	xx	5
Denmark	5.1%	xx	30,300	xxx	5
Germany	8.8%	xxx	28,100	xx	5
Netherlands	4.2%	xx	32,900	xxx	5
Spain	10.4%	xxx	26,500	xx	5
Sweden	5.4%	xx	31,300	xxx	5
United Kingdom	6.0%	xx	29,100	xxx	5
Estonia	17.6%	xxx	17,600	x	4
Finland	2.3%	x	29,000	xxx	4
France	5.8%	xx	27,600	xx	4
Greece	7.9%	xx	24,100	xx	4
Italy	5.0%	xx	25,200	xx	4
Latvia	19.0%	xxx	14,400	x	4
Malta	3.4%	xx	19,200	xx	4
Czech Republic	2.9%	x	20,200	xx	3
Portugal	4.1%	xx	18,600	x	3
Slovenia	2.7%	x	22,600	xx	3
Bulgaria	0.3%	x	9,500	x	2
Hungary	1.7%	x	15,800	x	2
Lithuania	1.2%	x	15,200	x	2
Poland	0.1%	x	13,300	x	2
Romania	0.1%	x	10,100	x	2
Slovakia	0.6%	x	17,000	x	2

*Source: Eurostat *x – bottom tertile; xx – centre tertile; xxx – top tertile **Sum of Score 1 and 2*

In addition, some countries are particularly frequented by foreign investors (for relocation, second homes or financial investment targets) such as France, Spain, Portugal, Cyprus or Greece. As concerns the difficulties linked to domestic property of non-nationals, these countries are especially affected. Also, in certain border regions where cross-border contacts are strong (such as e.g. between Belgium and France, Austria and Hungary), holding some property in the neighbouring country is more frequent.

3. Estimated number of successions in which the competent authority applies foreign law (including the law of third countries)

Legal practitioners from the Member States referred to the number of such cases to be very small, but could not quantify it.

4. Estimated proportion of cases where the law of third countries is not applied due to the application of the "ordre public exception"

Interviewees from the Czech Republic and United Kingdom (Scotland) reported that the exception was generally not used in succession-related cases. In Germany several judgments have been published by appellate courts in which the application of Islamic succession law has been prohibited as it has been considered as violating the German 'ordre public' as far as the intestate shares of heirs were dependent on religion or gender.

5. Approximate amount of successions in the EU in euro

Estimates as regards the value of successions have been made based on accessible studies, statistics and surveys, as well as estimations made by legal professionals. Information obtained, however, greatly varies across countries and even across figures for one single country, as reflected in Table 2.7.

In the United Kingdom[59], only 40,300 successions out of ca. 571,300 deaths in total (7%) surpassed in value the nil-band threshold of £240,000 (approximately 345,500 euro) in the budgetary year 2003-2004, with a total value of £23,110 million. In 291,000 cases, the value of the estate was below £5,000. Based on these figures, the average value of successions can be set at around £75-80,000 (108-115,000 euro). An estimation made by a legal professional was £50,000 (72,000 euro) – which may in fact be close to the median of successions.

According to the socio-economic panel survey of 2002 by the German research institute DIW, the average value of successions in Germany was ca. 102,000 euro in 1990 and 129,700 in 1996. Extrapolating trends, the average value of successions may in 2007 reach 242,000 euro (corresponding to a total value of ca. 200 bn euro). The research company Empirica has estimated the average value of successions to be around 180,000 in 2005.

[59] 'Inland Revenue - Inheritance Tax', a report by the National Audit Office, 2004.

Table 7 – Estimated average value of successions by country		
Country	**Estimated average value of successions**	**Source**
United Kingdom, 2004	108,000	NAO study, GHK calculations
United Kingdom, 2008	72,000	Estimation by a legal professional
Germany, 1990	102,000	Socio-economic panel survey by DIW
Germany, 1996	129,700	Socio-economic panel survey by DIW
Germany, 2005	180,000	Survey by Empirica[60]
Germany, 2007	242,000	Socio-economic panel survey by DIW
Spain, 2008	400,000	Estimation by a legal professional

Calculating with an average of the more recent survey results (176,667), this is about 5.5 times the gross national income per capita of the countries concerned (Germany and the UK, 30,000 and 33,800, respectively in 2007, according to Eurostat data). As the gross national income was 24,800 euro for the EU27, one can estimate the average value of successions to be around 137,000 euro, ca. 646 billion euro in total, 5.9% of the EU27 GDP.

This proportion will, however, continue to rise in the future – to a lesser extent because of demographic reasons (the more populous post-war cohorts will reach the age 65-70 in the next ten years; Eurostat demographic projections forecast a 5% increase in deaths for 2018 in the EU27, as compared to 2008, from 4,969,000 to 5,235,000), but mainly because of the increase in net wealth accumulated by the population.

Statistics by the German Central Bank (Deutsche Bundesbank) show a 20.6% increase in net wealth per capita from 1993 to 2003 (net of inflation), an increase that may be even more steep in other Member States. Financial assets have had the lion's share in the increase (although the credit crisis will have had some impact on this).

[60] „*Vermögensbildung in Deutschland: Immobilienerbschaften*", Empirica Forschung und Beratung, 2005.

Table 8 – Evolution of assets and liabilities per capita in Germany, 1993-2003 (in euro)			
Type of assets/liabilities	**1993**	**2003**	**Growth rate (adjusted for inflation)**
Real estate property	38,149	48,768	14.0%
Other investments	7,960	9,002	0.9%
Financial assets	29,856	47,483	41.9%
Other assets, consumable goods	8,810	11,850	20.0%
Gross wealth	84,787	117,103	23.2%
Liabilities	-12,075	-18,792	38.8%
Net wealth	72,711	98,311	20.6%

Source: Deutsche Bundesbank

However, the increase of net wealth was not equally distributed across generations. The eldest generations who are usually the testators in current-time successions only had a small share in this wealth accumulation. Their estates are not as large as those of the following generations will be.

Estimates in Table 2.8 already show that the value of estates significantly increased over time. In Germany, according to a study by Empirica from 2005, average real household wealth (i.e. discounting or inflation) has almost doubled in the last 25 years, and the ratio of households with a property rose by 10 percentage points (by ca. 20 percentage points for above-50-year-olds). Whilst the average net wealth for households with an over-69-year-old head was 119,803 euro in 2003, the corresponding figure for the 59-69 year age group was already 173,165, which is 44.5% higher. This wealth gap does also exist and can be even wider in other Member States.

One can thus expect that the average value of successions will rise significantly in real terms in the next ten years, maybe by around 45% (from 137,000 to some 199,000 euro), whilst their total value – accounting for the overall increase in the number of deceases – may rise by perhaps 50% (from 646 billion to some 969 billion euro per annum, at 2007 prices).

Generally, the studies and legal practitioners consulted to date have indicated that the average **value of cross-border successions** have a higher value than purely 'national' successions. One legal practitioner estimated its value to be around twice as high as national successions.

The bulk of successions involve a very small estate of some thousand euro only, which are unlikely to include property abroad (although other cross-border elements, e.g. the heirs being non-nationals, are possible). As for the UK, successions below £5,000 (7,197 euro) accounted for 50.9% of all cases in 2003/2004. In Austria, according to information from the Federal Ministry of Finance, two thirds of successions concerned an estate of less than 7,300 euro. In

Germany, the value of 28% of all estates was below 13,000 euro. Excluding the bottom half of successions that are probably not cross-border, an estimation of around twice the average value for the remaining half of successions can be used for calculations (i.e. 274,000 euro). Calculating with only 450,000 cross-border cases (around 9.5% of all), this would sum up to 123.3 billion euro.

These estates are liable to problems. Even if resolved in a reasonable manner the costs of legal fees might amount to from 2% (2.466 bn euro) to as much as 5% of the total value of international successions (6.165 bn euro), according to legal professionals interviewed. An average of 3% (3.699 bn euro) of the value of estates can be considered realistic.

In the past decades, successions involving property abroad was a characteristic only concerning the affluent testator, whereas today financial investments and even property purchases abroad are not restricted any more to the wealthiest citizens. The gap in the value of the average cross-border and purely national successions has probably started to narrow a bit, and will continue to narrow as cross-border property will be much more frequent. Despite this narrowing, the aggregated value of cross-border successions will rise by more than the previously estimated 50% (because of the increased proportion of cross-border successions).

6. Approximate number of legal professionals involved and the turnover which cross-border successions represent for these professionals

The number of notaries public has been obtained from six Member States only. The number of inhabitants per notary is, however, in a relatively narrow range (10,762 on average). If this proportion was applicable to the 21 Member States where this institution exists[61], the total number of notaries would be somewhere around 38,000.

Table 9 – Number of notaries public in the EU, 2008

Country	Number of notaries public	Population (2006)	Population per notary
Czech Republic	451	10,251,079	22,730
Germany	8513	82,062,249*	9369
Latvia	123	2,294,590	18,655
Lithuania	265	3,403,284	12,843
Romania	1,824	21,610,213	11,848
Slovenia	125	2,003,358	16,027
6 Member States total	*11,301*	*121,624,773*	*10,762*
EU21**	***37,899***	***407,875,883***	***10,762***

** Population in 2009*
*** EU27 minus the UK, Ireland, Cyprus, Sweden, Denmark and Finland*

61 EU-27 minus the UK, Ireland, Cyprus, Sweden, Denmark and Finland

Information on the numbers of other legal professionals involved (lawyers, judges etc.) have not been obtained. The same is valid with regard to the income of international successions for these groups of professionals; information has not been obtained.

As for the six Member States where notaries public are not employed, solicitors (or 'advocates' or 'lawyers') are engaged in settling successions[62]. Based on data obtained through desk-based research on the number of solicitors, it can be estimated that there are about 190,000 solicitors or equivalent in the six Members States concerned, about 130,000 of them being active. Most of them (existing data from England and Wales show that about 80%) work in private practices. That would correspond to about 100,000. The rest are in-door lawyers. Many of the solicitors in private practices would occasionally deal with successions, though estimates have not been received.

Table 10 – Number of solicitors in the 6 Member States concerned, 2008

Country / Region	Number of solicitors/lawyers (2007)		Population (2006)	Population per solicitor/lawyer
	On the roll	Active		
England and Wales	131,347	89,045 (2002)	52,919,979 (2004)	403
Scotland	11,958	8,609 (2000)	5,067,900 (2004)	424
Northern Ireland	2,441		1,706,475 (2004)	699
Ireland	11,241		4,209,019	374
Cyprus	1,000		766,414	766
Sweden	4,442	3,971	9,047,752	2,037
4 Member States total	*162,429*	*111,724**	*73,717,539*	*454*
EU6**	**187,580***	**129,023***	**85,132,010**	**454**

*Source: Law Societies, Bar Associations * GHK calculation **UK, Ireland, Cyprus, Sweden, Denmark and Finland*

62 When brought to court, successions would then also involve barristers / practicing advocates of course.

ANNEX 3 – Financial costs and benefits of the preferred policy option

The preferred policy option would lead to the following financial costs:

- **At EU level**: Costs for administrative work to produce the necessary legislation at EU level. This is estimated to be the equivalent of one Commission official during one year.

- **At national level**: Training of legal professionals (e.g. lawyers, judges, notaries, solicitors) and judicial cooperation. It is reasonable to assume that these costs would be less than 0.5% of the legal costs associated with problematic international successions. These costs would be 'one off' as the Regulation and related practice would rapidly become the norm and legal professionals regularly need to absorb and learn the consequences of new law.[63]

Specific elements of the preferred option may also incur initial costs:

- **Jurisdiction rules.** Financial costs for the Member States would also arise in making the necessary changes of national legislation with regard to the harmonised jurisdiction rules, e.g. legislation indicating what court/authority would handle the case, and enforcement. These costs would need to be borne by the Member States. It is reasonable to assume that the costs for the legislation would be very small as it would be technical in character, non-contentious and necessary.

- **Applicable law.** Financial costs to the administration for the introduction of the new rules would be low, i.e. comparable to those for the introduction of the Rome I and II Regulations.

- **Certificate.** The Member States that currently do not have a certificate would need new legislation to identify what body should issue the certificate and to institute procedure. There would also be a small administrative cost in issuing the certificate. It is reasonable to estimate the costs of a certificate at around € 60 assuming that identity checks similar to those required for obtaining a passport (or marriage certificate) are required, but that there would be no special technical requirements for the certificate itself. This would most likely be offset by a fee.

- **Establishment of interconnected national registers of wills.**

  – For those countries that currently do not have registers of wills, the option would result in establishment costs for creating registers of wills and running them. Such costs will only be relevant for a few countries; first, registers of wills already exist in several Member States[64], and second, the establishment of a register of wills would be voluntary.

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63 Professional services companies tend to invest circa 2% of turnover in training per annum. There would be a case for EU funding of some training on the consequences of the Regulation. However, the implications would be clear and the appropriate legal professionals would need to be informed as much as trained. Much of the costs of any training should be met by the legal professionals themselves.

64 Registers of wills have been established in nineteen Member States (Austria, Belgium, Czech Republic, Cyprus, Denmark, Estonia, France, Greece, Hungary, Italy, Lithuania, Luxembourg, the Netherlands, Portugal, Slovakia, Slovenia, Spain, Sweden and Romania), however, not all of these are 'official' (e.g. the register in Sweden is independent). Decentralised registers of wills are in place in three Member States (Germany, Poland, United Kingdom - England and Wales; probate register); registers may not

– Registers of wills in some Member States would be encouraged to move from a paper-based system to an electronic system in order to ensure the effective and efficient functioning of the interconnected system.[65]

– Other changes to existing registers (including electronic registers) may also be necessary in order to allow for interconnection.

– Total annual costs for running a register of wills currently range from € 2,700 for Hungary to € 3.5 million for France.[66]

- **Information campaigns** would be organised at a national level to inform citizens about the existence of registers of wills and the rules on wills. Overall, costs for the information campaign are estimated to be € 50,000,000 across the EU (estimates are based on 10 euro per death per annum), borne at the national level. Some of these costs would be recouped from testators who register wills and through fees paid for searches for wills (this assumes that fees will be charged for both, as the current registers do).

There would also be impacts on the level of financial costs as a consequence of the use of habitual residence instead of nationality as the connecting factor in combination with the possibility for the testator to make a limited choice of law.

In many EU Member States, nationality is currently used as a connecting factor. In these countries, the use of habitual residence will lead to additional costs in relation to the application of the law of third countries. However, on the other hand, the use of habitual residence will also result in substantial costs savings in those countries that currently have nationality as connecting factor. For example, there are many Turkish nationals who have their habitual residence in Germany. With nationality as connecting factor, Turkish succession law would at present be applied. With the new rules, German law would be applied. Both these costs and savings would, however, not be certain due to the introduction of a limited choice of law, which would mean that the law of the nationality would still be applied if the testator chose it.

Furthermore, the introduction of a unitary succession system at EU level would result in cost savings in those Member States which presently adhere to the split system (where immovable property is governed by the law at its location), because the court would apply only one succession law.

In sum, the introduction of the unitary succession system and of habitual residence as dominant connecting factor as well as the admission of a limited choice of law would tend to decrease costs; however, savings would vary between Member States.

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cover the entire country. Two Member States (Bulgaria and Latvia) are in the process of creating a register of wills. In two Member States (Ireland and Finland) no register of wills has been established and is not in the process of being established. No information on the existence of a register of wills has been identified for Malta.

65 Information on whether the registers are electronic or paper-based has been identified for thirteen Member States. The majority of them (Austria, Belgium, Czech Republic, Estonia, France, Hungary, Italy, Lithuania, Luxembourg and the Netherlands) currently have an electronic register of wills. Cyprus, Portugal, Spain, Sweden and Romania have paper-based registers.

66 Belgium: € 236,000, Estonia: € 15,600, Lithuania: € 193,000 and Italy: € 50,000. Annual budgets for maintenance of registers of wills have been provided by three Member States: Italy (€ 50,000), Belgium (€ 60,000) and France (€ 280,000).

ANNEX 4 – Economic effect on fees for legal professionals

The potentially affected legal professionals are:

- *Those assisting testators in making wills.* Two elements of the preferred option are likely to increase the proportion of wills drawn up. The first is the possibility to make a limited choice of law, which would need to be indicated in a will. The introduction of a limited choice of law would naturally have the greatest impact in those countries that currently do not allow a choice of law (Austria, Cyprus, France, Greece, Ireland, Latvia, Lithuania, Luxemburg, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Czech Republic)[67]. The second element that may lead to a minor increase in the proportion of wills is the national information campaigns relating to registering wills. These two elements are likely to have the effect of increasing the business and income for legal professionals assisting testators making wills.

- *Those charging for certificates of inheritance.* Where heirs previously used to need several certificates, but under the preferred option would only need one European certificate, the legal professionals issuing certificates could loose some business and revenue. In those countries which currently do not issue certificates, the introduction of a European certificate would however lead to new business opportunities. These effects would concern cross-border successions only as the proposed legislation would not contain obligations to issue a European certificate for purely national successions. However, for public notaries, overall revenues would not necessarily be reduced. In many countries, the fees they would charge would be fixed (or proportional to the estate). The market of public notaries is not necessarily a competitive one.

- *Those charging for searching for wills.* By implementing the preferred option, it is expected that the system of identifying wills would become more efficient. While the fees charged to clients for these activities may decrease, this might be associated with a substantial time and cost reductions for the professionals involved. This could increase the margins on such work as currently this often involves considerable resource intensive work.

- *Legal professionals involved in difficult cases.* By far the most significant effects (most of the potential 1.3 billion euro savings in legal costs) would be on legal professionals involved in difficult cases. This includes fees to legal professionals acting on behalf of the various parties (be it in- or out-of-court procedures), the costs of courts and court officials (that may be paid for by the 'public purse'), and the costs of 'parallel' proceedings. Here, there is a clear potential for fee reductions for clients, and thus revenue foregone for legal professionals. However, these effects are likely to be twofold. First, a reduction in the volume of work, second, an increase in the 'quality' of the work which could be associated with improved financial returns and efficiency. The effects should not therefore be seen as a disbenefit.

Aggregating the above effects, the maximum revenue foregone for legal professionals would be in the order of around 1.3 billion euro per annum, corresponding to the annual average employment of 10,800 FTE. However, this would be offset by potential increases in work to

[67] Information is unavailable for Hungary, Malta and Northern Ireland.

assist those making wills and in improvements in the quality of work due to reductions in legal uncertainty and complexities in identifying wills and the bona fide of heirs.

It has been estimated in the external study that the tax revenue in 2005 for the EU27 from inheritance tax was around 31.0 billion euro (this compares with the estimated total value of estates of 646 billion euro in 2005, 5.9% of the EU27 GDP). Inheritance tax was estimated to be 0.28% of EU27 GDP in the same year. Table 5.1 in Annex 5 indicates the total tax from inheritance and gifts for eight EU countries. These figures have been used to extrapolate to the EU27.

ANNEX 5 – Impact of the preferred option on inheritance tax

Table 5.1 – State revenues from inheritance tax, 2005										
	DE	**FR**	**UK**	**NL**	**ES**	**DK**	**AT**	**SE***	***Total***	**EU27****
Total revenues	4.1	8.9	4.7	1.7	2.3	0.4	0.2	0.1	*22.4*	31.0
as % of GDP	0.18	0.52	0.26	0.34	0.25	0.20	0.06	0.04	*0.28*	0.28

*Source: OECD *Inheritance tax abolished in 2004 **Extrapolated figure for the EU27*

Rates of inheritance tax vary markedly between Member States. Marginal rates range from nil to 80%. The latter maximum occurs in Belgium Wallonie and Brussels, for heirs not closely related with the testator, for inheritance above €250,000. The variation in effective tax rates is also considerable. Table 2 indicates the effective tax rates in EU countries for four examples (estates worth either 100,000 or 500,000 euro left to either spouse and/or children (assuming two heirs) or heirs apart from close relatives). The smaller examples of 100,000 euro reflect estimated average (median) size of estates in the EU average.

Seven EU countries do not have inheritance tax. Tax rate for heirs apart from close relatives are almost always higher. There are wide variations in effective tax rates for each of the four examples. For the example of spouses and children inheriting 50,000 euro each, effective tax rates range from 0 to 11.3%. For the example of spouses and children inheriting 250,000 euro each, effective tax rates range from 0 to 15.1%. For the example of heirs apart from close relatives inheriting 50,000 euro each, effective tax rates range from 0 to 46.3%. Finally, for the example of heirs apart from close relatives inheriting 250,000 euro each, effective tax rates range from 0 to 71.3%.

Table 5.2 – Effective tax rates applicable in selected Member States (for two categories of heirs and for two sample bequests), special tax deductions not accounted for				
Member State	**Spouse and children (closest family)**		**Heirs apart from close relatives****	
	€50,000	**€250,000**	**€50,000**	**€250,000**
Austria (as of 2008)	No inheritance tax			
Cyprus				
Estonia				
Latvia				
Portugal				
Slovakia				
Sweden				
Belgium (Flanders)	3%	7.8%	45%	57%
Belgium (Wallonie)	4.3%	10.7%	46.3%	71.3%
Belgium (Brussels)	3%	10.3%	40%	62.5%
Bulgaria	-	0.3%	-	2.4%

Czech Republic	1.1%	1.5%	7.7%	12.4%
Denmark	15% estate tax (nil for surviving spouses)		36.25% (15% estate tax and an additional 25% inheritance tax)	
Finland	11.3%	15.1%	33.9%	45.2%
France	-	8.9% (spouse) 10.9% (child)	-	48%
Germany	-	- (spouse) 1.3% (child)	15.2%	21.3%
Greece	-	-	18%	28.4%
Hungary	2.5%	7.2%	8%	14.8%
Ireland	-	-	10.1%	18%
Italy	-	-	8%	8%
Lithuania	-	-	5%	10%
Luxembourg	-	-	6%	13.5%
Malta (no inheritance tax but transfer duty)	5%	5%	5%	5%
Netherlands (plus 6% transfer duty)	- (spouse) 7.1% (child)	- (spouse) 14.2% (child)	43.8%	52.8%
Poland	6.3%	6.9%	18.8%	19.8%
Romania	0.6%	0.5%	0.6%	0.5%
Slovenia	-	-	12 – 39%	
Spain	0.3% (possibly exempted)	12.8%	9.9% (surcharges possible)	17.1% (surcharges possible)
United Kingdom (estate is subject to inheritance tax)	-	8.8%	-	8.8%
Ranges	**0 to 11.3%**	**0 to 15.1%**	**0 to 46.3%**	**0 to 71.3%**

** Heirs who are not close relatives (i.e. heirs except spouses, children, descendents of children, parents, siblings, nephews/nieces, in-laws)*

Note on table: For the purpose of this report, the figures have been derived by aggregating the different tax rates applicable to different bands[68], accounting for basic tax exemptions and nil-bands but not accounting for special tax deduction possibilities as for example in Belgium, or tax savings from e.g. family trust arrangements. The latter can be very significant in certain cases. Also, holdings in companies or immovable property may be subject to reduced tax rates (e.g. Greece).

There are few potential effects of the preferred option on inheritance tax paid.

Citizens may choose law on the basis of nationality or move habitual residence which would enable them to bequest their estates to heirs other than close family members. The effective tax rate to be paid by these 'other' categories of heirs (not spouses, descendents, parents) is usually higher. Thus inheritance tax receipts might increase. However, such an effect could only accrue to those 'choosing' England and Wales law. The scale of this effect is anticipated to be very low.

[68] Source of raw data http://www.globalpropertyguide.com

A large proportion of typical estates are made up of immovable assets. Inheritance tax (transfer duty) paid on immovables will continue to paid in the country in which they are located. The preferred option will only have very minor effects on this tax.

As a result of these effects it is unlikely that there would be large changes in inheritance tax paid in the EU. There might, however, be some, small changes on certain national budgets, either increases or decreases.

ANNEX 6 – Potential monitoring and evaluation indicators

Potential monitoring and evaluation indicators of the preferred option		
Main Policy Objectives	**Potential indicators**	**Sources of information**
General objectives		
To allow citizens to efficiently plan and to organise their succession in advance in a cross border context	The numbers of wills made and The number of instances when wills include a choice of law The numbers of wills registered The legal costs involved and time taken to resolve 'international' successions The incidences of citizens apparently using 'habitual residence' to avoid the implications of reserved portion obligations	Source: national authorities and legal professional bodies NB. This indicator would be of value in assessing whether the preferred option led to adverse 'side effects'
To increase the likelihood that the rights of potential heirs, persons formally or otherwise related to the deceased, private and public creditors etc. are being fulfilled in an efficient way	The numbers of wills contested by heirs The legal costs involved and time taken to resolve 'international' successions	Source: national authorities and legal professional bodies NB. Reductions in typical legal costs absolutely and as a proportion of the value of legacies would point to the achievement of this objective. It is reasonable to assume that high legal costs are a barrier to the exercising of rights.
Specific objectives		
To achieve a situation where parallel proceedings do not occur and where different substantive laws are not applied to the same international succession	The incidence of parallel proceedings	Legal bodies and individual legal professionals
To provide a (limited) choice of law for the testator	The numbers of wills made and the number of instances when these include a choice of law	Consultations of citizens and legal practitioners
To ensure the recognition of: Judgements, other decisions and authentic acts / deeds on international successions The powers of administrators/executors The status as an heir	The instances of judgements and other decisions not being recognised The incidence of the powers of administrators/executors being not recognised The numbers of certificates granted to heirs The number of certificates not recognised transnationally. The costs and time delays resulting from instances of non-recognition	Member States judicial authorities could be asked to provide such information periodically
To increase the accessibility of information on the existence of wills	The number of Member States having registers	Member States could be requested to provide this information on an annual

Potential monitoring and evaluation indicators of the preferred option		
Main Policy Objectives	**Potential indicators**	**Sources of information**
abroad	The number of Member States having electronic registers The number of registers that are interconnected The number of wills registered The time taken and accuracy of 'international' sources of wills The numbers of will made (as a proportion of the adult population)	basis.

Potential monitoring and evaluation indicators of the magnitude of international successions and wills			
Indicator	**Specific input data**	**Comments**	**Source**
Figures on the number of successions and wills in the EU	*i.* Number of wills registered in the country *ii.* Number of wills existing in the country that are not registered *iii.* Number of new wills made/registered in the country per annum (taking account of – i.e. discounting – updates and revocations)	*iv.* Some wills are not registered even in countries where a central register exists *v.* Individuals may have several wills in different countries *vi.* Specification needed of what the registered numbers include (wills of MS citizens only, several versions of wills of one person, etc.)	*vii.* Number of deceased by MS per annum by age group, trends (Eurostat) *viii.* Studies, reports, hearings, etc.: e.g. data or estimates on the number of wills or proportion of intestate deaths. *ix.* Consultations: *x.* Authorities managing the central wills register (if exists, like ES, FR) *xi.* Relevant professional bodies
	xii. Number of successions in the country per annum (separately for intestate successions and for successions where will is available) *xiii.* Proportion of intestate deceases of all deceases in the country *xiv.* Proportion of successions launched in case of intestate deceases	*xv.* Number of wills may be estimated by using proportion of intestate deceases and statistics on the number of deceased persons per annum *xvi.* Number of intestate successions may be estimated by using proportion of successions launched, estimates on number of wills and statistics on the number of deceased persons per annum *xvii.* The estimates on the proportion of successions launched could be based on separate assumptions by age group (e.g. infants usually do not possess property, therefore there is no need for succession)	
Number of cross-border successions within the EU as meaning involving: (a) a deceased who lived in a Member State different from its State of origin, or (b) a succession	*xviii.* Number of foreign nationals having the country as his/her habitual residence *xix.* Number of citizens having another country as his/here habitual residence	*xx.* The length/intention of stay is also relevant for the determination of 'habitual residence' (is it the citizen's centre of vital interests?) *xxi.* Account will have to be taken of temporary workers and third country nationals who might acquire citizenship later	*xxii.* Population by age group and citizenship/country of birth (Eurostat) *xxiii.* Number of EU citizens living in a state different from their own, by age group (Eurostat) *xxiv.* Number of foreign nationals living in EU Member States, by age
	xxx. Number of deceased citizens	*xxxiii.* A proportion of the deceased may not have had	

Potential monitoring and evaluation indicators of the preferred option			
Main Policy Objectives	**Potential indicators**		**Sources of information**
involving properties (e.g. bank accounts or immovable property) disseminated in more than one Member State;	abroad per annum *xxxi.* Number of deceased foreign nationals (both EU and third country nationals) in the country per annum *xxxii.* Proportion of deceased foreign nationals/citizens abroad who resided in the given country	their habitual residence in the country concerned; this will have to be taken into consideration	group (Eurostat) *xxv.* Number of international marriages and partnerships, both with EU or third country national, including same sex partnerships (Eurostat and available studies) *xxvi.* Studies, reports, etc.: e.g. figures on foreign nationals deceased in Finland have been already identified *xxvii.* National statistics Consultations: *xxviii.* Authorities operating national registers of citizenship and/or foreign nationals *xxix.* Tax authorities (foreign nationals paying tax in the country, tax-paying nationals living abroad)
	xxxiv. Number of successions involving cross-border elements per annum (application of law of different countries), EU/third countries separately *xxxv.* Proportion of deaths of foreign nationals in the country that involves succession in the country (existence of some connecting factor, national jurisdiction and/or application of national law), EU/third countries separately *xxxvi.* Proportion of deaths of citizens in a foreign country that involves succession (national jurisdiction and/or application of national law), EU/third countries separately *xxxvii.* Value and type of property involved in cross-border succession cases *xxxviii.* Proportion of succession-related tax revenues linked to cross-border successions	*xxxix.* All figures or estimates on cross-border successions would preferably be broken down to the different countries concerned *xl.* A breakdown of property involved according to different types is needed (immovables, financial assets and liabilities, etc.) *xli.* Trends in the total value of property abroad/foreign property in the country can be used to extrapolate results to Member States without specific data on value of cross-border successions; ultimately, most property abroad will undergo some form of succession	*xlii.* Tax revenue from inheritance tax, stamp duties or other state revenues in connection with succession (national financial accounts) *xliii.* Value of immovable/other property (bank accounts, capital share, movables) held in MSs by other nationals (studies, central banks, land registers, tax authorities, national statistics, etc.) *xliv.* Value of immovable/other property (bank accounts, capital share, movables, etc.) held by nationals of MSs abroad (studies, central banks, tax authorities, national statistics, etc.) *xlv.* Studies, reports, etc. Consultations *xlvi.* Professional bodies (to be identified) *xlvii.* Tax authorities (on the value and breakdown of property involved)
The number of successions in which	*xlviii.* Number or proportion of successions where the	*xlix.* In case proportion is only given, the number of successions can	Consultations:

Potential monitoring and evaluation indicators of the preferred option			
Main Policy Objectives	**Potential indicators**		**Sources of information**
the competent authority (e.g. court, administrator or notary) applies laws of other EU Member States.	competent authority applies laws of other EU Member States (in its entirety or elements)	be estimated on the basis of all cross-border successions, or extrapolated using other MSs' results	*l.* Professionals bodies
The number of successions in which the competent authority (e.g. court, administrator or notary) applies laws of third countries.	*li.* Number or proportion of successions where the competent authority applies laws of third countries (in its entirety or elements),	*lii.* In case proportion is only given, the number of successions will be estimated on the basis of all cross-border successions, or extrapolated using other MSs' results	Consultations: *liii.* Professional bodies (to be identified)
The value/amount of all these successions in the EU (in euro);	*liv.* Total value of cross-border successions (if possible, broken down to successions in which the competent authority applies laws of other EU/third countries) *lv.* Average value of cross-border successions (if possible, broken down to successions in which the competent authority applies laws of other EU/third countries) *lvi.* Average value of successions in general per MS	*lvii.* Total value may be estimated by multiplying average value of cross-border successions by the estimated number of such successions *lviii.* If average value is not available, extrapolation is possible using the average value of successions in general (though this is probably a significant underestimation) *lix.* For countries where the value of successions in general is not available, the average wealth per capita figures may be used to extrapolate	Average wealth per capita (studies, central banks, national statistics, etc.) Consultations: *lx.* Professional bodies (to be identified)
The number of cases where foreign law is not applied due to an opt out on the basis of 'ordre public' concerning: (a) Other EU Member States; and, (b) Third countries.	*lxi.* Number or proportion of successions where the law of another Member State is not applied due to an opt out on the basis of 'ordre public' *lxii.* Number or proportion of successions where the law of third countries is not applied du to an opt out on the basis of 'ordre public'	*lxiii.* In case proportion is only given, the number of successions can be estimated on the basis of all cross-border successions, or extrapolated using other MSs' results	Consultations: *lxiv.* Professional bodies
The number of legal professionals involved by Member States and the turnover which cross-border successions represent for these professionals (by type of group of professionals).	*lxv.* Total number of legal professionals in the country concerned (notaries public, solicitors, judges in civil courts, etc.) *lxvi.* Number or proportion of legal professionals dealing regularly/predominantly with cross-border successions *lxvii.* Number or proportion of legal professionals dealing occasionally with cross-border successions *lxviii.* Average turnover of a legal professional of the professions concerned (working days per annum for judges) *lxix.* Significance of cross-border successions in terms of time	*lxx.* Some legal professionals may just very occasionally deal with cross-border successions, this needs to be taken into account	*lxxi.* National registers of legal professionals concerned Consultations: *lxxii.* Professional bodies *lxxiii.* Professionals dealing with cross-border successions

Potential monitoring and evaluation indicators of the preferred option			
Main Policy Objectives	**Potential indicators**		**Sources of information**
	and/or revenue for legal professionals (separately for those dealing regularly or only occasionally with cross-border successions)		