



EUROPEAN COMMISSION

Brussels, 10.01.2010

C(2012) 51 final

*Dear President,*

*I would like to thank the Assembly of the Republic of Portugal for its opinion concerning the Commission's proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes {COM(2011)126 final} and the proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships {COM(2011)127 final}.*

*The Commission welcomes the support of the Assembly of the Republic of Portugal for the proposals and its positive opinion on the compliance with the principle of subsidiarity and the legal basis.*

*As regards the main issues raised in the Assembly's submission, the Commission would like to give the following clarifications.*

*Under both proposals, the legal basis is Article 81(3) of the Treaty on the Functioning of the European Union (hereafter "TFEU") which requires that both Regulations should be adopted by the Council acting unanimously after consulting the European Parliament according to the special legislative procedure. Article 81(3) covers measures concerning family law having cross-border implications. The Commission is aware of the differences existing between the Members States' legal systems and traditions on the matters covered by the proposed Regulations. Although the second subparagraph of Article 81(3) TFEU provides the possibility, under conditions expressed in the Treaty, to use the ordinary legislative procedure in those aspects of family law with cross-border implications, the Commission has no intention to make use of this possibility. If it occurs, the Commission will fully act under the provisions of the TFEU.*

*As regards the public policy of the forum, the Commission would like to note that the proposed Regulations contain such provisions related to the public policy exception, respectively in Article 23 of the proposed Regulation "on matrimonial property regimes" and in Article 18 of the proposed Regulation "on property consequences of registered partnerships". According to this rule, the application of a rule of the law determined by this Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum.*

*Mrs. Maria da Assunção Esteves  
Presidente da Assembleia  
da República  
Palácio de S. Bento  
P – 1249-068 LISBOA*

*Concerning the proposal on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes {COM(2011)126 final}, the Commission would like to provide the following clarifications:*

*As regards the scope and in particular the gifts, the "gifts between spouses" are excluded from the scope of application ( Article 1 (3), point c). Since the gifts are covered by Regulation (EC) n° 593/2008 (called "Rome I), the Commission decided to exclude them from the scope of application of the proposed Regulation to avoid overlappings. However, the Commission takes note of the concerns of the Portuguese Parliament and will consider further the issue.*

*As regards the reference to the Brussels I Regulation' provisions (which is under recast) and the proposal "on succession" {COM(2010)154 final} both under negotiation, the Commission did not include the rules but put only a reference because the two proposals are not yet finalised and will be still subject to modifications. The aim was also to avoid continuing changes at least as regards the number of articles. However, it will be more transparent and the reading of the proposal will be improved if the rules are fully included. As soon as the Regulation on "succession" is finalised, the reference will be adapted consequently.*

*As regards the related actions (Article 13) when actions are so closely connected that it is expedient to hear and determine them together, the Commission is open to enhance the operation of the rule by deleting the reference to national law. A similar approach is taken notably in the context of the Brussels I Regulation recast proposal and it would seem appropriate to align both texts on this matter.*

*As regards the provisional, including protective, measures, the Commission can ensure the Assembly that the aim of this provision is not to create the possibility of "forum shopping" but provide protective orders aimed at obtaining information or preserving evidence. It should be noted that this is a traditional provision in conflicts of jurisdictions rules.*

*As regards the applicable law, the principle is the unity of the applicable law. In the case where no choice is made by the spouses, the proposal (Article 17) provides for three connection criteria in hierarchical order. The "nationality" is not in the first place because this criterion does not reflect the mobility of international couples who move across the EU and this criterion comes in the second place. The first criteria related to the "first common habitual residence of the spouses after their marriage" was proposed since the habitual residence is a modern connecting factor in international private law.*

*As regards the change of applicable law, the possibility is given to the spouses to change the applicable law to their matrimonial property regime. However, this possibility is framed with conditions. This change shall be effective for the future unless the spouses expressed for the retroactive effects. If they choose the retroactive effects, that will not affect the previous transactions and the rights of third parties deriving from previous applicable law.*

*Concerning the proposal on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships {COM(2011)127 final}.*

*As regards the jurisdiction rules in other cases than in the event of the death or separation, Article 5 provides a list of connection factors in a hierarchical order. The declination of jurisdiction under Article 5(2) (foreseen for points a), b) and c) of Article 5(1) is a possibility. There is no obligation to decline the jurisdiction if the seized court's law does not recognise the institution of registered partnership. Further discussion during the ongoing negotiations at the Council Working Party will take place as regards the jurisdiction rules.*

*The Commission hopes that the clarifications provided above satisfactorily address the main issues expressed in your opinion, and I apologise for the undue delay in replying to your opinion.*

*Yours faithfully,*

*/-/ Maroš Šefčovič  
Vice-President*