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CCBE RESPONSE TO THE GREEN PAPER ON SUCCESSION AND WILLS OF THE EUROPEAN COMMISSION

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1. INTRODUCTION

The Council of Bars and Law Societies of Europe (CCBE) is the representative body of over 700,000 European lawyers through its member bars and law societies of the European Union and the European Economic Area. In addition to membership from EU bars, it has also observer representatives from a further seven European countries' bars. The CCBE responds regularly on behalf of its members to policy consultations which affect European lawyers.

Following the Green Paper on succession and wills presented by the European Commission setting out its proposed next steps in this area (COM SEC(2005) 270), this paper is the response of the CCBE to some of the questions raised in the above mentioned document.

Our remarks follow the order of the questions raised by the Commission in its document regarding the optional instrument.

The CCBE very much welcomes the initiative of the Commission to table an instrument under Section IV of the Treaty in the area of succession and wills. However, the CCBE would like the European Commission to elaborate on the extent of the legal basis for this instrument. The CCBE believes that such an instrument will minimize the present possibilities for forum shopping and the present risk of multiple courts dealing with the same case leading to conflicting judgments. The CCBE would like to support the findings of the Commission in the Green Paper (p. 3), that such an instrument will be very beneficial to the citizens of Europe and provide legal certainty and efficient legal co-operation.

Question 1*.What questions should be governed by the law applicable to the 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?*

The CCBE recommends that the instrument should cover succession and wills, and that those concepts should be uniform. Consequently, the instrument should cover all questions concerning succession, including, but not limited to, determination of heirs, their inheritance rights as well as representation and distribution of the estate.

However, there seems to be a need for some well-defined exceptions in order to ensure that the lex causae for the estate does not regulate (a) the matrimonial property regime (subject to questions 5-9) since this area is subject to its own choice of law rules, and (b) local administration of assets.

Question 2. *What connecting factor 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 the 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 is situated?

For reasons of efficiency and legal predictability, the CCBE strongly believes that an estate should be governed by the law of one Member State only, and that the competent courts should be the courts of one Member State only.

In particular, the chosen law should govern all issues, including movable and immovable property. Furthermore, the jurisdiction of the competent court should be all-encompassing and cover property regardless of where it is located. In doing so, the risk of multiple forums, different choice of laws and irreconcilable judgments is excluded.

The connecting factor for choice of law should be one the deceased person is strongly connected to. The CCBE recommends that a new and uniform European Connecting Factor (see next paragraph) be defined in the instrument. In recommending the same connecting factor for jurisdiction (see question 14), the instrument would ensure that the competent court will apply its own law (unless the deceased person has made a valid choice of law, see questions 5-9).

A new European Connecting Factor should be created for the purposes of the future instrument because the expressions 'domicile' and 'habitual residence' have different meanings in different member states. Throughout this document the expression 'European Connecting Factor' (ECF) will be used, which will refer to a definition with the following elements:

- permanent residence for at least 1 or 2 years (the CCBE would recommend 2 years);
- only one ECF permitted;
- should someone move back to his/her country of citizenship, he or she doesn't need to reside for a minimum period in that country in order to obtain again the ECF but it will attach immediately.
- the deceased can opt out of the ECF through personal choice of law expressed prior to death.

Question 3: *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 rate be formulated to take account of changes in connecting factors between the date of the will and the date of death?

CCBE believes that the validity of the creation of a will should be governed by the law of the state in which testator had his ECF at the time of the creation. The validity of a revocation of a will should be governed by the same law that governs the creation of the will. The form rules should however follow the Hague convention of 1961.

Question 4: *How should the question of the possible incompatibility of the laws applicable to the successions of persons dying in the same incident be settled?*

The CCBE believes that simultaneous deaths are rare in practice. Consequently, on this question, no provision seems necessary. The CCBE believes that the general provisions will function sufficiently well in these cases and no new material rules are necessary.

Question 5: *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?*

Question 6.*: 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?*

***Question 7**: At what time should these connecting factors be operative? Should they be subject to specific conditions (duration, validity on date of death, etc.) 1*

***Question 8:** Should it be possible to choose the law applicable to joint wills and agreements as to future successions? Should such choice be subject to rules and conditions? If so, how?*

***Question 9**: Should a spouse be allowed to choose the law applicable to his/her matrimonial property scheme as the law applicable to his/her succession?*

The CCBE is strongly in favour of allowing a degree of party autonomy. Party autonomy should be allowed without the consent of the heirs.

On the other hand, party autonomy should not be used to choose a law to which no substantial connection exists. Consequently, CCBE recommends limited party autonomy to the effect that a person can choose only between the law of ECF at the time of death, the law of nationality, and the law of ECF at the time of choice.

The CCBE believes that the heirs, on the other hand, should not be allowed to choose the applicable law.

In order to ensure predictability and efficiency, the CCBE recommends that the choice-of-law clause be subject to strict formal and substantive conditions. Consequently, the choice-of-law clause should be in writing and appear in the will. Furthermore, the choice-of-law clause should only be respected if it is express. Thus, no tacit choice of law should be accepted.

The CCBE also favours choice-of-law clauses in agreements concerning succession as well as joint wills, subject to the same conditions for wills proposed above.

***Question 10:** 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?*

The CCBE believes that the law applicable to the estate should govern everything. Consequently, lex causae should also govern whether the heirs are entitled to a reserved portion of the estate or whether the deceased can dispose over all his assets.

This proposal seems to be reasonable, since the CCBE recommends that the estate is to be governed by the law of the deceased's last ECF and that a 1 or 2 years time limit applies in cases of change of ECF. Consequently, the risk of abuse on behalf of the deceased vis-à-vis the heirs seems mitigated.

***Question 11:** should specific conflict rules be adopted for trusts? If so, what rules?*

The CCBE believes that gifts, trusts and similar institutions should be governed by the law of the State where the giver/the creator of the trust had his ECF at the time of the gift/the creation of the trust.

***Question 12:** 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?*

Generally, the possibility for renvoi complicates matters, and renvoi conflicts with the need for predictability and legal certainty in international cases.

Consequently, the future instrument should prohibit renvoi within the European Union, as is also done in the Rome Convention.

Regarding third countries outside the European Union, the CCBE believes that each Member State's private international law should be applied regarding such renvoi.

Question 13: *What conflict rule should be adopted to determine the law applicable to preliminary questions on which the succession may depend?*

Preliminary questions may come up in a variety of circumstances depending on the individual case and in respect of a number of issues which may have nothing to do with succession.

Therefore, the CCBE recommends that the future instrument should not deal with preliminary questions. These issues should be governed by the choice of law rules of the forum.

Question 14*: 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 criterion were to be adopted, what should it be?*

The CCBE believes that 'Lex successionis' should determine the jurisdiction regardless of where the assets are. This is an ambitious aim, to ensure that one court only will deal with the matter.

However, the CCBE realises that this solution cannot apply where the place of the deceased's ECF is outside the EU at the time of his or her death, or where the deceased person has chosen the law of a non-member state. The CCBE believes that these cases should be outside the future Regulation and thus be governed by the private international law of each member state.

Question 15: *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?*

It is advisable to have a single court dealing with the matter to avoid conflicting decisions. The CCBE, therefore, believes that the heirs should not be allowed to proceed in the courts of a Member State other than the one designated by the principal rule.

Question 16: *Where succession proceedings are pending in a Member State, should it be possible to apply to the courts in another Member State where the property is located for provisional and precautionary measures?*

The CCBE believes that this possibility should exist, taking into account that there is a similar provision in the 'Brussels I' regulation.

Question 17: *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?*

The CCBE believes that, if 'lex successionis' is adopted as the principal rule for deciding which court should deal with a matter, then such transfers will not be necessary. However, they will be needed if 'lex successionis' is not used as the principal rule.

Question 18: *What elements would be relevant in determining the jurisdiction of the courts of the Member States in a situation such as that outlined above?*

If the matter is not covered by the regulation itself, then each Member State's private international law should be applied.

Question 19: *Should these special rules of jurisdiction apply also to property situated in the territory of a third country claiming exclusive jurisdiction over it?*

These questions should be governed by relevant national law.

Question 20: *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?*

Yes, the future instrument should allow it (see answer to Question 1).

Question 21 *: 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?*

The question is extremely wide. The CCBE believes that it is too early to devote resources to dealing with these issues, and that the first step should rather be to deal with the resolution of conflict rules.

Question 24 **:** *What rules of jurisdiction should be contained in the future Community instrument as regards trusts created in wills?*

See previous answers.

Question 25. *Can the exequatur for the recognition of judgments be abolished? Or should grounds for refusing to recognise and enforce a judgment by included? If so, what are they?*

The CCBE recognises the difficulties involved in this ambitious project. It is clear that the issue of public policy might be invoked by a number of jurisdictions to overcome the proper application of other EU states creditor and family protection rules. Notwithstanding the Dörner and Lagarde recommendation that any review should be limited to the criteria mentioned in article 22 of Brussels II *bis* rules, this opens an Achille's heel to the whole project and should be resisted. The CCBE strongly recommends that the exequatur for the recognition of judgements in this area should be abolished. The CCBE would prefer the limits of criteria similar to article 22 of Brussels II *bis* rules to be as narrowly defined as possible and to exclude grounds of public policy so far as possible. The CCBE hopes that public policy will be continuously interpreted narrowly by the European Court of Justice.

Question 26. *Could it be provided that a judgment 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?*

The CCBE recommends that in due course a judgement in one Member State should automatically be recognised and available as the basis for the amendment of property registers in another Member State without the need for formal proceedings. An amended form of Article 21 Brussels II *bis* seems to be a good basis for dealing with recognition.

Question 27. *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 the inspiration?*

The CCBE recommends that in due course the same rules on recognition and enforcement be applied to succession related deeds as to judgements and that a succession related deed in one Member State should automatically be recognised and available as the basis for the amendment of property registers in another Member State without the need for further formality. Article 46 of Brussels II *bis*

would be a suitable inspiration save that authentic instruments from common law jurisdictions might need to be specifically recognised.

Initially, however, this may be over ambitious. Some procedure for local authentication may be necessary for a transitional period.

Question 28. *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 another Member State. The 1961 Hague Convention seems to be a reasonable basis to be adopted throughout the EU. The CCBE asks that issues of revocation and in particular revocation by marriage or formation of a registered partnership should also be dealt with. The revocation should be governed by the same law as the creation of the will. (See the answer to Question 3).

Question 29. *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?*

The CCBE recommends that once the applicable law is identified, all relevant issues under that law should be recognised in all Member States. Therefore a judgement in the state of the applicable law appointing an Executor should be recognised in all Member States as set out in our reply to Questions 25-27. Any provisions to enable a challenge to their designation or function should only be permitted in the limited circumstances set out in our replies to Questions 25-27.

Initially, however, this may be over ambitious. Some procedure for local authentication of the appointment of the Executors may be necessary for a period.

Consideration may also be necessary as to the applicability of local protection rules for Executors throughout the EU.

Question 30*: 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 the certificate? What should the certificate contain?*

The CCBE believes therefore that initially until the foreign judgement establishing the office of Executor is automatically recognised, such a certificate for an Executor would be helpful. The certificate will need to be issued by the local jurisdiction whether by the court or notarially in accordance with local rules.

Question 31. *Would the recognition of trusts created in wills allow trust property and related title documents to be entered in property registers? If not, what provisions would need to be adopted?*

In accordance with our answer to Question 11, trusts, created by the law in the State where the creator had his ECF at the time of the creation, should be recognised in all Member States, and trust property can in such case be entered in property registers in other EU States.

Question 32: *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?*

The CCBE thinks that the application of a reserved portion in the existence of a trust should be governed by the law in the State where the creator of the trust had his ECF at the time of the creation.

The definition of the assets in the estate of the deceased and the varying clawback rules of Member States are the most difficult areas for the proposed Regulations. Gifts and inheritance contracts should be governed by the law of the ECF at the time of the creation (see previous answers).

Question 33. *What effects should the certificate have?*

The effects should be the legitimation of the holder of the certificate in relation to the exercise of powers and the proof of certain facts contained in the certificate.

The certificate should enable the holder to act as heir in any Member State.

Question 34. *What information should appear on the certificate?*

The CCBE believes that the following information should appear on the certificate:

- the act by which the succession was accepted;
- whether it was accepted before a notary – if so, the contact details of the notary and the act of acceptance (number of the act, date, etc.);
- the court and a copy of the decision if it has come before a court, in cases of intestacy or what is called "interrogatio in iure";
- identification of the deceased through a certificate delivered by a public register of the Member State of the deceased;
- court decision based on the declaration of the certifier regarding in particular the law applicable to the succession;
- identification of heirs;
- document proving the power of disposal and power of representation should the succession need to be shared out; a similar document will be necessary if the person who has to carry it out is an executor.

Question 35. *Which Member State 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?*

The certificate should be issued in the state of 'lex successionis'. Regarding which authority should issue it, that is up to the law and practice in each Member State.

Question 36. *Should provision be made for a scheme for registering wills in all Member States? Should a centralised register be considered?*

The CCBE believes that there should be a scheme for registering wills in all Member States, but that it is premature to think of a centralised register.

Question 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 State)?*

The CCBE believes that such registers should be electronic.

Question 38. *Would there be any difficulties in abolishing formalities for the legalisation or endorsement (apostille) of succession-related public documents issued in a Member State?*

We do not think that it would cause any major difficulties. However, keeping the legalisation or endorsement (apostille) on such documents gives them more legal security.

***Question 39**. Can a single, complete instrument be produced? If not, in what order should work proceed and via what stages?*

The CCBE recognizes the difficulties involved in this ambitious project. However, the CCBE strongly recommends that the future instrument should be as complete and coherent as possible and thus cover jurisdiction, choice of law and recognition and enforcement of judgments. This seems to be the only way in which the European Union can avoid the disadvantages of the present, unsatisfactory situation where no harmonization exists.