

The European Commission's proposed regulation on succession and wills: negotiations continue

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On 14 October 2009, the European Commission launched a proposal to regulate succession and wills across the European Union. The purpose of the proposed Regulation was to help settle international succession disputes involving people living in the European Union, by unifying and simplifying the rules governing successions, increasing their predictability and providing more effective guarantees for the rights of heirs.

In principle, the Government is supportive of the project. Hundreds of thousands of UK citizens live and work in other EU Member States and, where they also own property across borders, the diversity of rules and systems that apply to succession in different Member States make for substantial complexity when distributing the estate.

When the Government launched a public consultation on the proposal last year, they received 99 responses from a variety of sectors, including 47 charities. Only two of the respondents believed that the Government should opt-in to the Regulation. Given the serious concerns raised, Jack Straw, Secretary of State for Justice at the time, announced on 16 December 2009 that the UK would not opt-in for the time being. The full report on the response to the public consultation has only recently been published, due to the intervening change in government.

While negotiations continue between the government and the European Commission regarding solutions, the key concerns remain as follows:

'Clawback'

The proposed Regulation allows for gifts made during a person's lifetime to be restored to the estate after death and taken into account when determining the shares of heirs. 93 of the respondents agreed that the clawback provisions had the potential to cause significant problems in practice. This was of particular concern for charities, whose funding would be destabilised by the possibility of having to return the gifts they receive at a later date. Given that in 2008-2009, charities received a total of £9.9 billion from voluntary giving, the Government accepted that this was a legitimate and serious concern. Clawback could also affect the English system of guaranteeing title to real property and undermine certain trust law principles.

'Habitual residence'

The place a person is habitually resident is the key connecting factor that would determine how the rules in the proposed Regulation will apply. 35 of the respondents were concerned that using 'habitual residence' in isolation to identify the appropriate jurisdiction and national succession law would cause serious problems. Firstly, UK nationals intending to live in another Member State for a relatively short time but who died whilst overseas could be habitually resident in the foreign jurisdiction. Their estate would then be subject to a law with which they had no connection and their families would have to deal with the delay and complications this would bring. In addition, concerns were raised about forum shopping and the uncertainty when individuals reside in different Member States at different times of year.

Ministry of Justice officials continue to participate in negotiations in the European Council Working Group but there has not been any significant progress. The International Directorate advised us this week that it looks unlikely that these concerns will be satisfactorily resolved until late in 2011.