COUNCIL OF
THE EUROPEAN UNION

Brussels, 28 January 2010 (02.02)
(OR. en,nl)

5811/10
ADD 3

LIMITE

JUSTCIV 22
CODEC 69

Interinstitutional File:
2009/0157 (COD)

NOTE

from :	Belgian delegation
to :	Working Party on Civil Law Matters (Succession)
No. Cion prop. :	14722/09 JUSTCIV 210 CODEC 1209
Subject :	Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession – Comments from the Belgian delegation

Belgium thanks the Presidency for its initiative in allowing the Member States to adopt a position concerning Chapters I to III. At this initial stage, Belgium would like to make the following comments.

1. Scope (Article 1)

Article 1(3)(g) and (h) concern *"enterprises, associations and legal persons"*. Enterprises and associations are legal persons and therefore no explicit mention of them needs to be made.

Proposal: Delete *"enterprises, associations and"*.

2. Definitions (Article 2)

A. Belgium considers that the **definition of "succession to the estates of deceased persons**" in Article 2(a) must be improved. Not only property but also other rights and liabilities are concerned. It would therefore be better to refer to **assets**. Assets are not really defined in Belgian law because this is a fluid concept: someone's assets change every day. Although this concept is not explicitly defined in Belgian law, it can be found inter alia to the Civil Code and the Mortgage Act. It is generally accepted that assets are the *totality of someone's property and entitlements that have a monetary value.*

Moreover, it is not clear whether transfer or handover is concerned. The Belgian Civil Code (private international law) refers to handover (Article 80(1)(7)). We want to ask the Commission if the content of *"a legal transfer of property"* is the same as what is understood by handover.

Proposal: replace *"transfer of property"* by *"transfer or handover of assets"*.

B. The definition of **court (Article 2(b))** should also be adapted. This position is adopted by (almost) every Member State and is a crucial element for achieving a regulation that works well. This is in connection inter alia with Article 3, which makes the chapter applicable to *"non-judicial authorities ... where necessary"*. The definition creates many problems, also with regard to the creation of a possible European Certificate of Succession.

3. The connecting factor: the habitual place of residence of the deceased[1] (Articles 4 and 16)

In the sphere of both the applicable law and the competent court, the criterion proposed by the Commission of the **last habitual place of residence** is applied by Belgian private international law as the basic rule **(Article 78(1) of the Civil Code (private international law))**, a criterion which also appears in the Hague Treaties. The exceptions to this are considerably different in the proposal for a regulation and in the Civil Code (PIL).

The concept is also used in other regulations and in international conventions but it has so far not proved possible to draw up a generally accepted definition. Given the increasing importance of this concept, Belgium is in favour of trying to **find a definition** or at least a number of guidelines with a view to achieving a uniform interpretation throughout the EU and consequently greater legal certainty. It will not be easy to reach a compromise in this connection but it is worthwhile making an attempt.

Proposal: A possible starting point is provided by Article 4(2)[2] of the Belgian Civil Code (PIL). The Court of Justice moreover has a large body of case law concerning the habitual place of residence, provisionally crowned by judgment C523/07 of 2 April 2009. We know that the following is a bothersome request but we would like to ask the Commission once again to get the Legal Service to make a summary analysis of the Court's case law as a basis for further work. If no generally accepted definition can be drawn up, such a summary analysis will certainly be useful in the context of other initiatives.

---

1 Abbreviated to LHR in this note.

2 Article 4 (….)
(2) For the application of this law, habitual place of residence means:
1. the place where a natural person has established his main place of residence, even in the absence of registration and irrespective of a residence permit or permanent residence permit; in order to determine this place, account is taken of personal and professional circumstances which show long-lasting links with the place or the intention of creating such links;
2. the place where a legal person's main place of business is situated.
(.....)

4. Freedom of choice with regard to the applicable law (Article 17)

Article 17 offers the testator the opportunity to depart from the basic principle of the law of his LHR being applicable to his succession. He can opt for the law of the country of his nationality. Belgium has a similar rule in its Civil Code (PIL). In our opinion, the freedom of choice proposed by the Commission is wide enough and does not need to be broadened.

The current formulation of the text raises questions for us.

A. The first question that arises is what happens if the deceased changed his nationality? Which is valid in that case, – his nationality at the time of his choice of law or his nationality at the time of his death?

For example: A Belgian of Moroccan origin living in France opts for Belgian law but finally adopts Moroccan nationality and dies shortly afterwards. Is Belgian law still applicable? And what happens if this person opts for "the law of the country of his nationality" without specifying the nationality?

Proposal: Specify that this choice is valid only if the testator had the nationality of that State or his habitual place of residence on the territory of that State[1] at the time of determination or at the time of death. This would remove any doubt whereas the existing silence can lead to different interpretations.

B. Belgium also has a fundamental problem with the current text. Our PIL still offers the testator the possibility of choosing the law of his nationality (Article 79 of the Civil Code (PIL)). Limited adaptation, whether in the preamble or not, would make the proposal perfectly acceptable to us. This relates to the problem of **multiple nationality**.

[1] See Article 79 of the Civil Code (PIL).

This problem was also discussed in the framework of the Rome III Regulation (divorce) but those discussions have been temporarily suspended. Whatever solution is accepted, it is hard to underestimate its importance in terms of **setting a precedent** for other (future) conventions.

The current version would have a great impact on our PIL and our applicable law with regard to persons who have another nationality in addition to Belgian nationality. Our PIL, based on the Hague Convention of 12 April 1930[1], states that a person who has dual nationality is considered as a Belgian for the application of PIL **(Article 3(2) of the Civil Code (PIL)**.

This rule was adopted to avoid discrimination against Belgians who do not have dual nationality. After all, persons with dual "BE-foreign" nationality can avoid the application of Belgian law by opting for their foreign nationality. Belgians with only one nationality cannot do so, resulting in discrimination between Belgians. Furthermore the international recommendations concerning multiple nationality are unambiguous: each person has the right to a nationality, must have a nationality and ideally should have only one nationality. It is not logical that an undesirable situation gives advantages to persons in that situation. They should not be the subject of positive or negative discrimination.

In the EU, a departure from that principle can be accepted in the context of freedom of movement and the confidence that Member States place in each other. The situation is fundamentally different in **relations with third countries** and that is the very crux of the problem.

For example: Under Belgian law as it now stands, a Belgian of Moroccan origin who lived and died in France, whose case comes before a Belgian judge (who will therefore determine substantive law on the basis of Belgian PIL) could not, in the current situation, make use of the freedom of choice provided by Article 79 of the Civil Code (PIL) to opt for Moroccan law for his succession. Under Belgian law he is considered to be Belgian, not Moroccan.

[1] EU Member States: BE, NL, UK and SE.

Under Article 17 of the proposal for a regulation, this person can choose between Belgian or Moroccan law, as the proposal does not provide for a rule similar to Article 3(2) of the Civil Code (PIL).

In relations with countries where, for example, the Shariah is in force, this means that a Belgian judge must apply it. As far as we know, this is a sensitive point in many European countries. It is true that this is alleviated by Article 27(2) (exception on the basis of public policy) so that for example, on the basis of public policy, the wife should receive the Belgian inheritance while the children (both male and female) should receive (or not receive) the Moroccan inheritance.

Proposal: An arrangement modelled on that in the draft Rome III. The statement in the preamble ***"The question of how to deal with cases of multiple nationalities should be left to national law"*** was finally accepted as a compromise.

5. Agreements as to succession (Article 18)

An agreement as to succession is *an arrangement whereby purely hypothetical rights to a future succession, to part of it or to an aspect of it are conferred, modified or transferred.*

Agreements as to succession are **formally prohibited by** Articles 791, 1130, 1388 and 1600 of **the Civil Code** and are incurably void (therefore governed by **public policy**). It is not permissible to accept or renounce a future succession in advance. This ban is seen as an important exception to the principle of contractual autonomy (Article 1134). It is usually based on Article 6 because such agreements are considered as being contrary to public policy.

It should be noted, however, that the Civil Code neither prohibits contracts on future events (Article 1130(1)) nor the insertion of terms into contracts (e.g. reservation of title or payment of the price on death). Moreover, exceptions are provided for.

It should moreover be noted that in certain cases other **mechanisms** are **(quite) similar** to an exception to the ban on agreements as to succession: inter vivos distribution (Article 1075) or waiver of the obligation to include a donation in the estate (the property given to an heir does not have to be included in the estate for distribution: DE PAGE, *op. cit.*, p. 413 ; contra : VERSTRAETE, « Pactes sur succession future », *Répertoire notarial*, 2005, Volume III, Book 2, p. 56).

Grounds for the ban:
The main reason put forward is the wish to avert the *votum mortis*, i.e. the desire for the person's death. However, the same criticisms were levelled against other instruments that are now common, such as life annuities and life assurance.
When the Civil Code was drafted, the aim was also to ensure equality between children. Other, unconvincing, reasons were put forward (indeterminable value, pointless, etc.) Embezzlement of assets and speculation by third parties may also be put forward.

The proposal involves the recognition, and incorporation into Belgian law, of agreements as to succession. We consider that there would be very few cases in which an agreement as to succession would not be accepted by a Belgian judge. The impact on the protection of the reserved portion of the estate is also not very clear. Internal consultations have not yet been concluded. We are therefore obliged to enter a scrutiny reservation in this connection.

6. Scope of applicable law (Article 19)

A. Sharing the inheritance

Article 80(1)(7) of the Civil Code (PIL) states that the lex successionis governs "*the nature and scope of the rights of the heirs and legatees as well as the liabilities imposed by the deceased*". Article 82 provides that "*administration and transfer of the succession are governed by" the lex successionis.*

Article 19(2)(l) states that the lex successionis governs *"sharing the inheritance"* but says nothing about the concrete procedures for distribution, unless the Commission can say if this is included in **subparagraph (f)** *"the transfer of assets and rights making up the succession to the heirs and legatees…."*. **Subparagraph (h)** does state that the lex successionis governs responsibility for the debts under the succession but we wonder why only responsibility is concerned, not also the transfer of debts or liabilities.

Proposal: Find a new formulation based on the Belgian Civil Code (PIL).

B. Eligibility to inherit v. the capacity to inherit (Article 19(2)(b), (c) and (d))

Eligibility to inherit must not be confused with the capacity to inherit. According to DE PAGE, *"a person's eligibility to inherit is due to the fact that that person falls within one of the categories of persons eligible to inherit that are recognised by the law: descendants, ascendants, collateral relatives, etc."* (Volume IX, 1974, No 41). It is also defined as the subject of the option to inherit. More generally, eligibility is defined as a *"right, generally conferred by the law, which cannot be renounced by its recipient before the event which actualises it (opening of the succession), but which existed earlier in a virtual or hypothetical state"* (Vocabulaire Juridique, 1990, 2nd edition, PUF).

The capacity to inherit consists of fulfilment by the person entitled to inherit of the prior conditions for succession. *"Failure to fulfil those conditions would render ineffective the most well-established eligibility to inherit"*.

There are three conditions in Belgium (Articles 720 to 722 CC and Articles 725 to 730):

- existing at the time of the opening of the succession (e.g. a viable child)
- being capable of inheriting (civil capacity)
- not being unworthy to inherit.

On reading this, it seems strange to refer to the "eligibility of the legatees" and we have not found a text referring to legatees in the context of eligibility. The expression in the proposal is however taken literally from **Article 80(1)(2) of the International Private Law Code**.

The International Private Law Code v. the draft Regulation

First of all, it must be said that the list made by both instruments is not exhaustive.

The draft Regulation explicitly governs law applicable to eligibility AND capacity:

– the law of succession is applicable to eligibility: Article 19(2)(b) of the proposal for a regulation;
– the law of succession is applicable to capacity: Article 19(3)(c) and (d).

However, in the International Private Law Code:

– The law of succession governs eligibility (Article 80(1)(2))
– but nothing in Article 80 governs capacity in general.
– The law of succession specifically governs "*the particular causes of incapacity to dispose or receive*" (Article 80(1)(9)).

It is therefore unclear whether capacity is tacitly governed by Article 80(1) or whether it is *not* governed by the latter with regard to succession, in which case it would be governed by the general article of the International Private Law Code, Article 34[1].
Parliamentary discussions on this subject are not unanimous. The explanations in Articles 34 and 80 are contradictory. It seems to be Article 34 that determines the law applicable to capacity.

[1] "Article 34 of the International Private Law Code.
1. **Apart from matters in which this law specifies otherwise, a person's status and capacity shall be governed by the law of the State of their nationality.**
However, capacity shall be governed by Belgian law if foreign law leads to the application of Belgian law.
Capacity acquired in accordance with the applicable law pursuant to paragraphs 1 and 2 shall not be lost as a result of a change in nationality.
2. Incapacity in relation to a legal relationship shall be governed by the law applicable to that relationship."

We are nevertheless not opposed to the Commission proposal, whereby the law governing succession applies to capacity.

C. <u>Transfer of assets and rights making up the succession</u> (Article 19(2)(f))

See point 7.

D. <u>Responsibility for debts under the succession</u> (Article 19(2)(h))

We should like the Commission to spell out the substance of this clause, which is open to broad interpretation. Does it cover debts incurred by the deceased only, or does it also include debts incurred in liquidating the estate, tax debts etc? That would leave the tax authorities subject to foreign law. This is remedied by Article 21(2)(b) for property located in the tax authorities' country only.

The relationship with Article 12(2) of the Rome I Regulation might also need to be clarified[1]. May we ask the Commission whether it is correct to interpret this as meaning that responsibility for debts under the succession is governed by the new Regulation, but the manner of performance and the steps to be taken by the creditor in the event of inadequate performance are governed by the law of the country of performance.

---

[1] Article 12 of the Rome I Regulation:

"*1. The law applicable to a contract by virtue of this Regulation shall govern in particular:*

(a) interpretation;

(b) performance;

(c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;

(d) the various ways of extinguishing obligations, and prescription and limitation of actions;

(e) the consequences of nullity of the contract.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the <u>law of the country in which performance takes place</u>.".

E. Form of wills (Article 19(2)(k))

Article 19(2)(k) explicitly excludes the form of wills from the draft Regulation's scope. The Commission has given a number of reasons for this, which we can understand. In our view, however, that exclusion runs counter to the intended harmonisation and foreseeability as to the law applicable.

Belgium therefore continues to take the view that the form of wills should also be covered by the Regulation. This could best be done by including the 1961 Hague Convention rules in the Regulation, as suggested by Hungary.

Proposal: We suggest that those countries not party to the Convention spell out their objections to its rules, as we do not know exactly what those objections are. They may not actually have any fundamental objections, in which case there would be no difficulty in incorporating the Hague Convention rules. As regards reservations entered in respect of that Convention, in our view, those countries which have done so ought really to explain why.

7. Validity of the form of acceptance or waiver (Article 20)

Under Article 20, acceptance or waiver is also valid if it meets the requirements under the law of the heir's place of habitual residence.

Under Article 80(1)(8) of the Belgian Code of Private International Law, the requirements are those of the law applicable (normally that of the last place of habitual residence); under paragraph 2 of that article, they are those of the law of the place where immovable property is located.

Belgium needs to enter a reservation on this point, as its internal consultations have not yet been completed. The practical implications are still under discussion among the various experts. We will keep the Council briefed on the eventual outcome of internal discussions.

8. Application of the law of the place in which property is located

A. We wonder how broadly the provision in **Article 21(1)** (actually an exception clause) is to be interpreted. What is meant by "*subsequent to*"? In practice, we have in mind our system of mortgage registration. Entry or transfer in the mortgage register does not in itself enact the transaction, nor is it a formal requirement, for the purposes of either transfer of ownership or acceptance/waiver of a succession. It is, however, crucially important for the protection of third parties (who would otherwise not need to make allowance for the transfer of ownership) and for legal certainty. Entry or transfer in the mortgage register may thus not come within the Regulation's scope (in which case there would be no problem, as it would remain fully applicable). What is the position as regards other formalities required by the law of the place where property is located? Are the safeguards in Article 21 in fact sufficient? It is very important for Belgium that the precise substance and extent of Article 21(1) should be made clear.

B. **Article 21(2)(a)** stipulates that the law of the place in which property is located is applicable where it "*subjects the administration and liquidation of the succession to the appointment of an administrator or executor of the will via an authority located in this Member State*" but adds that "*the law applicable to the succession shall govern the determination of the persons ... who are likely to be appointed*" to administer and liquidate the succession.

How is this to be taken? We consider it an illogical provision. It seems that whether anyone is actually to be appointed as an executor or administrator is governed by the *lex rei sitae*, but who is to be appointed, if so, is governed by the law of the country of last habitual residence. This, of course, gives rise to difficulties. What if the latter law makes no provision in this regard? And what if, under the former law, the person will normally be a notary while, under the latter law, it is an actual heir? We should like the Commission to clarify this point. The provision may need to be redrafted.

9. Simultaneous death (Article 23)

Article 23: "*Where two or more persons whose successions are governed by different laws die in circumstances which do not allow the order of death to be determined and where the laws deal with the situation through provisions which are incompatible or which do not settle it at all, none of the persons shall have any rights regarding the succession of the other party or parties.*"

A. Inclusion of substantive law in the proposal?

The course proposed by the Commission is not, in our view, a rule of private international law, but rather a provision putting forward a substantive solution to a problem encountered. However, the fact that the problem is encountered does not mean that any solution should be provided here. The purpose of the prospective Regulation is to determine the law applicable, not to harmonise Member States' substantive law. In our view, it is not for the Commission to decide that, in the event of a number of people dying simultaneously, they should not be able to inherit from one another.

B. Compatibility with Belgian law

Article 720 of the Civil Code: "*In order to be an heir or legatee, it shall be necessary to survive the person leaving the inheritance or legacy.*".
Article 721 of the Civil Code: "*If the order in which two or more persons have died cannot be established, they shall be deemed to have died simultaneously.*".

In other words, under Belgian law, in the event of (a presumption of) simultaneous death, one person will not be able to inherit from another, having failed to survive that other, as in the Commission proposal. It may have seemed that we are opposing the solution proposed by the Commission and, for that reason, are arguing that the matter is one of substantive law. However, as can be seen, Belgium applies broadly the same rule.

In Belgium, however, that rule is mitigated by **substitution**. This is "*a legal fiction, whereby substitutes assume the place, ranking and rights of the person superseded*" (Article 739 of the Civil Code).

Article 744: "*A substitute may not supersede a living person, only a deceased person.*
A substitute may supersede a person whose succession the substitute has waived.
Substitution shall take effect upon simultaneous death in the same way as upon prior death.".

A few examples may serve to make clear what is involved. Let us assume that A is the father of B1 and of B2, who is himself the father of C1 and C2.

(1) If B2 and C2 die "simultaneously", C1 will firstly inherit from B2 as his son. He would normally inherit from C2 as a brother. By means of substitution, however, he will inherit from him as if he were C2's father (B2)! Should A then also die, C1 will again take the place of B2 and inherit as if he were A's son rather than (as he actually is) his grandson.

(2) If the entire family is miraculously resurrected, but A and B2 soon die simultaneously, B2 would not normally be able to inherit from A, leaving B1 as the sole heir. By means of substitution, however, C1 and C2 will inherit from A as if they ranked as their father, B2.

Admittedly, our Code of Private International Law does not provide any solution to the problem addressed by the Commission in Article 23.

However, we have our doubts about the course opted for by the Commission, which does not involve any mitigating device. We cannot see any such exception (substitution) in the Commission proposal and therefore wonder whether, in the Commission's interpretation, the legal device of substitution would still be possible under its proposal, in the event of Article 23 operating. Under the Commission proposal, as we see it, C1 and C2 would no longer have any claim to inherit from their grandfather, A. Descendants would lose their entitlement to their ascendants' succession.

We should therefore like to ask the Commission firstly to explain why the rule introduced by it is not to be regarded as substantive law and secondly how it sees the problem raised by us. Is substitution still possible under the present version of Article 23?

10. Estate without a claimant

Article 24: Estate without a claimant: under Article 24, whether an estate is unclaimed is governed by the law of the place of last habitual residence. Should there turn out not to be any claimant, the Member State (i.e. not any third country) within which property (and not just immovable property) is located may seize it, if allowed to do so under its law.

Internal consultations have not yet been completed. We are consulting the Federal Ministry of Finance to see whether this provision gives rise to any problems.