**ASSEMBLY OF THE REPUBLIC**

**COMMITTEE FOR CONSTITUTIONAL AFFAIRS, RIGHTS, FREEDOMS AND GUARANTEES**

To
The Chairman of the European Affairs Committee

Official Letter no. 28/XI/1 – CACDLG/2009 Date: 09-12-2009

**RE: Opinion – COSAC subsidiarity test – (COM 2009/154 and SEC 410 and 411).**

As requested in your official letter no. 02/4ª-20.1 – CAE of 13-11-2009, please find attached the Opinion on the COSAC subsidiarity test **"Proposal for a Regulation of the European Parliament and 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 (COM 2009/154 and SEC 410 and 411)"**, the Conclusions of which and the respective Opinion were unanimously approved at the meeting of 09 December 2009 of the Committee for Constitutional Affairs, Rights, Freedoms and Guarantees.

Yours faithfully, (illegible words by hand)

The Chairman of the Committee

(illegible signature)

(Osvaldo de Castro)

[Bears stamp:
ASSEMBLY OF THE REPUBLIC
Committee Support Division
CACDLG
No. 332781
Sent no. 28 Date 09/12/2009]

**ASSEMBLY OF THE REPUBLIC**

**COMMITTEE FOR CONSTITUTIONAL AFFAIRS, RIGHTS, FREEDOMS AND GUARANTEES**

# OPINION

**COSAC SUBSIDIARITY TEST - Proposal for a Regulation of the European Parliament and 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 (COM 2009/154 and SEC 410 and 411)**

## I. Introductory Note

The Committee for Constitutional Affairs, Rights, Freedoms and Guarantees received a request for an Opinion from the 4th European Affairs Committee, on **(COM 2009/154)**, relating to the **"Proposal for a Regulation of the European Parliament and 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".**

It should also be noted that the proposal in question was forwarded to the Committee for Constitutional Affairs, Rights, Freedoms and Guarantees accompanied by two working documents **{ SEC 410 and 411 }** on which the proposal was based and from which the proposal in question was drafted, meaning that an examination of the proposal necessarily involves analysis of the working documents which lay behind it.

Finally, we should note that, in addition to this analysis having considered three documents, two of these were only available in the English language version, and some possible shortcomings may eventually arise in this attempt at *ad hoc* translation.

## II. Background to the Proposal

### 1. General Background

Article 61 of the Treaty establishing the European Community (hereinafter the "Treaty") sets out the objective of progressively establishing a common area of freedom, security and justice, in particular by adopting measures in the field of judicial cooperation in civil matters. Article 65 explicitly mentions measures "*improving and simplifying the recognition and enforcement of decisions in civil and commercial matters, including decisions in extrajudicial cases*" and "*promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction*". The adoption of a European instrument in the area of successions was already one of the priorities of the 1998 Vienna Action Plan. The Hague Programme calls for the presentation of an instrument covering all the issues involved: applicable law, jurisdiction and recognition, administrative measures (certificates of inheritance, registration of wills).

Accordingly, in the light of the proposal from the Commission and the Opinion from the European Economic and Social Committee, the European Parliament and the Council of the European Union propose that this Proposal for a Regulation be adopted, in view of the following aspects:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, it has to adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market.

(2) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement that principle.

(3) On 30 November 2000 the Council adopted a draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters. It provides for the drawing up of an instrument relating to successions and wills, which were not included in

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

(4) The European Council meeting in Brussels on 4 and 5 November 2004 adopted a new programme entitled “The Hague Programme: strengthening freedom, security and justice in the European Union".The programme underlines the need to adopt by 2011 an instrument on the law of succession which deals among other things with the issue of conflict of laws, legal jurisdiction, mutual recognition and the enforcement of decisions in this area, a European Certificate of Succession and a mechanism enabling it to be known with certainty if a resident of the European Union has left a last will or testament.

(5) The smooth functioning of the internal market should be facilitated by removing the obstacles to the free movement of persons who currently face difficulties asserting their rights in the context of an international succession. In the European area of justice, citizens must be able to organise their succession in advance. The rights of heirs and/or legatees, other persons linked to the deceased and creditors of the succession must be effectively guaranteed.

(6) In order to achieve these objectives, this Regulation should group together the provisions on legal jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in this area and on the European Certificate of Succession.

(7) The scope of this Regulation should include all questions arising in civil law in connection with succession to the estates of deceased persons, namely all forms of transfer of property as a result of death, be it by voluntary transfer, transfer in accordance with a will or an agreement as to succession, or a legal transfer of property as a result of death.

(8) While this Regulation should cover the method of acquiring a right in rem in respect of tangible or intangible property as provided for in the law governing the succession, the exhaustive list (*“numerus clausus”)* of rights in rem which may exist under the national law of the Member States, which is, in principle, governed by the *lex rei sitae,* should be included in the national rules governing conflict of laws.

The publication of these rights, in particular the functioning of the land registry and the effects of entry or failure to make an entry into the register, which is also governed by local law, should also be excluded.

(9) In order to take into account the different methods of settling a succession in the Member States, this Regulation should define the jurisdiction of the courts in the broad sense, including the jurisdiction of non-judicial authorities where they exercise a jurisdictional role, in particular by delegation.

(10) In view of the increasing mobility of European citizens and in order to encourage good administration of justice within the European Union and to ensure that a genuine connecting factor exists between the succession and the Member State exercising jurisdiction, this Regulation should provide for the competence of the courts of the Member State of the last habitual residence of the deceased for the whole of the succession. For the same reasons, it should allow the competent court, by way of exception and under certain conditions, to transfer the case to the jurisdiction where the deceased had nationality if the latter is better placed to hear the case.

(11) In order to simplify the lives of heirs and legatees living in a Member State other than that in which the courts are competent to settle the succession, the settlement should authorise them to make declarations regarding the acceptance or waiver of succession in the manner provided for under the law of their last habitual residence, if necessary before the courts of that State.

(12) The close links between the succession rules and the substantive rules mean that the Regulation should provide for the exceptional competence of the courts of the Member State where the property is located if the law of this Member State requires the intervention of its courts in order to take measures covered by substantive law relating to the transmission of this property and its recording in the land registers.

(13) In order to allow citizens to avail themselves, with all legal certainty, of the benefits offered by the internal market, this Regulation should enable them to know in advance which law will apply to their succession. Harmonised rules governing conflict of laws should be introduced in order to avoid contradictory decisions being delivered in the Member States. The main rule should ensure that the succession is governed by a

predictable law to which it is closely linked. Concern for legal certainty requires that this law should cover all of the property involved in the succession, irrespective of its nature or location, in order to avoid difficulties arising from the fragmentation of the succession.

(14) In order to facilitate recognition of succession rights acquired in a Member State, the conflict-of-laws rule should favour the validity of the agreements as to succession by accepting alternative connecting factors. The legitimate expectations of third parties should be preserved.

(15) The differences between, on the one hand, national solutions as to the right of the State to seize a vacant succession and, on the other hand, the handling of a situation in which the order of death of one or more persons is not known can lead to contradictory results or, conversely, the absence of a solution. This Regulation should provide for a result consistent with the substantive law of the Member States.

(16) An accelerated, manageable and efficient settlement of international successions within the European Union implies the possibility for the heir, legatee, executor of the will or administrator to prove easily on an out-of-court basis their capacity in the Member States in which the property involved in the succession is located. In order to facilitate free movement of this proof within the European Union, this Regulation should introduce a uniform model for the European Certificate of Succession and appoint the authority competent to issue it. In order to respect the principle of subsidiarity, this certificate should not replace the internal procedures of the Member States. The Regulation should specify the linkage with these procedures.

(17) Where the concept of "nationality" serves to determine the law applicable, account should be taken of the fact that certain States whose legal system is based on *common law* use the concept of "*domicile*" and not "nationality" as an equivalent connecting factor in matters of succession.

(18) Since the objectives of this Regulation, namely the free movement of persons, the organisation in advance by European citizens of their succession in an international context, the rights of heirs and legatees, and persons linked to the deceased and the creditors of the succession, cannot be satisfactorily met by the Member States and can therefore, by reason of the scale and effects of this Regulation, be better achieved at

Community level, the Community may take measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

## 2. Grounds for and objectives of the proposal

The significance of cross-border successions within the European Union has been highlighted in the impact assessment attached to the proposal. The diversity of both the rules under substantive law and the rules of international jurisdiction or of applicable law, the multitude of authorities to which international succession matters can be referred and the fragmentation of successions which can result from these divergent rules are obstacles to the free movement of persons in the Union.

Today, such persons are therefore faced with considerable difficulties in asserting their rights with regard to an international succession. These divergent rules also prevent the full exercise of private property law, which, in accordance with the settled case law of the Court of Justice, forms an integral part of the fundamental rights which the Court ensures are respected.

The objective of this proposal is to enable people living in the European Union to organise their succession in advance and effectively to guarantee the rights of heirs and/or legatees and of other persons linked to the deceased, as well as creditors of the succession.

### 2.1 Result of the consultations – impact assessment

Before this proposal was drawn up, a wide-ranging consultation exercise took place within the Member States, the other institutions and the public. The Commission was sent a "Study on international successions in the European Union", which had been drawn up by the German Institute of Notaries in November 2002.

Its Green Paper on successions and wills, which was published on 1 March 2005, elicited 60 or so replies and was followed by a public hearing on 30 November 2006. A group of experts known as "PRM III/IV", set up by the Commission on 1 March 2006

met on seven occasions between 2006 and 2008, and the Commission organised a meeting of national experts on 30 June 2008.

The contributions received confirm the need for a Community instrument in this area and support the adoption of a proposal covering, among other things, questions concerning applicable law, jurisdiction, recognition and enforcement of decisions and the creation of a European Certificate of Succession. The adoption of such an instrument has received the support of the European Parliament and the European Economic and Social Committee. The Commission has carried out an impact assessment which is attached to the proposal.

## 3. Legal aspects of the proposal

### 3.1. Legal basis

Article 67(5) of the Treaty stipulates that the Council may take the measures provided for in Article 65 using the co-decision procedure laid down in Article 251 of the Treaty, except with regard to "aspects relating to family law".

It should first be emphasized that the vast majority of Member States, with the exception of the Nordic countries, classify the law of succession as a matter distinct from family law on account of the fact that it mainly covers property. Even at the level of substantive law, there are significant differences between the two matters. The main aim of the law of succession is to define the rules for passing on the inheritance and for regulating the transfer of the inheritance itself.

Unlike inheritance law, the objective of family law is to govern above all the legal relationships linked to marriage and partnerships, filiation and the civil status of persons. Its basic social function is to protect family ties. Moreover, in contrast to family law, where the wishes of individuals play a very minor role and the vast majority of ties are governed by public policy, the law of succession remains a matter where the wishes of the entitled party play an important role.

There is therefore sufficient autonomy within these two branches of civil law for these matters to be treated separately from each other. Furthermore, as this is an

exception, Article 67(5), second indent, of the Treaty must continue to be interpreted and applied strictly by the institutions. The exception is therefore not applicable to this Regulation as far as succession is concerned.

The Community institutions have a certain margin of discretion in determining whether a measure is necessary for the proper functioning of the internal market. The objective of this proposal is to eliminate all the obstacles to the free movement of persons arising out of the differences between the rules of the Member States governing international successions.

### 3.2. Subsidiarity principle

The objectives of the proposal can be met only by way of common rules governing international successions which must be identical in order to guarantee legal certainty and predictability for citizens. Unilateral action by Member States would therefore run counter to this objective.

There is a Hague Convention concerning the law relating to successions ( "the Convention") which has never entered into force. The Hague Convention of 5 October 1961 on the conflicts of laws relating to the form of testamentary dispositions has been ratified by 16 Member States. It would be desirable for the other Member States to ratify the Convention in the interests of the Community.

### 3.3. Proportionality principle and choice of instrument

The proposal does not go beyond what is strictly necessary to achieve its objectives. It does not harmonize either the law of succession or the property law of Member States. Nor does it affect the way in which inheritances are taxed by Member States. Consequently, international successions could continue to give rise to inconsistencies between national tax systems and they may lead to double taxation or discrimination.

The need for legal certainty and predictability calls for clear and uniform rules and imposes the form of a regulation. The objectives would be compromised if the Member States had some discretion with regard to implementing the rules.

## 4. Comments on the Articles

### 4.1. Chapter I: Scope of application and definitions

*Article 1*

This Proposal for a Regulations applies only to successions upon death, and not to the connected fiscal, customs and adminsitrative issues. The concept of “succession” must be interpreted in an autonomous manner and encompasses all the elements of a succession, in particular its handover, administration and liquidation.

The exclusion of rights and properties created or transferred other than by means of succession to the estates of deceased persons covers not only the forms of joint property [joint tenancy] known under *common law,* but also all forms of gifts under civil law.

The exception envisaged for *trusts* is not an obstacle to the application to succession of the law governing it on the basis of this Regulation.

Paragraph (j) stipulates that the Regulation applies to the acquisition of a right in rem relating to inherited property, but not to the content of such a right. The Regulation does not affect the "*numerus clausus*" of property law in the Member States, the classification of property and rights, and the determination of the prerogatives of the holder of such rights. As a consequence, it is not, in principle, valid to establish a right in rem without knowing the law of the place in which the property is located.

The law on succession cannot lead to the introduction in the State in which the property is located of a property law clause, or the stripping of such clause, without the knowledge of the State. For example, usufruct cannot be introduced in a State which does not recognise it. However, this exception does not apply to the transfer of a right in rem recognised by the Member State in which the inherited property is located.

The publication of property rights, in particular the functioning of the land register and the effects of an entry or failure to make an entry in this register, is also excluded.

*This article excludes from the scope of application of the Regulation a vast number of matters connected to succession upon death for which specific provision is made in Portuguese law, under the rules of the Civil Code (Articles 14 to 65).*

*Article 2*

**Courts:** More often than not, successions are settled out of court. The concept of courts used in this Regulation is used in its broadest sense and includes other authorities where they exercise a function falling within the jurisdiction of the courts, in particular by means of delegation, including notaries and court clerks.

### 4.2. Chapter II: Jurisdiction

*Article 4*

The rules of legal jurisdiction relating to succession vary considerably between the Member States. This leads to positive conflicts, where the courts in several States declare themselves to be competent, or negative conflicts, where no court declares itself to be competent. In order to avoid these difficulties for citizens, a uniform rule is required.

The competence of the Member State where the deceased had their last habitual residence is the most widespread method used in the Member States and frequently coincides with the location of the deceased's property. These courts will be competent to rule on all elements of the succession, irrespective of whether adversarial or non-adversarial proceedings are involved.

*Article 5*

Referral to a more appropriate court should not be automatic where the deceased has chosen the law of another Member State. The competent court should take into account, among other things, the interests of the deceased, the heirs, legatees and creditors, and their habitual residence. This rule would in particular allow a balanced

solution to be found where the deceased had lived for a short while in a Member State other than that of their nationality and where their family has remained in their Member State of origin.

*Article 6*

Where the deceased had their residence in a third State, this rule guarantees access to justice for Community heirs and creditors where the location has close links with a Member State on account of the presence of property.

*Article 9*

The close links between the succession rules and the substantive rules require exceptional jurisdiction on the part of the courts in the Member State in which the property is located where the law of that Member State requires the intervention of its courts. However, this jurisdiction is strictly limited to the aspects of substantive law relating to the transmission of the property.

### 4.3. Chapter III: Applicable law

*Article 16*

*A single scheme*

The disadvantages of the so-called system of scission, in which succession to movable assets is subject to the law of residence of the deceased and succession to the estate is subject to the law of the State in which the property is located, were highlighted in the consultations.

The system creates several bodies of assets, each one subject to a different law which determines differently heirs and their respective shares, and the division and liquidation of the succession. The choice to create a single scheme by means of a regulation allows the succession to be subjected to a single law, thereby avoiding these disadvantages. A single scheme also enables a testator to plan the division of their property between their heirs in a fair manner, irrespective of the location of this property.

*The connecting factor: the law of the last habitual residence of the deceased*

The Regulation retains this law, instead of the law of nationality, as it coincides with the centre of interest of the deceased and often with the place where most of their property is located. Such a connection is more favourable to integration into the Member State of habitual residence and avoids any discrimination regarding persons who are resident there without possessing the relevant nationality.

Habitual residence has also been retained in the conflict-of-law rules of several Member States and in all modern legal instruments, in particular in the Convention.

*Article 17*

All the legal systems of the Member States have mechanisms intended to guarantee support for the relatives of the deceased, including primarily the mechanisms concerning the reserved portion of an estate. However, testators who are nationals of Member States in which *inter vivos* gifts are considered irrevocable may confirm the validity of such acts by opting for their national law as that applying to their successions.

A key objective of the Regulation is to ensure that these mechanisms are respected. By allowing the testator a choice of law, a compromise needed to be found between the benefits of such a choice, e.g. legal certainty and a greater ability to plan their succession, and the protection of the legitimate interests of the relatives of the deceased, in particular the surviving spouse and children.

For this reason, the Regulation allows the testator only to choose the law governing their nationality, and this must be assessed in conjunction with the general rule leading to the application of the law of residence. This choice enables the testator who has benefited from the freedom of movement offered within the Union but who is keen to preserve close links with their country of origin to maintain these cultural links by means of their succession.

*Exclusion of other choices:* The Regulation has removed the possibility of choosing as the law applicable to succession the law applicable to matrimonial property scheme

of the testator. Such a provision would have allowed multiple choices where, for the matrimonial property schemes, the spouses benefit from greater flexibility in their choice of applicable law. This would have run counter to the above objectives.

*Article 18*

It is vital to provide for rules governing the law applicable to the agreements as to succession and joint wills used in certain States, e.g. in order to organise the transfer of a company and for couples to allow the surviving spouse to benefit from joint property.

*Article 21*

The aim of this Article is to take into account the specific features of *common law* legal systems, such as the English legal system, where the heirs do not directly acquire the rights of the deceased upon the latter's death but where the succession is managed by an administrator appointed and supervised by the judge.

*Article 22*

On account of their economic, family or social purpose, some buildings, enterprises or other categories of property are subject to a special succession regime in the Member State in which they are located, and this should be respected. Such a special scheme exists, for example, for family farms. This exception requires strict interpretation in order to remain compatible with the general objective of this Regulation. In particular, it does not apply to the system of scission or to the reserved portion of an estate.

*Article 27*

Recourse to public policy must occur in exceptional circumstances only. Differences between the laws relating to the protection of the legitimate interests of the relatives of the deceased must not be used to justify its use, as this would be incompatible with the objective of ensuring the application of a single law to all of the succession property.

### 4.4. Chapter IV: Recognition and enforcement

The provisions contained in this Chapter are based on the corresponding rules contained in Regulation (EC) No 44/2001. Provision is made for the recognition of all the decisions and legal transactions in order to give substance in succession matters to the principle of mutual recognition, which is based on the principle of mutual trust. The grounds for non-recognition have therefore been kept to the necessary minimum.

### 4.5. Chapter V: Authentic instruments

In view of the practical importance of authentic instruments in succession matters, this Regulation should ensure their recognition in order to allow their free movement. This recognition means that they will enjoy the same full and complete evidentiary effect in respect of the contents of the recorded instruments and the facts contained therein as that of national authentic instruments or on the same basis as in their country of origin, a presumption of authenticity, and an enforceable nature within the limits set by this Regulation.

### 4.6. Chapter VI: European Certificate of Succession

In order to enable international successions to be settled rapidly, this Regulation introduces a European Certificate of Succession. To facilitate its circulation in the Union, a uniform model certificate should be adopted and an authority appointed which would have the international competence to issue it. Consistency with the rules of substantive jurisdiction requires that the authority should be the same court as has jurisdiction to settle the succession.

This certificate does not replace existing certificates in certain Member States.

In the Member State of the competent authority, the capacity of heir and the powers of an administrator or executor of the succession must therefore be proven according to the domestic procedure.

**SUMMARY**

**Matters relating to 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.**

The numerous instruments already adopted on this basis, namely, Regulation (EC) no. 44/2001, exclude successions from their field of application.

The free movement of persons within the European Union cannot be constrained or obstructed by the diversity of the rules of substantive law, or of rules on international jurisdiction or relating to the applicable law. Moreover, such freedom of movement cannot be limited by the multiplicity of authorities to which international succession matters has to or can be referred, which often leads to fragmentation of the applicable succession rules due to the divergence of the rules applicable.

The initiative in question therefore seeks to overcome these difficulties and to assure the means, conditions and rules which enshrine the **right of European citizens, with legal security and certainty, to best defend and guarantee their rights in succession matters in cross-border or international successions.**

**III – Rapporteur's Opinion**

Under Article 137.3 of the Rules of Procedure of the Assembly of the Republic, the rapporteur hereby excuses himself from expressing his opinion in this regard.

**IV. Conclusions**

The Committee for Constitutional Affairs, Rights, Freedoms and Guarantees received **COM 2009/154**, relating to the **"Matters relating to 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".**

1. Forwarded by the European Affairs Committee, in compliance with the decision of the 42nd COSAC held in Stockholm, which decided on 5 and 6

October to conduct a further subsidiarity test in order to test the new provisions of the Lisbon Treaty.

2. The proposal in question was forwarded to the Committee for Constitutional Affairs, Rights, Freedoms and Guarantees, accompanied by two working documents **{ SEC (2009) 410 and SEC (2009) 411 }**, meaning that this opinion encompasses the analysis of the three documents taken together, given that they all deal with the same matter.
3. This proposal seeks to establish minimum common rules on succession rights in cross-border successions in the European Union, and specifically on the law applicable to successions upon death.
4. This initiative is intended to permit persons residing in the European Union to organize their succession in advance and to provide effective guarantees for the rights of heirs and/or legatees and other persons connected with the deceased, as well as creditors of the succession.
5. This initiative does not breach the principle of subsidiarity; on the contrary, it guarantees the principle.

**Opinion**

In view of the above, there being nothing further to add, the Parliamentary Committee for Constitutional Affairs, Rights, Freedoms and Guarantees proposes that this report be forwarded to the European Affairs Committee, for consideration, as required by the Rules of Procedure and the applicable legal rules.

**Assembly of the Republic, 9 December 2009**

| **The Member of Parliament and Rapporteur** | **The Chairman of the Committee** |
|---|---|
| (illegible signature) | (illegible signature) |
| **(António Ribeiro Gameiro)** | **(Osvaldo Castro)** |

**ASSEMBLY OF THE REPUBLIC**
**EUROPEAN AFFAIRS COMMITTEE**

# OPINION

**Proposal for a Regulation of the European Parliament and 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**

**COM (2009) 154 final**
**{SEC (2009) 410}**
**{SEC (2008) 411}**

## INTRODUCTORY NOTE

Article 65 EC Treaty states that measures should be taken in the field of judicial cooperation on civil matters where cross-border issues are involved, specifically with the aim of "*improving and simplifying the recognition and enforcement of decisions in civil and commercial matters, including decisions in extrajudicial cases*" and "*promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction*". Various community instruments have so far been adopted on this basis, albeit without dealing with questions of succession.

The draft regulation under examination here seeks to create an instrument covering questions relating to cross-border successions, namely the applicable law, jurisdiction and recognition and enforcement measures.

## WHEREAS

In view of the provisions of the proposal for a regulation, the following questions should be raised:

### *a) The subsidiarity principle*

In the field of regulation of cross-border succession law, the objectives of the proposal for a regulation in question would not be sufficiently met at the level of each of the Member States, and are better met at European Union level.

### *b) The connecting factor: "the last habitual residence of the deceased"*

The explanatory memorandum states that the proposal for a regulation has opted for this connecting factor to determine the applicable law, instead of the law of nationality, as it coincides with the centre of interest of the deceased and often with the place where most of their property is located. However, these arguments do not stand up.

The fact is that determining the "habitual residence" may raise doubts in situations where the deceased has various residences, without any of these being "habitual", or in situations where the deceased had as his or her last habitual residence that with which he or she had the least connection.

Finally, the grounds stated in the explanatory memorandum fail to stand up given that there is no guarantee that the "last habitual residence" is in the country where most of the deceased's property is located.

Moreover, in the Portuguese legal system, Articles 62 and 31, no. 1, of the Portuguese Civil Code require application of the personal statute of the deceased at the time of his death, this being the law of nationality. It should therefore be noted that this proposal for a regulation is divergent from Portuguese legislation as currently in force.

In view of the above, it is considered that the concept of "habitual residence", if adopted, should reflect the centre of interests of the deceased, and namely that it should be supported by other criteria which allow the proposed objectives to be met, without undermining legal certainty and security.

***c) Application of the Public Policy Principle***

The explanatory memorandum makes a brief reference to the grounds for Article 27, which regulates the possibility of application of the Public Policy Principle to refuse application of a provision of the applicable law, stating that "*differences between the laws relating to the protection of the legitimate interests of the relatives of the deceased must not be used to justify"* the application of the Public Policy, *"as this would be incompatible with the objective of ensuring the application of a single law to all of the succession property".*

However, considering that, on the one hand, in addition to regulating succession upon death, Succession Law seeks above all to protect heirs (in particular the closest family members, spouse, children and parents), in both the Roman and German legal traditions, and, on the other hand, considering the legally grounded expectations held by heirs as designated by law [*herdeiros legitimários*][1] in various European legal systems, the inclusion of paragraph 2 of Article 27 might undermine this situation. Indeed, paragraph 2 of Article 27 expressly excludes the possibility of the courts considering that the reserved portion of the estate falls within the scope of the public policy of the forum.

Moreover, the Portuguese legal system establishes, in Article 22 of the Portuguese Civil Code, that *"the provisions of foreign law indicated by the conflict of laws shall not apply when such application undermines the*

[1] Spouse, descendants and ascendants who are entitled to the *legítima* – which designate the reserved portion of the estate which the testator is not at liberty to dispose of, passing by law to the *herdeiros legitimários*.

*fundamental principles of the international public policy of the Portuguese State"*. The Portuguese courts have accordingly held[2] that a foreign law which permits the testator to dispose of his estate without limits to the detriment of his children, in other words to refuse them the *legítima*, is not applicable. It should therefore be noted that also in this respect the proposal for a regulation diverges from Portuguese legislation in force.

In view of the above, it is considered that Article 27 could include, instead of paragraph 2, provisions which would ensure that the fundamental principle, common to a number of European legal systems, to the effect that a reserved portion of the estate [*legítima*] passes to the heirs as designated by law [*herdeiros legitimários*], is not undermined.

## CONCLUSION

In view of the considerations set out above and in the light of the opinion from the Committee for Constitutional Affairs, Rights, Freedoms and Guarantees on the *Proposal for a Regulation of the European Parliament and 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*, the European Affairs Committee is of the opinion that **the proposal for a regulation in question does not violate the principle of subsidiarity, insofar as the objective in view will be more effectively achieved through community action.**

With regard to the questions raised in the recitals above, the Assembly of the Republic will continue to follow the legislative process for this Proposal for a Regulation, namely by exchanging information with the Government.

São Bento Palace, 17 December 2009

**The Member of Parliament and Author of the Opinion** — **The Chairman of the Committee**

***(Ana Catarina Mendes)*** — ***(Vitalino Canas)***

Attached: Report from the Committee for Constitutional Affairs, Rights, Freedoms and Guarantees, drawn up by António Gameiro MP (PS)

[2] Cfr. Decision of the Lisbon Court of Appeal, 5th May 1992, published in BMJ no. 417.