# Contents

1. Introduction 1

2. Conflicts of Law 5
   2.1 General Questions 5
   2.2 Wills & agreements as to future successions 6
   2.3 Simultaneous death 7
   2.4 Choice of law applicable to the succession 7
   2.5 Reserved portion of estate 8
   2.6 Trusts created by a testator 9
   2.7 Renvoi 10
   2.8 Preliminary questions (e.g. legitimacy, validity of marriage, capacity) 10

3. Rules on jurisdiction 10
   3.1 Choice of a head of jurisdiction 10
   3.2 Procedures for the transfer of immovable property 11
   3.3 Jurisdiction of non-judicial authorities 11
   3.4 Trusts 12

4. Rules of Recognition & Enforcement 12
   4.1 Recognition and enforcement of judgements 12
   4.2 Recognition and enforcement of deeds and wills 13
   4.3 Executors (including trustees for trusts created in wills) 13

5. Evidence of status and heir: the European Certificate of Inheritance 14

6. Registration of wills 14

7. Legalisation 15

8. Legislative approach 15
1. Introduction

The Law Society and the Society of Trust and Estate Practitioners welcome and support the programme that will seek to simplify cross-border rules and resolve disputes over which laws prevail on the death of a citizen or resident of the European Union. We recognise that significant benefits will accrue to UK residents, as well as all other citizens of the European Union, at the end of the process of programme implementation, since at present those who fall foul of the existing conflict rules may find that there is no satisfactory or straightforward way of resolving jurisdictional issues. It will be a very positive development for people originating from the UK to be able, for example, to choose English law to apply to the devolution of properties bought in France, so there is more coherence in the way assets are distributed on death.

Within the European Union, only England, Wales, Northern Ireland, Cyprus and the Republic of Ireland operate common law systems. A number of common law concepts, such as that of a trust, do not exist in the majority civil law states, and so we are concerned that the full consequences of changes for common law systems should be fully appreciated and accounted for before legislation is drafted. If implementation of the programme is to work well, then we would urge those drafting the new rules to grapple with some of the fundamental differences between the many systems and legal traditions and recognise that it may not be possible to introduce all desired changes simultaneously.

Once the dominant jurisdiction (lex successionis) is chosen then we agree that is desirable that one system of law applies to all assets in the estate in all EU jurisdictions where property is held. If this approach is agreed then for example English property law concepts will have to be applied and accommodated within the French system, for moveable and immovable property, and vice versa. The legal apparatus developed to facilitate the transfer of property in England will not have exact equivalents in France, and so drafters and legislators must face the issue of how English law concepts such as discretionary trusts can be imported. How will civil law systems recognise a discretionary trust with an overriding power of appointment, or revocable trusts? How will the English land registry enter a tontine on the property register or accommodate the German first heir and second heir concept? Another concern is that common law jurisdictions accept oral evidence much more readily than many civil law systems. If, for example, English lex successionis is operative in France, will French courts accept oral evidence or continue to insist on written evidence or notarised documentation, which may not exist because the common law system does not require the generation of documentation to the same degree? Furthermore, how will the different court and administrative systems cope with directly applicable or enforceable foreign orders, where no legal equivalent exists locally?

It seems to us that on closer examination there may be a good case for a degree of flexibility to be allowed in the interpretation of imported judgements and concepts by local courts and administrative regimes, if one law is to apply to both moveable and immovable property.

We have attached an appendix to this response in which we deal specifically with some of the differences between the systems (Appendix A - Law Society briefing for EU succession meeting at the Department for
Constitutional Affairs on 2nd March 2005). Also attached as an appendix is a paper by Professor David Hayton in which the underlying legal principles in the English and Welsh system are discussed and compared in more detail to civil law equivalents (Appendix B - European Commission’s Green Paper consulting on Succession with an International Dimension). We hope that this document will be found useful by those considering how to frame proposals.

**Our principal concern**

We urge that any new system introduced under this programme of reform should not result in the undermining of the common law system of property ownership. In England and Wales, the property to be devolved on death comprises only of property in the estate at the date of death. In many civil law jurisdictions, the deceased’s estate extends beyond property owned at death to property given away during the deceased’s lifetime. Civil heirs will then have a compensation claim against the asset holder who was given the property. Such claims are not recognised in common law systems and it is our strongly held view that only the property owned at death in England and Wales should be subject to the claims of heirs whether civil or common law. Any other rule would allow civil heirs to overturn gifts and transactions made lawfully in the lifetime of the deceased in common law systems and would lead to great confusion, uncertainty and unfairness. Uncertainty would be multiplied because different civil law systems have different time limits beyond which gifts cannot be challenged, and in addition there are different rules for assessing the size of a compensation claim, with some systems looking at the value of the gift at the date it was made, while others look at the value at the date of death.

A recognition by the lex successionis jurisdiction that pre-death succession related events occurring lawfully in another jurisdiction should not be upset would not only benefit England and Wales. For example, common law systems would agree to recognise marital regimes established lawfully in civil law jurisdictions, if one party subsequently became habitually resident or domiciled in England and Wales. We would suggest that a number EU states are likely to want to preserve their particular gifting regimes whether these relate to joint tenancy systems, tontines or matrimonial property regimes. Therefore it may transpire that there would be considerable support from common and civil law jurisdictions for proposals that would ensure that such arrangements, properly made by a person who later moved country or elected to use the lex successionis of a different state, should not be upset.

If the legitimacy of such gifts is accepted when the new harmonised regime is in place, then the heirs of a deceased citizen whose estate is governed by a forced heirship lex successions, with property gifted away years before in England and Wales, will not be able to make a compensation claim against the donee of the gift. Some civil lawyers may say that such a limitation on going beyond the estate at death is unfair to the forced heirs who will not receive a proper share of the estate. However we would contend that not only is such a limit essential in order to protect local gifting regimes, but that the heirs are already protected by the Inheritance (Provision for Family and Dependants) Act 1975 in England and Wales.

We are quite confident in stating that any perception that the English and Welsh system is unfair to heirs, is erroneous, because of the terms of the Inheritance (Provision for Family and Dependants) Act 1975. We would point
out that the 1975 Act goes beyond the protection offered in forced heirship regimes by allowing a non-spouse/civil partner or non-blood relative to make a claim, if that person was a dependant of the deceased or lived as husband and wife with the deceased or was treated as a child of the family of the deceased. Therefore, for example step-children may claim a share of the estate.

Under English and Welsh system it is possible for gifts made six years before death to be challenged either by creditors or by virtue of a claim under the Inheritance (Provision for Family & Dependents) Act 1975 if such gifts were made in bad faith with the intention of removing the property from the estate.

However, in order to serve both certainty and justice we must urge that any question of re-opening lifetime gifts should be governed by the lex situs rather than the lex successionis.

**Other issues of concern**

As already stated, in principle we agree that change is required in order to harmonise the conflicts rules. However, we have identified a number of problems in seeking to conceive how elements of these proposals will be applied. Particularly we have looked at the mechanics of how the changes could be introduced in England and Wales.

For example, we propose that the question of the introduction of the register of wills and certificates of heirship should be postponed until the harmonisation of the conflict rules has had time to settle and lawyers in different jurisdictions have had time to become familiar with the mechanics of the new system.

To give an example of a potential problem that could occur if everything came into effect immediately, we know that in civil systems a certificate of heirship is used by relatives of the deceased to prove title to asset holders. The asset holders will accept the claims of relatives to assets on production of the certificate of heirship. However, in the English and Welsh system, it is the probate registries of the High Court that issue grants of representation to executors or administrators (who may or may not be heirs) and this grant of representation is produced to asset holders before title is transferred to the executor or administrator and then on to the heirs. In England and Wales local lawyers do not certify entitlement to assets. It is the practice that the court performs this function. Given the common law tradition it is easy to see that local lawyers would be uncomfortable dealing with a European certificate which might require the lawyer to deal directly with heirs. A solution might be to allow the English and Welsh courts (the probate registries could perform this function) to produce a notarial certificate which would be recognised throughout the European Union.

In our view English and Welsh asset holders (such as banks) and their lawyers would be uncomfortable dealing with a European certificate, unless there is court endorsement allowing assets holders to be confident that property is released to those properly entitled, who will also settle any tax liability before withdrawing assets from the jurisdiction. Asset holders such as banks would also have to introduce systems that would help them verify the identity of heirs claiming assets that would satisfy the requirements of anti-money laundering and similar legislation.
Turning back to the text of the Green Paper introduction, we would like to highlight how confusion and misunderstanding can arise unless language is very clearly used and defined. The “Terms Used” section of the Green Paper on page 2 defines certain words in a way that is not recognised in the English and Welsh systems. For example, “deed” as defined is different to the term as used in the UK where a deed is an instrument in writing which may, for example, convey an interest in land or transfer title of property under a trust, and which is executed in compliance with specific legal requirements. Authentication by a public authority is not required. We would suggest that the definition given of deed is in fact a definition of an “acte authentique”. We would suggest that those drafting any future provisions should be careful to distinguish terms used from any equivalent English terms, for the avoidance of confusion.

Again where the term “joint wills” is dealt with, it is not clear if the definition is intended to include the English and Welsh concept of the mutual will or to refer to “mirror” wills which are simply wills with near identical provisions made usually for spouses. Mutual wills are those made at the same time, usually by husband and wife, in separate documents, where there is an agreement that the wills cannot be revoked without the consent of the other party and where death of one party means that the survivor is bound by the term of the mutual will, although re-marriage may allow devolution of estate assets to be varied.

In summary of our main concerns, we take the view that the primary issue here for the drafters of legislation is that there needs to be an agreement on what property is in the estate at death. Once there is agreement on this, then procedural issues as to how assets devolve under the rules of one jurisdiction when they are held in another jurisdiction can be addressed in a practical manner. If there is no agreement about what is in the estate (we would say property held as joint tenants, pensions, trust property and assets given away lawfully prior to death for example are outside the estate) then procedural matters cannot be addressed in any realistic way. Thus we would urge a two stage approach, with principles worked out first and procedural matters left until the second or subsequent stages.

We propose consideration of the creation of an EU arbitration committee as a mechanism for the giving of guidance and/or resolution of issues thrown up by the harmonisation process.

Finally we would like drafters of the current proposals to start early consideration of how a harmonised EU system should seek to deal with the resolution of conflicts involving the rest of the world.
Green Paper Questions and Answers

2. Conflicts of Law

2.1 General Questions

Q1. What questions should be governed by the law applicable to succession?

In particular, should the conflict rules be confined to the determination of heirs and their rights or also cover the administration and distribution of the estate?

First of all we would like to suggest that the use of the term “heirs” may lead to misunderstanding because in civil law systems the term is limited to spouses and blood relatives, whereas in common law systems it may be used loosely to include all beneficiaries of the estate whether or not these are relatives of the deceased. We would suggest that the term “the people who benefit from the succession” could be used instead.

We feel strongly that individuals should be allowed to choose the lex successionis in their wills, as long as they have some connection with the territory whether through nationality, domicile or habitual residence.

Where no election is made by will the relevant law and jurisdiction should be the habitual residence or domicile at the date of death.

We would urge that the lex forum should automatically be the same as the lex successionis identified in the will. We think that this system would be the simplest to operate in conceptual terms. However we do acknowledge that a Unitarian approach brings a range of problems which are discussed more fully below in the answer to Q2.

In our view the reform of, and harmonisation of the conflict rules should be approached stage by stage if the complexities identified in our introduction are to be dealt with properly. Therefore we propose that the first step should be to address the determination of the estate and then the heirs/beneficiaries and their rights so that within the European Union all agree which succession laws govern the devolution of a particular estate.

At the initial stage we should not seek to deal with the administrative machinery in place to handle estate administration. If the programme was to be implemented stage by stage, initially there would still be administrative difficulties such as the requirement to have the certificate of inheritance of another country endorsed, but each state could look at introducing measures to streamline procedures that would ease the current difficulties.

Q2. What connecting factors should be used to determine the applicable law? Should the same factor apply to the whole range of issues covered by the applicable law or might different criteria apply to different aspects of succession?
In particular, should the Community conflict rule distinguish between movable and immovable property? Should there be a role for the law of the country where immovable property situated?

We are ready to accept and adopt the test of habitual residence where there are cross-border issues to be resolve, as we recognise habitual residence to be the concept most likely to be acceptable throughout the EU, since it is important that the whole EU adopts one common connecting factor. However we do want the options of domicile and nationality to remain available as now on an election, since the concepts are already well established in international agreements.

We are aware that there may be calls for the concept of connecting factors to include affiliation to a set of religious laws, however we take the view that adoption of religious laws such as Sharia, which are not supported by the apparatus of a state based legal system within the EU, would be too difficult to integrate.

We are clear that any concept of habitual residence must be well drafted and carefully expressed if such a test is to simplify existing processes. We suggest that habitual residence should be defined as a person’s “main centre of social and economic activity”, since there are many individuals who originate in one jurisdiction but who work or travel temporarily elsewhere. We propose that guidance on this point should be included in the text of the new rules.

We feel strongly that individuals should be allowed to choose the applicable law in their wills as long as they have some connection with the legal system concerned whether through nationality, domicile or habitual residence, with a choice between habitual residence, nationality or domicile at the time the will was made or at the time of death. If there is no election made by will, in our view the relevant jurisdiction should be the habitual residence or domicile at the time of death, and this rule should apply in the case of intestacy.

We suggest that where a state such as the United Kingdom has a number of separate jurisdictions within its borders, it should be a matter for the internal laws of the UK to determine whether a subject or citizen can elect between for example the laws of England and Scotland.

As already mentioned above, we take the view that there should be one system in effect for both moveable and immovable property. However we accept that although such a Unitarian system, would on the face of it, be very simple conceptually, in reality it may be extremely difficult to reconcile the practices of different legal traditions where one set of laws is imported into a jurisdiction which operates on different principles. Even if political agreement is reached on this point, the practical accommodation of unfamiliar concepts and principles within another system where there is no adequate legal equivalent of, for example, a discretionary trust or a joint tenancy, may throw up huge difficulties. Therefore, we would urge that a measure of flexibility within the court and administrative system is allowed in the interpretation of foreign orders and concepts if a Unitarian system is adopted.

2.2 Wills & agreements as to future successions

Q3. What law should be applicable to:

- general testamentary capacity?
- validity:
  - as to the form of the will?
  - as to the substance of the will?
  - joint wills?
  - agreements as to future successions?
  - the revocation of wills?

How should the conflict rule be formulated to take account of changes in connecting factors between the date of the will and the date of death?

Once the applicable succession law is identified, whether an election has been made in the will, or in the absence of an election, where last habitual residence or domicile has been established, that law should generally govern determination of issues such as the validity of agreements as to future succession, mutual wills assessment of testamentary capacity and circumstances in which a will can be revoked.

2.3 Simultaneous death

Q4. How should the question of the possible incompatibility of the laws applicable to the successions of persons dying in the same incident be settled?

First of all we suggest that the use of the established term “commorientes” may be more useful than the term “simultaneous death”.

Once the applicable succession law is identified after an election has been made in the will or, in the absence of an election, where last habitual residence or domicile has been established, that law should govern the determination of issues such as who is to succeed in the case of simultaneous death.

2.4 Choice of law applicable to the succession

Q5. Should the future deceased (in a testate or intestate succession) be allowed to choose the law applicable to his succession, with or without the agreement of his presumptive heirs? Should the heirs enjoy the same possibility after the succession has been opened?

Yes. Once the applicable succession law is identified after an election has been made in the will or in the absence of an election, where last habitual residence or domicile has been established, that law should govern determination of these issues.

We do not think the heirs/beneficiaries should have any right to alter the applicable law. This must be fixed by the deceased on election, or by the appropriate connecting factor at the date of death where there is no election.

Q6. If the possibility of choosing the law applicable to the succession is allowed, should the possibilities be limited, and should the procedure for making the choice be determined? If they have not been defined as
connecting factors, should the following criteria be accepted: nationality, domicile, habitual residence or other criterion?

As stated above an election between habitual residence, domicile and nationality should be made in the will. On intestacy habitual residence or domicile at the date of death should apply.

Q7. At what time should these connecting factors be operative? Should they be subject to specific conditions (duration, validity on date of death, etc.)?

Once the applicable succession law is identified after an election has been made in the will or in the absence of an election, where last habitual residence or domicile has been established, that law should govern determination of these issues.

Q8. Should it be possible to choose the law applicable to joint wills and agreements as to future succession? Should such choice be subject to rules and conditions? If so, how?

In our view it is essential that for mutual wills coming into force after the legislative programme has been implemented, there must be an election in the will stating which jurisdiction’s laws govern the will. Such an election should be that of the testator’s nationality, domicile or habitual residence. Without such a requirement, it would be possible to change the effect of the mutual will by, for example, changing habitual residence. We suggest that similar concerns may apply in relation to binding inheritance contracts in some civil law jurisdictions, and even to certain statutory arrangements. For example we understand that joint wills in some jurisdictions are only revocable with the agreement of both parties to the will, so it would seem unsatisfactory to allow such joint wills to be revoked, simply by the expedient of taking up habitual residence in another EU state that does not have such a rule. Therefore the implications for all such analogous arrangements would need to be assessed.

Transitional provisions may need to be put in place to deal with mutual wills and inheritance contracts executed before the change.

Q9. Should a spouse be allowed to choose the law applicable to his/her matrimonial property scheme as the law applicable to his/her succession?

We suggest it would be appropriate to wait until the deliberation over the forthcoming matrimonial property Green Paper of Brussels III is complete before seeking to resolve this issue.

2.5 Reserved portion of estate

Q10. Should the application of the reserved portion of the estate be maintained where the law designated by the conflict rule does not recognise the principle or defines its scope differently? If so, how?

Once the applicable law has been identified, the devolution of the estate will follow the law of that jurisdiction.
2.6 Trusts created by a testator

Q11. Should specific conflict rules be adopted for trusts? If so, what rules?

We note that issues of conflict of law relating to testamentary and inter vivos trusts are already within the Hague Convention which, to date, has been implemented by the United Kingdom, Italy, Malta, the Netherlands and Luxembourg.

We are answering this question on the basis that the question concerns will trusts only. If the question concerns all trusts then we might answer differently (please refer to our answer to Q24).

It is our understanding that the Hague Convention governs both inter vivos and will trusts and so following its terms, it would be logical to agree that the laws applicable to a pre-existing trust can be different from the laws of the lex successionis. Thus we would urge a two stage approach, with principles worked out first and procedural matters left until the second or subsequent stages. The same issues will apply in relation to usufructs (which is analogous to a life interest under English Law but with proprietary rights of the “life tenant” rather than the rights granted under a trust).

Inter vivos trusts which were properly constituted when created according to the laws of the jurisdiction governing them should not be subject to variation if the testator dies with a habitual residence or has elected to use the laws of a nationality that does not recognise the trust concept. It would be clearly unsatisfactory for a trust that has been running for a number of years to be wound up or modified because of a later change in the residence of the settlor.

We also take the view that inter vivos trusts should not be brought into hotchpot (account) to make up a beneficiary’s share.

We repeat again that our main concern as common lawyers is that any new system should treat the estate of the deceased as the property that is in the estate at the point of death. In the UK, the tax system may look back 7 years to assess how inheritance tax should be calculated, but as far as the property available to be devolved to beneficiaries is concerned, it is only the property in the estate on death that is available. In many civil law jurisdictions it is possible for beneficiaries to have a personal claim for compensation where property was given away many years before death (in France with no restriction and in Belgium up to 30 years). We are very concerned that valid gifts, whether made outright or on trust, in one jurisdiction should not be set aside in another jurisdiction and to resist any attempt to allow the reclamation of property situated in the UK or related compensation claims under the forced heirship systems, since this could cause significant and sustained disruption and would resulted in unwarranted uncertainty and an erosion of the common law system of inheritance. Any such encroachment might also damage the operation of charities which could not rely on the use of assets left to them if forced heirship claims were allowed against such assets.

Further we are strongly of the view that certain property such as pensions and joint tenancies (tontines and matrimonial property in certain civil systems) and trusts which are currently outside the estate of the deceased, should remain so under any new system, and should not be subject to succession law claims.
2.7 Renvoi

Q12. Should the future Community instrument allow renvoi if the harmonised conflict rules designate the law of a third country? If so how and within what limits?

Within the Community there would be no renvoi. If the new rules stated that the laws of a third country prevailed then it is probably best that renvoi is not permitted, in the interests of simplicity and choice.

If there are difficulties in relation to matters of jurisdiction then in our view national laws dealing with matters of succession with non-EU states should remain.

2.8 Preliminary questions (e.g. legitimacy, validity of marriage, capacity)

Q13. What conflict rule should be adopted to determine the law applicable to preliminary questions on which the succession may depend?

In our view this is an issue to be addressed after the Brussels III process (cohabitation rights in relation to matrimonial property) has completed. Subject to this, once the applicable law is identified then preliminary questions will follow this designation.

3. Rules on jurisdiction

3.1 Choice of a head of jurisdiction

Q14. Is it desirable to determine a single forum in matters of succession? Is it possible to abandon the jurisdiction of the forum situationis for immovables? If a general single criteria were to be abandoned, what should it be?

We believe this is desirable in due course, but referring back to the answer we gave in question 1, we take the view that the best approach is to deal with administrative matters at a subsequent stage.

Q15. Might the heirs be allowed to proceed in the courts of a Member State other than the one designated by a principal rule on conflict of jurisdiction? If so, under what conditions?

No. We take the view that proceedings should be taken in the State designated as having the governing law.

Q16. Where succession proceedings are pending in a Member State, should be possible to apply to the courts in another Member State where the property is located for provisional and precautionary measures?

We agreed that it should be possible to take action locally simply to preserve assets.

Q17. Should the future Community instrument contain provisions allowing a case to be transferred from a court in one Member State to a court in another Member State and, if so under what conditions?
Yes. We agree that this should be allowed where the transferring court thinks transfer is expedient. Such a transfer might happen where the lex successionis was in one jurisdiction, but where most of the heirs and assets were in a second jurisdiction and the transferring court took the view that the courts of the second jurisdiction could apply the law of the lex successionis.

**Q18. What elements would be relevant in determining the jurisdiction of the courts of the Member States in a situation such as that outlined above?**

Subject to situations in which an application is made to preserve assets or where proceedings are started erroneously in a jurisdiction that is not the jurisdiction of the applicable law, all matters should be transferred to the jurisdiction of the governing law, which should be the internal laws of the third country (there being no renvoi).

**Q19. Should these special rules of jurisdiction apply also to property situated in the territory of a third country claiming exclusive jurisdiction over it?**

In our view it may not be possible to resolve such issues satisfactorily unless treaties are entered into with third countries. With a European Union resident testator, it may be sensible to take into account property based in a third country that goes to a particular heir when calculating the entitlement of each beneficiary so that hotchpot applies.

### 3.2 Procedures for the transfer of immovable property

**Q20. Should the jurisdiction of the authorities for the place where the real property in the succession is situated be reserved where the authorities of another Member State enjoy the principal jurisdiction:**

- To issue the documents needed for the amendment of the property registers?
- To carry out administrative acts and transfer property?

At the first stage of this programme, we recommend that the authorities of the State in which real property is situated should handle administrative matters, although devolution of the assets follows the rules of the jurisdiction in which the testator was habitually resident or which was chosen by election.

**Q21. Is it possible to devise uniform Community documents to be used in all the Member States where property is situated? If so, what existing documents could be standardised? Could certain formalities currently required for the purpose of international successions be abolished or simplified? If so, which ones?**

We recommend that creation of such a document should not be contemplated at this stage. We do not consider it appropriate to comment on the potential harmonisation of documentation until the concepts and principles of their application have been agreed and understood by all Member States.

### 3.3 Jurisdiction of non-judicial authorities
Q22. Should it be provided that the harmonised rule of jurisdiction also applies to other authorities likely to be involved with a succession?

Other than in a case where assets need to be protected, we would not agree with this proposal at the initial stage of implementation of the programme changes, and for the time being do not think harmonisation rules should apply.

Q23. Should it be provided that certain formalities can be performed before the authorities of a Member State other than the one designated by the principal rule of conflict of jurisdiction? Should this possibility be subject to rules and limits?

We would recommend that once the applicable jurisdiction is identified, substantive matters are transferred to that jurisdiction, although some administrative issues can be dealt with locally.

3.4 Trusts

Q24. What rule of jurisdiction should be contained in the future Community instrument as regards trusts creation in wills?

We refer to our answer in Question 11 above. However we note that testamentary trusts, like inter vivos trusts, are already governed by the Brussels Convention, Regulation 44 of 2001 and the Lugano Convention. There is a view that the Brussels Convention only applies to inter vivos trusts, however we understand that this view has arisen because of a misunderstanding flowing from an explanatory note of Professor Schlosser (1979 OJ C.59/71) around the term “wills and succession”. We attach an appendix, a paper by Professor David Hayton that addresses these matters (Appendix C - The Need for Harmonisation of Private International Law Rules on Succession).

4. Rules of Recognition & Enforcement

4.1 Recognition and enforcement of judgements

Q25. Can the exequatur for the recognition of judgements be included? If so, what are they?

This proposal should not apply in England and Wales at present. In our view the exequatur would not be needed once a system is in place that would recognise notarial documents such as a European certificate of inheritance once the court had endorsed the document.

Q26. Could it be provided that a judgement given in one Member State in a succession case should automatically be recognised and available as the basis for the amendment of property registers in another Member State without formal proceedings? Should Article 21(3) of Regulation (EC) No 2201/2003 be the inspiration?

We do not accept this proposal at the moment. We think that continuing formalities are essential until new conflicts rules have been established. Automatic recognition should be considered at a later stage.
4.2 Recognition and enforcement of deeds and wills

Q27. Can the same rules on recognition and enforcement be applied to succession-related deeds as to judgements? Would it therefore be possible to imagine that succession-related deeds issued in one Member State could serve as the basis for amending property registers in the other Member States without further formalities? Should Article 46 of Regulation (EC) No 2201/2003 be inspiration?

No. Again we think continuing formalities are essential since documents must be comprehensible in a different jurisdiction until new conflicts rules have been established. Similar rules should be considered at a later stage.

Q28. Should there be special rules to facilitate the recognition and enforcement in one Member State of wills made in another Member State?

Once the applicable law is identified, formalities are necessary to facilitate the acceptance of wills made in other States. The 1961 Hague Convention, seems to be a reasonable basis to be adopted throughout the EU.

4.3 Executors (including trustees for trusts created in wills)

Q29. Could consideration be given to automatic recognition in all Member States of the designation and functions of executors? Should provision be made for grounds for challenging their designation and functions?

This idea is attractive in principle however differences in succession laws may mean that the proposal could not work successfully in practice, without other formalities and safeguards being in place.

In a number of jurisdictions, while the function of executor exists, title passes directly to the beneficiaries who are entitled to participate in the administration. In England and Wales legal title vests in the executors and the beneficiaries are not entitled to participate, unless they have been named as executors in a will or have been appointed to administer the estate by the court.

Q30. Should a certificate be established to certify the designation of the executor and describe his powers? Which person or authority should be responsible for issuing for issuing the certificate? What should the certificate contain?

Yes, this would be helpful.

Q31. Would the recognition of trusts created in wills allow trust property and related title documents to be entered in the property register? If not, what provisions would need to be adopted?

Such recognition would be possible if all relevant States became signatories to the Hague Convention. Similar issues will apply to usufructs and their recognition.
Q32. Should provisions be adopted to preserve the application of the reserved portion provided for by the law of succession or another law requiring such protection to be given, despite the existence of a trust? If yes, what provisions?

This depends if trusts were in existence before. The reserved portion provisions should apply for will trusts but not for inter vivos trusts, which should fall outside the estate.

5. Evidence of status and heir: the European Certificate of Inheritance

Q33. What effects should the certificate have?

We would prefer that the introduction of such a proposal is left until the later stages of implementation of this programme.

In England and Wales, the grant of probate or administration cannot be issued until inheritance tax has been settled. If a European Certificate of Inheritance allowed asset holders to release assets on production of such a certificate by the heirs then the tax effects would have to be considered.

Local asset holders would have to have confidence in the system and might be concerned at releasing assets without verifying identity to their own satisfaction.

In our view, until the new rules have been operating for sometime it would be difficult to recognise such a document.

Q34. What information should appear on the certificate?

See Q33. above.

Q35. Which Member States should issue it? Should the Member States remain free to decide which authorities are to issue the certificate or should certain criteria be laid down in the light of the certificate’s content and functions?

See Q33. above.

6. Registration of wills

Q36. Should provision be made for a scheme for registering wills in all Member States? Should a centralised register be considered?

We are concerned at the proposal to create a register of wills. Like many EU states, the UK is of course a party to the Basel Convention and has enacted sections 23-25 of the Administration of Justice Act 1982, but has not brought them into force. The English and Welsh systems treat will making as a private matter so any compulsion to register wills would constitute a fundamental change to the system. Drafters of such regulations would have to decide the status of unregistered and death bed wills. At present a person can make their own will or instruct someone to make a will for a fee. Will making for a fee is unregulated so any rules relating to compulsory registration would draw the currently unregulated unqualified will writers charging a fee for their service into the regulatory net.
Q.37. What arrangements should be adopted to facilitate access to the national components of the system or the centralised register for the heirs presumptive and the relevant authorities (including their own Member States)?

See Q36. above.

7. Legalisation

Q38. Would there be any difficulties in abolishing formalities for the legalisation or endorsements (apostille) of succession-related public documents issued in a Member States?

It would be necessary to establish an EU register of Notaries, so that the validity of Notarial Acts could be authenticated, without difficulty.

One questions if the necessity for legalisation were to be abolished for these purposes, why it would be necessary to retain it for any purposes within the EU.

8. Legislative approach

Q39. Can a single, complete instrument be produced? If not, in what order should work proceed and via what stages?

As stated previously we are strongly of the view that the programme should be implemented in a number of separate stages.
If you have any comments on this response please contact:

**Julia Bateman**  
Justice and Home Affairs Policy Executive  
The Law Society  
Brussels Office  
142-144 Avenue de Tervuren  
B-1150 Brussels  
Belgium  
Tel: 00322 743 8585  
Fax: 0322 743 8586  
Email: julia.bateman@lawsociety.org.uk

or

**Keith Johnston**  
Head of Policy and Communications  
Society of Trust and Estate Practitioners  
STEP Worldwide  
26 Grosvenor Gardens  
London SW1W OGT  
United Kingdom  
Tel: +44 (0) 20 7838 4875  
Fax: +44 (0) 20 7838 4886  
Mobile: +44 (0) 7884 182636  
[www.step.org](http://www.step.org)

or

**Sonia Purser**  
Policy Adviser – wills, trusts and probate  
The Law Society  
113 Chancery Lane  
London WC2A 1PL  
England  
Tel: 020 7320 5691  
Fax: 020 7320 5673  
Email: sonia.purser@lawsociety.org.uk