

May 2010

Annex to the Report
on the Results of the Subsidiarity Check
on the Proposal for a Regulation of the
European Parliament and of the Council
on jurisdiction, applicable law,
recognition and enforcement of decisions
and authentic instruments
in matters of succession and the creation
of a European Certificate of Succession:

National Parliaments' Opinions and
Replies to the Questionnaire

Prepared by the COSAC Secretariat and presented to:

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Questionnaire: in English

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?
2. Was the plenary involved?
3. At which level the final decision was taken and who signed it?
4. Which administrative services of your parliament were involved and how? Please specify.
5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?
6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?
7. Did you consult your regional parliaments with legislative powers?
8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?
9. What was the chronology of events? Please specify the dates.
10. Did you cooperate with other national parliaments in the process? If so, by what means?
11. Did you publicise your findings? If so, by what means?

Findings:

12. Did you find any breach of the principle of subsidiarity?
13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.
14. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?
15. Did you encounter any specific difficulties during this subsidiarity check?
16. Any other comments?

Questionnaire: en français

Procédure :

1. Quelles commissions parlementaires ont été impliquées dans le test de subsidiarité et de quelle manière ?
2. La séance plénière a-t-elle été impliquée ?
3. A quel niveau la décision finale a-t-elle été prise et qui l'a paraphée ?
4. Quels services administratifs de votre parlement ont été impliqués et de quelle manière? Merci de préciser.
5. En ce qui concerne les parlements bicaméraux : avez-vous conduit le test de subsidiarité en coordination avec l'autre chambre ?
6. Votre gouvernement a-t-il fourni des informations relatives au respect du principe de subsidiarité par la proposition de la directive ?
7. Avez-vous consulté les parlements régionaux de votre pays qui disposeraient de pouvoirs législatifs ?
8. Avez-vous consulté des organisations non gouvernementales, des groupes d'intérêt, des experts extérieurs ou d'autres parties prenantes ?
9. Selon quelle chronologie le test a-t-il été conduit au sein de votre Parlement ? Merci de préciser les dates.
10. Avez-vous coopéré avec d'autres parlements nationaux ? Si oui, par quels moyens ?
11. Avez-vous publié vos conclusions ? Si oui, par quels moyens ?

Conclusions :

12. Avez-vous découvert un quelconque manquement au principe de subsidiarité ?
13. Avez-vous adopté un avis motivé sur la proposition de directive ? Si oui, veuillez en joindre une copie.
14. Avez-vous trouvé les justifications de la Commission sur le respect du principe de subsidiarité satisfaisantes ?
15. Avez-vous rencontré des difficultés spécifiques pendant l'examen ?
16. Avez-vous d'autres observations ?

Austria: Bundesrat

Evaluation of the subsidiarity check on the Proposal
for a Regulation of the
European Parliament and of the Council
on jurisdiction, applicable law,
recognition and enforcement of decisions
and authentic instruments
in matters of succession
and the creation
of a European Certificate of Succession

Austrian Reply

EU-Committee of the Bundesrat

COSAC Secretariat (secretariat@cosac.eu)

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?

EU-Committee of the Bundesrat

2. Was the plenary involved?

No

3. At which level the final decision was taken and who signed it?

The statement was issued by the Committee. The President transmitted the statement to its recipients.

4. Which administrative services of your parliament were involved and how?
Please specify.

The EU- and International Service performed a subsidiarity pre-check of the proposal, coordinated information exchange with government and external experts, and was in charge of all organisational issues before, during and after the Committee session.

5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

No (not on the official level)

6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?

The Ministry of Justice provided a position paper. Officials of the Ministry of Justice provided (oral) statements during the Committee session.

7. Did you consult your regional parliaments with legislative powers?

Yes

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?

Yes. The Chamber of Advocates as well as the Chamber of Notaries provided written statements.

9. What was the chronology of events? Please specify the dates.

Discussion of the Proposal in the EU-Committee of the Bundesrat on 1 December 2009

10. Did you cooperate with other national parliaments in the process? If so, by what means?

Yes, via IPEX

11. Did you publicise your findings? If so, by what means?

Yes. A summary of the proceedings was published on the internet website of the Parliament, and the statement was publicised through IPEX.

Findings:

12. Did you find any breach of the principle of subsidiarity?

No

13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.

Yes

14. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?

No

15. Did you encounter any specific difficulties during this subsidiarity check?

No

16. Any other comments?

No

EU Committee of the Federal Council on 1 December 2009

Statement

concerning COM (2009) 154 final Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (20011/EU XXIV.GP)

The EU Committee of the Federal Council discussed COM (2009) 154 final Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (20011/EU XXIV.GP) in a public meeting on 1 December 2009 and came to the following conclusions.

A.

Comments to the President of the European Parliament, the Council and the European Commission in accordance with article 5 of the Treaty on European Union as amended by the Treaty of Lisbon together with article 6 of the Protocol on the application of the principles of subsidiarity and proportionality

The EU Committee of the Federal Council concludes that the Proposal does not conflict with the principles of subsidiarity or proportionality.

It nevertheless has the following reservation in this regard:

Adequate qualitative or quantitative reasons as to why the Commission is of the opinion that the Proposal complies with the principles of subsidiarity and proportionality are practically non-existent. In view of the subject matter, these aspects are particularly important in order to emphasise the need for a Regulation of this nature.

B.

The EU Committee basically welcomes this Proposal as a further step towards unification of conflict of law principles, but has the following reservations about the content:

- The present Proposal does not state explicitly enough that the Regulation will not interfere with national procedural law, national substantive laws of succession and national property laws. The provisions in this regard in the Regulation are not adequate and need to be more clearly formulated.

- The Regulation should not exacerbate the work of the courts and make probate proceedings more complicated and expensive or frustrate the justified expectations of those involved because of unclear provisions.
- In the opinion of the Committee, the concept of “habitual residence” needs to be more precisely formulated. The habitual residence alone is not adequate without additional provisions as the determining factor for establishing the applicable law or jurisdiction in matters of succession. It is possible, for example, for the deceased to have several or no habitual residences. The state in which the deceased had his/her last habitual residence might not be the state with which he/she is most closely associated. An explicit definition of habitual residence or an escape clause, as in Regulations Rome I and II, is needed to resolve this problem.
- It is particularly important to ensure that the application of this Regulation does not interfere with special laws of succession (e.g. farm succession laws). To this end special jurisdiction regulations are required that would allow the possibility of refusing to recognise a decision if it conflicts with this jurisdiction rule.
- The Proposal does not clearly state whether the Regulation is also applicable to the legal institution of “gift in the event of death” and if so, which law is to be applied.
- There are some unanswered questions in connection with the provisions concerning the European Certificate of Succession. Further minimum procedural standards need to be established in the Regulation with respect to the issuance of this certificate.
- The provisions for entry into force and transitional arrangements could result in a choice of law by a deceased person according to national law before the entry into force of the Regulation becoming invalid after the Regulation has entered into force. The deceased will frequently be unaware of this circumstance and his/her choice of law and the testamentary disposition on which it is based might not take account of the new legal situation arising as a result of the Regulation. This could significantly damage trust in the existing legislation and should therefore be taken sufficiently into account in the transitional arrangements.
- According to the Proposal, the Regulation is only to be applied if the deceased dies after it enters into force. Consideration might be given to the possibility of enabling heirs to benefit from the European Certificate of Succession, which is in any case issued only on application, if the deceased dies before the Regulation enters into force.
- The Committee is also of the opinion that explicit reference should be made in the comments on the Regulation that the form of the testamentary disposition should be based on the Hague Convention on wills.
- Regarding the relationship to family or inheritance law, clarification is needed finally as to which law is applicable to marriage contracts and the succession provisions in them.

- The Committee therefore believes that a sufficiently long *vacatio legis* should be allowed between the publication and entry into force of the Regulation so that future testators are better informed about the new legal situation.

Probate proceedings are carried out in Austria by notaries on behalf of the courts. The statement by the Austrian Chamber of Notaries of 25 November 2009, which contains valuable comments, is therefore attached for information.

Belgium: *Chambre des représentants*

**SUBSIDIARITY CHECK ON COM(2009)0154
EVALUATION**

Belgian House of Representatives

1. Only the Justice Committee of the Belgian House of Representatives was involved
2. No
3. The Justice Committee took the final decision which was signed by the Committee Chairwoman and the Rapporteur
4. Only the European Affairs Unit and the Committee Department were involved
5. There was no coordination with the Belgian Senate although some committee members were in favour of such a coordination
6. The representative of the Secretary of State responsible for Family Affairs provided information to the Justice Committee on the compliance of the proposal with the principle of subsidiarity (cf. House of representatives, DOC 52 2330/1, p. 9).
7. In this case, such a consultation was not necessary
8. Yes. The European Affairs Unit of the House of Representatives first contacted the Royal Federation of Belgian Notaries in order to elaborate a document to inform the members of the Justice Committee. When the topic was discussed in the Justice Committee, the International Council of the Belgian Notaries was consulted.
9. Chronology of events:
 - 28 October 2009: the Conference of Presidents of the House decides that the Justice Committee will discuss the Draft Regulation.
 - 9 November 2009: a note of the European Affairs Unit of the House is forwarded to the members of the Justice Committee.
 - 24 November, 8 and 15 December 2009: meetings of the Justice Committee + advice on the principle of subsidiarity
10. There was no such cooperation
11. The Committee's findings were published as a parliamentary document (52 2330/001)
12. The Justice Committee found that on the issue of Article 27 of the draft regulation there might be a breach of the principle of proportionality. Indeed, the EC-Treaty does not allow the European authorities to intervene in matters of Family Law. Therefore, the draft regulation needs to be reviewed on that issue
13. cf. <http://www.dekamer.be/FLWB/PDF/52/2330/52K2330001.pdf>
14. The Justice Committee deemed the Commission's justification satisfactory
15. No
16. No other comments

20 January 2010

III. — AVIS DE SUBSIDIARITÉ

1. En ce qui concerne le respect du principe de subsidiarité

La commission de la Justice reconnaît que l'intervention des autorités européennes est nécessaire pour harmoniser les règles relatives à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions et des actes authentiques en matière de successions internationales. La création d'un certificat successoral européen participe également à ce souci d'harmonisation.

Le commission juge que le règlement est l'instrument juridique adéquat pour réaliser cette harmonisation. Pareil règlement permettra de faciliter la liquidation des successions internationales et de garantir une plus grande sécurité juridique et prévisibilité pour les citoyens.

La commission est d'avis que l'intervention des autorités européennes en la matière respecte bien le principe de subsidiarité.

2. En ce qui concerne le respect du principe de proportionnalité

Certaines dispositions de la proposition vont plus loin que ce qui est nécessaire à la réalisation des objectifs poursuivis.

Ainsi, l'article 27 de la proposition de règlement, dans ses versions française et anglaise¹ actuelles, aboutirait à remettre en question le mécanisme de la réserve héréditaire, élément fondamental du droit successoral belge. Or, ce principe, d'ordre public, est destiné à protéger la famille du défunt. La commission de la Justice rappelle à cet égard que dans son rapport du 16 octobre 2006 portant recommandations à la Commission sur les successions et testaments (2005/2148(INI)), le Parlement européen estimait que le futur instrument européen d'harmonisation devait éviter qu'avec la faculté de choisir la loi applicable ne soient violés les principes fondamentaux d'attribution de la réserve héréditaire aux plus proches parents établis par la loi applicable à la succession à titre objectif.

La commission de la Justice estime qu'en prévoyant qu'il pourra être dérogé à ce principe, les autorités européennes s'aventurent sur le terrain du droit familial pour lequel le Traité instituant la Communauté européenne exclut sa compétence.

Dans ce cas, l'intervention du législateur européen ne serait pas seulement disproportionnée aux objectifs poursuivis mais enfreindrait également le droit communautaire.

La commission de la Justice conclut par conséquent que pour être acceptable, sous l'angle du principe de proportionnalité, le texte devra être aménagé sur ce point.

*

* *

Le présent avis de subsidiarité a été adopté par 13 voix et une abstention.

Conformément à l'article 37bis du Règlement, l'avis de la commission est réputé être celui de la Chambre.

Le rapporteur,

Clotilde NYSSSENS

La présidente,

Sonja BECQ

¹ ² La commission attire l'attention du législateur européen sur les discordances fondamentales entre la version néerlandaise et les versions française et anglaise de l'article 27 de la proposition de règlement soumise à son examen et l'invite à soumettre ces textes à un examen approfondi afin d'en vérifier la concordance générale.

Belgium: Sénat

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how? *The subsidiarity check was conducted in the Justice Committee*
2. Was the plenary involved? *Yes*
3. At which level the final decision was taken and who signed it? *The final decision is taken by the plenary*
4. Which administrative services of your parliament were involved and how? Please specify. *The European Affairs service manages the reception, selection and sending of the documents. The legal service checks if the selected document falls under the competence of the Senate. The Committee and Plenary services organize the check in Committee and the final vote in the plenary. (see attached procedure)*
5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber? *No*
6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity? *No*
7. Did you consult your regional parliaments with legislative powers? *No, they have no competence in this matter*
8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders? *No*
9. What was the chronology of events? *The document was discussed in the Committee on the 1st and the 8th of December. The advice was voted in plenary on the 10th December.*
10. Did you cooperate with other national parliaments in the process? If so, by what means? *No*
11. Did you publicise your findings? If so, by what means? *Yes, on our website, on IPEX and on paper (parliamentary documents distributed to members and staff)*

Findings:

12. Did you find any breach of the principle of subsidiarity? *Yes*
13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy. *Has been sent last week in pdf version, html in annex.*
14. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory? *No, see opinion*
15. Did you encounter any specific difficulties during this subsidiarity check? *No*
16. Any other comments?

SÉNAT DE BELGIQUE

SESSION DE 2009-2010

8 DÉCEMBRE 2009

Proposition de règlement du Parlement européen et du Conseil relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions et des actes authentiques en matière de successions et à la création d'un certificat successoral européen. — Test de contrôle de la procédure de subsidiarité et de proportionnalité

Examen de la subsidiarité

**CONCLUSION DE LA COMMISSION
DE LA JUSTICE**

En ce qui concerne la subsidiarité, la commission :

— constate des contradictions entre les textes de la proposition de règlement dans les différentes langues, alors que ceux-ci ont pourtant la même force authentique. Elle renvoie au très important article 27 dont le texte néerlandais, d'une part, et les textes français et anglais, d'autre part, sont totalement contradictoires. Il y a lieu de faire la clarté sur cette question;

— souligne que le régime de compétence proposé dans le règlement modifie indirectement des dispositions de droit matériel du droit successoral. Le régime prévu dans le texte anglais par exemple porte atteinte à la réserve légale, qui est d'ordre public en Belgique. Il s'agit donc d'une modification très radicale du système successoral belge;

— conclut donc que le respect du principe de subsidiarité n'est pas garanti et qu'une plus ample justification doit être fournie par les autorités européennes pour connaître la portée exacte de la proposition de règlement.

BELGIAN SENATE

Session 2009-2010

8 December 2009

Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession – Control of Subsidiarity and proportionality

Subsidiarity Check

CONCLUSION OF THE COMMITTEE FOR JUSTICE

Concerning the subsidiarity, the Committee:

- **notices the contradictions between the texts of the proposal for a regulation in the different languages, although they have the same authentic power. She refers to the very important article 27, of which the Dutch text on one side and the texts in French and English, on the other side, are totally contradictory. This needs to be cleared out ;**
 - **underlines that the settlement of competence proposed in the regulation modifies indirectly provisions of substantive law from the succession law. The settlement in the English version for example infringes the legal reserve, which is of Public Order in Belgium. It means a very radical modification of the Belgian system for successions ;**
 - **concludes thus that the principle of subsidiarity is not guaranteed and that further justification should be provided by the European Authorities in order to know the exact scope of the proposal for regulation.**
-

Bulgaria: Narodno Sabranie

Subsidiarity check on the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?

The document has been discussed at the joint meeting of the European Affairs and Oversight of the European Funds Committee (CEAOEF) and the Legal Affairs Committee (LAC).

2. Was the plenary involved?

No, the plenary was not involved.

3. At which level the final decision was taken and who signed it?

The final report was adopted by the LAC and the CEAOEF and was signed by the Chairmen of the Committees. The report was then sent to the President of the National Assembly.

4. Which administrative services of your parliament were involved and how? Please specify.

The EU Law Department analyzed the proposal and provided a written opinion.

5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

The Bulgarian Parliament is unicameral.

6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?

The government submitted an explanatory memorandum and a position on the proposal, including information on the compliance with the principle of subsidiarity.

7. Did you consult your regional parliaments with legislative powers?

No.

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?

Yes, the Notary Chamber of the Republic of Bulgaria and the Supreme Judicial Council provided a statement.

9. What was the chronology of events? Please specify the dates.

- 1) October 14, 2009 Adoption of the EC proposal;
- 2) December 4, 2009 Submission by the Council of Ministers of the proposal for a regulation and an explanatory memorandum to the National Assembly;
- 4) December 4, 2009 The “European Law” Department submits an opinion on the proposal for a regulation to the standing committees;

6) December 10, 2009 The proposal for a regulation is being scrutinized by the LAC and the CEAOEF. Both committees adopt a report and submit it to the President of the National Assembly;

7) December 14, 2009 The President of the National Assembly submits the report to the Government.

10. Did you cooperate with other national parliaments in the process? If so, by what means?

Yes, via IPEX.

11. Did you publicise your findings? If so, by what means?

Yes, the report is published on the web page of the National Assembly:

<http://parliament.bg/?page=ns&lng=en&nsid=5&action=show&Type=docs&gid=240>

A summary of the report is published in the bulletin “[Euronews](#)” of the National Assembly.

Findings:

12. Did you find any breach of the principle of subsidiarity?

No.

13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.

No. However, the report includes some remarks.

14. Did you find the Commission’s justification with regard to the principle of subsidiarity satisfactory?

Yes.

15. Did you encounter any specific difficulties during this subsidiarity check?

No.

16. Any other comments?

Both committees adopted the following conclusions:

1. The Draft Proposal for a Regulation should be approved, because it would help EU citizens to better organize their succession in advance and to guarantee effectively the rights of heirs and/or legatees. The Proposal will contribute to eliminate the parallel proceedings, enhance the mutual recognition of the respective documents and court decisions, as well as it will facilitate the approach to information concerning the successions in the EU Member States.

2. The Proposal for a Regulation corresponds to the principle of subsidiarity, because the variety of national laws in this field impedes the free movement of persons in the Union. Having in mind the increasing mobility of the EU citizens and the transnational character of the questions, related to the international successions, it could be concluded that the mentioned issues could be more effectively regulated on EU level.

3. The presented Position, according to which the Republic of Bulgaria approves in general the Proposal for a Regulation, pointing out that it is necessary to define certain terms in the text, corresponds to the policy, which our country carries out in this area and thus could be supported.

4. In order to avoid different interpretations it is advisable to define in the text of the draft proposal the criterion - habitual residence. Within the negotiations in the Council, the Republic of Bulgaria should explicitly declare that succession agreements and joint wills won’t be admitted when Bulgarian law is applicable.

REPORT

Concerning a hearing of representatives of the Ministry of Justice on the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Inheritance and the Council of Ministers' Framework Position

On December, 10th 2009 a joint meeting of the Committee on European Affairs and Oversight of the European Funds and the Legal Affairs Committee was held, with the purpose of discussing the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Inheritance, and the government Framework Position on the draft act.

The Framework Position of the Republic of Bulgaria was presented by Mr. Borislav Petkov, Director of the "International legal cooperation and European Affairs Directorate" and Ms. Elena Doycheva, Head of "International cooperation and legal assistance in civil proceedings Department" at the Ministry of Justice.

European citizens who acquire succession property in another Member State within the EU, face exceptional administrative and financial difficulties, due to the complicated rules, applicable to those successions which are often hard to predict. The legislation in this area also varies widely from Member State to Member State and thus it is hard to define the applicable rules according to the national legislation.

The Proposal for a Regulation aims to facilitate the free movement of citizens, establishing common rules in the field of jurisdiction, the applicable law, recognition and enforcement of judgments and authentic instruments in cross-border succession, and the European Certificate of Inheritance.

The European Commission proposes the habitual residence as a common criterion for determining the applicable law in international succession cases by the competent authorities. According to Art. 4 of the Proposal for a Regulation, the criterion for the competence in the succession case is the last habitual residence of the deceased. But the competent judicial authority could refer the case to the national law if it finds it more appropriate (Art. 5). The common rule stipulates that the applicable law is the law of the state where the deceased had his/her last habitual residence (Art. 16).

whether

Article 17 of the Proposal foresees limited freedom of choice. The citizens could decide the applicable law for the succession property (movable and immovable) to be the national law of the state whose nationality they possess. Art. 18 foresees some regulations that determine the applicable law to the agreements concerning the succession and those concerning the succession of joint wills, used in some Member States.

It is provided that the principle of mutual recognition is applicable in the court decisions and in the authentic instruments in succession (Art. 29 and next).

The Art. 36 of the Proposal stipulates that the European Inheritance Certificate constitutes a legal proof of the capacity of heir or legatee and of the powers of the executors of wills or third-party administrators all over the territory of the EU without any other formalities needed.

II. The Council of Ministers Framework Position specifies that **the Republic of Bulgaria supports the approval** of a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Inheritance. The objective of this proposal is to enable people living in the European Union to organize their succession in advance and effectively to guarantee the rights of heirs and/or legatees and of other persons linked to the deceased. The Position also mentions that the diversity, existing in the legal systems and traditions of every Member State in the field of succession and testament and the lack of harmonized rules concerning the competence and the conflict of laws in the field of international succession cases should be dealt on EU level. The Republic of Bulgaria supports the implementation of a European Certificate of Inheritance, as a measure for rapid and complete exercising of their succession rights.

There are some remarks on the essence of the proposal. According to the expressed national Position it is necessary to define the criteria “habitual residence”. Although Bulgarian legislation accepts the different status of movable and immovable property, the Government would approve a uniform approach in the Proposal, where the criteria is the habitual residence which the deceased had at the time of his/her death. Reserves are stated with regards to the instruments - agreement of succession and joint will. The Republic of Bulgaria would approve if the draft proposal regulates also the form of the testaments. The idea of elaboration of a national testament registers and establishing connection between them within the Member States is also supported.

Within the procedure of parliamentary scrutiny and control the Supreme Judicial Council and the Chamber of Notaries were consulted. The Chamber of Notaries gives its general approval of the Proposal, considering in its statement from 30th November 2009 that it has many advantages, but it’s also possible to make some improvements in the text.

The Proposal for a Regulation does not contradict to the principle of subsidiarity. The European Commission reckons that the objectives of the Proposal could be reached only in the form of common rules in the area of international succession, which should be uniform in order to provide the citizens with legal certainty and predictability. That’s why unilateral actions launched by the Member States would contradict to the above mentioned objectives. The European Commission, on the other side, points that The Hague Convention governing the legal conflicts regarding the form of last Wills and Testaments has been ratified by 16 Member States only.

It should be noticed that the European Commission has included in the Proposal for a Regulation a reasoned motivation on the observation of the principle of subsidiarity. The involvement of the EU is legitimate, because the diversity of national laws in these area impedes the free movement of persons in the Union. Because of the transnational character of the issues, related to jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of international succession, they should be regulated at EU level.

IV. After a discussion held during the session, both committees accepted the following conclusions:

1. The Draft Proposal for a Regulation should be approved, because it would help EU citizens to better organize their succession in advance and to guarantee effectively the rights of heirs and/or legatees. The Proposal will contribute to eliminate the parallel proceedings, enhance the mutual recognition of the respective documents and court decisions, as well as it will facilitate the approach to information concerning the successions in the EU Member States.

2. The Proposal for a Regulation corresponds to the principle of subsidiarity, because the variety of national laws in this field impedes the free movement of persons in the Union. Having in mind the increasing mobility of the EU citizens and the transnational character of the questions, related to the international successions, it could be concluded that the mentioned issues could be more effectively regulated on EU level.

3. The presented Position, according to which the Republic of Bulgaria approves in general the Proposal for a Regulation, pointing out that it is necessary to define certain terms in the text, corresponds to the policy, which our country carries out in this area and thus could be supported.

4. In order to avoid different interpretations it is advisable to define in the text of the draft proposal the criterion - habitual residence. Within the negotiations in the Council, the Republic of Bulgaria should explicitly declare that succession agreements and joint wills won't be admitted when Bulgarian law is applicable.

Cyprus: Vouli ton Antiprosopon

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?

The parliamentary committee on European Affairs carried out the subsidiarity check.

2. Was the plenary involved?

The plenary of the House of Representatives was not involved in this experimental exercise, but this does not preclude the possibility of the plenary being involved in future proceedings.

3. At which level the final decision was taken and who signed it?

The final decision was taken by the Parliamentary Committee on European Affairs and was signed by the President of the said Committee.

4. Which administrative services of your parliament were involved and how? Please specify.

The European Affairs Service was involved in the subsidiarity check, through the study of the proposal at hand and the compilation of a report for the members of the Parliamentary Committee on European Affairs to aid them in the carrying out of the subsidiarity and proportionality check. Furthermore, the European Affairs Service carried out various administrative tasks such as the distribution all the relevant documents, information and views to the members of the Parliamentary Committee on European Affairs and the communication with the COSAC Secretariat.

5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

A bicameral system does not exist in Cyprus.

6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?

Yes, an opinion concerning the compliance of the Proposal with the principle of subsidiarity and proportionality was received by the Ministry of Justice and Public Order.

7. Did you consult your regional parliaments with legislative powers?

No regional parliaments exist in Cyprus.

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?

No.

9. What was the chronology of events? Please specify the dates.

On 28 July 2009, the legislative proposal, accompanied by material concerning the principle of subsidiarity and proportionality and the explanatory note of the COSAC Secretariat concerning the matter, were distributed to the members of the Parliamentary Committee on European Affairs.

The documents were also accompanied by a letter from the President of the Parliamentary Committee on European Affairs, explaining the requirements of the task before the Committee. A report of the European Affairs Service, which studied the legislative proposal

and put down its recommendations concerning the principle of subsidiarity and proportionality, was distributed to all the members of the House of Representatives.

10. Did you cooperate with other national parliaments in the process? If so, by what means?

No direct communication with other national parliaments was made concerning the subsidiarity check. However, the IPEX system was frequently consulted during the process to obtain information on the subsidiarity check from the parliaments of other member states.

11. Did you publicise your findings? If so, by what means?

No publication of the findings was made. However a summary of the findings will be uploaded on the IPEX system and a report will be forwarded to the EU institutions.

Findings:

12. Did you find any breach of the principle of subsidiarity?

No.

13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.

No.

14. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?

Unfortunately, the Commission's justification with regard to the principle of subsidiarity was deemed, to have been unsatisfactory since only a very brief section in the proposal was dedicated to the justification of the compliance of the said proposal with the principle of subsidiarity.

15. Did you encounter any specific difficulties during this subsidiarity check?

Due to the fact that the Commission proposal in question was transmitted to the House of Representatives during the summer recess, it was difficult to involve other sectoral committees of the House of Representatives other than the Parliamentary Committee on European Affairs. The said Committee, due to time constraints, completed the examination of the above mentioned proposal without having the opportunity to hear the opinions of interested parties, out of necessity in order to complete the subsidiarity check within the prescribed eight week period.

16. Any other comments?

None.

Evaluation of the subsidiarity check on the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession

Procedures:

1. *Which parliamentary committees were involved in the subsidiarity check and how?*

Only the Committee for European Affairs was involved in this subsidiarity check.

2. *Was the plenary involved?*

No.

3. *At which level the final decision was taken and who signed it?*

The final decision was taken by the Committee for European Affairs, as noticed above. The respective resolution was signed by the Rapporteur of the Committee, Mr. Cyril Svoboda, by the Verifier of the Committee, Mr. Jozef Kochan, and by the Vice-chairperson of the Committee, Mr. Jan Bauer, who presided over the meeting.

4. *Which administrative services of your parliament were involved and how? Please specify.*

The Parliamentary Institute of the Office of the Chamber of Deputies provided expert assistance to the Committee for European Affairs and especially to the Member of Parliament, who was appointed by the Committee as rapporteur.

5. *In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?*

No.

6. *Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?*

The government provided the Committee for European Affairs with the regular Government's preliminary position on the proposal without any particular reference to the principle of subsidiarity.

7. *Did you consult your regional parliaments with legislative powers?*

No.

8. *Did you consult any non-governmental organizations, interest groups, external experts or other stakeholders?*

No.

9. *What was the chronology of events? Please specify the dates.*

The draft Regulation was received by the Chamber of Deputies on 21 October 2009. The Committee for European Affairs started to deliberate the document on 12 November 2009. The deliberation continued and finished at the Committee's meeting on 19 November 2009.

10. *Did you cooperate with other national parliaments in the process? If so, by what means?*

Chamber of Deputies cooperated with other national parliaments on the officials' level, namely by e-mail.

11. *Did you publicise your findings? If so, by what means?*

Findings were incorporated in the resolution of the Committee for European Affairs², which is available to the public on the website of the Chamber of Deputies. The resolution was also published on the IPEX website.

Findings:

12. *Did you find any breach of the principle of subsidiarity?*

No.

13. *Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.*

Yes. See the enclosed annex.

14. *Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?*

Yes.

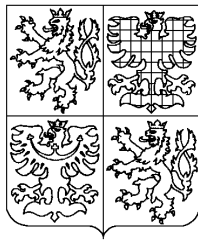
15. *Did you encounter any specific difficulties during this subsidiarity check?*

No.

16. *Any other comments?*

No.

² Available at <http://www.psp.cz/cgi-bin/eng/sqw/hp.sqw?k=99&ido=762&td=1> – only in Czech.



**PARLIAMENT
OF THE CZECH REPUBLIC**
Chamber of Deputies
Kateřina Jacques
Chairwoman
Committee for European Affairs

Prague, 7th December 2009

Dear Madame/ Sir,

I am writing to inform you that according to the Conclusions of the XXXIX COSAC taking place on 7 - 8 May 2008 in Brdo pri Kranju, the Committee for European Affairs of the Chamber of Deputies of the Parliament of the Czech Republic has decided to conduct a subsidiarity check on the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (COM(2009) 154 final).

The respective document was included in the agenda of the 59th session of the Committee for European Affairs and was scrutinized on 19th November 2009. According to the Rules of Procedure of the Chamber of Deputies a Vice-Minister of Justice was present at the session to introduce the preliminary government's framework position.

After the hearing of the rapporteur's review and after the discussion the Committee has adopted the resolution No. 480 which is enclosed to this letter. The Committee did not find any breach of the principle of subsidiarity.

Yours faithfully,

To be addressed:

Commission: sg-national-parliaments@ec.europa.eu

European Parliament: ep-np@europarl.europa.eu

Council: sgc.cosac@consilium.europa.eu

COSAC-Secretariat: secretariat@cosac.eu

Parliament of the Czech Republic

CHAMBER OF DEPUTIES

2009

5th electoral term

480th

RESOLUTION

***of the Committee for European Affairs
from its 59th session held on 19 November 2009***

on the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (COM(2009) 154 final)

The Committee for European Affairs after hearing the report of the Deputy Minister of Justice, JUDr. Pavel Staněk, after hearing the report of the Rapporteur, Mr. Jozef Kochan, and after deliberating the matter

a p p r o v e s the position annexed to this resolution.

Jozef Kochan v. r.
Committee Verifier

Cyril Svoboda v. r.
Committee Rapporteur

Jan Bauer v. r.
Committee Vice-Chairman

DOKUMENT 14722/09

Návrh nařízení Evropského parlamentu a Rady o příslušnosti, rozhodném právu, uznávání a výkonu rozhodnutí a úředních listin ve věcech dědictví
a vytvoření evropského dědického osvědčení znění, kód Rady 14722/09
Interinstitucionální spis 2009/0157/COD

- **Právní základ:**
Článek 61, 67 odst. 5 Smlouvy ES
- **Datum zaslání Radě EU:**
15. 10. 2009
- **Datum zaslání Poslanecké sněmovně prostřednictvím VEZ:**
21. 10. 2009
- **Datum projednání ve VEZ:**
12. 11. 2009 (1. kolo)
- **Procedura:**
Spolurozhodování.
- **Předběžné stanovisko vlády (dle § 109a odst. 1 jednacího řádu PS):**
Nebylo výboru pro evropské záležitosti vládou poskytnuto.

- **Hodnocení z hlediska principu subsidiarity:**

Předsedové výborů pro evropské záležitosti na svém setkání 18. února 2008 v Ljubljani (tzv. malý COSAC) rozhodli o provedení koordinovaného testu subsidiarity k *Návrhu nařízení Evropského parlamentu a Rady o rozhodném právu, příslušnosti, uznávání rozhodnutí a úředních opatření ve věcech dědictví a závětí*. Toto rozhodnutí potvrdilo XXXIX. zasedání COSAC v Brdu pri Kranju. Protože přijetí návrhu bylo Komisí odloženo na rok 2009, shodli se předsedové výborů pro evropské záležitosti na setkání 7. července 2008 v Paříži na provedení testu subsidiarity v prvním semestru roku 2009 během českého předsednictví. Vzhledem k tomu, že návrh Komise nepředložila ani během českého předsednictví, bylo rozhodnutí provést kontrolu subsidiarity k tomuto návrhu znovu potvrzeno na XLII. zasedání COSAC ve Stockholmu 5. – 6. října 2009.

Kontrola subsidiarity má být provedena podle ustanovení Protokolu č. 2 o aplikaci principů subsidiarity a proporcionality připojeného k Lisabonské smlouvě pozměňující Smlouvu o Evropské unii a Smlouvu o založení Evropského společenství.

Návrh nařízení Evropského parlamentu a Rady o příslušnosti, rozhodném právu, uznávání a výkonu rozhodnutí a úředních listin ve věcech dědictví a vytvoření evropského dědického

osvědčení (dále jen návrh) přijala Komise dne 14. října 2009, osmítýdenní lhůta stanovená pro provedení kontroly subsidiarity uplyne 17. prosince 2009.

V odůvodnění návrhu Komise k zásadě subsidiarity uvádí pouze to, že: „*Cílů návrhu může být dosaženo pouze ve formě společných pravidel v oblasti dědictví s mezinárodním prvkem, která musí být jednotná, aby zajistila občanům právní jistotu a předvídatelnost. Jednostranné opatření členských států by tak nevedlo k dosažení tohoto cíle. Existuje Haagská úmluva o právu použitelném na dědictví (dále jen „Úmluva“), která ale nikdy nevstoupila v platnost.*³ *Haagská úmluva ze dne 5. října 1961 o kolizních právních předpisech týkajících se formy závěti byla ratifikována šestnácti státy. Bylo by vhodné, aby další státy v zájmu Společenství tuto úmluvu ratifikovaly. Všechny konzultace a studie prokázaly rozsah problémů, na které se tento návrh zaměřuje.*“⁴

• **Odůvodnění a předmět:**

Evropský nástroj upravující určité otázky v oblasti dědictví a závětí byl poprvé zmíněn Vídeňským akčním plánem z roku 1998. V Haagském programu⁵ vyzvala Rada Komisi k předložení zelené knihy pokrývající celou danou problematiku: rozhodné právo, příslušnost a uznávání, správní opatření (dědická osvědčení, evidence závětí). Komise zveřejnila *Zelenou knihu – Dědictví a závěti*⁶ dne 1. března 2005. Obdržela okolo šedesáti odpovědí, po kterých následovalo dne 30. listopadu 2006 veřejné slyšení. Komise vytvořila skupinu odborníků, která se v období let 2006 – 2008 sedmkrát sešla a rovněž zorganizovala dne 30. června 2008 schůzku národních odborníků. O nesnadnostech, s nimiž se Komise potýkala při tvorbě návrhu, svědčí mj. skutečnost, že jeho předložení bylo Komisí několikrát odloženo a že byl zveřejněn s více jak ročním zpožděním.

Dokladem obtížnosti unifikace norem mezinárodního práva soukromého a procesního v oblasti dědického práva jsou i neúspěšné pokusy o jejich unifikaci podniknuté na půdě mezinárodních organizací. Dosud nejambicióznějším z těchto pokusů je *Úmluva o právu rozhodném pro dědění* vypracovaná Haagskou konferencí mezinárodního práva soukromého v roce 1988, která dosud nevstoupila v platnost. Důvodem je především skutečnost, že pravidla obsažená v právních úpravách jednotlivých států se v této oblasti značně liší a potřeba jejich sjednocení není většinou považována za nezbytnou. Zatím byla Úmluva ratifikována pouze jediným státem – Nizozemím.

Potřebu unijního⁷ nástroje sjednocujícího právní úpravu členských států v dědických vztazích s „komunitárním prvkem“ Komise odůvodnila tak, že „*zvýšená mobilita osob v prostoru bez vnitřních hranic, stejně jako rostoucí počet svazků mezi příslušníky různých členských států, které jsou často doprovázeny nabýváním majetku nacházejícího se na území několika států Unie, značně komplikují dědictví. Potíže, s nimiž se setkávají účastníci mezistátního dědického řízení jsou z větší části dány rozdílností základních norem, procesních norem a pravidel pro konfliktní zákonné předpisy upravujících tuto oblast v jednotlivých členských státech. Normy mezinárodního soukromého práva Společenství, které byly dosud přijaty,*

³ V české odborné literatuře se tradičně používá *Úmluva o právu rozhodném pro dědění*.

⁴ Bod 3.2, str. 4 návrhu.

⁵ Viz závěry ze zasedání předsednictva Evropské rady v Bruselu konaného ve dnech 4. a 5. listopadu 2004. Následně viz KOM (2005) 184 v konečném znění.

⁶ KOM (2005) 65 v konečném znění.

⁷ Přijímání nařízení se neúčastní Dánsko. Spojené království a Irsko se rozhodnou, zda se budou přijímání nařízení účastnit (tzv. opt-in) či nikoliv.

oblast dědictví vůbec neřeší. Přijetí harmonizovaných předpisů na celoevropské úrovni se tedy jeví jako nezbytné.“⁸

Svůj návrh nařízení Komise založila na čl. 61 písm. c) a na čl. 67 odst. 5 druhé odrážce Smlouvy o založení ES.

Čl. 61 písm. c) svěřuje Radě pravomoc přijmout *opatření v oblasti soudní spolupráce v občanských věcech, jak je stanoveno v článku 65*, a to za účelem postupného vytvoření prostoru svobody, bezpečnosti a práva.

Čl. 65 stanoví, že: „*Opatření v oblasti soudní spolupráce v občanských věcech s mezinárodním prvkem přijímaná podle článku 67, pokud je to nutné k řádnému fungování vnitřního trhu, zahrnují mimo jiné:*

a) zlepšení a zjednodušení:

- systému mezinárodního doručování soudních a mimosoudních písemností,

- spolupráce při opatrování důkazů,

- uznání a výkonu soudních a mimosoudních rozhodnutí v občanských a obchodních věcech;

b) podporu slučitelnosti kolizních norem platných v členských státech a předpisů pro řešení kompetenčních sporů;

c) odstraňování překážek řádného průběhu občanskoprávního řízení, v případě potřeby podporou slučitelnosti úprav občanskoprávního řízení v členských státech.“

Podle čl. 67 odst. 5 druhé odrážky se při přijímání opatření podle čl. 65 použije procedura spolurozhodování s výjimkou oblasti rodinného práva, kde je pro přijímání opatření Radou nutná jednomyslnost.

Stanovisko PI:

Takto zvolený právní základ vzbuzuje především tradiční otázku týkající se naplnění kritéria, podle něhož musí být opatření v oblasti soudní spolupráce v občanských věcech s mezinárodním prvkem *nutné k řádnému fungování vnitřního trhu*. Široká interpretace tohoto kritéria ze strany Komise bývá předmětem kritiky, a to i ze strany výboru pro evropské záležitosti PS PČR (viz usnesení VEZ k *Návrhu nařízení Rady, kterým se mění nařízení (ES) č. 2201/2003 ohledně příslušnosti a současně se zavádí pravidla pro určení rozhodného práva pro manželské věci*, tzv. Řím III). Tato námitka bude odstraněna vstupem Lisabonské smlouvy v platnost dne 1. prosince 2009. Kritérium, aby opatření bylo *nezbytné k řádnému fungování vnitřního trhu*, je relativizováno slovem „*zejména*“.⁹

⁸ Str. 3, KOM (2005) 65 v konečném znění.

⁹ Čl. 81 Smlouvy o fungování EU ve znění Lisabonské smlouvy (bývalý čl. 65 SES) tedy zní:

1. Unie rozvíjí justiční spolupráci v občanských věcech s mezinárodním prvkem založenou na zásadě vzájemného uznávání soudních a mimosoudních rozhodnutí. Tato spolupráce může zahrnovat přijímání opatření pro sbližování právních předpisů členských států.

2. Pro účely odstavce 1 přijímají Evropský parlament a Rada řádným legislativním postupem opatření, která mají, **zejména pokud je to nezbytné k řádnému fungování vnitřního trhu**, za cíl zajistit:

a) vzájemné uznávání a výkon soudních a mimosoudních rozhodnutí mezi členskými státy;

b) přeshraniční doručování soudních a mimosoudních písemností;

c) slučitelnost kolizních norem a pravidel pro určení příslušnosti platných v členských státech;

d) spolupráci při opatrování důkazů;

e) účinný přístup ke spravedlnosti;

f) odstraňování překážek řádného průběhu občanskoprávního řízení, v případě potřeby podporou slučitelnosti úpravy občanskoprávního řízení v členských státech;

g) rozvíjení alternativních metod urovnávání sporů;

h) podporu dalšího vzdělávání soudců a soudních zaměstnanců.

3. **Odchylně od odstavce 2 přijímá Rada opatření týkající se rodinného práva s mezinárodním prvkem zvláštním legislativním postupem. Rada rozhoduje jednomyslně po konzultaci s Evropským parlamentem.**

Druhý okruh problémů souvisí se systematickým řazením dědického práva. Zatímco většina členských států považuje dědické právo za relativně autonomní oblast práva občanského, některé, zejména skandinávské, státy jej řadí do oblasti práva rodinného. Zařazení má zásadní význam pro určení procedury, jakou bude o návrhu hlasováno na Radě – pokud by spadal do oblasti rodinného práva, byla by nutná jednomyslnost (na rozdíl od kvalifikované většiny v opačném případě). Lisabonská smlouva situaci v tomto případě neřeší – opatření týkající se rodinného práva s mezinárodním prvkem podléhá zvláštnímu legislativnímu postupu, kdy Rada rozhoduje jednomyslně po konzultaci s Evropským parlamentem. Evropská komise k tomu uvádí: *Hlavním cílem dědického práva je určit pravidla převodu dědictví a vyřídit převod dědictví samotného. Na rozdíl od dědického práva je předmětem práva rodinného upravovat právní vztahy spojené s manželstvím a s partnerským životem, se vztahy mezi předky a potomky a osobním stavem osob. Jeho základní sociální funkcí je chránit rodinné vztahy. Kromě toho, na rozdíl od rodinného práva, kde je vůle jedinců výrazně omezena a kde je převážná většina vztahů upravena předpisy veřejného pořádku, zůstává dědické právo oblastí, kde má vůle držitele práv významné místo. Tato dvě odvětví občanského práva jsou tudíž dostatečně autonomní na to, aby se s těmito odvětvími nakládalo odděleně. Jelikož se jedná o výjimku, musí zůstat výklad nebo uplatňování čl. 67 odst. 5 druhé odrážky Smlouvy institucemi přesné. Tato výjimka se tudíž na toto nařízení o dědictví neuplatňuje.*

- **Obsah a dopad:**

Návrh nařízení obsahuje normy evropského mezinárodního práva procesního – tj. pravidla o příslušnosti soudů k řízení ve věcech dědictví, o uznávání a výkonu rozhodnutí a uznávání a vykonatelnosti cizích úředních listin, a zavádí evropské dědické osvědčení. Kromě toho obsahuje kolizní normy určující rozhodné právo ve vztazích s mezinárodním prvkem (tj. normy evropského mezinárodního práva soukromého, které ovšem díky principu univerzální použitelnosti vytlačí normy mezinárodního práva soukromého vnitrostátního původu).

V kapitole I návrhu je vymezena **oblast působnosti nařízení a základní pojmy**. Věcná působnost nařízení je stanovena tak, že se vztahuje na dědictví. Z jeho věcné působnosti jsou vyloučeny (tak jako v případě ostatních nařízení upravujících evropský justiční prostor v civilních věcech) především věci daňové, správní a celní. Kromě toho se nařízení nebude vztahovat na otázky upravující rodinný stav fyzických osob, rodinné vztahy a vztahy se srovnatelnými účinky, způsobilost fyzických osob k právům a právním úkonům, zmizení, nepřítomnost a předpokládané úmrtí fyzické osoby, otázky vlastnických vztahů v manželství a úprava majetkových vztahů, která se použije na vztahy s účinky srovnatelnými s manželstvím, vyživovací povinnost, práva a majetek vytvořený nebo převedený jiným způsobem než dědictvím z důvodu úmrtí, otázky upravené právem obchodních společností, jako ustanovení v základajících listinách a statutech společností, sdružení a právnických osob, které určují nakládání s podíly v případě úmrtí jejich členů, rušení, zánik a slučování společností, sdružení a právnických osob, zakládání, fungování a rušení *trustů*, povahu věcných práv vztahující se k majetku a zveřejňování těchto práv.

Rada může na návrh Komise přijmout rozhodnutí určující ty aspekty rodinného práva s mezinárodním prvkem, které mohou být předmětem aktů přijatých řádným legislativním postupem. Rada rozhoduje jednomyslně po konzultaci s Evropským parlamentem.

Návrh uvedený v druhém pododstavci se postoupí vnitrostátním parlamentům. Vysloví-li některý vnitrostátní parlament během šesti měsíců ode dne tohoto postoupení svůj nesouhlas, není rozhodnutí přijato. Není-li nesouhlas vysloven, může Rada rozhodnutí přijmout.

Z místní příslušnosti je – v souladu s *Protokolem o postavení Dánska*, vyloučeno Dánsko a zatím je otevřena možnost přistoupení Spojeného království a Irska podle *Protokolu o postavení Spojeného království a Irska s ohledem na prostor svobody, bezpečnosti a práva*.

V čl. 2 jsou definovány základní pojmy použité v návrhu nařízení. Mj. je stanoveno, že za soud je považován *každý soudní orgán či příslušný orgán členského státu vykonávající funkci soudu ve věcech dědictví. Za soudy se považují rovněž jiné orgány veřejné moci, které vykonávají funkce soudu přenesením pravomocí, jak jsou stanoveny v tomto nařízení*. Návrh nařízení tak pod pojem soud zahrnuje i např. soudní úředníky a notáře.

Kapitola II návrhu obsahuje **pravidla pro určení soudní příslušnosti**. Podle základního pravidla jsou příslušné soudy státu, na jehož území měl zesnulý v době úmrtí obvyklé bydliště (domicil). V případě, že si zesnulý zvolil právo, jímž se má řídit správa dědictví, může soud státu obvyklého bydliště postoupit projednání případu soudu státu, jehož předpisy si zesnulý zvolil (čl. 5 návrhu). Pokud měl zesnulý své bydliště ve třetím státě, stanovuje návrh pravidla pro určení tzv. zbytkové příslušnosti zaručující dědicům a věřitelům ze Společenství přístup k právní ochraně za předpokladu, že se majetek zesnulého nachází na území členského státu – tzn. že situace vykazuje úzké vazby s členským státem z důvodu přítomnosti majetku (čl. 6 návrhu).

V kapitole III návrhu jsou obsaženy **kolizní normy určující právo rozhodné pro dědictví**. Stejně jako český zákon č. 97/1963 Sb., o mezinárodním právu soukromém a procesním ve znění pozdějších předpisů (dále jen ZMPS), i návrh nařízení je založen na tzv. jednotném dědickém statutu. To znamená, že pro dědické právní poměry ohledně celého dědictví bez rozlišení mezi věcmi movitými a nemovitými používá jediný hraniční určovatel.¹⁰ Na rozdíl od české úpravy, která vychází z hraničního určovatele státní příslušnosti (lex patriae), je podle obecného pravidla v čl. 16 návrhu nařízení rozhodným právem právo státu, ve kterém měl zesnulý své obvyklé bydliště v době úmrtí (lex domicilii). Čl. 17 zakotvuje tzv. omezenou volbu práva – osoba si může zvolit za právo, podle kterého se spravuje celé její dědictví, právo státu, jehož je státním příslušníkem. Rozhodným právem se řídí celé dědické řízení, od jeho zahájení až do konečného převodu dědictví oprávněným osobám. Otázky upravené dědickým statutem jsou demonstrativně vypočítány v čl. 19 odst. 2. Za určitých výjimečných podmínek může dojít k prolomení použití práva rozhodného pro dědictví ve prospěch práva státu, kde se majetek nachází, pokud toto právo vyžaduje k přijetí či odmítnutí dědictví či odkazu dodatečné formality vedle formalit vyžadovaných rozhodným právem pro dědictví. Jako příklad jsou v odůvodnění uváděny rodinné zemědělské podniky existující v některých členských státech.

Podle čl. 25 návrhu se práva určeného na základě nařízení použije bez ohledu na to, zda je právem některého z členských států. Takto stanovená tzv. univerzální použitelnost nařízení znamená, že jsou prakticky vyřazeny z použití kolizní normy členských států ve věcech upravených nařízením. Čl. 26 vylučuje tzv. zpětný a další odkaz. Možnost uplatnění výhrady veřejného pořádku je zakotvena v čl. 27, přičemž je výslovně stanoveno, že: *Použití ustanovení práva určeného podle tohoto nařízení nemůže být považováno za odporující*

¹⁰ Opakem je tzv. rozštěpený dědický statut, který používá jednoho hraničního určovatele pro nemovitosti (lex rei sitae) a jiný pro věci movité (lex patriae nebo lex domicilii).

veřejnému pořádku státu soudu, u něž bylo řízení zahájeno, zejména když je jediným důvodem skutečnost, že ustanovení týkající se povinného dědického dílu jsou odlišná od platných ustanovení ve státě soudu, u něž bylo řízení zahájeno.

Pravidla pro uznávání a výkon rozhodnutí (kapitola IV návrhu) vydaných na základě návrhu nařízení vycházejí z úpravy obsažené v *nařízení Rady č. 44/2001, o soudní příslušnosti a uznávání a výkonu soudních rozhodnutí v občanských a obchodních věcech* (tzv. Brusel I). Rozhodnutí vydaná použitím tohoto nařízení v některém členském státě jsou v ostatních členských státech uznávána, aniž by bylo vyžadováno zvláštní řízení (čl. 29 návrhu). Důvody pro neuznání rozhodnutí jsou omezeny na minimum (čl. 30). V žádném případě nesmí být cizí rozhodnutí přezkoumáváno ve věci samé (čl. 31).

Cílem ustanovení obsažených v kapitole V týkající se **úředních listin** je zajištění jejich uznávání, a tím umožnit jejich volný pohyb. S výhradou rozporu s veřejným pořádkem členského státu, v němž se o uznání žádá, požívají cizí úřední listiny shodného postavení s vnitrostátními úředními listinami.

V kapitole VI je zaveden nový institut tzv. **evropského dědického osvědčení**. Jeho účelem má být „*rychlé, cenově přijatelné a účinné vypořádání dědictví s mezinárodním prvkem*“ (bod 27 preambule návrhu). Toto evropské dědické osvědčení bude prokazovat způsobilost dědice, závětního dědice, vykonavatele dědictví či správce v členských státech, kde se nachází majetek, který je předmětem dědictví. Jeho použití není povinné, je vydáváno pouze na žádost osoby, která má povinnost dokázat svoji způsobilost dědice, závětního dědice a pravomoci vykonavatelů závěti nebo třetích správců. Příslušným k jeho vydání je soud, jehož příslušnost byla stanovena na základě pravidel obsažených v kapitole I nařízení. V přílohách návrhu nařízení jsou stanoveny jak formuláře, které musí žadatel o osvědčení vyplnit (příloha 1), tak i vzor evropského dědického osvědčení (příloha 2). Evropské dědické osvědčení je automaticky uznáváno ve všech členských státech, pokud se jedná o způsobilost dědice, závětního dědice, pravomoci vykonavatele závěti nebo třetích správců. Jeho obsah je považován za pravdivý ve všech členských státech po dobu jeho platnosti. Má se za to, že ten, kterého osvědčení určuje za dědice, závětního dědice, vykonavatele závěti či správce, je držitelem dědického práva či správních pravomocí uvedených v osvědčení a že neexistují další podmínky či omezení než ta, která jsou v osvědčení uvedena (čl. 42 návrhu).

Závěrečná kapitola VII obsahuje standardní **závěrečná ustanovení** týkající se např. vztahu ke stávajícím mezinárodním úmluvám, změn formulářů obsažených v přílohách (poradním postupem), přezkumu a vstupu v platnost.

Dopad na ČR:

Vzhledem k univerzální použitelnosti nařízení by po jeho vstupu v platnost v podstatě přestaly být používány české kolizní normy týkající se dědického práva obsažené v ZMPS. Namísto dosavadního hraničního určovatele v podobě *lex patriae* by byl aplikován hraniční určovatel obvyklého bydliště zesnulého v době úmrtí.

Pokud jde o příslušnost, byla by ve vztazích mezi členskými státy (s výjimkou Dánska, popř. Irska a Spojeného království) rovněž aplikována pravidla o příslušnosti obsažená v nařízení místo pravidel obsažených v ZMPS.

- **Předpokládaný harmonogram projednávání v orgánech EU:**

V Evropském parlamentu bude návrh projednávat Výbor pro právní záležitosti, dosud nebyl přidělen zpravodaj, ani stanoveno datum projednání. Stanovisko k návrhu bude vydávat rovněž Výbor pro občanské svobody, spravedlnost a vnitřní věci.

Na Radě EU by měl být návrh poprvé projednáván v rámci pracovní skupiny začátkem prosince 2009.

- **Conclusion:**

The Committee for European Affairs

1. **takes into account** the Proposal for a regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession;
2. **states** that the proposal does not breach the principle of subsidiarity;
3. **passes on for information** the proposal together with the resolution to the Committee on Constitutional and Legal Affairs;
4. **entrusts** its Chairperson with forwarding the resolution to the European Commission, the Council of EU, the European Parliament and COSAC.

Jozef Kochan v. r.
Committee Verifier

Cyril Svoboda v. r.
Committee Rapporteur

Jan Bauer v. r.
Committee Vice-Chairman

THE PARLIAMENT OF THE CZECH REPUBLIC

SENATE

Evaluation of the COSAC Subsidiarity Check on the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?

Committee on EU Affairs. It adopted a resolution whereby it takes the proposal into account and declares that there is no breach of the principle of subsidiarity.

2. Was the plenary involved?

The plenary was not involved, as the Committee on EU Affairs neither found any breach of the principle of subsidiarity nor had any other observation. Thus, the scrutiny was completed on the Committee level.

3. At which level the final decision was taken and who signed it?

The final decision was taken by the Committee on EU Affairs and was signed by its Chairman.

4. Which administrative services of your parliament were involved and how? Please specify.

The European Union Unit was involved in analysing the content of the proposal and of the government's position. The advisor of the Committee on EU Affairs was involved in the examination of the subsidiarity principle.

5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

No.

6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?

Yes, in the Explanatory Memorandum of the government the full compliance of the proposal with the principle of subsidiarity was mentioned.

7. Did you consult your regional parliaments with legislative powers?

No.

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?

Not directly. Administrative services of the Senate took note of the positions of the notaries, judges and academics on the key aspects of the proposal at the Conference on Successions and Wills held in Prague in April 2009.

9. What was the chronology of events? Please specify the dates.

On 4th of November the proposal was chosen for scrutiny by the Committee on EU Affairs. On 2nd of December the Committee issued its resolution (see above) whereby the scrutiny was finished.

10. Did you cooperate with other national parliaments in the process? If so, by what means?

There was a standard cooperation via representatives of national parliaments in Brussels and consultation of the IPEX web pages.

11. Did you publicise your findings? If so, by what means?

The resolution of the Committee on EU Affairs has been published on the Senate and IPEX web pages and forwarded to the government.

Findings:

12. Did you find any breach of the principle of subsidiarity?

No.

13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.

No.

14. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?

Yes.

15. Did you encounter any specific difficulties during this subsidiarity check?

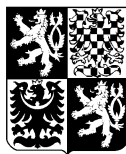
No.

16. Any other comments?

No.

THE PARLIAMENT OF THE CZECH REPUBLIC

SENATE



7th term

196th RESOLUTION

COMMITTEE ON EU AFFAIRS

delivered on the 20th meeting held on 2nd December 2009

on Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession

(Senate Press no. N 083/07)

Following introductory information from Mr. Marek Ženíšek, Deputy Minister of Justice, the rapporteur's report by Senator Luděk Sefzig and after a debate

the Committee

I. Takes into account

the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, attached to this Resolution;

II. States

that the Proposal is not in breach of the principle of subsidiarity;

III. Authorises

the Committee Chairperson Senator Luděk Sefzig to submit this resolution to the President of the Senate of the Parliament of the Czech Republic and to the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC).

Luděk Sefzig

sign manual

Committee Chairperson

Luděk Sefzig

sign manual

Committee Rapporteur

Tomáš Grulich

sign manual

Committee Verifier

Denmark: Folketing

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?
The European Affairs Committee and the Legal Affairs Committee

2. Was the plenary involved?
No, the Plenary was not involved

3. At which level the final decision was taken and who signed it?
The final decision was taken by the European Affairs Committee and the Legal Affairs Committee

4. Which administrative services of your parliament were involved and how? Please specify. *The European Affairs Committee Secretariat and the EU-Advisory unit of the International Secretariat in the Folketing + the clerk of the Legal Affairs Committee.*

2. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

3. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity? Yes *a subsidiarity note was provided by the Government on 10 November 2009.*

4. Did you consult your regional parliaments with legislative powers? Did you consult your regional parliaments with legislative powers?
No, we don't have Regional assemblies with legislative powers.

5. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders? NO

6. What was the chronology of events? Please specify the dates. *The EAC decided to ask the LAC to examine whether the proposal for a framework decision complied with the principle of subsidiarity. The Legal Affairs Committee agreed on 12 November on an opinion, which was submitted to the EAC.*

The EAC endorsed the joint text at its meeting on 4 December.

7. Did you cooperate with other national parliaments in the process? If so, by what means? NO

8. Did you publicise your findings? If so, by what means? *The findings will be made available to the public on the Folketing's website*

9.

Findings:

10. Did you find any breach of the principle of subsidiarity? NO

Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy. *Yes. A copy has been submitted to the COSAC secretariat.*

11.

12. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory? Yes

13. Did you encounter any specific difficulties during this subsidiarity check? NO

14. Any other comments? NO

**The European Affairs Committee and the Legal Affairs Committee
The International Secretariat of the Folketing**

Date: 11 December 2009

**Opinion adopted by the European Affairs Committee and the Legal Affairs Committee
of the Danish Parliament**

**On the Commission's proposal for a REGULATION OF THE EUROPEAN
PARLIAMENT AND OF THE COUNCIL on jurisdiction, applicable law, recognition
and enforcement of decisions and authentic instruments in matters of succession and
the creation of a European Certificate of Succession - COM(2009) 154**

At the request of COSAC, the European Affairs Committee and the Legal Affairs Committee of the Danish Parliament have conducted an assessment of whether the “proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession” complies with the principle of subsidiarity.

Background

The objective of the proposal is to enable people living in the European Union to organise their succession in advance and to guarantee the rights of heirs and/or legatees, as well as creditors of the succession. In the explanatory memorandum, the Commission argues, with regard to the proposals' compliance with the subsidiarity principle, that 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. Furthermore, the Commission refers to The Hague Convention concerning the law relating to successions, which has never entered into force, and to the Hague Convention of 5 October 1961 on the conflicts of laws relating to the form of testamentary dispositions, which has been ratified by 16 Member States. In that respect, the Commission urges the other Member States to ratify the Convention.

Finally the Commission states that all consultations and studies have illustrated the amplitude of the problems with which this proposal deals.

Opinion

The European Affairs Committee and the Legal Affairs Committee find that the establishment of rules on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European

Certificate of Succession has trans-national aspects, which cannot be satisfactorily regulated by legislation from the Member States.

In view of the fact that the proposal does not alter the substantive laws on succession in the Member States, but merely lays down common provisions aimed at easing the settlement of successions from persons who – while they were living – used their right to free movement, the establishment of common rules would have clear advantages in comparison with legislation from each Member State.

The European Affairs Committee and the Legal Affairs Committee therefore find the proposal to be in compliance with the principle of subsidiarity.

Yours sincerely

Per Skaarup
Chairman of the Legal Affairs Committee

Anne-Marie Meldgaard
Chairman of the European Affairs Committee



RIIGIKOGU

PARLIAMENT OF ESTONIA

**EUROPEAN UNION AFFAIRS
COMMITTEE**



Ms Loreta Raulinaityté
COSAC Secretariat
E-mail: secretariat@cosac.eu

12 February 2010 No. 2.1-3/293-1

Dear Ms Raulinaityté

Based on the proposals from national parliaments, the COSAC Chairpersons in their meeting on 18 February 2008 in Ljubljana agreed to carry a COSAC-coordinated subsidiarity check on

the Proposal for a Regulation of the European Parliament and of the Council on the applicable law, jurisdiction, recognition of decisions and administrative measures in the area of successions and wills (2008/JLS/122) in 2008. This decision was reconfirmed by the XLII COSAC meeting in Stockholm on 5-6 October 2009. Following the decision of the COSAC Chairpersons, the European Union Affairs Committee of the Riigikogu (Parliament) of the Republic of Estonia has carried out a subsidiarity check on the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession [COM(2009)154/4]. In order to facilitate the complication of the response we have structured it in the form of answers to the question in the aide-mémoire.

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?

A: The Legal Affairs Committee and the European Union Affairs Committee of the Riigikogu were involved.

2. Was the plenary involved?

A: No, the plenary was not involved.

3. At which level the final decision was taken and who signed it?

A: Final decision was taken by the European Union Affairs Committee and was signed by the Chairman of the Committee.

4. Which administrative services of your parliament were involved and how?

A: The European Union Affairs Committee and the Legal Affairs Committee. Other administrative services of Riigikogu were not involved.

5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber? **A: Estonia has a unicameral parliament.**

6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity? **A: Yes, the Government provided its position.**

7. Did you consult your regional parliaments with legislative powers? **A: There are no regional parliaments in Estonia.**

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders? **A: No, we did not.**

9. What was the chronology of events? Please specify the dates.

A: On 22 October 2009, the European Union Affairs Committee asked the Ministry of Justice to present the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession to the Government. On 28 of January 2010 the Government presented its position regarding the Proposal to Riigikogu. On 9 of February 2010 the Legal Affairs Committee gave its opinion to the European Union Affairs Committee on that subject. On 12 February 2010 the issue was examined and final decision was taken by the European Union Affairs Committee.

10. Did you cooperate with other national parliaments in the process? If so, by what means? **A: No, we did not. The European Union Affairs Committee followed subsidiarity checks in other EU parliaments through IPEX and Permanent Representative to the European Parliament.**

11. Did you publicise your findings? If so, by what means? **A: The positions of the Committees are public (we put the minutes on the Riigikogu web).**

Findings:

12. Did you find any breach of the principle of subsidiarity? **A: The European Union Affairs Committee of the Parliament of Estonia has not found any breach of the principle of subsidiarity.**

13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.
A: No, just the decision/position.

14. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory? **A: Yes, the Commission's justification with regard to the principle of subsidiarity were considered as satisfactory.**

15. Did you encounter any specific difficulties during this subsidiarity check?
A: No.

16. Any other comments? **A: No**

Yours sincerely,
Marko Mihkelson
Chairman
EU Affairs Committee



**EDUSKUNTA - PARLIAMENT OF
FINLAND**

8 December 2009

The Grand Committee

Subsidiarity check on Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decision and authentic instruments in matters of succession and the creation of a European Certificate of Succession COM(2009) 154

Answers of Eduskunta, Parliament of Finland

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?
Legal Affairs Committee

2. Was the plenary involved?
No

3. At which level the final decision was taken and who signed it?
According to the Subsidiarity control procedure of Eduskunta. The proposals (links) are send to the committee members. If no one demands the matter to be handled in the committee meeting, the counsel of the committee considers the matter handled and finished.

4. Which administrative services of your parliament were involved and how? Please specify.
The secretariat of the Legal Affairs Committee, members of the secretariats analysed the proposal.

5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber? –

6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?
No.

7. Did you consult your regional parliaments with legislative powers?
No.

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?
No.

9. What was the chronology of events? Please specify the dates.

-

10. Did you cooperate with other national parliaments in the process? If so, by what means?

No.

11. Did you publicise your findings? If so, by what means?

No.

Findings:

12. Did you find any breach of the principle of subsidiarity?

No.

13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.

No.

14. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?

Yes.

15. Did you encounter any specific difficulties during this subsidiarity check?

No.

16. Any other comments?-

France: Assemblée nationale



SERVICE DES AFFAIRES EUROPEENNES
PB

RÉPUBLIQUE FRANÇAISE
LIBERTÉ-ÉGALITÉ-FRATERNITÉ

Paris, le 19 May 2010

Objet : test de subsidiarité de l'Assemblée nationale sur la proposition de règlement sur les successions transfrontalières

Procédure :

1. Quelles commissions parlementaires ont été impliquées dans le test de subsidiarité et de quelle manière ?

Conformément à la procédure informelle en vigueur au moment du test, la Commission des affaires européennes de l'Assemblée a adopté, le 17 novembre 2009, sur le rapport de M. Guy Geoffroy, député, un projet d'avis contestant la conformité de la proposition avec le principe de proportionnalité (voir [le compte-rendu de la réunion](#)). Par suite, dans les trois semaines dont elle dispose pour s'exprimer si elle le désire, la Commission concernée au fond, la Commission des lois, a adopté le projet sans modification, sur le rapport de M. Sébastien Huyghe, député (voir [le rapport d'information](#) et [le compte-rendu de la réunion](#)) le 9 décembre 2009.

Le projet est donc devenu, à cette même date, l'avis de l'Assemblée nationale adressé au Président de la Commission européenne.

2. La séance plénière a-t-elle été impliquée ?

La procédure informelle alors applicable ne prévoyait pas l'intervention de la séance publique. En revanche, la procédure applicable aux avis à compter de l'entrée en vigueur du traité de Lisbonne est organisée comme suit.

– Chaque député peut déposer une proposition de résolution portant avis contestant la conformité d'un projet d'acte au principe de subsidiarité.

– La Commission des affaires européennes examine toutes ces propositions, dans les 15 jours si un président de groupe politique, un président de commission ou le Gouvernement le demandent. Elle les rejette ou les adopte, éventuellement amendées.

– La Commission permanente concernée dispose ensuite de 15 jours pour examiner la proposition d'avis. A défaut d'intervention, la position adoptée par la Commission des affaires européennes est réputée approuvée.

– Les présidents de groupe politique ou de commission, ainsi que le Gouvernement, peuvent enfin demander, dans les 15 jours, l'inscription en séance plénière. A défaut, à l'expiration de ce délai, la proposition devient l'avis de l'Assemblée nationale.

3. A quel niveau la décision finale a-t-elle été prise et qui l'a paraphée ?

La décision finale a donc été prise par la Commission des lois de l'Assemblée. L'avis a été adressé au Président de la Commission européenne par le Président de l'Assemblée nationale.

4. Quels services administratifs de votre parlement ont été impliqués et de quelle manière? Merci de préciser.

Le secrétariat de la Commission des affaires européennes a fourni l'expertise technique nécessaire aux travaux de M. Guy Geoffroy, puis celui de la Commission des lois à ceux de M. Sébastien Huyghe.

5. En ce qui concerne les parlements bicaméraux : avez-vous conduit le test de subsidiarité en coordination avec l'autre chambre ?

La Commission des lois du Sénat a adopté au même moment une résolution sur cette proposition (de portée plus large que le contrôle de subsidiarité). L'intervention des deux chambres a ainsi été précédée et accompagnée d'un intense échange d'information entre les deux administrations, selon un format toutefois informel.

6. Votre gouvernement a-t-il fourni des informations relatives au respect du principe de subsidiarité par la proposition de la directive ?

Comme pour l'ensemble des travaux de la Commission des affaires européennes (CAEU) de l'Assemblée, de nombreux échanges informels d'information entre les services du Gouvernement et ceux de l'Assemblée ont précédé la prise de position. La Ministre française de la Justice, auditionnée par la CAEU quelques jours après l'adoption de l'avis de l'Assemblée, a d'ailleurs relevé à cette occasion qu'elle était particulièrement attentive aux travaux du Parlement sur cette question.

7. Avez-vous consulté les parlements régionaux de votre pays qui disposeraient de pouvoirs législatifs ?

Question sans objet en France.

8. Avez-vous consulté des organisations non gouvernementales, des groupes d'intérêt, des experts extérieurs ou d'autres parties prenantes ?

Ces consultations ont été menées, sur une base informelle, au cours des travaux des commissions impliquées.

9. Selon quelle chronologie le test a-t-il été conduit au sein de votre Parlement ? Merci de préciser les dates.

Voir ci-dessus.

10. Avez-vous coopéré avec d'autres parlements nationaux ? Si oui, par quels moyens ?

Le représentant permanent de l'Assemblée nationale à Bruxelles a consulté l'ensemble de ses collègues dès l'examen préparatoire du contrôle, début novembre 2009, à l'initiative de la CAEU. Plusieurs parlements ont adressé des réponses au secrétariat.

En outre, dès le lendemain de l'adoption de la proposition d'avis par la CAEU le 17 novembre 2009, le secrétariat de la CAEU a adressé ce document à son homologue du Bundestag allemand.

11. Avez-vous publié vos conclusions ? Si oui, par quels moyens ?

Les travaux au titre de la subsidiarité sont publiés sur le site de l'Assemblée nationale (<http://www.assemblee-nationale.fr/europe/index-subsidiarite.asp>)

Conclusions :

12. Avez-vous découvert un quelconque manquement au principe de subsidiarité ?

L'Assemblée nationale a identifié un manquement au principe de proportionnalité (voir, ci-dessus, les rapports et comptes rendus des commissions et, ci-dessous, le texte de l'avis).

13. Avez-vous adopté un avis motivé sur la proposition de directive ? Si oui, veuillez en joindre une copie.

http://www.assemblee-nationale.fr/europe/pdf/avis_subsidiarite/projet_avis_e4863.pdf

14. Avez-vous trouvé les justifications de la Commission sur le respect du principe de subsidiarité satisfaisantes ?

voir [le compte-rendu de la réunion](#) de la CAEU du 17 novembre 2009

15. Avez-vous rencontré des difficultés spécifiques pendant l'examen ?

16. Avez-vous d'autres observations ?

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Commission chargée des affaires européennes
mardi 17 novembre 2009
17 heures

Compte rendu n° 126
Présidence de M. Pierre Lequiller Président

- I. Communication de M. Guy Geoffroy sur le contrôle de subsidiarité relatif à la proposition de règlement sur les successions transfrontalières (document E 4863)**
- II. Communication de M. Guy Geoffroy sur le projet de décision-cadre sur la transmission des procédures pénales (document E 4552)**
- III. Communication de M. Guy Geoffroy relative au projet d'accord SWIFT (document E 4934)**
- IV. Communication de M^{me} Odile Saugues sur le passage à la deuxième phase de l'association entre l'Union européenne et l'ancienne République yougoslave de Macédoine (document E 4842)**

COMMISSION DES AFFAIRES EUROPEENNES

Mardi 17 novembre 2009

Présidence de M. Pierre Lequiller, Président de la Commission

La séance est ouverte à dix sept heures

I. Communication de M. Guy Geoffroy sur le contrôle de subsidiarité relatif à la proposition de règlement sur les successions transfrontalières (document E 4863)

M. Guy Geoffroy, rapporteur. La Commission européenne a présenté, le 14 octobre dernier, une très ambitieuse proposition de règlement visant à simplifier les successions internationales fondée sur trois principes. La juridiction compétente et la loi applicable aux successions dans toute l'Union seraient, par défaut, celle de l'Etat de la résidence habituelle du défunt. Le testateur pourrait toutefois lui préférer expressément sa loi nationale pour organiser sa future succession. Les décisions rendues par les juridictions compétentes seraient reconnues dans toute l'Union.

Dans le cadre des tests coordonnés de subsidiarité pilotés par la COSAC, notre Commission est aujourd'hui invitée à apprécier la conformité de cette proposition aux principes de subsidiarité et de proportionnalité. Cela devrait d'ailleurs être l'un des derniers contrôles effectués dans le cadre de la procédure « anticipée », qui permet depuis 2006 aux parlements nationaux d'exprimer leurs opinions sur la conformité des textes européens à la juste et efficace répartition des compétences entre l'Union et les Etats membres. Avec le traité de Lisbonne entrera en effet en vigueur la procédure juridique du contrôle de la subsidiarité, qui renforcera l'intensité de notre contrôle, puisqu'un texte dénoncé par la moitié des parlements nationaux pourra désormais être rejeté, à la majorité simple, par les législateurs européens, mais qui cependant en réduira l'emprise, puisqu'elle ne prévoit pas, à la différence de l'actuelle procédure, un contrôle étendu au principe de proportionnalité. L'importance du texte examiné plaide par ailleurs pour que l'on se cantonne aujourd'hui à ce seul contrôle, en réservant notre position sur le fond du texte à un moment plus favorable, lorsque les premières négociations auront permis d'apprécier les possibilités de compromis.

Il nous faut dans un premier temps nous attacher au principe de subsidiarité, qui se résume en une question : les objectifs poursuivis ne peuvent-ils être atteints de manière suffisante par les Etats membres ?

Il suppose à ce titre la satisfaction de trois conditions cumulatives. Les objectifs poursuivis doivent être légitimes et répondre à un réel besoin qui ne peut être satisfait par l'intervention des seuls

Etats membres. L'action européenne doit être autorisée et prévue par les traités. Le champ global des actions projetées – et non leur détail, qui relève du principe de proportionnalité – ne doit pas conduire à traiter au niveau européen des problèmes qui pourraient être plus efficacement résolus au niveau national. En miroir, l'action européenne doit aussi mobiliser tous les instruments propres à encourager une action efficace.

La légitimité d'une intervention de l'Union européenne dans le domaine des successions transfrontalières n'est guère contestable. Le règlement des successions transfrontalières se heurte en effet aujourd'hui à de très lourds obstacles. Ces difficultés tiennent non seulement à la grande diversité des dispositions nationales mais aussi à l'absence d'instrument international sur les conflits de juridiction et de loi dont la résolution est ainsi suspendue aux traditions de chaque Etat membre.

Ces 50 à 100 000 successions intervenant chaque année dans l'Union exposent ainsi leurs bénéficiaires, dans un moment particulièrement douloureux de leur existence, à une complexité et à une insécurité juridique d'autant moins acceptables que leurs règlements peuvent parfois aboutir à des conclusions contradictoires selon le lieu de liquidation de la succession.

Si la majorité des Etats retiennent ainsi la compétence du tribunal et l'application de la loi de résidence du défunt (Danemark, Pays-Bas...), d'autres lui préfèrent la loi de sa nationalité (Allemagne, Italie, Grèce, Suède...) tandis que les Etats du Code Napoléon (France, Belgique et Luxembourg) soumettent tous les immeubles situés sur leur territoire, quels que soient la nationalité et le domicile de leur propriétaire, à leur loi successorale nationale, que les tribunaux de *common law* peuvent étendre à l'ensemble de la succession dès lors qu'un seul bien est situé dans les îles britanniques.

De toute évidence, une intervention commune est nécessaire pour dégager des critères uniformes et stables permettant aux citoyens d'identifier clairement quelle loi est applicable à leur succession.

Or, cette intervention est prévue par les traités.

L'article 65 du traité instituant les Communautés européennes dispose ainsi que l'Union peut adopter des mesures relevant du domaine de la coopération judiciaire dans les matières civiles afin, d'une part, « *d'améliorer et de simplifier la reconnaissance et l'exécution des décisions judiciaires et extrajudiciaires* » et, d'autre part, de « *favoriser la compatibilité des règles applicables dans les Etats membres en matière de conflits de lois et de compétence* ».

Les mesures prévues relèvent de la codécision, donc de la majorité qualifiée au sein du Conseil, « *à l'exclusion des aspects touchant le droit de la famille* » qui demeurent soumis à l'unanimité.

La Commission considère le droit successoral, en raison de ses aspects patrimoniaux prépondérants, comme une matière distincte du droit de la famille. Cette interprétation, conforme à la législation de la très vaste majorité des Etats membres, permet d'ouvrir la voie à un accord, le maintien de l'exigence d'unanimité obérant toute perspective d'avancées en la matière, comme l'a montré l'enlisement de la proposition de règlement relative aux conflits de loi en matière matrimoniale.

Il me semble toutefois important de tirer toutes les conséquences de la procédure retenue. La proposition, pour pouvoir être considérée comme autonome à l'égard du droit de la famille, ne doit pas conduire à altérer la finalité même de ce droit, la protection des liens familiaux. Cela implique en particulier d'aménager une protection suffisante des mécanismes de réserve héréditaire qui fixent dans chaque législation nationale l'étendue des obligations qui lient le testateur à ses parents proches.

Enfin, le champ de la présente proposition respecte les frontières fixées par le principe de subsidiarité.

La Commission européenne a renoncé utilement à toute tentative d'harmonisation, même modeste, du droit matériel des successions, qui engage des aspects décisifs de l'identité nationale. Dans un même esprit, la proposition ne touche ni à la validité des donations, ni au

régime des trusts successoraux, ni au droit fiscal, ni au régime de propriété qui demeurent de la compétence exclusive des Etats membres.

En parallèle, la proposition comprend l'ensemble des éléments nécessaires à une action efficace. Ainsi prévoit-elle que la loi successorale désignée régie l'ensemble des opérations successorales afin d'en simplifier et d'en unifier autant que possible le règlement. Elle prévoit la reconnaissance mutuelle des actes authentiques qui jouent un rôle décisif dans le règlement des successions. Pour garantir une application harmonieuse et diligente du droit, elle étend aux décisions successorales le principe de reconnaissance mutuelle, encourageant le règlement rapide des successions en introduisant un certificat successoral européen uniforme fournissant partout en Europe la preuve des qualités héréditaires du bénéficiaire.

L'examen de la subsidiarité achevé, il convient ensuite, pour contrôler le respect du principe de proportionnalité, de répondre à la deuxième question : l'action européenne excède-t-elle ce qui est nécessaire pour atteindre les objectifs poursuivis ?

La première mesure proposée, la soumission par défaut de l'ensemble des biens de la succession à la loi de la dernière résidence habituelle du défunt, emporte de lourdes conséquences sur le droit français.

Notre système, dit scissionniste, opère en effet une distinction entre les biens meubles, soumis à la loi du domicile au jour de son décès, et les immeubles, soumis à leur loi de situation. Cette solution présente l'intérêt de faire coïncider la loi successorale et la loi réelle du bien. L'efficacité des décisions prises par la juridiction du lieu de situation de l'immeuble, en parfaite corrélation avec les règles de publicité foncière, est ainsi garantie.

Pour autant, force est de constater que la complexité de notre régime, qui divise la succession en plusieurs masses successorales soumises à des règles divergentes et qui impose aux héritiers un harassant nomadisme juridique afin de saisir les diverses juridictions des lieux de situation des immeubles, s'oppose au légitime souci de faciliter la préparation et le règlement des successions.

Dans ce contexte, le rattachement à une seule et unique loi est cohérent. La loi proposée, celle de la dernière résidence habituelle, apparaît cohérente. Elle est d'ailleurs aujourd'hui appliquée dans notre pays pour l'ensemble des biens meubles d'une succession transfrontalière.

Ce choix coïncide généralement avec le centre d'activité et d'intérêt des citoyens et avec le lieu de situation de la très vaste majorité de son patrimoine. Il présuppose une volonté d'intégration des citoyens dans l'Etat dans lequel ils fixent leur domicile qui est conforme à l'ambition européenne de créer un espace de vie commun et de doter la liberté de circulation de garanties concrètes.

Mais la proposition apporte aussi une vraie innovation, en permettant au testateur de choisir une autre loi applicable à sa succession afin de planifier plus aisément sa succession et de préserver les liens particuliers qui l'attachent à un autre Etat que celui dans lequel il réside. Afin toutefois de ne pas obérer la protection des intérêts légitimes des proches du défunt et de faire obstacle à tout « lex shopping », il est proposé de limiter cette faculté à la seule loi de nationalité du défunt.

Cette faculté de *professio juris* constitue un vrai progrès pour les citoyens, qui pourraient ainsi conserver le bénéfice d'une loi nationale qu'ils connaissent souvent mieux et qui coïncide fréquemment avec les aspirations naturelles de ceux qui souhaitent conserver un attachement électif avec leur pays d'origine.

Si cette solution emporte de redoutables ambiguïtés pratiques qu'il appartiendra au législateur européen de trancher, par exemple sur l'introduction dans les Etats de régimes qu'ils ignorent, comme l'usufruit ou les trusts successoraux, elle ne semble pas dans son principe excéder ce qui est nécessaire à une action européenne répondant aux attentes légitimes des citoyens.

Cependant, et en dernier lieu, la proposition européenne ne saurait conduire les Etats membres à renoncer à l'application des mécanismes de réserve héréditaire qui, au cœur du contrat social des nations, garantissent le respect des obligations qui lient indissolublement le défunt à son cercle familial proche.

Leur protection est assurée dans notre pays par le jeu de deux dispositions que le projet de la Commission fait disparaître.

La première tient à l'application de la loi nationale aux immeubles situés sur notre territoire qui permet de soumettre des éléments essentiels des successions internationales à nos mécanismes de réserve héréditaire. En outre, l'article 2 de la loi du 14 juillet 1819 permet aux héritiers de nationalité française de prélever sur les immeubles de la succession situés en France une part spéciale correspondant à la valeur des biens situés à l'étranger dont ils sont privés, au regard de la réserve légale française, par l'application d'une loi étrangère.

La présente proposition pourrait dès lors faire émerger des situations inacceptables.

Des tribunaux français pourraient devoir appliquer des mécanismes de réserve héréditaire moins favorables, voire inexistantes comme dans le droit britannique, pour régler la succession de défunts dont la majorité du patrimoine et la résidence ou la nationalité des héritiers sont françaises. Des ressortissants français se verraient offrir la faculté de contourner tout ou partie des obligations qui leur incombent au titre de la réserve héréditaire en fixant par exemple leur résidence habituelle en fin de vie dans un pays qui ne connaît pas de mécanisme protecteur équivalent.

Il est nécessaire que la Commission européenne examine des solutions alternatives. Il serait ainsi possible de disposer que les modalités concernant la réserve héréditaire en vigueur dans le pays de résidence du défunt soient intégrées, lorsqu'elles sont plus favorables aux conjoints et aux enfants, à l'ordre public du for afin d'écarter l'application des dispositions moins favorables de la loi désignée par le testateur.

De manière concurrente, la proposition pourrait utilement s'inspirer de l'article 23 de la Convention de La Haye de 1989 qui permettait aux Etats de préciser qu'ils ne reconnaîtront pas une désignation de *professio juris* lorsque la loi désignée prive « *totalelement ou dans une proportion très importante le conjoint ou l'enfant du défunt d'attributions de nature successorale ou familiale auxquelles ils auraient eu droit selon les règles de la loi de la résidence habituelle du défunt* ».

En parallèle, afin d'empêcher les ressortissants d'un Etat membre d'établir en fin de vie leur résidence habituelle dans un autre Etat aux seules fins de contourner les dispositions relatives à la réserve héréditaire, il serait également envisageable de permettre aux proches parents de saisir le tribunal de l'Etat de nationalité aux fins d'appliquer les modalités de réserve plus favorables de la loi de nationalité.

Afin de demeurer compatible avec l'objectif de prévisibilité des successions, cette solution audacieuse devrait cependant être étroitement encadrée. Le recours pourrait ainsi être réservé aux seuls héritiers jouissant de la nationalité du tribunal saisi et y résidant habituellement, ne porter que sur la succession d'un défunt ayant établi sa résidence habituelle dans un autre Etat depuis moins de cinq ans et n'être recevable que lorsque la loi successorale appliquée prive totalement ou dans une proportion très importante les héritiers de leur droit réservataire.

En tout état de cause, il m'apparaît nécessaire de veiller à ce que cette préoccupation soit intégrée à la proposition de règlement qui nous est soumise.

C'est pourquoi je vous propose d'adopter un avis contestant sa conformité au principe de proportionnalité, en invitant la Commission européenne à définir un mécanisme efficace de préservation des mécanismes de réserves successorales les plus favorables aux héritiers proches.

Le Président Pierre Lequiller. Je remercie le rapporteur pour cette présentation d'un cas concret et fondé d'appréciation de la proportionnalité d'une proposition de texte. Je propose que l'avis que nous adoptons soit transmis immédiatement à la commission des affaires européennes du Bundestag, afin de rendre possible un travail franco-allemand au niveau parlementaire sur ce thème.

II. Communication de M. Guy Geoffroy sur le projet de décision-cadre sur la transmission des procédures pénales (document E 4552)

M. Guy Geoffroy, rapporteur. La présente proposition de décision-cadre tend à réviser le cadre de la « dénonciation officielle », par laquelle un Etat membre dénonce des faits à un autre Etat pour que celui-ci engage les poursuites. Il existe un instrument partiel, la convention de l'Union du 29 mai 2000 relative à l'entraide judiciaire en matière pénale, qui permet une dénonciation par voie directe entre autorités judiciaires. Pour la France, cette convention offre un mécanisme souple et efficace de dénonciation. Il faut également citer la convention du Conseil de l'Europe du 15 mai 1972 sur la transmission des procédures répressives mais celle-ci n'a été ratifiée que par treize Etats membres et signée par sept, dont ne fait pas partie la France.

Cependant, ce nouvel instrument permettrait de compléter le cadre existant afin de formaliser les demandes et éventuels refus et de s'assurer que, lorsqu'un pays accepte le transfert, il ait effectivement compétence pour poursuivre l'affaire. Une règle de compétence spécifique serait créée dans le cadre de la mise en œuvre de l'instrument, ce qui constitue une novation importante. La France s'est associée au dépôt de ce projet.

Les principes du projet sont les suivants. L'article 7 établit les critères de demande d'une transmission de procédure. Le but visé est de « *faciliter la bonne administration de la justice et d'en renforcer l'efficacité* ». Une condition, au moins, devrait être remplie, par exemple : l'infraction a été commise, en tout ou partie, sur le territoire d'un autre Etat membre, ou la plupart des effets ont été causés sur le territoire de l'autre Etat, ou le suspect purge une peine de prison dans l'autre Etat.

L'article 5 du projet complète cet article en disposant que, aux fins de l'application de la décision-cadre, un Etat membre a compétence pour poursuivre, conformément à son droit national, une infraction à laquelle le droit d'un autre Etat membre est applicable. En fait, cette formulation vise à s'assurer que l'Etat membre auquel la procédure serait transmise ait bien compétence pour agir. La compétence créée par l'article 5 ne serait valable que pour les cas dans lesquels l'Etat est saisi d'une demande de transmission de procédure.

En France, le principe général de la compétence est celui fixé par l'article 113-2 du code pénal qui dispose que : « *la loi pénale française est applicable aux infractions commises sur le territoire de la République* » et l'article 113-6 du même code qui prévoit que : « *la loi pénale française est applicable à tout crime commis par un Français hors du territoire de la République. Elle est applicable aux délits commis par des Français hors du territoire de la République si les faits sont punis par la législation du pays où ils ont été commis* ». La possibilité de poursuivre un résident français commettant une infraction à l'étranger est une exception et existe à l'heure actuelle en droit français pour la répression du tourisme sexuel (article 225-12-3 du code pénal).

L'outil créé serait donc assez puissant, puisqu'il ne vise pas une exception en fonction de la nature des faits mais en fonction de l'instrument utilisé pour la transmission de la procédure pénale.

Les autorités françaises sont à ce stade favorables à la proposition, selon les informations transmises, mais nombre d'Etats membres y sont opposés : l'Allemagne, le Royaume-Uni, l'Irlande, Malte, Chypre et l'Autriche ont souhaité avoir la possibilité de ne pas appliquer l'article 5. Une possibilité « *d'opt out* » a été négociée selon laquelle, si la compétence prévue est incompatible avec les principes fondamentaux du droit national, les Etats doivent établir leur compétence pour poursuivre si les critères suivants sont remplis :

- l'infraction a été commise, en tout ou en partie, sur le territoire de l'autre Etat membre ou la plupart de ses effets ou une part importante du préjudice qu'elle a causé ont eu lieu sur le territoire de l'autre Etat membre;
- le suspect a la nationalité ou sa résidence habituelle dans l'autre Etat membre;
- la victime a la nationalité ou sa résidence habituelle dans l'autre Etat membre.

L'application de cet « *opt out* » devrait être décidée lors de l'adoption de la proposition et serait valable pour des périodes de cinq ans renouvelables. Les autorités françaises ne soutiennent pas cette nouvelle rédaction et estiment que l'on pourrait aller plus loin sans dispositif dérogatoire. Chaque Etat désignerait les autorités compétentes pour agir en qualité d'autorité de transmission ou d'autorité destinataire. Elles pourraient être, dans certains cas, des autorités non judiciaires. Avant de demander le transfert de la procédure, la personne soupçonnée devrait être informée (article 8). Si des observations étaient formulées, l'autorité de l'autre Etat membre serait avertie.

Avant de procéder à une demande de transmission, l'autorité devrait tenir dûment compte des intérêts de la victime de l'infraction et veiller à ce que les droits que lui reconnaît la législation nationale soient pleinement respectés, et notamment son droit d'être informée de la transmission prévue (article 9).

Le reste des dispositions sont cohérentes avec le dispositif.

La proposition est assez novatrice et nécessaire. Elle suscite encore des réserves de nombreuses délégations.

Les autorités françaises se sont associées au dépôt de cette initiative, qui ne pourra vraisemblablement pas être adoptée sous présidence suédoise. Néanmoins, il est temps de peser sur les négociations, notamment sur un point très important.

La rédaction de l'article 16 du projet est insuffisamment détaillée et devra régler de manière tout à fait claire les conséquences de l'acceptation de la transmission de la procédure pénale dans l'Etat membre ayant fait la demande. Les situations de détention provisoire et de mesures de contrôle judiciaire doivent notamment être revues de manière à assurer une sécurité juridique totale.

M. Jacques Myard. Il est clair que la coopération judiciaire transnationale est importante et doit être facilitée. Sur le fond, j'approuve donc les objectifs de ce texte. Mais je m'interroge sur l'instrument choisi, qui est une décision-cadre du Conseil. Une convention entre Etats serait plus appropriée.

M. Guy Geoffroy, rapporteur. Le souci d'efficacité doit primer. La convention existante, celle du Conseil de l'Europe, est restée largement lettre morte. La décision-cadre est un outil susceptible d'être beaucoup plus efficace qu'un traité.

M. Jacques Myard. Mais sur quelle base juridique serait-elle fondée ? On a déjà vu des tribunaux refuser d'appliquer des dispositions sur lesquelles le Parlement national ne s'était pas prononcé.

M. Guy Geoffroy, rapporteur. Il s'agit des articles 31-1-a et 34-2-b du traité sur l'Union européenne. La coopération pénale entre les Etats membres est prévue par les traités.

Le Président Pierre Lequiller. La réunion interparlementaire qui s'est tenue aujourd'hui à Bruxelles sur le « programme de Stockholm » a fait apparaître combien, sur ces questions, l'Allemagne manifeste une réticence certaine. Pour quelles raisons ? Cela tient, d'une part, à l'organisation administrative fédérale de l'Allemagne, et, d'autre part, à une position générale traditionnellement assez réservée sur les questions de droit civil et de droit pénal, commune à tous les partis politiques.

A l'issue de ce débat, la Commission a *approuvé* la proposition de décision-cadre sous réserves des observations relatives à l'article 16.

III. Communication de M. Guy Geoffroy relative au projet d'accord SWIFT (document E 4934)

M. Guy Geoffroy, rapporteur. Ce projet d'accord vise à établir le nouveau cadre dans lequel des données de messagerie financière seront accessibles aux autorités répressives américaines en vue de lutter contre le terrorisme.

L'accord actuellement en vigueur est connu sous le nom d'accord « SWIFT », du nom de la société qui fournit des services de messagerie financière internationale en matière de paiement. La *Society for Worldwide Interbank Financial Telecommunication* (SWIFT) est une société de droit

belge. SWIFT transporte les messages standardisés de ses 8.000 clients (banques, institutions financières et clients professionnels) entre établissements financiers. Le centre d'exploitation est situé aux Pays-Bas et la duplication de cette base de données est assurée dans une base de données située aux Etats-Unis.

Suite aux attentats du 11 septembre 2001, le département du Trésor des Etats-Unis a mis au point un programme de surveillance du financement du terrorisme (« *Terrorist Finance Tracking Program* » dénommé « TFTP »). Le département du Trésor des Etats-Unis a admis en 2006 avoir adressé des injonctions à la société SWIFT afin que les bureaux de SWIFT implantés aux Etats-Unis transfèrent au bureau de contrôle des avoirs étrangers du département du Trésor des données à caractère personnel conservées sur le serveur situé aux Etats-Unis dans le cadre de la lutte contre le terrorisme.

L'autorité belge en charge de la protection des données et le G29 (groupe européen des autorités de protection des données) avaient jugé que SWIFT violait les règles de protection des données en n'assurant pas une protection des données adéquate et en n'informant pas les personnes concernées du traitement des informations. Le Parlement européen s'était également fermement opposé à ces échanges de données.

Dans un échange de lettres en date des 28 juin 2007 et 20 juillet 2007 entre le département du Trésor et la Commission européenne, une série d'observations, une dizaine de pages, sur les contrôles et garanties en matière de protection des données avaient été données par les Etats-Unis. Il était prévu qu'une personnalité européenne éminente serait désignée afin de vérifier que le programme est mis en œuvre conformément aux engagements du Trésor. Il s'agira du juge Jean-Louis Bruguière. Le juge Jean-Louis Bruguière a rendu son rapport, classifié, le 16 février dernier et, selon les informations disponibles, le Trésor américain aurait apporté la démonstration du respect des garanties prévues par les échanges de lettres. Les autorités américaines auraient respecté leurs engagements en matière de protection des données provenant de l'Union et l'exploitation de ces données aurait permis d'accroître l'efficacité de la lutte contre le terrorisme.

La société SWIFT a décidé de renoncer à sa base de données située aux Etats-Unis pour les données internes à l'espace européen et de répartir son activité entre deux bases, dont l'une serait aux Pays-Bas en charge des données internes à l'Union européenne et de certains pays l'ayant choisie, l'autre base, située en Suisse, conservant les autres données (les données internes aux Etats-Unis y seraient toujours traitées avec une sauvegarde en Suisse). Le trafic entre la zone européenne et la zone transatlantique serait stocké à la fois dans la zone d'émission et dans la zone de réception. SWIFT mettra en œuvre cette nouvelle architecture dès l'automne. Une partie importante des données constituant la base des injonctions rendues dans le cadre du TFTP ne sera donc plus stockée aux Etats-Unis.

En conséquence, la conclusion d'un accord avec les Etats-Unis, lié à cette nouvelle configuration, s'impose. Tel est l'objet du présent document.

La commission a eu à examiner cet été un projet de mandat de négociation pour le nouvel accord SWIFT (document [E 4551](#)).

Suite à la demande d'examen en urgence présentée par M. Pierre Lellouche au nom du Gouvernement, le Président Pierre Lequiller a émis de fortes réserves sur la procédure suivie pour un texte de cette importance, en évoquant la protection des données personnelles. La France n'a pas pu obtenir de nos partenaires européens le délai supplémentaire qui aurait permis à notre Commission d'examiner ce texte selon la procédure classique. Compte tenu de la nécessité de négocier rapidement un nouvel accord, avant que la société SWIFT ne supprime sa base de données située aux Etats-Unis, et de ne pas interrompre ces échanges de données stratégiques en matière de lutte contre le terrorisme, le Président Pierre Lequiller a accepté, au nom de la Commission, de procéder à l'examen en urgence. Cela était nécessaire afin de permettre d'engager les négociations avec les Etats-Unis. Le mandat a été adopté par le Conseil le 27 juillet 2009.

L'accord serait un accord relevant du troisième pilier, conclu pour une durée limitée, et permettrait de lier les autorités américaines.

Le mandat encadrerait relativement strictement les possibilités de transfert et d'utilisation des données. L'accord devait apporter des garanties en matière de protection des droits fondamentaux et notamment de protection des données à caractère personnel et de respect de la vie privée. En matière de définition des finalités, de protection des données et d'encadrement de leur utilisation, plusieurs types de garanties sont effectivement posés.

Néanmoins, un certain nombre de points doivent encore être clarifiés et, au regard des standards européens de protection des données, des exigences doivent être soulignées. Les travaux du Parlement européen, qui a adopté, le 17 septembre 2009, une résolution à ce propos, doivent être soutenus.

Le Président Pierre Lequiller. Nous avons entendu, à deux reprises, le Président de la Commission nationale de l'informatique et des libertés (CNIL), M. Alex Türk, qui était inquiet sur cette affaire. Cet accord serait conclu pour une durée limitée. Mais il faudra le renégocier, et l'améliorer, dans le contexte de l'entrée en vigueur du traité de Lisbonne. Mais nous devons aujourd'hui l'approuver compte tenu de ce caractère provisoire.

M. Jérôme Lambert. Je souhaite savoir quelles sont les positions de nos partenaires européens et notamment de l'Autriche, de l'Allemagne et de la Finlande.

M. Guy Geoffroy, rapporteur. Un certain nombre de réticences sont partagées par plusieurs Etats. Il faut convenir qu'aujourd'hui la nécessité de conclure l'accord s'impose. On doit empêcher la rupture de la transmission des données, tout en restant libres d'affirmer que des insuffisances existent, et de prendre date pour l'accord qui sera conclu de manière pérenne ensuite.

M. Jérôme Lambert. Je souhaite également faire des propositions d'ajouts aux conclusions dont certaines sont reprises des travaux du Parlement européen qui a adopté une résolution le 17 septembre dernier.

Sur proposition du rapporteur, la Commission a ensuite *adopté* les conclusions suivantes :

« La Commission des affaires européennes,

Vu l'article 88-4 de la Constitution,

Vu le projet d'accord entre l'Union européenne et les Etats-Unis d'Amérique sur le traitement et le transfert de données de messagerie financière de l'Union européenne aux Etats-Unis d'Amérique aux fins du programme de surveillance du financement du terrorisme (accord SWIFT) ;

Souligne l'intérêt mutuel de l'échange de données au regard de la lutte antiterroriste,

Rappelle qu'il est nécessaire de ne pas se trouver dans une situation dans laquelle l'accès aux données pour la lutte antiterroriste serait interrompu, SWIFT ayant modifié son architecture mais aucun accord n'ayant pu être signé,

Considère, pour autant qu'un accord international soit nécessaire, qu'un certain nombre de garanties, en premier lieu en matière de protection des données, doivent être assurées,

Prend acte du caractère provisoire de l'accord,

Demande :

- que le rôle exact des autorités chargées de recevoir et de traiter les demandes du département du Trésor américain soit clarifié,

- que l'accord ne permette que le transfert de données précisément limitées,

- que le partage éventuel des données avec les autorités des Etats tiers soit soumis à des conditions extrêmement strictes, garantissant la protection des données à caractère personnel conformément aux règles de l'Union européenne en la matière,

- que des garanties soient apportées sur les possibilités effectives de recours des personnes concernées,

- que les données utilisées ne puissent être conservées que durant une période réduite clairement définie,

- que les exigences minimales formulées dans le point 7 de la résolution du Parlement européen du 17 septembre 2009 sur l'accord international envisagé à ce propos avec les Etats-Unis, soient garanties dès cet accord. »

Sous réserve de ces conclusions, la Commission a approuvé le projet de décision du Conseil relative à la signature de l'accord.

IV. Communication de M^{me} Odile Saugues sur le passage à la deuxième phase de l'association entre l'Union européenne et l'ancienne République yougoslave de Macédoine (document E 4842)

M^{me} Odile Saugues, rapporteure. L'examen de la proposition sur le passage à la deuxième phase de l'association entre l'Union européenne et l'ancienne République yougoslave de Macédoine (ARYM) est l'occasion de faire un point plus général sur le processus de réforme et d'adhésion à l'Union européenne de l'ARYM.

Ce processus a connu un élan jusqu'en 2005, un ralentissement ensuite.

Le long processus de réformes devant conduire à l'adhésion comprend deux étapes principales – la conclusion d'un accord de stabilisation et d'association (ASA) et les négociations d'adhésion – et est ponctué d'autres étapes intermédiaires comme le dépôt de candidature, la reconnaissance du statut de pays candidat et l'ouverture des négociations d'adhésion.

L'ARYM s'est placée rapidement en bonne position puisque son ASA, signé en 2001, est entré en vigueur le 1^{er} avril 2004, et que le Conseil lui a reconnu le statut de pays candidat en décembre 2005.

L'ARYM doit cette bonne position notamment au fait que la Communauté internationale et l'Union européenne en particulier reconnurent son rôle stabilisateur au moment du conflit du Kosovo en 1999, lorsqu'elle accueillit 500.000 réfugiés représentant le quart de sa population, ainsi que sa capacité à surmonter ses divisions internes.

Ce pays de 2,045 millions d'habitants, en 2008, sur un territoire de 25.713 km² réussit tout d'abord à être le seul Etat de l'ex-Yougoslavie à n'avoir participé à aucun des conflits qui l'ont ravagée dans la décennie quatre-vingt-dix. Il réussit ensuite à éviter une guerre civile entre sa majorité slavophone et orthodoxe et sa minorité albanophone et musulmane, représentant respectivement deux tiers et un tiers de la population, en signant les accords d'Ohrid en août 2001. Cet accord a garanti les droits de la minorité albanophone à une représentation équitable, à la décentralisation et à l'utilisation de sa langue et il a permis l'édification d'une société multiethnique et démocratique pouvant servir d'exemple dans une région où les divisions ethniques perdurent.

Toutefois, le processus de rapprochement avec l'Union européenne a connu ensuite une certaine stagnation pour trois raisons.

D'abord, le contentieux bilatéral entre l'ARYM et la Grèce sur son nom a retardé l'examen d'une ouverture des négociations.

Ensuite, le rejet du traité constitutionnel lors des référendums français et néerlandais a conduit l'Union européenne à privilégier le règlement du débat institutionnel et à se montrer plus exigeante sur la mise en œuvre effective des réformes par les pays candidats.

Enfin, les violences et irrégularités lors des élections législatives de juin 2008 en ARYM ont révélé des dysfonctionnements institutionnels qui ont démontré que ce pays candidat n'était pas encore prêt à respecter les critères politiques, essentiels pour l'ouverture des négociations d'adhésion. La

Commission européenne a été amenée à poser un nouveau critère de progrès – la réforme de la loi électorale – et à reporter à l'automne 2009 l'examen de l'ouverture des négociations.

L'ARYM a tenu compte de cet avertissement, comme l'ont montré la bonne tenue des élections présidentielles et municipales des 22 mars et 5 avril 2009 ainsi qu'un nouveau progrès dans les réformes.

Désormais, cinq ans après la reconnaissance du statut de candidat, les conditions sont aujourd'hui réunies pour que l'ARYM franchisse de nouvelles étapes la rapprochant de l'Union européenne, même s'il reste encore beaucoup d'obstacles à surmonter et de réformes à accomplir.

L'ARYM va franchir trois étapes importantes la rapprochant de l'Union européenne : ASA, visas, recommandation d'ouverture des négociations.

La première concerne le passage à la deuxième phase de l'association entre l'Union européenne et l'ARYM, qui témoigne du progrès des réformes réalisées par l'ARYM dans le cadre de l'ASA. Cet accord prévoit en effet que l'association sera réalisée à l'issue d'une période de transition d'une durée maximale de dix ans, divisée en deux phases successives, et que, quatre ans après son entrée en vigueur, le conseil de stabilisation et d'association évalue les progrès accomplis et décide du passage à la seconde phase. La Commission européenne propose au Conseil de décider de passer à la deuxième phase de l'ASA, notamment parce que l'ARYM a honoré tous les engagements qui étaient prévus dans le cadre de la première phase en matière de circulation des travailleurs, droit d'établissement, prestations de services, circulation des capitaux.

Deuxième bonne nouvelle, la suppression des visas de courte durée pour voyager dans l'Union européenne, le 1^{er} janvier 2010, répond à une très forte attente de l'ARYM et représentera une date historique dans les relations de l'Union européenne avec les pays des Balkans occidentaux. La Commission européenne a en effet proposé, le 15 juillet dernier, de supprimer les visas pour l'ARYM, la Serbie et le Monténégro parce qu'ils avaient rempli les conditions relatives à l'établissement de passeports biométriques, au renforcement des contrôles aux frontières, à la lutte contre la corruption et le crime organisé et au respect des droits fondamentaux. Le rapport de progrès 2009 sur l'ARYM note en particulier que ce pays a procédé à l'arrestation de hauts personnages pour lutter contre la corruption.

La suppression de visas permettra aux Macédoniens de revivre la situation d'avant 1991 quand les Yougoslaves pouvaient voyager sans visa vers l'Europe de l'est et de l'Ouest et les sortira de l'enfermement dans lequel les ont plongés les conflits de l'ex-Yougoslavie.

Enfin, la recommandation de la Commission européenne d'ouvrir les négociations d'adhésion avec l'ARYM constitue la troisième bonne nouvelle pour ce pays reconnu candidat depuis quatre ans.

Dans sa communication du 14 octobre 2009 sur la stratégie d'élargissement et les principaux défis pour 2009-2011, la Commission européenne conclut que l'ARYM satisfait suffisamment aux critères politiques de Copenhague et du processus de stabilisation pour ouvrir les négociations d'adhésion.

Elle note en particulier que les élections présidentielles et locales de mars et avril 2009 se sont déroulées dans le respect de la plupart des normes internationales, et que des progrès ont eu lieu conformément aux exigences posées par la Commission européenne en 2008 : le fonctionnement des procédures parlementaires a été amélioré ; la loi sur la police est entrée en vigueur et la réforme s'est poursuivie avec l'adoption de la loi sur la sécurité intérieure ; la réforme législative du pouvoir judiciaire est achevée ; la lutte contre la corruption s'est développée grâce à la modification de la loi sur le financement des partis politiques et à l'amélioration des capacités des organismes de lutte contre la corruption ; la loi sur la fonction publique est une étape vers un système de promotion au mérite.

Par ailleurs, si le pays a été touché par la crise économique, la stabilité du secteur bancaire et le maintien de la consommation privée ont permis de limiter le ralentissement de la croissance. Des progrès ont également été observés dans la lutte contre le chômage structurel et la réduction des

entraves à l'emploi. Cependant, le chômage se maintient à un niveau très élevé, notamment parmi les jeunes et les moins qualifiés et reste préoccupant.

Enfin, la Commission européenne souligne la nécessité de maintenir de bonnes relations de voisinage et de trouver, sous l'égide des Nations Unies, une solution négociée et acceptée mutuellement au problème de la dénomination du pays.

Sur le premier point, il est remarquable que l'ARYM vienne de conclure un accord de délimitation de sa frontière avec le Kosovo. L'ARYM participe également à un maillage d'accords ou de dispositifs de nature à favoriser la coopération régionale grâce à des progrès concrets.

Sur le deuxième point, la Commission européenne met en exergue un contentieux bilatéral qui a, jusqu'à présent, bloqué l'ouverture des négociations et sur lequel l'Union européenne a peu d'influence. Elle n'a d'ailleurs pas préconisé de date pour l'ouverture des négociations.

Il reste en effet encore beaucoup d'obstacles à surmonter, de réformes à accomplir et de questions à clarifier

Le nom de la Macédoine est depuis 1991 l'objet d'un différend entre Skopje et Athènes qui bloque sa reconnaissance internationale sous le nom de « République de Macédoine », au motif que ce nom fait partie du patrimoine historique de la Grèce et qu'il pourrait impliquer une visée territoriale de ce pays sur la province qui porte le même nom au nord de la Grèce. La Macédoine a été admise à l'ONU en 1993 sous le nom provisoire d'« ancienne République yougoslave de Macédoine (ARYM ou FYROM en anglais). La Macédoine se dit prête à adopter un nom composé comme « Nouvelle Macédoine » ou « Haute Macédoine » pour ses relations avec la Grèce, tout en conservant le nom de « République de Macédoine » pour les relations internationales.

Le blocage des négociations menées sous l'égide des Nations Unies depuis dix-sept ans a conduit la Grèce à bloquer l'adhésion de l'ARYM à l'OTAN au Sommet de Bucarest en avril 2008 et l'ARYM à saisir la Cour internationale de justice à La Haye, le 17 novembre 2008. Un accord intérimaire conclu en 1995 comporterait un engagement de la Grèce de ne pas empêcher l'adhésion de l'ARYM à l'OTAN, mais la Grèce réplique que l'ARYM aurait elle-même violé cet accord dans le passé, en particulier sur le principe des relations de bon voisinage. Rebaptiser « Alexandre le Grand » l'aéroport de Skopje n'était sans doute pas de nature à apaiser la Grèce.

L'avènement d'un nouveau gouvernement un peu plus ouvert en Grèce est une occasion à saisir par les deux parties pour s'entendre.

La présidence suédoise et les autres Etats membres sont partagés entre la volonté d'ouvrir les négociations et la solidarité communautaire à laquelle la France, notamment, est très attachée. Ils observent que le règlement de ce contentieux bilatéral n'est pas une pré-condition mais que le Conseil ne pourra pas envisager une date, pour l'ouverture des négociations, sans une volonté de compromis des deux parties. La Grèce, premier investisseur en ARYM, a intérêt à un arrimage rapide de ce pays à l'Union européenne de manière à consolider définitivement l'équilibre démocratique et multiethnique auquel il est parvenu et à éviter le risque d'une nouvelle instabilité régionale. L'enjeu est encore plus grand pour l'ARYM, qui n'a pas d'autre choix pour sa stabilité et sa prospérité que la perspective européenne.

Par ailleurs, si la Commission européenne a jugé suffisant le respect des critères politiques pour l'ouverture des négociations, elle n'en souligne pas moins qu'il reste beaucoup de réformes à accomplir et que la phase des négociations sera encore plus exigeante sur leur mise en œuvre effective.

Enfin, trois questions mériteraient d'être clarifiées pour rassurer l'opinion européenne sur le processus d'élargissement aux Balkans occidentaux.

La première concerne l'effectivité des réformes en matière de justice et d'affaires intérieures. Les Etats membres de l'Union européenne ont été heureux d'accueillir, le 1^{er} janvier 2007, la Bulgarie et la Roumanie dans la famille européenne, mais ils ont eu ensuite le désagrément de découvrir que ces deux pays n'étaient pas tout à fait prêts dans le domaine précité, contrairement aux assurances données par la Commission européenne. Cette expérience ne doit pas se reproduire,

car les affaires de justice et de police et la lutte contre la corruption et le crime organisé fondent le rapport de confiance qui doit s'établir entre anciens et nouveaux Etats membres et est une condition indispensable de leur adhésion. Cette exigence est particulièrement forte à l'égard des pays candidats des Balkans occidentaux, dans la mesure où les conflits de l'ex-Yougoslavie et les embargos les ont particulièrement exposés à ces risques. Y répondre est d'ailleurs dans l'intérêt des pays candidats s'ils veulent bénéficier des aides communautaires, des prêts de la BEI ainsi que des investissements directs étrangers. De 2007 à 2012 inclus, l'ARYM aura reçu 507,3 millions d'euros d'aide bilatérale de l'instrument d'aide de préadhésion. Or, dans un audit publié le 13 octobre 2009, la Cour des comptes de l'Union européenne a mis en cause l'efficacité des projets de la Commission européenne dans le domaine de la justice et des affaires intérieures dans les Balkans occidentaux.

Tout en reconnaissant l'environnement difficile dans lequel agit la Commission européenne, la Cour doute de la durabilité et de l'appropriation de plus d'un tiers des résultats obtenus, en raison de la faiblesse politique et de l'absence d'engagement des bénéficiaires, dès lors que les initiatives de réforme n'émanent pas d'eux-mêmes, mais de la Commission. La Cour recommande à la Commission d'établir une correspondance plus étroite entre les projets d'investissement et ceux relatifs au renforcement des capacités institutionnelles, de beaucoup plus impliquer les bénéficiaires, de doter tous les projets d'un plan de suivi et d'utiliser la gestion intégrée des frontières pour encourager la coopération régionale.

La Commission européenne devra se montrer dans ce domaine d'une rigueur absolue, à la mesure des exigences des Etats membres et des craintes des opinions publiques.

La deuxième question concerne le risque de blocage d'un processus d'adhésions successives fondées sur les mérites de chaque pays candidat, en raison des contentieux bilatéraux multiples opposant les pays de l'ex-Yougoslavie. Les Etats issus de l'ex-Yougoslavie ont fait exploser leur fédération parce qu'ils avaient tous des contentieux contre tous ou presque, et le risque est grand que le dernier candidat entré dans l'Union européenne excipe d'un contentieux bilatéral avec un candidat de la région pour bloquer son processus de négociation. Comme il est admis par tous que la perspective européenne offerte par l'Union européenne est le seul moyen de sortir les pays de la région de leur logique d'affrontement séculaire, on peut s'interroger sur l'introduction dans les prochains traités d'adhésion d'une clause par laquelle le nouvel Etat membre s'engagerait à ne pas paralyser le processus d'élargissement des pays candidats de la région en raison d'un contentieux bilatéral sans lien avec ce processus.

Cette clause exceptionnelle ne s'appliquerait qu'aux pays candidats de la région et pourrait être justifiée par l'événement exceptionnel qu'a constitué la fragmentation de l'ex-Yougoslavie en sept Etats.

La troisième question concerne les conséquences de la fragmentation de l'ex-Yougoslavie en Etats moins peuplés sur le processus de décision de l'Union européenne après leur adhésion. Il serait très difficile d'attribuer des sièges au Parlement européen à l'ensemble des Etats de l'ex-Yougoslavie sans remettre en cause les critères définis par l'article 14 du traité sur l'Union européenne pour l'après 2014 (plafond global de 750 députés plus le président, seuil maximal de 96 et seuil minimal de six pour chaque Etat et proportionnalité dégressive). En particulier, le seuil minimal de six députés pour les Etats les moins peuplés aboutirait à un doublement de la représentation des sept Etats par rapport à ce qu'aurait été celle de l'ex-Yougoslavie, en considération d'une population d'environ 21 millions d'habitants.

La prime à la fragmentation des Etats dans le système décisionnel de l'Union européenne présente le risque de délégitimer les décisions des institutions communautaires. Elle risque également de favoriser la revendication de certaines régions à compétence législative, beaucoup plus riches et peuplées, de devenir des Etats membres de plein exercice pour participer directement aux décisions de l'Union européenne.

L'échéance de ces futures adhésions est encore lointaine mais la réflexion mériterait d'être engagée dès maintenant.

Le Président Pierre Lequiller. Les deux derniers points méritent que soit menée une réflexion particulière. Il est vrai que le système institutionnel européen tel qu'il est conçu, incite à la séparation des Etats dans la mesure où il y a une prime au commissaire, aux députés. Par ailleurs, certains pays utilisent la volonté d'adhésion d'autres pays pour exercer des pressions dans le cadre d'un contentieux bilatéral.

M. Thierry Mariani. Je souhaiterais savoir si le traité de Lisbonne fixe une date pour la désignation des deux sièges supplémentaires de députés européens pour la France.

Le Président Pierre Lequiller. Pour l'heure, rien n'est fixé. Il est vrai que le traité de Lisbonne fait passer le nombre de députés européens de 736 à 751, augmentant notamment de deux membres la représentation de la France, mais diminuant cependant de trois celle de l'Allemagne. Le Conseil européen des 11 et 12 décembre 2008 s'était entendu pour éviter à notre voisin de devoir réduire en cours de mandat son effectif au Parlement européen, en relevant le plafond des eurodéputés à 754. Cela impose toutefois de modifier les dispositions des traités, puis de les ratifier dans chaque Etat membre, ce qui ne pourra se faire à brève échéance qu'à l'occasion du traité d'adhésion de la Croatie. Cette perspective n'est donc pas imminente, ce qui ne nous interdit en rien de réfléchir dès à présent aux modalités de désignation de nos deux nouveaux députés.

Sur proposition de la rapporteure, la Commission a adopté les conclusions suivantes :

« La Commission des affaires européennes,

Vu l'article 88-4 de la Constitution,

Vu la proposition de décision du Conseil et de la Commission concernant la position de la Communauté au sein du conseil de stabilisation et d'association sur le passage à la deuxième phase de l'association entre les Communautés européennes et leurs Etats membres, d'une part, et l'ancienne République yougoslave de Macédoine, d'autre part, conformément à l'article 5 de l'accord de stabilisation et d'association (COM (2009) 280 final/E 4842),

Vu la communication de la Commission au Conseil et au Parlement européen sur la stratégie d'élargissement et les principaux défis 2009-2010 (COM (2009) 533), en particulier sa recommandation d'ouvrir des négociations d'adhésion avec l'ancienne République yougoslave de Macédoine, et le rapport de progrès 2009 pour ce pays reconnu candidat en décembre 2005 (SEC (2009) 1335),

Vu le rapport spécial n° 12/2009 de la Cour des comptes européenne sur l'efficacité des projets de la Commission dans le domaine de la justice et des affaires intérieures pour les Balkans occidentaux,

1. Approuve la proposition sur le passage à la deuxième phase de l'association entre l'Union européenne et l'ancienne République yougoslave de Macédoine dans la mesure où elle invite ce pays candidat à redoubler son effort de réforme pour se préparer à une future adhésion ;

2. Estime que la décision à venir du Conseil d'ouvrir des négociations d'adhésion, selon la recommandation de la Commission, devra appeler le pays candidat au respect intégral des critères d'adhésion généraux et spécifiques aux Balkans occidentaux à la date de son adhésion ;

3. Demande que la Commission se montre d'une rigueur absolue pour la mise en œuvre effective des réformes en matière de justice et d'affaires intérieures et qu'en particulier, elle suive les recommandations de la Cour des comptes européenne ;

4. S'inquiète du risque de blocage d'un processus d'adhésions successives fondées sur les mérites de chaque pays candidat, en raison des contentieux bilatéraux opposant les pays issus de l'ex-Yougoslavie, et s'interroge sur la possibilité d'introduire dans les prochains traités d'adhésion une clause par laquelle le nouvel Etat membre s'engagerait à ne pas paralyser le processus d'élargissement des pays candidats de la région en raison d'un contentieux bilatéral sans lien avec ce processus ;

5. Souhaite qu'une réflexion soit engagée sur les garanties à prévoir pour que la fragmentation d'un Etat en Etats moins peuplés n'affaiblisse pas le système décisionnel de l'Union européenne après leur adhésion ni sa capacité d'intégration de nouveaux Etats membres. »

Puis la Commission a autorisé la publication de cette communication sous la forme d'un rapport d'information.

La séance est levée à dix huit heures trente

Membres présents ou excusés

Commission des affaires européennes

Réunion du mardi 17 novembre 2009 à 17 heures

Présents. - M. Michel Delebarre, M. Guy Geoffroy, Mme Annick Girardin, M. Jérôme Lambert, M. Pierre Lequiller, M. Thierry Mariani, M. Jacques Myard, M. Didier Quentin, Mme Chantal Robin-Rodrigo, Mme Odile Saugues, M. André Schneider, M. Gérard Voisin

Excusés. - M. Michel Diefenbacher, Mme Arlette Franco, Mme Anne Grommerch, M^{me} Danièle Hoffman-Rispal, Mme Marietta Karamanli, M. Francis Vercamer

SUBSIDIARITE

Questionnaire du Secrétariat de la COSAC

1. Quelles commissions parlementaires ont été impliquées dans le test de subsidiarité et de quelle manière ?

Seule la commission des affaires européennes est chargée, au sein du Sénat français, d'examiner les textes européens au regard de la subsidiarité et de la proportionnalité.

Cette commission a donc examiné cette proposition de règlement relative aux successions et aux testaments au cours de sa réunion du jeudi 10 décembre 2009, sur le rapport de l'un de ses membres, M. Pierre Fauchon.

Il convient d'observer que ce sénateur avait également été désigné par la commission des lois pour examiner ce texte au fond. Il a communiqué ses observations sur le fond du texte au cours d'une réunion de la commission des lois le 2 décembre dernier et a proposé le dépôt d'une proposition de résolution sur ce texte. Les autres membres de la commission des lois ont approuvé cette décision et la proposition de résolution est devenue résolution du Sénat le 13 décembre dernier.

2. La Séance plénière a-t-elle été impliquée ?

Non. Seule la commission des affaires européennes intervient, au sein du Sénat français, en matière de subsidiarité. Les commissions permanentes et la séance plénière sont compétentes pour juger du fond du texte, comme indiqué dans la réponse précédente.

3. A quel niveau la décision finale a-t-elle été prise et qui l'a paraphée ?

La décision en matière de subsidiarité et de proportionnalité a été prise par la commission des affaires européennes au cours de sa réunion du jeudi 10 décembre 2009.

4. Quels services administratifs de votre parlement ont été impliqués et de quelle manière ?

En ce qui concerne la subsidiarité, le service des affaires européennes a assisté M. Pierre Fauchon pour élaborer ses observations en matière de subsidiarité et de proportionnalité.

En revanche, le sénateur avait déjà travaillé sur le fond de ce texte au sein de la commission des lois et avait donc bénéficié de l'aide du secrétariat de cette commission. Il avait notamment conduit des auditions avant de déposer sa proposition de résolution sur le fond du texte.

5. Avez-vous conduit le test de subsidiarité en coordination avec l'autre chambre ?

Non

6. Votre gouvernement a-t-il fourni des informations relatives au respect du principe de subsidiarité par la proposition de directive ?

Le Gouvernement français n'a pas fourni d'informations ayant un lien direct avec les questions de subsidiarité et de proportionnalité. Le service des affaires européennes n'a pas eu de contact avec le Gouvernement préalablement à l'examen, devant la commission des affaires européennes, de ce texte au regard de la subsidiarité et de la proportionnalité.

Toutefois, dans le cadre de l'examen au fond qu'il a mené au sein de la commission des lois, M. Pierre Fauchon avait rencontré Mme Pascale Fombeur, directrice des affaires civiles et du sceau au sein du ministère de la Justice et des Libertés, et M. Emmanuel Chassaing, secrétaire général adjoint des affaires européennes, qui lui avaient fait part de leurs commentaires sur cette proposition.

7. Avez-vous consulté les parlements régionaux de votre pays qui disposeraient de pouvoirs législatifs ?

Sans objet.

8. Avez-vous consulté des ONG, groupes d'intérêt, experts extérieurs ou autres ?

Pour l'examen au regard de la subsidiarité, M. Pierre Fauchon n'a consulté aucun organisme extérieur. En revanche, il avait précédemment auditionné, dans le cadre de ses activités au sein de la commission des lois, le Conseil supérieur du notariat ainsi que l'Union nationale des associations familiales afin de connaître la position de ces deux organismes sur le contenu de cette proposition de règlement.

9. Selon quelle chronologie le test a-t-il été conduit au sein de votre Parlement ?

Le test a pris la forme d'une communication que M. Pierre Fauchon, Sénateur, a faite devant la commission des affaires européennes du Sénat lors d'une réunion le jeudi 10 décembre 2009. M. Pierre Fauchon a alors émis des observations au regard de la proportionnalité, qui ont été approuvées par les autres membres de la commission des affaires européennes.

10. Avez-vous coopéré avec d'autres parlements nationaux ?

Non.

11. Avez-vous publié vos conclusions ? Si oui, par quels moyens ?

Les observations du Sénat au regard de la subsidiarité et de la proportionnalité ont été publiées sur les pages « Europe » du site du Sénat de deux manières :

- dans l'onglet « comptes-rendus des réunions » : le compte-rendu de la communication de M. Fauchon et du débat qui s'en est suivi sont disponibles en cliquant sur « compte-rendu de la réunion du 10 décembre 2009 » ;
- dans l'onglet « subsidiarité et proportionnalité » : cet onglet indique que des observations ont été adoptées sur la proposition de règlement relative aux successions et aux testaments et renvoie au compte-rendu de la réunion du 10 décembre 2009.

12. Avez-vous découvert un quelconque manquement au principe de subsidiarité ?

La commission des affaires européennes a estimé que la proposition ne soulevait aucune difficulté au regard du principe de subsidiarité : face aux disparités en matière de règles de conflits de loi et de compétence du tribunal, une intervention de l'Union européenne dans ce domaine lui paraît tout à fait justifiée.

Elle a toutefois considéré que la proposition était susceptible de porter atteinte au principe de proportionnalité. En effet, la commission estime qu'il serait tout à fait disproportionné que le futur règlement vienne remettre en cause le principe de la réserve héréditaire.

13. Avez-vous adopté un avis motivé sur la proposition de directive ?

Observations

Proposition de règlement relative à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions et des actes authentiques en matière de successions et à la création d'un certificat successoral européen (COM (2009) 154 final).

*

La commission des affaires européennes du Sénat considère :

– que l'objectif d'unifier les règles de conflit de lois et de compétences en matière de successions transfrontalières ne nécessite pas de mettre en cause la protection accordée aux membres de la famille à travers le mécanisme de la réserve héréditaire ;

– que, faute de prévoir un dispositif garantissant que l'unification de ces règles ne pourra avoir pour effet de faire échec à la réserve héréditaire, **la proposition ne respecte donc pas le principe de proportionnalité.**

Cf. communication de M. Pierre Fauchon ci-jointe.

14. Avez-vous trouvé les justifications de la Commission sur le respect du principe de subsidiarité satisfaisantes ?

Du point de vue de la subsidiarité, la commission des affaires européennes a estimé que les justifications avancées par la Commission étaient tout à fait convaincantes. En revanche, elle n'a pas été satisfaite des motivations exprimées par la Commission en ce qui concerne le principe de proportionnalité.

15. Avez-vous rencontré des difficultés spécifiques pendant l'examen ?

Non.

Réunion du jeudi 10 décembre 2009

Subsidiarité

Successions et testaments (E 4863)
(examen au regard de la subsidiarité et de la proportionnalité)

Communication de M. Pierre Fauchon

J'ai présenté à la commission des lois, le 2 décembre dernier, une communication sur la proposition de règlement relative aux successions. A l'issue de cette communication, la commission des lois a adopté, au titre de l'article 88-4 de la Constitution, une **proposition de résolution** sur laquelle je reviendrai.

Il s'agissait là d'un examen sur le fond. Nous sommes appelés aujourd'hui à nous prononcer uniquement sur le **respect des principes de subsidiarité et de proportionnalité**. Je rappelle que, sur une communication de notre collègue Monique Papon, nous avons examiné précédemment le livre vert présenté par la Commission européenne en 2005 sur ce même sujet.

I. Quel est l'objet de cette proposition de règlement ?

Cette proposition de règlement a pour objet **de supprimer les difficultés** auxquelles sont confrontées les personnes pour mettre en œuvre leurs droits dans le cadre d'une succession internationale. A cette fin, elle traite tout à la fois la question de la compétence judiciaire, des conflits de lois, de la reconnaissance mutuelle, de l'exécution des décisions dans ce domaine. Elle prévoit par ailleurs la création d'un certificat successoral européen.

Ce faisant, elle met en œuvre, avec retard, les recommandations du programme de la Haye de 2004.

• Comment la proposition détermine-t-elle la juridiction compétente?

La proposition retient un **critère de rattachement juridictionnel unique**, celui de l'État membre sur le territoire duquel le défunt avait sa **résidence habituelle** au moment du décès. Cette juridiction sera alors compétente pour statuer sur tous les aspects du règlement de la succession.

Ce critère de rattachement unique aura un impact important sur notre droit des successions, **dit scissionniste**. Les règles françaises de compétence juridictionnelle en matière de successions reposent, en effet, sur la distinction entre les successions mobilières et immobilières. La succession mobilière est en principe soumise au tribunal du **lieu d'ouverture de la succession** (*articles 45 du code de procédure civile et 720 du code civil*). La succession immobilière, quant à elle, relève en principe du tribunal du **lieu de situation de l'immeuble** (*article 44 du code de procédure civile*).

Le système européen mettrait fin à cette scission.

- **Comment la proposition détermine-t-elle la loi applicable?**

Pour la détermination de la loi applicable au règlement d'une succession, la proposition retient un **système unitaire** qui aboutit à l'application **d'une seule loi**. Le critère de rattachement sera celui de la **dernière résidence habituelle du défunt**. Toutefois, le testateur pourra choisir expressément dans son testament l'application de sa **loi nationale**.

- **Que dit la proposition sur la reconnaissance et l'exécution des décisions et celles des actes authentiques ?**

La reconnaissance de toutes les décisions et transactions judiciaires est prévue afin de concrétiser en matière de successions le principe de **reconnaissance mutuelle**. Les motifs de non-reconnaissance ont été réduits au minimum nécessaire (décision manifestement contraire à l'ordre public de l'État requis, par exemple). De même, au vu de l'importance pratique des actes authentiques en matière de successions, la proposition **assure leur reconnaissance** afin de permettre leur libre circulation.

- **Quelle sera le rôle du nouveau certificat successoral européen ?**

Afin de permettre le règlement rapide d'une succession internationale, la proposition de règlement introduit un **certificat successoral européen**, qui a pour objet de fournir la preuve de la qualité d'héritier, des vocations successorales et des pouvoirs pour administrer la succession. Ce certificat **ne remplace pas** les certificats existants dans certains États membres.

II. Quelle appréciation pouvons-nous porter au titre de la subsidiarité et de la proportionnalité ?

- **Le texte respecte-t-il le principe de subsidiarité ?**

Pour répondre à cette question, il faut s'assurer que l'intervention de l'Union européenne dans ce domaine est **légitime et nécessaire**.

D'abord, elle s'appuie sur une **base juridique incontestable**. L'article 65 du traité CE (*article 81 du TFUE*) dispose que l'Union européenne peut adopter des mesures relevant de la coopération judiciaire en matière civile afin d'une part « *d'améliorer et de simplifier la reconnaissance et l'exécution des **décisions judiciaires et extrajudiciaires*** » et d'autre part de « *favoriser la compatibilité des règles applicables dans les États membres en matière de **conflits de lois et de compétence***. » Je précise que les mesures envisagées relèveront, selon la Commission européenne, de la procédure de codécision et de la majorité qualifiée au Conseil, à la différence des questions touchant au droit de la famille qui demeurent soumis à l'unanimité. La Commission européenne considère, en effet, qu'en raison de ses aspects patrimoniaux prédominants, le droit successoral constitue une **matière distincte du droit de la famille**. C'est d'ailleurs la solution qui prévaut dans la plupart des États membres.

Si elle est fondée juridiquement, l'intervention de l'Union européenne est-elle nécessaire ?

A cette fin, je crois que l'on doit d'abord évaluer la sensibilité de la question des successions transfrontalières en Europe. On estime qu'il y aurait autour de **50 000 dévolutions successorales transfrontalières** chaque année concernant des ressortissants des États membres. La valeur moyenne de ces successions transfrontalières représenterait chaque année quelque **123,3 milliards d'euros**. Il y a donc là un véritable enjeu qui appelle des règles adéquates.

Or pour répondre à cet enjeu, force est de constater qu'il existe une **grande diversité entre les États membres** sur les solutions à mettre en œuvre. Les règles de conflit de lois se répartissent entre deux systèmes. Certains États membres (*Allemagne, Autriche, Danemark, Espagne, Finlande, Grèce, Italie, Portugal et Suède*) appliquent un **système dit unitaire**. L'ensemble des biens qui relèvent de la succession est soumis à une loi unique car la succession est considérée comme une masse unique. Au contraire, d'autres États membres dont la France mais aussi le Royaume Uni, appliquent un **système dit scissionniste** car il opère une distinction entre les biens meubles, dont la succession est soumise à la loi du dernier domicile, et les biens immeubles, dont la succession est soumise à la loi du lieu de situation respective des immeubles. A l'intérieur de ces deux grands systèmes, les solutions ne sont elles-mêmes pas homogènes.

En pratique, cette confrontation de règles distinctes de conflit de lois conduit dans un grand nombre de cas à l'application de **plusieurs lois différentes** lorsque les biens dépendant d'une succession sont répartis sur le territoire de différents États membres. Il en résulte à l'évidence de **grosses difficultés** à la fois pour les personnes qui désirent organiser leur succession, pour les successibles qui sont confrontés à une grande incertitude sur la nature et la portée de leurs droits, et pour les créanciers de la succession qui n'ont pas les mêmes garanties de recouvrement de leurs créances selon le droit applicable.

Cette disparité peut aussi être constatée dans les solutions retenues par les États membres pour déterminer les **tribunaux compétents** pour statuer en matière successorale. Il peut s'agir du lieu du dernier domicile du défunt, de celui du défendeur ou du demandeur à l'instance, du lieu de situation de certains biens ou encore de la nationalité du défunt ou de l'une ou l'autre partie à l'instance.

En outre, une autre disparité importante concerne la question de la **réserve héréditaire**. Je l'examinerai au titre de la proportionnalité.

Or ces difficultés ne sont pas résolues par des **instruments de droit communautaire ou de droit international**. Au plan communautaire, les successions sont expressément exclues du champ d'application du règlement du 22 décembre 2000 sur la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale. Quant aux conventions internationales, soit elles ne concernent que certains États membres comme la convention nordique du 19 novembre 1934 (*Danemark, Finlande et Suède*), soit elles ne traitent qu'une partie de la question comme la convention de La Haye du 2 octobre 1961 qui ne porte que sur les conflits de lois relatifs à la forme des dispositions testamentaires. La convention de la Haye du 1^{er} août 1989 sur la loi applicable aux successions à cause de mort, qui aurait pu régler la

question, n'est jamais entrée en vigueur, faute d'avoir été ratifiée par un nombre suffisant d'États.

Dans ces conditions, l'adoption d'un nouvel instrument communautaire peut apporter des **clarifications utiles**. En outre, elle respecte la faculté pour chacun d'organiser librement sa succession dès lors qu'il établit un testament.

J'ajouterai que la Commission européenne a opportunément écarté toute tentative d'harmonisation du **droit matériel** des successions. C'est ainsi que les questions relatives à la validité des successions, au régime des trusts successoraux pour les pays qui connaissent ce système, à la fiscalité ou au régime de propriété, resteront de la compétence exclusive des États membres.

Je vous propose donc de considérer que la proposition de la Commission européenne respecte le principe de la subsidiarité.

- **Le texte respecte-t-il le principe de proportionnalité ?**

Je rappelle qu'en vertu de ce principe, l'action de l'Union **ne doit pas excéder ce qui est nécessaire** pour atteindre l'objectif assigné par le traité, en l'espèce l'article 65 dont j'ai rappelé les termes précédemment.

En définissant un critère de rattachement juridictionnel unique et un critère de rattachement pour déterminer la loi applicable à l'ensemble des opérations successorales, la proposition de règlement me paraît répondre de manière proportionnée à l'objectif fixé par le traité. J'observe par ailleurs que la proposition ménage **certaines souplesses** par rapport aux règles qu'elle met en place. C'est ainsi que le testateur pourra opter pour sa loi nationale. De même, une juridiction déclarée compétente pourra décider de renvoyer le soin de se prononcer à une autre juridiction mieux placée qu'elle au regard des intérêts du défunt, des héritiers, des légataires ou des créanciers.

Mais cette unification des règles de conflits de lois et de compétences **risque d'avoir pour effet de réduire la protection des proches du défunt**, telle qu'elle est assurée par les droits nationaux à travers le mécanisme de la **réserve héréditaire**.

En droit français, le code civil définit cette réserve héréditaire comme la part des biens et droits successoraux dont la loi assure la dévolution libre de charges à certains héritiers dits réservataires, s'ils sont appelés à la succession et s'ils l'acceptent (*article 912*). La très grande **majorité des États membres** connaît ce mécanisme qui, selon des modalités variables, interdit au testateur de disposer librement de la totalité de sa succession. Cependant, d'autres États, comme le Royaume Uni (à l'exception de l'Écosse), n'appliquent pas ce mécanisme et consacrent la totale liberté testamentaire de leurs ressortissants.

Or, en l'état, la proposition de règlement permettrait à des ressortissants européens **d'échapper à la contrainte de la réserve héréditaire** prévue par leur droit national. Ainsi, un Français n'aurait qu'à fixer sa résidence en Grande-Bretagne et rédiger un testament réglant sa succession qui écarte ses enfants. A son décès, le juge

anglais serait compétent. La loi applicable serait la loi anglaise qui reconnaît son **entière liberté testamentaire**.

Une telle situation ne me paraît pas acceptable. Tous les États membres qui connaissent la réserve héréditaire poursuivent un objectif commun. Il s'agit de **protéger les membres de la famille du défunt**, y compris contre lui-même en lui interdisant de les déshériter et en leur permettant d'obtenir la réduction des libéralités qui auraient pu léser leurs droits de succession.

Je rappelle que cette règle très ancienne trouve son origine dans le **droit romain** (« quarte légitime »), qui le conçoit comme un **devoir de famille** du défunt à l'égard de ses descendants, ainsi que dans le **droit coutumier**. Elle a été transposée dans l'ancien droit français et a été réaffirmée d'abord dans le droit révolutionnaire puis dans le code civil.

Cette réserve héréditaire répond, à mon sens, à un **devoir moral** qui s'impose aux parents qui ont des responsabilités à l'égard de leurs enfants qu'ils ne peuvent abandonner à leur sort.

Même s'il existe déjà des mécanismes, notamment l'assurance-vie, qui permettent de contourner la réserve héréditaire, on est là face à une question de principe qui est au cœur de notre conception du droit des successions.

C'est pourquoi la commission des lois a jugé nécessaire d'adopter une proposition de résolution qui, tout en approuvant l'orientation générale retenue par la Commission européenne, demande au Gouvernement *« de veiller à ce que le texte finalement adopté garantisse que l'application des règles déterminant la loi applicable ne puisse permettre à un ressortissant Français de faire échapper sa succession au mécanisme de la réserve héréditaire. »*

Je crois que nous devons nous aussi, au titre de l'examen de proportionnalité, indiquer à la Commission européenne les **réserves** qu'appelle sur ce point son dispositif. En l'état, la proposition excède ce qui est nécessaire pour atteindre l'objectif poursuivi. En effet, l'objectif de simplification et d'unification, que nous partageons, **ne nécessite pas de supprimer la protection accordée aux membres de la famille du défunt**. Cette suppression n'est donc pas proportionnelle à l'objectif poursuivi. Ce que montre clairement le fait que, par ailleurs, la proposition de la Commission européenne reconnaît à chacun la faculté de régler librement sa succession par testament.

Je rappelle que, lors de l'examen du livre vert de la Commission européenne, la délégation pour l'Union européenne avait adopté des conclusions qui approuvaient l'harmonisation des règles de conflit de lois et de compétences mais qui demandaient déjà la préservation du principe de la réserve héréditaire.

Compte rendu sommaire du débat

M. Hubert Haenel :

C'est un sujet à la fois intéressant et important. Il comporte de grands enjeux qui sont très ancrés dans l'histoire et les traditions juridiques des États membres. Je rappelle que nos observations seront communiquées directement à la Commission européenne dans le cadre du dialogue politique sur la subsidiarité et la proportionnalité.

M. Richard Yung :

Ces observations s'ajouteront-elles à la proposition de résolution qu'a adoptée la commission des lois ?

M. Hubert Haenel :

C'est bien le cas. La proposition de résolution est destinée au Gouvernement au titre de l'article 88-4 de la Constitution. Nos observations sont transmises directement à la Commission européenne dans le cadre du dialogue politique qui a été mis en place par le président Barroso en 2006.

M. Richard Yung :

Nous avons eu un débat au sein de la commission des lois sur la proposition de règlement. Les observations proposées par le rapporteur reflètent bien ce débat.

Quels seront les effets pratiques de la proposition de règlement ? Quelle sera la portée du certificat successoral européen ?

M. Pierre Fauchon :

La proposition de règlement permet de régler les conflits de lois et de juridiction. Le certificat successoral européen facilitera la preuve.

M. Hubert Haenel :

Qui produira ce certificat successoral européen ?

M. Pierre Fauchon :

Ce sera le juge saisi ou un officier ministériel comme le notaire en droit français.

M. Richard Yung :

Ce texte constitue un progrès car il existe beaucoup de situations très compliquées en matière de succession. J'ai notamment pu l'observer en Allemagne.

J'approuve donc les observations qui nous sont proposées. Il restera néanmoins à traiter le volet fiscal des successions.

Il en est ainsi décidé et le projet d'observations est adopté dans le texte suivant :

Observations

Proposition de règlement relative à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions et des actes authentiques en matière de successions et à la création d'un certificat successoral européen (COM (2009) 154 final).

*

La commission des affaires européennes considère :

- que l'objectif d'unifier les règles de conflit de lois et de compétences en matière de successions transfrontalières ne nécessite pas de mettre en cause la protection accordée aux membres de la famille à travers le mécanisme de la réserve héréditaire ;
- que, faute de prévoir un dispositif garantissant que l'unification de ces règles ne pourra avoir pour effet de faire échec à la réserve héréditaire, la proposition ne respecte donc pas le principe de proportionnalité.

Germany: Bundestag

Subsidiarity check on the Commission Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?

Two committees of the German Bundestag were involved in the subsidiarity check: Committee on Legal Affairs (lead committee) and the Committee on the Affairs of the European Union participating in advisory capacity (committee asked for an opinion).

2. Was the plenary involved?

Yes. The final decision of the German Bundestag on the proposal's compliance with the subsidiarity principle was taken by the plenary. It was prepared by the named committees and communicated to the plenary through a reasoned statement (= recommendation for a decision and report to the plenary). On that basis the plenary took its final vote.

3. At which level the final decision was taken and who signed it?

The decision of the plenary based on the lead committee's recommendation for a decision. It was signed by the president of the German Bundestag, Prof. Dr. Norbert Lammert.

4. Which administrative services of your parliament were involved and how?

The deliberation and decision process was supported by the administrative units of the involved committees (Secretariats), by the division PA 1 (Europe) and by the Parliamentary Secretariat of the German Bundestag.

The division PA 1 (Europe) supported the lead committee with a notation on the proposal's compliance with the subsidiarity principle and further information on the legal framework of the subsidiarity check. The named notation was distributed to all involved committees and their members as well as the parliamentary groups.

The Secretariat of the Committee on Legal Affairs prepared and organized the deliberation and decision process of the lead committee and prepared the committee's recommendation for a decision and report to the plenary. In cooperation with the Parliamentary Secretariat it finally coordinated the information of the EU institutions.

As division responsible for Bundestag's COSAC membership, the Secretariat of the Committee on the Affairs of the European Union was in charge with the general coordination

of the subsidiarity check. It distributed all relevant information (subject, procedure, responsibilities, deadline, schedule) on the COSAC subsidiarity check, examined the proposal for its committee deliberations and communicated the vote to the lead committee. Finally, it edited the questionnaire and sent it to the COSAC Secretariat.

5. In case of bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

Secretariats of both chambers' EU-committees informed each other on their participation in the subsidiarity check. There was, however, no special cooperation between Bundestag and Bundesrat.

6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?

Written information/report on the Proposal was provided by the Federal Ministry of Justice.

7. Did you consult your regional parliaments with legislative powers?

Federal State parliaments were not involved.

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?

No.

9. What was the chronology of events?

The German Bundestag basically worked within its usual scrutiny procedure on EU documents, as follows:

- Referral of the proposal to the German Bundestag (received: October 22, 2009)
- Written report on the Proposal by the Federal Ministry of Justice (October 30, 2009)
- Prioritization proposal concerning subsidiarity check and notation on subsidiarity questions (provided by division PA 1 (Europe)) (November 11, 2009)
- Deliberation and decision of the involved committees (December 2/16, 2009)
- Committee on the Affairs of the European Union: deliberation and vote, communication vote to lead committee (December 2, 2009)
- Committee on Legal Affairs (lead): recommendation for a decision and report to the plenary (December 16, 2009)
- Deliberation and decision of the plenary (final vote) (December 17, 2009)
- Transmission of the German Bundestag' decision to the EU institutions by the president of the German Bundestag (December 17, 2009)
- Transmission of the recommendation for a decision and report to the plenary and the questionnaire to the COSAC Secretariat (December 17, 2009)

10. Did you cooperate with other national parliaments in the process? If so, by what means?

The EU-Committee communicated especially with the French Assemblée nationale on the results of the subsidiarity check.

11. Did you publicise your findings?

The decision of the Bundestag will be published on the IPEX website in English and French in order to inform other national parliaments on the check's result.

Findings:

12. Did you find any breach of the principle of subsidiarity?

A breach was not found. Regarding the legal basis the Bundestag sees a need for clarification on certain points, especially the European Certificate of Succession. There were, however, no concerns regarding the compliance with the principle of subsidiarity (and proportionality).

13. Did you adopt a reasoned opinion on the Proposal?

No. A reasoned opinion under Protocol 2, Treaty of Lisbon was not adopted. A letter of the President of the German Bundestag is sent within the deadline to the EU institutions, containing the final vote of the plenary.

14. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?

Within the parliamentary discussions the Commission's justification has not been criticized for not being sufficient.

15. Did you encounter any specific difficulties during this subsidiarity check?

No.

16. Any other comments?

No.

Germany: Bundesrat

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?

The Committee for European Union Questions is the lead committee in the Bundesrat for deliberations on draft EU legislation and other EU proposals. The Committee for European Union Questions deliberates on the basis of recommendations from the relevant sector-specific committees. The Legal Affairs Committee also examined the draft Regulation.

2. Was the plenary involved?

In its meeting on 11th November 2009, the Legal Affairs Committee deferred its deliberations until 27th January 2010. The aim of this is to give the ministries of justice in the various federal states an opportunity to comment on how the envisaged provisions would affect enforcement of the law by the courts. With the exception of the supreme courts, the issue of jurisdiction falls within the ambit of the federal states.

In its meeting on 13th November 2009, the EU Committee also postponed its deliberations, because as a general rule it does not examine draft EU legislation until deliberations have been concluded in the relevant sector-specific committees.

On the basis of the opinions submitted, the Legal Affairs Committee discussed the draft legislation on 26th January 2010 and the EU Committee examined the draft on 29th January 2010. On the basis of these deliberations, the Bundesrat adopted an Opinion in its plenary session on 12th February 2010.

3. At which level was the final decision was taken and who signed it?

Cf. the answer to question 2.

4. Which administrative services of your parliament were involved and how? Please specify.

On the basis of deliberations on the draft legislation in the Legal Affairs Committee and in the EU Committee, the Office of the EU Committee compiled the recommendations from the committees into a text, which formed the basis for the vote in the Bundesrat plenary session.

5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

As the deliberations in the Legal Affairs Committee have been deferred, thus falling on a date after the 8-week deadline, the subsidiarity check was not coordinated with the Office of the German Bundestag's lead committee.

6. Did your government provide any information on the compliance of the proposal with the principle of subsidiarity?

Prior to deliberations in the Legal Affairs Committee, the Federal Government transmitted a brief report paper on the draft Regulation, together with a comprehensive appraisal of the content of the draft Regulation. It transpires from these documents that the Federal Government does not have any reservations concerning respect for the subsidiarity principle.

In addition, the Federal Government also gave a detailed explanation of its appraisal in respect of the draft legislation in the meetings of the Legal Affairs Committee and the EU Committee.

7. Did you consult your regional parliaments with legislative powers?

It is incumbent upon the governments in the federal states to ensure that regional parliaments are consulted.

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?

Stakeholders, such as for example non-governmental organisations, are generally consulted directly by the federal states.

9. What was the chronology of events? Please specify the dates.

The draft regulation was transmitted to the Bundesrat by the Commission on 15th October 2009 and on 22nd October 2009 by the Federal Government, in both instances in the German-language version. On behalf of the President of the Bundesrat, the Secretary General of the Bundesrat assigned the draft legislation to the Legal Affairs Committee for consideration in addition to examination by the lead committee, i.e. the EU Committee (c.f. question 1). In its meeting on 11th November 2009, the Legal Affairs Committee deferred its deliberations, as did the EU Committee in its meeting on 13th November 2009.

In the week from 25th January to 29th January 2010 the committees involved met once again and adopted their recommendations for the plenary. The EU Committee endorsed the position of the Legal Affairs Committee at this juncture.

10. Did you cooperate with other national parliaments in the process?
If so, by what means?

There was no cooperation with other national parliaments. The results of their deliberations, where available, were consulted via the IPEX system. Progress on deliberations and the interim outcome of deliberations in the Bundesrat were also entered into the IPEX system.

11. Did you publicise your findings? If so, by what means?

The Bundesrat's Resolutions are public and are available on the Internet.

Findings:

12. Did you find any breach of the principle of subsidiarity?

In its Opinion of 12th February 2010, the Bundesrat did not comment on the compatibility of the draft Regulation with the principle of subsidiarity. The Bundesrat explicitly supported the Commission's intention to accelerate processing of succession cases involving other countries by harmonising provisions on competences and conflict of laws, and by introducing a European Certificate of Succession. However the Bundesrat did identify a need to clarify and correct certain aspects of some provisions in order to ensure legal security and legal clarity in cross-border inheritance cases.

The Bundesrat considers in particular that there is a need to examine the issue of whether there is a legal basis for the EU to introduce provisions on a European Certificate of Succession, as these provisions pertain to substantive inheritance law.

In this context it should be noted that the Bundesrat considers scrutiny of the legal basis to constitute part of its scrutiny of compliance with the subsidiarity principle. If a proposal for legislation or some of the provisions contained in such legislation do not fall within the ambit of EU legislative competence, the legislation in question cannot be considered to be in compliance with the principle of subsidiarity.

13. Did you adopt a reasoned opinion on the proposal?

If so, please enclose a copy.

The Bundesrat adopted the appended Opinion concerning the draft Regulation on 12th February 2010.

14. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?

The Bundesrat had no objections to the Commission's justification concerning the subsidiarity principle.

15. Did you encounter any specific difficulties during this subsidiarity check?

No

16. Any other comments?

If the early warning system had already been applicable to the draft regulation, the Bundesrat would have adopted an Opinion within the 8-week deadline on the draft legislation's compatibility with the subsidiarity principle and would have deferred its deliberations on the other points.

Greece: Vouli ton Ellinon

Subsidiarity check on the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?
The aforementioned proposal for a regulation was examined by the Special Standing Committee for European Affairs and the Standing Committee for Public Administration, Public Order and Justice, during a joint meeting held on 11 December 2009.
2. Was the plenary involved?
No.
3. At which level the final decision was taken and who signed it?
According to the Standing Orders of the Hellenic Parliament, opinions regarding draft legislative acts of the EU are adopted by the competent Committees.
4. Which administrative services of your parliament were involved and how? Please specify.
The Directorate for European Affairs and the Directorate of Parliamentary Committees.
5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?
The Hellenic Parliament consists of one Chamber.
6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?
The competent Ministry for Justice, Transparency, and Human Rights provided a memorandum.
7. Did you consult your regional parliaments with legislative powers?
There no regional Parliaments in our country.
8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?
Comments relevant with the creation of a European Certificate of Succession were provided by the Notary Association of Athens-Piraeus-Aegean - and Dodecanese.
9. What was the chronology of events? Please specify the dates.
As soon as the greek version of the proposal was communicated, we asked the Ministry and other competent stakeholders for their comments. When these were made available, our department distributed them along with the draft legislation and other accompanying documents to all the members of the aforementioned committees as well as to all Greek MEPs. A few days before the joint meeting, a draft opinion was also distributed to them.

10. Did you cooperate with other national parliaments in the process? If so, by what means?

We did not cooperate, but consulted their findings through IPEX and through our Parliament's Representative in Brussels.

11. Did you publicise your findings? If so, by what means?

When the opinion text was finalised and approved by the Bureau of the responsible Committees it was immediately uploaded at the relevant scrutiny page of IPEX.

Findings:

12. Did you find any breach of the principle of subsidiarity?

No. However the majority of the Committees members expressed reservations concerning several provisions, which were included in our Parliament's opinion.

13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.

Yes.

14. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?

All relevant data are included in the opinion text.

15. Did you encounter any specific difficulties during this subsidiarity check?

No.

16. Any other comments?

No.



HELLENIC PARLIAMENT

JOINT SESSION

- **SPECIAL STANDING COMMITTEE ON EUROPEAN AFFAIRS**
- **STANDING COMMITTEE ON PUBLIC ADMINISTRATION, PUBLIC ORDER AND JUSTICE**

On **Friday, December 11, 2009**, the aforementioned committees of the Hellenic Parliament convened to a Joint Session in order to adopt an:

OPINION

On the Proposal for a
REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession

The members of the aforementioned Committees having considered:

- The Proposal for a regulation, of the European Parliament and the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession,
- The Commission Staff Working Document accompanying the proposal for a regulation (Impact assessment),
- The memoranda provided by the Ministry for Justice, Transparency, and Human Rights and by the Notary Association of Athens-Piraeus-Aegean-Dodecanese.
- The oral presentation by the Minister for Justice, Transparency, and Human Rights, Mr Haris Kastanidis,

Have adopted by majority the following opinion:

The proposal for a Regulation under consideration comports with the **subsidiarity principle** as its objectives (arrangement of cross-border succession disputes) can not be adequately served individually by the member-states.

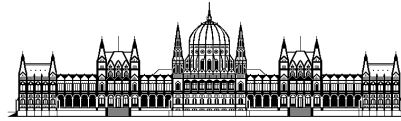
It also complies with **the proportionality principle**, as its scope is limited to the necessary extent: It does neither harmonize law governing property, nor succession law of member states and does not affect their succession taxation status.

However, the members of the Committees wish to express the following **reservations on the proposal's actual content**:

- The Proposal for a Regulation stipulates by the provision of article 16 the law of habitual residence of the testator at his time of death as applicable both to succession to movable assets and property (estate). Article 28 of the Greek Civil Code stipulates as applicable to succession relations the law of nationality of the deceased at his time of death and, therefore is in opposition to article's 16 provision of the Proposal. The law governing nationality provides greater protection and legal certainty as compared to the law of habitual residence, which may provide grounds for contestation or dispute. The opening of borders and markets for EU citizens facilitates their frequent movement, which could possibly challenge the specification of habitual residence. Moreover, the law of habitual residence may lead to the "forum shopping" phenomenon (e.g. retired persons choosing to reside at a certain country during the last years of their lives, based on the criterion of it's law application concerning regulation of succession).
- Article 18 introduces the legal formulas of agreements as to succession and joint wills, which contravene an interdictory statute and therefore are null and void according to internal law (368 C.C *Agreement as to succession of a living person*, 1717 C.C *Joint will*)
- In what concerns the European Certificate of Succession, further clarification should be provided regarding the authenticity of its content and its contestation process, as well as the issues of creating a European Certificate of Succession central data basis , which will allow for central internet or intranet administration/management , but also the appointment of the whole system's administrator.
- Article 6 (*Residual jurisdiction*): the categories of assets or succession properties, as well as the value of the critical asset in relation to the assets' or properties' total value could be jointly assessed, which would lead to the applicability of the said provision. Moreover, sub-case c could lead to "forum actoris" (action at law at the courts of the plaintiff's habitual residence), something not considered advisable in general , as providing the plaintiff with special privileges.
- Article 24 (*Estate without a claimant*): these provisions should be examined within the spirit of protecting citizens' property in third countries against potential adverse measures of the

country where their property is located. Protection may be drawn from the provision of article 27 par.1 as well.

- Article 27 (*Public policy*): regarding par.2 provisions and specifically regarding the protection of the reserved portion of an estate. Our national law attributes great importance to family cohesion and therefore regards the protection of the reserved portion of an estate solely as a matter of public policy.
- Article 30 (*Grounds of non-recognition*) : provisions of this article are met on a permanent basis in texts of similar regulations of a juridical nature. Moreover, in the frame of a detailed examination of the said article, issues of relevant provisions' compatibility with EHRC and fundamental juridical principles may be examined.
- Article 38 (*Content of the application*) : the article contains a list of information to be written on a special form by the person applying for the issue of a certificate of succession. The issue of whether the claimant should be aware of contestation/disputation possibility concerning rights to succession needs further examination.



**Hungarian National Assembly
Committee on European Affairs**

Answers to the COSAC questionnaire concerning the subsidiarity check

of the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession

COM(2009)154 final; 2009/0157(COD)

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?

The Committee on European Affairs was involved in the subsidiarity check.

Following the internal preparations within the Secretariat of the Committee and with experts of factions, the subsidiarity check was put on the agenda of the Committee sitting of 17 November 2009.

2. Was the plenary involved?

No. According to the Standing Orders of the Hungarian National Assembly the plenary is involved in the procedure if a breach of the principle of subsidiarity is found by the Committee on European Affairs. If that was the case, the plenary should decide on the motion of the Committee on European Affairs of the Hungarian National Assembly within fifteen days.

3. At which level the final decision was taken and who signed it?

The final decision was taken by the Committee on European Affairs since the breach of subsidiarity was not found.

4. Which administrative services of your parliament were involved and how?
Please specify.

Generally, subsidiarity check is carried out by the Committee on European Affairs. Besides the secretariat the permanent representative in Brussels has been involved in the professional preparations.

5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

The Hungarian National Assembly is a unicameral parliament.

6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?

At this stage there has been no information provided by the government on the Proposal.

7. Did you consult your regional parliaments with legislative powers?

No, in Hungary there are no regional parliaments.

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?

No, the advisers at the Secretariat of the Committee on European Affairs examined the Proposal thoroughly and presented their findings in a paper. No external expertise was used.

9. What was the chronology of events? Please specify the dates.

The first language versions of the Proposal were published on 14 October 2009, the official eight-week period started on 21 October 2009.

The members of the Committee and the experts of the political groups were informed via email about the adoption of the Proposal and the launch of the subsidiarity check on the same day.

The advisors of the Secretariat started the examination of the draft and their preliminary findings were sent to the Members of the Committee by the beginning of November.

The proposal was discussed by the Committee on European Affairs on its meeting of 17 November 2009.

10. Did you cooperate with other national parliaments in the process? If so, by what means?

Yes, the Committee on European Affairs cooperated through the permanent representatives in Brussels and through COSAC.

11. Did you publicise your findings? If so, by what means?

The minutes of the Committee meeting and a short memo summarizing the main discussion points were published on the website of the Committee. The Committee made available its opinion on the IPEX website.

Findings:

12. Did you find any breach of the principle of subsidiarity?

No breach of subsidiarity was found by the Committee on European Affairs.

13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.

No.

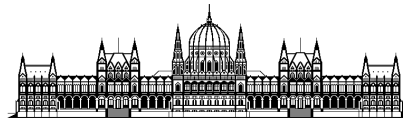
14. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?

The Committee on European Affairs found the justification satisfactory, nevertheless, the Committee underlined the necessity of the respect of Member States' national traditions in the field of successions.

15. Did you encounter any specific difficulties during this subsidiarity check?

No difficulties occurred.

16. Any other comments? –



**Hungarian National Assembly
Committee on European Affairs**

**Opinion
of the Committee on European Affairs of the Hungarian National
Assembly
concerning the subsidiarity check**

of the Proposal for Regulation of the European Parliament and of the Council on jurisdiction,
applicable law, recognition and enforcement of decisions and authentic instruments in
matters of succession and the creation of a European Certificate of Succession

COM (2009) 154, 2009/0157/COD

By virtue of Paragraph 1 of Article 134/D of the Standing Orders of the Hungarian National Assembly, the Committee on European Affairs is competent to examine the enforcement of the principle of subsidiarity in the draft legislations of the European Commission.

The Committee on European Affairs discussed the Proposal on its meeting of 17 November 2009.

The Committee on European Affairs welcomes the goals of the Proposal concerning the establishment of harmonised rules in the field of cross-border succession issues. The Committee agrees that the current number of possible positive and negative conflict of laws and jurisdictions in cross-border cases should be reduced in order to guarantee legal certainty and equal legal protection.

The Committee underlines that mutual recognition of judgments and mutual trust between the Member States' authorities concerned are the prerequisites for the effectiveness of the Proposal. The Committee emphasizes that the Proposal should contribute to the abolishment of the current limitations with regard to the full exercise of private property rights in cases involving cross-border successions.

The Committee finds that the chosen legal basis, Article 61 c) and the second indent of Article 67(5) of the EC Treaty provide sufficient ground for cooperation in this field.

The Commission's obligation to justify the respect for the subsidiarity principle seems to have been fulfilled since the Explanatory Memorandum, the Preamble and the attached Impact Assessment contains a declaration and brief reasoning on the necessity and added-value of the Proposal. The Committee recognises that Community-level measures may bring real added-value to the current practice and the daily life of the EU citizens.

The Committee on European Affairs calls the attention to the necessity of the respect of Member States' national traditions in the field of successions. In particular, it is necessary to assure that the Proposal does not have any impact on the national substantive regulations concerning the effects of *inter vivos gifts*.

It also should be pointed out that the relations between the European Certificate of Succession to be introduced by the Proposal and decision issued by competent national authorities should be clearly determined since the eventual difference in the content of these types of documents may lead to legal uncertainty.

Finally, the Committee finds that the consistency between the definitions of habitual residence applied by the Proposal and the term "residence" used in national regulations should be examined.

The Committee concludes that **the breach of subsidiarity was not found** since the Proposal respects the relevant competence of the Member States.

Budapest, 17 November 2009

Ireland: Houses of the Oireachtas

Joint Committee on European Scrutiny

Evaluation of the subsidiarity check – COSAC questionnaire

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?

The subsidiarity check with regard to the Proposal for a Regulation on the applicable law, jurisdiction, recognition of decisions and administrative measures in the area of successions and wills (COM 2009 154) was conducted by the Joint Committee on European Scrutiny (JCES). As this is the parliamentary committee with the primary responsibility for subsidiarity checks and the scrutiny of EU legislative proposals, there were no other committees involved.

2. Was the plenary involved?

No. This is the last subsidiarity check before the full coming into effect of the Lisbon Treaty so the subsidiarity check was undertaken by the JCES acting as a committee of the Houses of the Oireachtas.

[Note - now that the Treaty has come into effect since 1 December, the Irish Parliament is considering the arrangements to be put in place to give effect to the enhanced role for national parliaments. It is likely that the plenary will be afforded a more active role, particularly if a reasoned opinion on subsidiarity grounds is being considered within the Oireachtas.]

3. At which level the final decision was taken and who signed it?

The check and the reasoned opinion were finalised and subsequently adopted by the JCES acting as a committee of the Houses of the Oireachtas.

4. Which administrative services of your parliament were involved and how (please specify)?

The Secretariat of the JCES, including policy advisors, were involved in facilitating and administering the subsidiarity check. A template was used which had been provided previously by the Office's Parliamentary Legal Adviser.

5. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?

Yes. At the request of the JCES, specific briefing information was provided by the Department of Justice, Equality and Law Reform the Government department with primary responsibility.

6. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

Yes. As the JCES is a joint committee of the Houses of the Oireachtas it includes members of both the Dáil and the Seanad. Therefore, both Houses were involved simultaneously in the subsidiarity check.

7. Did you consult your regional parliaments with legislative powers?

There are no such regional parliaments in Ireland.

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?

The JCES did seek the views of the Irish delegation to the Committee of the Regions. The Committee also had regard to the information publically available on the potential need for this measure, and the benefits/issues involved. There was not time to directly with external bodies due to the existing large workload the Committee has in looking draft new EU legislation.

9. What was the chronology of events?

The draft proposal was first considered by the JCES on 3 November. At this meeting, it was agreed to seek the views of the relevant Government department (Department of Justice). A policy advice note was prepared based on the available evidence and submitted to the Committee. The JCES decided at its meeting today on 15 December that a reasoned opinion is not necessary as the proposal does not appear to breach the principle of subsidiarity.

10. Did you cooperate with other national parliaments in the process? If so, by what means?

Yes. The Committee was able to make increased use of IPEX which seems to have improved in terms of functionality. It was also very valuable that the Oireachtas Liaison Officer in Brussels was able to work with his colleagues across member states to provide timely information from other parliaments.

11. Did you publicise your findings? If so, by what means?

The Committee's decision is being posted now on the website of the JCES.

12. Has your parliament introduced any procedural changes with regard to the subsidiarity check mechanism since September 2008? If so, please specify how.

No procedural changes have been introduced since September 2008 up to Treaty implementation on 1 December 2009. However the position is being actively progressed since 1 December. Motions were passed in both chambers on 10 December to put a number of temporary procedural changes into place.

In addition the two European Committees in the Oireachtas have been given six months to do a joint report for the Houses on the permanent procedural changes needed. The report will look at how best to calibrate the subsidiarity checking mechanism so that this important responsibility is adequately provided for.

Findings:

13. Did you find any breach of the subsidiarity principle?

No.

14. Did you adopt a reasoned opinion on the Proposal? (If so, please enclose a copy)

None adopted.

15. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?

The JCES found the Commission's justification to be far more complete than in some previous subsidiarity tests. There were more quantitative/qualitative measures given which aids the depth of analysis in the impact assessment.

16. Did you encounter any specific difficulties during this subsidiarity check?

No specific difficulties to report.

17. Any other comments?

None at this time. Except to thank the COSAC secretariat for their efficient and helpful attitude in co-ordinating these tests.

*Joint Committee on European Scrutiny
15 December 2009*

Italy: Camera dei Deputati

ITALIAN CHAMBER OF DEPUTIES

Procedures:

As COM(2009)154 was adopted by the European Commission before the entry into force of the Treaty of Lisbon, the Chamber **followed the ordinary scrutiny procedure**. Under this procedure the Committee on EU Policies issued an opinion to the Committee which is competent by subject matter (Committee on Justice).

(For EU draft legislative acts adopted since 1°december 2009 a specific procedure for the subsidiarity check will be applied, according to the the binding **opinion** of the **Committee on rules of procedure** of the Italian Chamber of Deputies concerning the interpretation of the Rules on dealing with EU Affairs in the Chamber: the main competence will be conferred upon the EU Affairs Committee which issues an opinion to the Government and to the EU Institutions.)

1. Which committees were involved?

The Committee on EU Policies issued an opinion to the Committee on Justice which is supposed adopt a final document in the following weeks.

2. Was the plenary involved?

No.

3. At what level the final decision was taken and who signed it?

See answer 1

4. Which administrative services of your parliament were involved?

The Department for EU Affairs, the secretariat of the EU Affairs Committee and the Research Department

5. In case of a bicameral system, did you coordinate with the other chamber?

No

6. Did your government provide any information as part of the scrutiny process?

No.

7. Did you consult regional parliaments with legislative powers?

No

8. Did you consult any non-governmental organisations, interests groups, external experts or other stakeholders?

No

9. What was the chronology of events?

The Committee on EU Policies started the consideration of the proposal on 10 December. and issued an opinion on 17 December .

10. Did you cooperate with other national parliaments in the process? If so, by what means?

Information about any step of the scrutiny of the proposal within the Italian Chamber was provided timely in the IPEX web site. The Department for EU Affairs provided the EU Policies Committee with information about the state of scrutiny in other parliaments by using IPEX.

11. Did you publicise your findings (e.g. in a special press release)?

No

Findings:

5. Did you find any breach of the subsidiarity principle?

No. In its opinion the Committee on EU Policies found that the proposal fully complies with the principle of subsidiarity.

6. Did you adopt a reasoned opinion on the Proposal? (If so, please enclose a copy)

No. A reasoned opinion could be adopted for draft legislative acts adopted after 1st December 2009 (See procedural explanation).

7. Did you find the Commission's justification with regard to the subsidiarity principle satisfactory?

Yes.

8. Did you encounter any specific difficulties during the examination?

No

9. Any other comments?

A summary of the content of the EU affairs committee opinion will be published in the IPEX web site

Italian CHAMBER OF DEPUTIES
The Committee Department

Opinion

on the “Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession” [COM (2009)154 final].

The Committee on European Union Policies,

- having regard to the “Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession” (COM(2009)154 final);
- whereas the data available show that cross-border successions are very frequent and involve securities and real assets of considerable value;
- whereas the existence of highly diverse national legislations entails overly-onerous costs and administrative burden for EU citizens;
- welcoming the European Commission’s intention to adopt measures in this respect and establish a less fragmented and uncertain legal framework by defining common rules on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments and the establishment of a European Certificate of Succession;
- whereas the grounds for adopting EU legislation to regulate the matter appear to be well founded according to the subsidiarity principle;
- whereas the proposal’s legal basis (which, following the Lisbon Treaty’s entry into force, is Article 80(2) of the Treaty on the Functioning of the European Union) appears appropriate in relation to the scope and the aims of the proposed measures;
- whereas the adoption of legislation at EU level must not prejudice the safeguard of the family, which is provided for by the Italian legal system, in the first place through the provisions of the Constitution;
- whereas the EU legal order, too, protects family law by providing, in particular under article 81(3) of the Treaty on the Functioning of the European Union, that family-law measures with trans-national implications be adopted by way of a special legislative procedure, whereby the Council shall take its decisions unanimously after prior consultation with the European Parliament and by according national Parliaments a right to opposition in this matter;

- considering that the proposal for a regulation adopts the deceased person's habitual residence at the moment of death as the criterion for identifying which law is applicable, such criterion being the one most widely used in Member States, but nevertheless the same proposal for a regulation does not provide a clear definition of it;
- given that the proposal for a regulation under consideration does not affect the way in which Member States tax inheritance and that, with a view to the Communication that the European Commission is going to present on the subject in 2010, it will be appropriate to consider the adoption of measures aimed at resolving the current discrepancies between national legislations, which can lead to cases of double taxation or, conversely, of tax avoidance;
- considering that in its Resolution with recommendations to the Commission on succession and wills (adopted on 16 November 2006) the European Parliament, *inter alia*, stated its hope that a European network of national registers of wills would be set up by linking up existing national registers;
- noting the need for the present Opinion to be transmitted, together with the final document approved by the relevant parliamentary Committee, both to the European Commission (for the purposes of political dialogue) and to the European Parliament;

Hereby expresses

ITS FAVOURABLE OPINION

on condition that:

- 1) in order to prevent prejudice to the protection of family members provided for by the national legal system (in that it entitles them to a share of the deceased's estate), the regulation contain provisions aimed at guaranteeing that the said family members may nevertheless assert the rights accorded them by the existing legislation of the Member State of which the deceased was a citizen, if more favourable;
- 2) a specific provision aimed at defining the concept of habitual residence, understood as the actual residence of the *de cuius*, be inserted into the text of the regulation, so as to avoid possible uncertainty and contradictory judgements in cases of litigation;

and with the following remarks:

Consideration should be given to the appropriateness of including in the regulation's text a measure on the establishment of a European network of national registers of wills by linking up existing national registers, in order to facilitate the search for and ascertainment of the provisions of a deceased person's last will.

Italy: Senato della Repubblica

Replies of the Italian Senate to the COSAC Questionnaire on subsidiarity compliance check on the proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (COM(2009)154).

To COSAC Secretariat (secretariat@cosac.eu).

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?

The proposal was referred to the Committee on Justice as the committee having jurisdiction over the matter ant to the Committee on Eu policies for an advisory remit.

2. Was the plenary involved?

No

3. At which level the final decision was taken and who signed it?

The Committee on Justice hasn't concluded scrutiny yet. The Committee on EU policies issued an opinion on 2 december 2009, within the 8 weeks time. Senate Rules of procedure state that if the Committee having jurisdiction over the subject matter (the Committee on Justice in this case) does not issue its "final" decision within 15 days counting from the date when the opinion of the Committee on EU policies is issued, then the opinion of the Committee on EU policies should be considered the final decision of the Senate. In such case, the European Affairs Committee shall take another vote on the opinion, but only to "upgrade" it to. The vote is taken by simple majority, with the presence of the majority of members (15 out of 29).

All opinions issued by Senate committees scrutinising EU business are signed by the rapporteurs.

4. Which administrative services of your parliament were involved and how? Please specify.

The European Affairs Office followed the scrutiny of the proposal and prepared documentation on it. The Secretariats of the Committee on Eu policies and the Committee on Justice were involved too.

5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the

other chamber?

No.

6. Did your government provide any information on the compliance of the Proposal with

the principle of subsidiarity?

No.

7. Did you consult your regional parliaments with legislative powers?

No.

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?

No.

9. What was the chronology of events? Please specify the dates.

On 3 November 2009 the proposal was referred to the Committee on Justice and to the Committee on EU policies.

On 11 November 2009 the Committee on Justice started consideration.

the Committee on EU policies started consideration on 25 November 2009 and ended it on 2 December 2009 issuing an opinion to the Committee on Justice.

10. Did you cooperate with other national parliaments in the process? If so, by what means?

No. The opinion of the French National Assembly has been taken into consideration.

11. Did you publicise your findings? If so, by what means?

Yes. As usual, a summary report of the sittings was published on the Senate website the day following the Committee meetings. The papers adopted and the opinion issued are attached to the reports of the sittings. The opinion is also published on the IPEX website, at the following page:

http://www.ipex.eu/ipex/cms/home/Documents/dossier_COD20090157/pid/45639?matrix=1260957888449

Findings:

12. Did you find any breach of the principle of subsidiarity?

See answer to question 13.

13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.

The Committee on Eu policies expressed a positive opinion on the Proposal as a whole. However expressed a critical opinion on the wording of article 27(2) because, there would appear to be reasonable doubts regarding respect of the legal basis which is needed to govern this subject area, whose linkage with family law (which is excluded from co-decision under the provisions of article 67(5) second indent of the EC Treaty), albeit indirectly and under the rules governing "conflicts of law" may be reasonably asserted. In fact, under Italian legislation the choice of the law applicable to the succession by individuals must not interfere with the rights which Italian law grants to

legitimate heirs resident in Italy, that is to say that Italian law makers has clearly acted in favour of the closest family members as legitimate heirs. Consequently, in this particular part, the Proposal differs from Italian law because under article 27(2) of the proposal “the application of a rule of the law determined by this Regulation may not be considered to be contrary to the public policy of the forum on the sole ground that its clauses regarding the reserved portion of an estate differ from those in force in the forum”. Therefore the Committee has asked that the adoption of a measure of this kind should be carefully reconsidered because the application of co-decision with qualified majority voting on the Council might not be enough adequate.

14. Did you find the Commission’s justification with regard to the principle of subsidiarity satisfactory?

See answer to question 13.

15. Did you encounter any specific difficulties during this subsidiarity check?

No.

Latvia: Saeima

Riga, December 16, 2009
No. 9/17-

European Commission

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European Parliament

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European Council

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COSAC Secretariat

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On the subsidiarity and proportionality

The participants of the COSAC Chairpersons meeting on 18 February 2008 in Ljubljana agreed to carry out the subsidiarity check on the Proposal for a Regulation of the European Parliament and of the Council on the applicable law, jurisdiction, recognition of decisions and administrative measures in the area of successions and wills.

Accordingly, the Saeima (Parliament) of the Republic of Latvia has carried out a subsidiarity and proportionality check concerning the final wording of the Proposal for Regulation of the European Parliament and the Council COM(2009)154 on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession.

On 11 December 2009 the given issue was examined and the final decision was taken by the Saeima European Affairs Committee. The Saeima European Affairs Committee's initial assessment regarding observance of subsidiarity and proportionality principles is as follows: Saeima European Affairs Committee considers that the final wording of the Proposal for Regulation of the European Parliament and the Council COM(2009)154 on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession complies with the principles of subsidiarity and proportionality and the regulation of the said issue falls within the competence of the European Union.

In order to facilitate the compilation of the replies, we have structured our reply in the form of answers to the questions posed in the aide-mémoire prepared by the COSAC Secretariat.

Annex: A copy in English (four pages) of the opinion of the Saeima European Affairs Committee.

Sincerely,

Vaira Paegle
Chairperson of the Saeima
European Affairs Committee

Opinion of the Saeima European Affairs Committee on the subsidiarity and proportionality check for the final wording of the Proposal for Regulation of the European Parliament and the Council COM(2009)154 on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession

Procedure:

1. Which parliamentary committees were involved in the subsidiarity check and how?

The Saeima European Affairs Committee and Legal Affairs Committee considered the proposal.

2. Was the plenary involved?

The given issue has not been on the agenda of Saeima plenary meetings.

3. At which level the final decision was taken and who signed it?

Rules of Procedure of the Saeima Article 185¹. (1) state, that the Saeima shall participate in EU affairs through the European Affairs Committee unless the Saeima has ruled otherwise.

Accordingly final decision was taken by Saeima European Affairs Committee and covering letter signed by Chairperson of the Saeima European Affairs Committee.

4. Which administrative services of your parliament were involved and how? Please specify?

The Saeima European Affairs Committee and Legal Affairs Committee. Other administrative services of the Saeima were not involved in the scrutiny process.

5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

Latvia has a unicameral parliament.

6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?

On the part of the Latvian government, the Ministry for Justice was involved in the scrutiny process. Ministry for Justice provided opinion regarding the observation of the principles of subsidiarity and proportionality in the given item.

7. Did you consult your regional parliaments with legislative powers?

Since the given proposal does not lie within the competence of Latvian local governments, local governments were not consulted on this issue.

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders??

In view of the specific nature of the issue, other external actors were not involved in the examination.

9. What was the chronology of events? Please specify the dates.

On 21 October 2009, the Saeima European Affairs Committee transmitted a letter to the Ministry of Justice of the Republic of Latvia and Legal Affairs Committee with a request to assess the compatibility of the given proposal with the principles of subsidiarity and proportionality.

On 9 December 2009, the Saeima European Affairs Committee received the opinion of the Ministry of Justice of the Republic of Latvia regarding the observation of the principles of subsidiarity and proportionality in the given proposal.

On 11 December 2009 the issue was examined and final decision was taken by the Saeima European Affairs Committee. Chairperson and members of Legal Affairs Committee participate in European Affairs Committee meeting and contributed their views to the European Affairs Committee.

10. Did you cooperate with other national parliaments in the process? If so, by what means?

While preparing its opinion on subsidiarity and proportionality check the Saeima European Affairs Committee did not directly cooperate with other EU national parliaments. European Affairs Committee followed subsidiarity and proportionality checks in other EU parliaments through IPEX and Permanent Representative to the EU of the Parliament of Latvia.

11. Did you publicise your findings? If so, by what means?

The conclusions were not published; however, a press release on the last meeting of the European Affairs Committee during which the subsidiarity and proportionality check was discussed was prepared and sent to the Latvian news agencies.

Findings:

12. Did you find any breach of the principle of subsidiarity?

Breaches of the subsidiarity and proportionality principles were not detected.

13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.

Taking into account the fact that no breaches of the subsidiarity and proportionality principles were detected, the reasoned opinion on the given item was not adopted.

14. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?

The justification elaborated in Explanatory memorandum where considered as satisfactory.

15. Did you encounter any specific difficulties during this subsidiarity check?

No.

16. Any other comments?

This proposal for a regulation has been drafted by taking into account the increasingly growing number of cross-border succession cases within the European Union. The variety of substantive law provisions and of provisions of applicable laws and jurisdiction, a large number of authorities where people can apply in case of a cross-border succession, as well as the need to settle matters of succession in different countries concurrently because of differing regulations, hampers the freedom of movement in the European Union. Currently, people face major difficulties in realizing their rights in matters of cross-border succession. For example, one should bear in mind that most countries apply the principle that in disputes over real estate, exclusive jurisdiction belongs to the country where the property is located. Thus people who need to settle matters of succession have to deal with the authorities of various countries in order to start settling the succession. Even if the national legislative acts concerning international private law allowed a seemingly effective solution – giving to the court (authority) of this country a jurisdiction to govern the succession as a whole – then probably there would be a problem with recognizing and enforcing this decision in countries where some property items of the succession are actually located. This creates a situation whereby the potential heir has to initiate a new succession process in each country where some property items of the succession are located; furthermore, each country may have different rules regarding private law with different provisions for applicable law, jurisdiction, etc., which makes the succession settlement process burdensome, bothersome, and ineffective, as well as cost-inefficient and time-consuming. Concurrently this uncertain and hardly predictable situation poses a threat to legal predictability and legitimate expectation, since there is the risk of “running to court” – namely, people, knowing that regulations in force in different countries differ, can manipulate the possible outcomes of the case, depending on who initiates the case in the competent authority of the country that offers them more beneficial regulation.

The objective of this draft regulation is to solve the above-mentioned problems and to enable people living in the European Union to organize their succession matters effectively in advance with the last will in order to guarantee the rights of heirs and/or legatees and of other persons linked to the deceased, as well as creditors of the succession. Taking into account the fact that the draft regulation applies only to cross-border succession matters that are of international nature, the problematic issues in this context cannot be solved by action taken by Member States only, or only at national level. Furthermore, the Saeima European Affairs Committee regards that such regulation at Union level that is foreseen in this draft regulation would ensure a more effective functioning of the internal market by encouraging the free movement of people than would similar measures if they were taken individually in the framework of the national regulations of each Member State.

At the same time, Article 67.4 of the Treaty on the Functioning of the European Union provides that “The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters”. Thus, taking into account the fact that practical problems in cross-border succession cases have been identified and that solving these problems at national level would not be possible, as well as the fact that the Treaty on the Functioning of the European Union has a clearly defined objective of facilitating cooperation among Member States in civil matters, one can conclude

that inaction of the Union in seeking the solution to the problems would contradict provisions and objectives set forth by the Treaty on the Functioning of the European Union.

Article 81 of the Treaty on the Functioning of the European Union, which sets forth the judicial cooperation in civil matters having cross-border implications, also refers to succession cases in which there is more than one Member State involved. In addition to facilitating effective access to justice, as well as the mutual recognition and enforcement of judgments, Article 81 of the Treaty on the Functioning of the European Union sets forth measures aimed at ensuring the compatibility of the rules applicable in the Member States concerning jurisdiction and conflict of laws. With respect to the relevant sphere of competence, the draft regulation offers uniform rules for jurisdiction, applicable law, and recognition and enforcement of judgments.

The Saeima European Affairs Committee is of the opinion that the measures set forth in the draft regulation aimed at effectively guaranteeing to the Community citizens the rights of heirs and/or legatees and of other persons linked to the deceased, as well as creditors of the succession, are proportional and appropriate. First, the draft regulation sets forth uniform rules for jurisdiction, applicable law, and recognition and enforcement of judgments, etc, which ensure simplified and more efficient settlement of cross-border successions in the European Union. Second, measures set forth in the draft regulation are appropriate and proportional with the set goal. Thus these measures do not exceed which is necessary for ensuring the intended effect and achieving the set goal, namely, ensuring legitimate expectation, legal certainty, and clarity of the legal regulation in all cross-border successions in the European Union.

In view of the afore-mentioned facts, The Saeima European Affairs Committee's initial assessment about observance of subsidiarity and proportionality principles is as follows: the European Commission has chosen an adequate framework for developing legislative act. Cause aims put forward in the Regulation of the European Parliament and the Council can not be fully achieved by Member States acting alone. Considering proportionality, Saeima European Affairs Committee considered that planned requirements put forward in Regulation of the European Parliament and the Council are adequate and do not exceed the minimum necessary to achieve the aims.

Taking into consideration the above-mentioned, the Saeima European Affairs Committee considers that the final wording of the Proposal for Regulation of the European Parliament and the Council COM(2009)154 on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession complies with the principles of subsidiarity and proportionality and the regulation of the said issue falls within the competence of the European Union.

REPORT TO COSAC

**BY THE COMMITTEE ON EUROPEAN AFFAIRS
OF THE SEIMAS OF THE REPUBLIC OF LITHUANIA**

**ON THE SUBSIDIARITY CHECK OF THE COMMISSION PROPOSAL FOR A
REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON
JURISDICTION, APPLICABLE LAW, RECOGNITION AND ENFORCEMENT OF
DECISIONS AND AUTHENTIC INSTRUMENTS IN MATTERS OF SUCCESSION
AND THE CREATION OF A EUROPEAN CERTIFICATE OF SUCCESSION**

19 November 2009

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?

Three parliamentary committees were involved: the Committee on European Affairs and two specialised committees, the Committee on Legal Affairs and Committee on Human Rights. The specialised committees submitted their expert conclusions to the Committee on European Affairs, which made the final decision.

2. Was the plenary involved?

No.

In accordance with the provisions of the Statute (Rules of Procedure) of the Seimas, reasoned opinions are subject to adoption at the plenary in cases where the Committee on European Affairs has established non-compliance with the principle of subsidiarity. In cases where the European Affairs Committee, having obtained an opinion of the specialised committee, concludes that draft legislative proposal does not violate the principle of subsidiarity, the matter is completed without involvement of the plenary.

3. At which level the final decision was taken and who signed it?

The final decision was taken by the Committee on European Affairs and signed by the Chairman of the Committee.

4. Which administrative services of your parliament were involved and how (please specify)?

The Legal Department of the Office of the Seimas was asked to submit its conclusion on the compliance of the Proposal with the principle of subsidiarity.

5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

Not relevant.

6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?

Yes.

The Ministry of Justice and the Supreme Court of Lithuania were commissioned to submit their opinions on whether the Proposal for a Regulation is in conformity with the principle of subsidiarity. In addition, the European Law Department under the Ministry of Justice was asked to present its expert opinion.

7. Did you consult your regional parliaments with legislative powers?

Not relevant.

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?

Yes.

The Institute of Law, a public research institution established by the Government of the Republic of Lithuania and designed to coordinate the reform of the legal system and legal institutions as well as harmonize the process with the economic and social reform of the state, was asked to submit its opinion. According to the Institute of Law, the Proposal complies with the principle of subsidiarity.

Lithuanian Chamber of Notaries was invited to submit its opinion. The Lithuanian Chamber of Notaries is a self-government institution of notaries, established in accordance with the Law on the Notariat of the Republic of Lithuania and uniting all notaries of Lithuania. The legal form of the Chamber of Notaries is an association.

9. What was the chronology of events? Please specify the dates.

The subsidiarity check organised through the COSAC is conducted following the usual control mechanism of the principle of subsidiarity provided for in Article 180⁶ of the Seimas Statute, with one exception: the procedure is initiated by the Committee on European Affairs rather than by a specialised committee, which is normally responsible, within its competence, for proper and timely control of the principle of subsidiarity, as generally provided for in Article 180⁶(1) of the Seimas Statute.

21 October 2009

The Committee on European Affairs initiated the subsidiarity check at the Seimas. The Committee informed the responsible specialised committees (Committee on Legal Affairs and Committee on Human Rights) in writing and requested their conclusions. The Committee also requested other institutions,

organisations and experts, within whose competence comes this issue, to present their expert opinion on the compliance of the Commission Proposal with the principle of subsidiarity. Two members of the Committee on European Affairs were nominated as reporters.

Beginning of 1e November 2009 Ministry of Justice presented the primary conclusion that the Proposal for a Regulation of the European Union is in conformity with the principle of subsidiarity.

The European Law Department under the Ministry of Justice submitted its opinion to the Committee on European Affairs. In view of the analysis and reasoning of the Proposal provisions, the Department assumes that there are no grounds to suggest that the draft EU legislative proposal is not in conformity with the legal criteria of the principle of subsidiarity.

The Legal Department of the Office of the Seimas issued its legal conclusion. In its opinion, it cannot be definitely stated that the provisions of the Proposal are not related in any way to the regulations of the Lithuanian law applied to the family law; therefore, this does not allow, in its turn, to unambiguously assess the compliance of the Proposal with the principle of subsidiarity regardless of the potential added value of the Proposal (creating the area of European civil justice in matters of succession).

The Lithuanian Chamber of Notaries submitted its opinion. Following legal, social and economic assessment of the Proposal, Lithuania can expect positive results in solving the international succession matters without violating the state's sovereignty or interfering with the national legal system or established practice.

The Institute of Law submitted its opinion that the Proposal does not result in potential non-conformity with the principle of subsidiarity.

In the opinion of the Supreme Court, the Proposal complies with the principle of subsidiarity.

18 November 2009 The Committee on Legal Affairs held a meeting and issued its conclusion. In the opinion of this specialised committee, this Proposal complies with the principle of subsidiarity.

At the same day the Committee on Human Rights held a meeting and issued its conclusion that this Proposal complies with the principle of subsidiarity.

20 November 2009 The Committee on European Affairs debated the issue at its

meeting.

10. Did you cooperate with other national parliaments in the process? If so, by what means?

Traditionally, the Committee on European Affairs follows subsidiarity checks in other EU national parliaments through IPEX and Permanent Representative to the EU of the Seimas of Lithuania. Yet, the information on the decisions made by other national parliaments was rather limited in this case, this may be due to the fact that the Committee adopted its opinion at quite an early stage.

11. Did you publicise your findings? If so, by what means?

No.

Findings:

12. Did you find any breach of the principle of subsidiarity?

No. Subsequent to its initial assessment, the Committee on European Affairs adopted the conclusion that it has found no possible breach of the principle of subsidiarity.

13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.

No.

14. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?

Yes.

15. Did you encounter any specific difficulties during this subsidiarity check?

No.

16. Any other comments?

The Seimas has made an extensive use of the opportunities provided by the initiative of Mr Barroso and stated its opinion not only on the subsidiarity principle, but also on that of proportionality as well as on some aspects relating to the content of the proposal.

At its meeting on 20 November 2009, the Committee on European Affairs adopted the following conclusion.

Bearing in mind that:

- the diversity of national legal rules on succession in the European Union Member States creates considerable difficulties not only for the people asserting their rights in international succession matters but also for the legal authorities competent to settle succession matters,

- the Proposal aims at removing obstacles to the free movement of persons that result from divergent rules on international succession applicable in Member States,

- the object of the Proposal is obviously transnational in nature and individual actions by Member States would not be able to achieve the purpose of the proposed instrument and ensure proper functioning of the single market,

- the adoption of the Proposal would provide the citizens of the European Union with a greater legal certainty, create conditions for determining the law applicable in every individual case of succession, facilitate the settlement of matters of international succession, help avoid overlapping procedures, and thus save costs and time,

- the adoption of the Proposal would facilitate the international recognition of court judgements passed in individual Member States,

the Committee considers the Proposal submitted by the Commission of the European Communities to comply with the principle of subsidiarity.

In view that:

- the Proposal is not aimed to harmonise the law of succession of Member States, nor deny or eliminate the applicability of the national law in the area of legal relations, but rather harmonise just some conflict-of-laws rules on international succession (as far as jurisdiction, applicable law, and recognition and enforcement of decisions are concerned); therefore, the proposed actions are necessary for creating the conditions for the citizens of the European Union to organise their succession in advance and to effectively ensure the rights of heirs and legatees;

- even though a Regulation is the strictest form of regulation, a law that is universally applicable in the entire European Union would provide more legal certainty and help avoid divergent regulation, which could arise due to uneven transposition of the European Union *acquis* into the national law;

the Committee considers that there are no grounds to assume that the Proposal is disproportionate to its objectives and that it essentially complies with the principle of proportionality.

Noting, however, that the national law of some Member States of the European Union does not provide for eligibility of the closest family members to the statutory legacy,

the Committee:

recommends that in the process of drafting and presenting the position of the Republic of Lithuania at the negotiations within the European Union institutions (in particular, debating the rules determining the applicable law), the authorised institutions of Lithuania should take account of the fact that, in matters of succession, the laws of the Republic of Lithuania provide for eligibility of heirs in need of support to the statutory legacy.

Luxembourg: *Chambre des Députés*

Commission juridique de la Chambre des Députés

Résultats du 8^{ième} test de subsidiarité (15 décembre 2009)

Procédure

1. Quelles commissions parlementaires ont été impliquées dans le test de subsidiarité et de quelle manière ?

La Commission juridique a été saisie par la Présidence de la Chambre des Députés afin de procéder à l'examen du 8^{ième} test de subsidiarité de la COSAC sur la contrôle du principe de subsidiarité de la proposition de règlement du Parlement européen et du Conseil relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions et des actes authentiques en matière de successions et à la création d'un certificat successoral européen. En tout, la Commission juridique a consacré deux réunions à la mise en œuvre de ce 8^{ième} test de subsidiarité. La Commission juridique a désigné Mme le Président comme rapporteur aux fins de rédiger un avis reprenant les observations et conclusions de la commission.

2. La session plénière a-t-elle été impliquée?

La session plénière de la Chambre des Députés n'a pas été impliquée dans la mise en œuvre du 8^{ième} test de subsidiarité de la COSAC.

3. A quel niveau la décision finale a-t-elle été prise et qui l'a paraphée ?

Les membres de la Commission juridique ont adopté par un vote unanime un avis préparé et présenté par Mme le Rapporteur.

4. Quels services administratifs de votre parlement ont été impliqués et de quelle manière? Merci de préciser.

Le secrétariat de la Commission juridique a assuré la préparation de l'avis mentionné ci-avant. Le Service des Relations internationales a assuré la réception et la transmission, via un courrier de la Présidence de la Chambre des Députés, des documents officiels pour attribution à la Commission juridique.

5. En ce qui concerne les parlements bicaméraux : avez-vous conduit le test de subsidiarité en coordination avec l'autre chambre ?

Le Luxembourg ne disposant que d'un parlement monocaméral, la question est sans objet.

6. Votre gouvernement a-t-il fourni des informations relatives au respect du principe de subsidiarité par la proposition de la directive ?

Des représentants du Gouvernement ont assisté aux deux réunions et ont fourni des précisions d'ordre technique à la demande des membres de la commission.

7. Avez-vous consulté les parlements régionaux de votre pays qui disposeraient de pouvoirs législatifs ?

Le Luxembourg ne disposant pas de parlements régionaux, cette question est sans objet.

8. Avez-vous consulté des organisations non gouvernementales, des groupes d'intérêt, des experts extérieurs ou d'autres parties prenantes ?

La Commission juridique n'a pas fait appel à une organisation non gouvernementale, ni à un groupe d'intérêt, ni à un expert extérieur ou à toute autre partie prenante.

9. Selon quelle chronologie le test a-t-il été conduit au sein de votre Parlement ? Merci de préciser les dates.

Les membres de la Commission juridique ont été saisis par courrier de la Présidence en date du 21 octobre 2009. Les réunions du 11 novembre et du 2 décembre 2009 ont été consacrées à l'examen de la proposition de règlement. L'avis transmis par Mme le Rapporteur aux membres de la Commission juridique en date du 8 décembre 2009 a recueilli l'accord unanime.

10. Avez-vous coopéré avec d'autres parlements nationaux ? Si oui, par quels moyens ?

La Chambre des Députés n'a pas coopéré avec un parlement national d'un autre Etat membre.

11. Avez-vous publié vos conclusions ? Si oui, par quels moyens ?

Les observations et les conclusions de la Commission juridique, consignées dans l'avis transmis aux autorités compétentes, n'ont pas été publiées.

Conclusions

12. Avez-vous découvert un quelconque manquement au principe de subsidiarité?

La Commission juridique a conclu que la proposition de règlement du Parlement européen et du Conseil sur la loi et la juridiction applicables, la reconnaissance mutuelle et l'exécution des décisions et mesures administratives dans le domaine des successions et des testaments est conforme au principe de subsidiarité.

13. Avez-vous adopté un avis motivé de la proposition de directive ? Si oui, veuillez en joindre une copie.

La Commission juridique a partant adopté un avis confirmant le respect du principe de subsidiarité.

14. Avez-vous trouvé les justifications de la Commission sur le respect du principe de subsidiarité satisfaisantes ?

Les membres de la Commission juridique ont jugé les justifications de la Commission quant à la nécessité d'une action législative communautaire au niveau de la loi et de la juridiction applicables, de la reconnaissance mutuelle et de l'exécution des décisions et mesures administratives dans le domaine des successions et des testaments de satisfaisantes.

15. Avez-vous rencontré des difficultés spécifiques pendant l'examen?

La Commission juridique n'a éprouvé aucune difficulté spécifique pendant l'examen de la proposition de règlement sous rubrique.

16. Avez-vous d'autres observations ?

Il n'y a aucune autre observation à formuler.

Luxembourg, le 15 décembre
2009

Le Président-Rapporteur

Christine Doerner

Huitième test de subsidiarité de la COSAC

Avis de la Commission juridique de la Chambre des Députés

(15 décembre 2009)

Depuis le Traité de Maastricht, les principes de subsidiarité et de proportionnalité s'appliquent à l'action législative communautaire.

Le Traité d'Amsterdam renforce ces principes et exige de la Commission 1. de « *procéder à des larges consultations avant de proposer des textes législatives ...* » 2. à faire des analyses d'impact et 3. de faire des lois claires et simples.

Le principe de subsidiarité exige la transparence et le contrôle des Parlements Nationaux.

Ainsi notre Chambre des Députés a disposé en temps utile de la proposition de règlement et des documents préparatoires.

Dans ses réunions du 11 novembre et du 2 décembre 2009, la Commission juridique a pris position sur le sujet et tente ainsi de renforcer ses relations de coopération avec les Institutions Européennes pour que les lois communautaires soient prises le plus près possible du citoyen.

1. Portée du problème

Le nombre des successions de l'Union européenne est évalué à 4,5 millions chaque année, dont environ 10 % comportent un élément international. La valeur de ces successions internationales est estimée à 123 milliards euro par an.

2. Les inconvénients de la situation actuelle

Les règles de rattachement de la loi applicable en matière de succession internationale sont presque aussi variées que les dispositions en matière successorale des différents pays.

Le droit luxembourgeois se base sur la théorie des statuts qui a pris naissance au Moyen-âge et a évolué à travers le temps.

Par conséquent, la dévolution successorale des biens meubles est régie par la loi de l'Etat du dernier domicile du défunt et les biens immeubles par la loi de l'Etat de la situation des biens (*lex sitae* / système scissionniste).

Ce système se trouve également en Belgique, France, Irlande, Royaume-Uni, Chypre, Malte, c'est-à-dire tant dans les Etats européens dont les Codes se basent sur le Code Napoléon que dans les systèmes de Common Law, qui se base sur le régime féodal et sur l'importance des aspects réels de la dévolution successorale.

La qualification mobilière ou immobilière se fait selon la loi de l'Etat où ils sont situés.

Dans la plupart des autres Etats de l'UE, la dévolution successorale est soumise à une loi unique. Dans ces systèmes unitaires, le rattachement est le plus souvent la nationalité du défunt (Allemagne, Autriche, Espagne, Grèce, Italie, Portugal, Suède).

D'autres Etats à système unitaire rattachent la succession à la loi de l'Etat du dernier domicile du défunt (Danemark) ou à la résidence habituelle qualifiée (Pays-Bas, Finlande).

Cette référence au statut personnel du défunt correspond à l'idée de mettre au centre de l'intérêt le défunt et ses relations familiales.

Dans tous les Etats à système unitaire, la succession des apatrides et des réfugiés est régie le plus souvent par la loi de l'Etat de leur dernier domicile.

Les nouveaux Etats membres de l'Europe de l'Est ont favorisé l'applicabilité de la loi de la nationalité (Croatie, Slovaquie). En Bulgarie, Pologne et Roumanie, la *lex sitae* s'applique conformément à des conventions bilatérales signées entre ces pays.

A cela s'ajoute que la plupart des Etats membres ne connaissent pas la possibilité de choisir par voie testamentaire la loi applicable à leur succession. La professio iuris n'est pas admise au Luxembourg ni en France.

En outre, il existe des divergences entre les Etats de l'UE qui admettent largement le renvoi tant au premier qu'au deuxième degré (Allemagne, France, Royaume-Uni), tandis que d'autres ne l'admettent qu'au premier degré (Luxembourg, Belgique et Espagne). Un autre groupe d'Etats est hostile au renvoi (Grèce, Danemark, Finlande et Suède).

La diversité de ces règles est une incitation pour les héritiers ou créanciers au forum shopping.

Et en même temps cette divergence représente une impossibilité pour une personne de prévoir et de préparer à l'avance sa succession.

La notion de sécurité juridique proclamée en tant que principe par la CJCE et la CEDH fait défaut, concept pourtant indispensable au développement harmonieux d'un espace juridico-économique pour les familles sans frontières.

Une fois la succession d'une personne de nationalité étrangère est acceptée par ses héritiers, comment ceux-ci vont-ils entrer en possession des biens héréditaires ? En droit luxembourgeois et dans la plupart des systèmes du Code Napoléon, les héritiers sont directement saisis des biens et droits du défunt. A l'opposé, dans les pays à Common Law, la succession est soumise à un contrôle judiciaire. Un conflit peut s'élever pour la preuve de qualité d'héritier.

3. Remèdes proposées

a) L'unité de la loi successorale.

Une seule loi régira dorénavant toutes les questions relatives à une succession peu importe dans quel pays les différents biens mobiliers ou immobiliers sont situés. Cette situation sera très nouvelle pour le Grand-Duché de Luxembourg qui connaît le principe du morcellement de la succession internationale.

- b) La loi successorale applicable sera la loi de la résidence habituelle du défunt au moment de son décès. Notons qu'il est fait référence à la résidence habituelle et non au domicile, ce qui donne une priorité sur la notion de fait de la résidence et une certaine permanence en retenant un caractère habituel de celle-ci

Mais on peut aussi, par un choix personnel, soumettre sa succession internationale à sa loi nationale, ce qu'on appelle la *professio iuris*, actuellement interdite au Luxembourg.

Cette restriction dans le choix de la loi applicable a sans doute été dictée pour éviter le détournement des règles d'ordre public de la réserve héréditaire dans les pays de droit latin (Luxembourg, France ...).

Parallèlement, il y aura unification des règles de compétence internationale, de sorte que le tribunal du lieu de la dernière résidence habituelle du défunt sera en principe compétent, tant pour les biens meubles qu'immeubles, n'importe où ils sont situés.

c) Le certificat successoral européen (CSE)

Ce nouvel instrument constituera la preuve de la qualité des héritiers légataires ou légataires, les pouvoirs des exécuteurs testamentaires ou des tiers administrateurs et sera reconnu de plein droit dans tous les Etats membres de l'UE.

4. Nécessité juridique et politique d'une harmonisation des règles de conflit de lois

a) Compétence d'agir de la Commission européenne

En raison des aspects patrimoniaux prépondérant d'une succession, la Commission européenne estime que le droit de la succession ne relève pas du droit de la famille. La Commission européenne a aussi d'autres raisons plus pragmatiques. En effet, pour les sujets touchant au droit de la famille, l'unanimité est requise au sein du Conseil des Ministres ce qui complique la prise de décision.

En effet, la matière successorale se situe au carrefour du droit de la famille, du droit de biens et du droit des actes juridiques ce qui ne facilite pas les tâches d'un législateur international.

b) La proposition envisagée et le test de subsidiarité

En vue d'assurer le plein effet des libertés de circulation garanties par le Traité, l'unification des règles de conflits de lois en matière de succession contribuera à la protection élevée

des familles et de leur patrimoine. Vues l'ampleur et la dimension et les effets des situations divergentes à résoudre, cette action de droit communautaire apportera une véritable valeur ajoutée à l'UE si elle sera réalisée au niveau communautaire plutôt qu'au niveau de tentatives de rapprochement des Etats membres œuvrant séparément.

c) L'évaluation d'impact

Cette proposition de règlement ambitieuse dans ses objectifs a commencé par une large consultation des meilleurs experts en la matière et repose sur des données de droit comparé très importantes. Un livre vert a été élaboré (petite remarque : ce livre vert a été officialisé en 2004 avant l'admission des nouveaux Etats membres, de sorte qu'on regrette que seulement 15 pays de l'UE y ont contribué).

Il résulte de l'analyse de l'impact que « les règles fiscales sont expressément exclues du champ d'application de cette proposition et qu'aucun changement dans la législation nationale des Etats membres en matière de droit des successions » ne s'imposera.

Cependant, « *le règlement proposé ne contribue pas à réduire la complexité des systèmes fiscaux applicables aux successions internationales La Commission a l'intention de publier une communication en 2010 afin d'aborder ces problèmes* » (cf. résumé de l'analyse d'impact du 14 octobre 2009 SES, 2009, 410).

5. Proportionnalité

Cette proposition de règlement ne comprend que des mesures proportionnées à son objectif. Elle ne s'applique qu'aux seules successions entre Etats membres, les successions nationales étant couvertes par les droits nationaux. Ainsi l'identité nationale du système juridique des vingt-sept membres est respectée. Par exemple la non remise en cause des règles de la réserve légale, de la validité des pactes successoraux admis par une loi étrangère, des donation-partage internationales et de la reconnaissance du Trust.

Dans ses travaux d'unification et de simplification, la Commission s'est inspirée largement de la Convention de la Haye de 1989 sur les successions, qui a d'ailleurs été signée par le Luxembourg. Cette Convention prévoit qu'une seule loi régit la succession internationale mobilière et immobilière et que le testateur peut choisir entre sa loi nationale ou celle de sa résidence habituelle.

D'autre part, le Luxembourg a signé la Convention de la Haye du 2 octobre 1973 sur l'administration internationale d'une succession. Cette Convention a déjà institué en 1973 un certificat international qui se rapproche du certificat successoral européen à établir en principe selon la loi interne de la dernière résidence habituelle du défunt.

Comme le contrat de mariage peut aussi avoir une influence dans le règlement d'une succession internationale un peu compliquée, la Commission se propose de régler également cette matière dans le futur.

Mieux légiférer est une priorité de la Commission Barroso.

En effet, la règle de droit est le moteur de la construction et de l'intégration européenne. La Commission européenne propose de moderniser et d'adapter cette matière très complexe des successions internationales par un Règlement clair et lisible, et cela pour simplifier les successions, moment toujours délicat dans l'histoire des personnes et des familles.

Luxembourg, le 15 décembre 2009

Le Président - Rapporteur

Christine Doerner

Netherlands: Tweede Kamer

TWEEDE KAMER DER STATEN-GENERAAL

STAF EUROPESE ZAKEN

3. Evaluation of the subsidiarity check

To facilitate the evaluation of the subsidiarity check, national parliaments or chambers are, on behalf of the Czech Presidency, kindly asked to reply to the following questions and send their answers to the COSAC Secretariat (secretariat@cosac.eu).

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?

The Standing Committee on Justice issued an opinion to the Subsidiarity Check Committee of the House of representatives (nov 18th).

The Subsidiarity Check Committee issued a proposal to the Plenary.

2. Was the plenary involved?

Yes, the draft letter was voted December 15th.

3. At which level the final decision was taken and who signed it?

The final decision was taken at Plenary level. The President of the House signed.

4. Which administrative services of your parliament were involved and how? Please specify.

Most work was done by the EU staff, who prepared a summary of the proposal and draft position.

5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

Yes. Both Chambers kept each other up to date.

It is to be noted that, as of this autumn, the joint subsidiarity committee has ceased to operate. Each Chamber now has their separate procedures. Cooperation, such as sending joint letters, is still an option. It will be decided upon on an ad hoc basis. The House still operates a Subsidiarity Check Committee, which operates as a switchboard and dialogue partner to the various Standing Committees.

The Senate, working through separate procedures, arrived at the same opinion as the House. This being the case, it was considered adequate to send a joint letter sent by the Presidents of both Houses.

6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?

Yes.

7. Did you consult your regional parliaments with legislative powers?

n.a.

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?

No.

9. What was the chronology of events? Please specify the dates.

22/10 Subsidiarity Committee asks for opinion from Standing Committee on Justice.

18/11 opinion is handed in.

8/12 Subsidiarity Committee endorses opinion handed in by Standing Committee. It is decided to send a joint letter with Senate. These decisions are sent to the Plenary for endorsement.

15/12 endorsement by Plenary.

15/12 signing of letters and sending them to European Commission

10. Did you cooperate with other national parliaments in the process? If so, by what means?

No.

11. Did you publicise your findings? If so, by what means?

As usual, in public Parliamentary records.

Findings:

12. Did you find any breach of the principle of subsidiarity?

No.

13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.

No.

14. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?

There were no complaints.

15. Did you encounter any specific difficulties during this subsidiarity check?

No.

16. Any other comments?

No.

Evaluation

**of the Subsidiarity check
by the Senate of the
Kingdom of the Netherlands
under the provisions
of the Treaty of Lisbon
on the Commission Proposal
for a Regulation of the
European Parliament and of the Council
on jurisdiction, applicable law,
recognition and enforcement of decisions
and authentic instruments
in matters of succession
and the creation
of a European Certificate of Succession**

Contact:

Senate of The Kingdom of the Netherlands
T.a.o. Laurens Dragstra
Staff Member
Laurens.Dragstra@eerstekamer.nl
+ 31 70 3129200

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?

Answer:

The proposal was scrutinised by the standing Committee for the JHA-Council of the Senate, which drafted an opinion for adoption by the Plenary.

2. Was the plenary involved?

Answer:

Yes.

3. At which level the final decision was taken and who signed it?

Answer:

The final decision concerning the content of the written opinion was taken by the Plenary of the Senate and the letter was signed by the President of the Senate of the States General. Since it was a joint letter by both Houses of Parliament, the letter was also signed by the President of the Lower House (Tweede Kamer).

4. Which administrative services of your parliament were involved and how? Please specify.

Answer:

The staff of the Committee mentioned in the reply to question 1.

5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

Answer:

Yes. The staff of the standing Committee for the JHA-Council exchanged information with the staff of the standing Committee for Justice of the Lower House and suggested a joint letter of both Houses, signed by both Presidents, be sent to the Commission.

6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?

Answer:

Yes, it did. It sent a so-called 'BNC-fiche' to Parliament, which contained a brief analysis of the proposal. Compliance with the subsidiarity principle was also discussed in this document.

7. Did you consult your regional parliaments with legislative powers?

Answer:

Not applicable.

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?

Answer:

No.

9. What was the chronology of events? Please specify the dates.

Answer:

17 November 2009: the proposal for a Regulation is scrutinised by the standing Committee for the JHA-Council. The Committee finds that there is sufficient legal basis for the proposal in the EU-treaties and that the proposal does not violate the subsidiarity and proportionality principles. This opinion is communicated to the staff of the standing Committee for Justice of the Lower House. This Committee scrutinises the proposal a day later and comes to the same conclusions as the standing Committee for the JHA-Council.

24 November 2009: the standing Committee for the JHA-Council decides to send its opinion to the Plenary for adoption on 8 December 2009.

8 December 2009: the Plenary accepts the opinion proposed by the standing Committee for the JHA-Council.

16 December 2009: joint letters, signed by the Presidents of the Lower House and Senate are sent to the Vice-President of the European Commission, the Presidents of the Council and the European Parliament, the Dutch Government and the COSAC Secretariat. Scan copies are sent by e-mail.

10. Did you cooperate with other national parliaments in the process? If so, by what means?

Answer:

No.

11. Did you publicise your findings? If so, by what means?

Answer:

Yes, the Senate's findings were publicised on its Europapoort website (www.europapoort.nl).

Findings:

12. Did you find any breach of the principle of subsidiarity?

Answer:

No.

13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.

Answer:

Yes. See below for a copy and a courtesy translation.

14. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?

Answer:

Yes. The Senate has not asked the Commission for any additional information regarding compliance with the principle of subsidiarity.

15. Did you encounter any specific difficulties during this subsidiarity check?

Answer:

No.

16. Any other comments?

Answer:

No.

Geachte mevrouw Wallström,

Beide Kamers der Staten-Generaal van het Koninkrijk der Nederlanden hebben - overeenkomstig de door hen vastgestelde procedures – het voorstel voor een verordening van het Europees Parlement en de Raad betreffende de bevoegdheid, het toepasselijke recht, de erkenning en de tenuitvoerlegging van beslissingen en authentieke akten op het gebied van erfopvolging en betreffende de instelling van een Europese erfrechtverklaring (COM(2009)154) getoetst aan de beginselen van subsidiariteit en proportionaliteit. Zij hebben daarmee toepassing gegeven aan artikel 5 EU-Verdrag en Protocol 2 bij dit Verdrag betreffende de toepassing van het subsidiariteits- en het evenredigheidsbeginsel.

Beide Kamers der Staten-Generaal zijn van oordeel dat in de EU-verdragen voldoende rechtsgrondslag bestaat voor maatregelen zoals voorgesteld in de ontwerpverordening. Ten aanzien van de subsidiariteit en proportionaliteit van het voorstel zijn de beide Kamers der Staten-Generaal van oordeel dat er geen bezwaren zijn gebleken.

Hoogachtend,

Drs. P. René H. M. van der Linden
Voorzitter van de Eerste Kamer
der Staten-Generaal

Gerdi A. Verbeet
Voorzitter van de Tweede Kamer
der Staten-Generaal

Deze brief is in afschrift verzonden aan de voorzitters van de Raad en het Europees Parlement, alsmede aan de Nederlandse regering en het secretariaat van COSAC.

COURTESY TRANSLATION

Dear Mrs Wallström,

In accordance with the procedures adopted by them, the two Houses of the States-General of the Kingdom of the Netherlands have checked the proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM(2009)154, by reference to the principles of subsidiarity and proportionality. In doing so, they have applied Article 5 of the EU Treaty and Protocol 2 to this Treaty on the application of the principles of subsidiarity and proportionality.

Both Houses of the States General consider that the EU Treaties contain an adequate legal basis for the measures as proposed in the draft Regulation. With respect to the subsidiary and proportionality of the proposal both Houses of the States-General take the opinion that there are no apparent objections.

Yours sincerely,

P. René H.M. van der Linden
President of the Senate
of the States General

Gerdi A. Verbeet
President of the House of Representatives
of the States General

Copies of this letter have been sent to the Presidents of the Council, the European Parliament, as well as to the Government of the Netherlands and the COSAC Secretariat.



SEJM
OF THE REPUBLIC OF POLAND
EUROPEAN UNION AFFAIRS COMMITTEE

CHAIRMAN
Stanisław Rakoczy

Warsaw, December 15th, 2009

**Answers on the following questions concerning subsidiarity check on the
‘Proposal for a Regulation of the European Parliament and of the Council on
jurisdiction, applicable law, recognition and enforcement of decisions and authentic
instruments in matters of succession and the creation of a European Certificate of
Succession
(COM(2009) 154)’
adopted by European Union Affairs Committee of the Sejm of the Republic of Poland
on the 11th December 2009.**

**1. Which parliamentary committees were involved in the subsidiarity check
and how?**

The European Union Affairs Committee (EUAC) was involved in the subsidiarity check. The EUAC is a specialized body of the Sejm, that gives opinions on behalf of the whole Chamber on the European Union matters.

2. Was the plenary involved?

No, it was not.

3. At which level the final decision was taken and who signed it?

The final decision was taken on the level of the European Union Affairs Committee of the Sejm of the Republic of Poland. The opinion concerning subsidiarity check on the ‘Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable

law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (COM(2009) 154)' was signed by Mr Stanisław Rakoczy, the Chairman of the EUAC.

4. Which administrative services of your parliament were involved and how? Please specify.

According to practice in the subsidiarity check the following administrative bodies of the Chancellery of the Sejm were involved:

- The European Union Division in the European Union Affairs Bureau, as a competent section to organize and coordinate works of the EUAC meetings,
- The Bureau of Research of the Chancellery of the Sejm, which prepared expertise on the subsidiarity check.

5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

No, we did not. The European Union Affairs Committee of the Sejm and The European Union Affairs Committee of the Senate worked separately.

6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?

No, the government did not provide any written information.

7. Did you consult your regional parliaments with legislative powers?

No, we didn't consult. In Poland, regional parliaments do not exist.

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?

No, we did not consult.

9. What was the chronology of events?

The EUAC meeting on 11th December 2009 the opinion concerning subsidiarity check was adopted. The opinion of the EUAC was held in accordance with the Protocol (No 2) on the Application of the principles of Subsidiarity and Proportionality to the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, on the 'Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (COM(2009) 154)'.

10. Did you cooperate with other national parliaments in the process? If so, by what means?

No, we did not cooperate.

11. Did you publicise your findings? If so, by what means?

The Committee's opinion was forwarded to the government and was published on the website of the EUAC. Additionally, the transcript of the EUAC meeting is available on the website of the Sejm.

Findings:

12. Did you find any breach of the principle of subsidiarity?

No, the Committee did not find any breach of the subsidiarity principle.

13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.

“The European Union Affairs Committee of the Sejm of the Republic of Poland:

1. finds that “Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (COM(2009) 154 final)” to be consistent with the subsidiarity principle;
2. makes no objections to the proposed Regulation mentioned in point 1 and to the Government’s draft position relating thereto.”

14. Did you find the Commission’s justification with regard to the principle of subsidiarity satisfactory?

The European Union Affairs Committee found the Commission’s justification satisfactory. The written opinion of the Bureau of Research of the Chancellery of the Sejm, was also positive.

15. Did you encounter any specific difficulties during this subsidiarity check?

No, there was no specific difficulties.

16. Any other comments?

No, we do not have any other comments.

Chairman of the Committee

Stanisław Rakoczy

Opinion No. 55
of the European Union Affairs Committee
of the Sejm of the Republic of Poland
on the “Proposal for a Regulation of the European Parliament and of the Council on
jurisdiction, applicable law, recognition and enforcement of decisions and authentic
instruments in matters of succession and the creation of a European Certificate of Succession
(COM(2009) 154 final)”
adopted at its 157th meeting on 11 December 2009

The European Union Affairs Committee of the Sejm of the Republic of Poland:

1. finds that “Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (COM(2009) 154 final)” to be consistent with the subsidiarity principle;
2. makes no objections to the proposed Regulation mentioned in point 1 and to the Government’s draft position relating thereto.

Deputy Chairman of the Committee

/-/ Andrzej Gałazewski

Poland: Senat



SENATE OF THE REPUBLIC OF POLAND THE EUROPEAN UNION AFFAIRS COMMITTEE

Warsaw, December 10, 2009

Ms. Anna Kinberg Batra
Chairwoman of the Committee on European Union Affairs
Swedish/Sveriges Riksdag

Dear Ms Kinberg Batra,

According to the provisions of Protocol 2 on the Application of the Principles of Subsidiarity and Proportionality attached to the Treaty of Lisbon, the European Union Affairs Committee of the Senate of the Republic of Poland, at the sitting on 9th December 2009, conducted a subsidiarity check concerning **the proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (COM(2009) 154)**. The European Union Affairs Committee, with the co-operation of the Human Rights, the Rule of Law and Petitions Committee, has come to the conclusion that the above mentioned EU proposal **does not breach the subsidiarity principle**.

We have prepared our reply in the form of answers to the questions posed in the aide-mémoire provided by the COSAC Secretariat.

Please find enclosed the report on the subsidiarity check.

Yours sincerely,

Edmund Wittbrodt
Chairman of the European Union Affairs Committee



SENATE OF THE REPUBLIC OF POLAND
THE EUROPEAN UNION AFFAIRS COMMITTEE

Warsaw, December 10, 2009

SENATE OF THE REPUBLIC OF POLAND

Report on the subsidiarity check under the Treaty of Lisbon on the proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (COM(2009) 154).

At the sitting on 9th December 2009 the Senate's European Union Affairs Committee carried out a subsidiarity check following the procedure agreed by the COSAC. The check was completed and the conclusions formulated as follows:

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?

Two parliamentary committees were involved in the subsidiarity check in the Senate of the Republic of Poland: the European Union Affairs Committee and the Human Rights, the Rule of Law and Petitions Committee.

At the first sitting concerning the subsidiarity check the European Union Affairs Committee discussed the procedures regarding the subsidiarity check, as well as approved the working agenda, the sectoral committees to give opinions on the said proposal and the choice of the experts.

The Human Rights, the Rule of Law and Petitions Committee joined the EU Affairs Committee at the second sitting concerning the subsidiarity check. After a discussion both committees came to the conclusion that the above-mentioned proposal complies with the principle of subsidiarity.

2. Was the plenary involved?

No.

3. At which level the final decision was taken and who signed it?

The decision was taken by the European Union Affairs Committee and signed by the chairman of the Committee.

4. Which administrative services of your parliament were involved and how? Please specify.

The Analyses and Documentation Office (seeking external experts and concluding agreements with them), the European Union Unit (preparing a sitting, drafting an opinion, making a report).

5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

No.

6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?

The government's written position on the proposed draft regulation, submitted to the parliament, included their opinion on the compliance with the subsidiarity and proportionality principles. A government official took part in the committee sitting and provided the senators with additional information.

7. Did you consult your regional parliaments with legislative powers?

No. There are no regional parliaments or any similar bodies in Poland.

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?

Yes, the Committee was provided with an external expertise prepared by an independent expert.

9. What was the chronology of events? Please specify the dates.

- **21 October 2009**, the European Commission published all linguistic versions of the Proposal for a Regulation
- **3 November 2009** – the sitting of the European Union Affairs Committee:
 - discussing the procedures regarding the subsidiarity check
 - approving the working agenda
 - appointing the sectoral committees to give opinions on the said proposal
 - choosing the experts

- **9 December 2009** – the joint sitting of the European Union Affairs Committee and the Human Rights, the Rule of Law and Petitions Committee:
- hearing the opinions of the government representatives
 - hearing the opinions of the Committee expert
 - discussion
 - adopting an opinion on the basis of the tabled motions
- **11 December 2009** - preparing and forwarding the report to the COSAC secretariat.

10. Did you cooperate with other national parliaments in the process? If so, by what means?

No.

11. Did you publicise your findings? If so, by what means?

Yes, a report on the subsidiarity check has been publicised on the website of the European Union Affairs Committee and in the IPEX network.

Findings:

12. Did you find any breach of the principle of subsidiarity?

*The European Union Affairs Committee came to the conclusion that the proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession **does not breach the subsidiarity principle.***

13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.

No.

14. Did you find the Commission's justification with regard to the subsidiarity principle satisfactory?

Yes.

15. Did you encounter any specific difficulties during this subsidiarity check?

No.

16. Any other comments?

In view of the entry into force of the Treaty of Lisbon on 1 December 2009 the latest subsidiarity scrutiny on the draft regulation constitutes an exercise of the Senate's

newly acquired powers resulting from the *Protocol on the application of principles of subsidiarity and proportionality*. The procedure applied during the check has been developed throughout s COSAC previous subsidiarity tests. The said procedure may be changed following the amendment of the *Act on Cooperation of the Council of Ministers with the Sejm and the Senates in matters related to Poland's membership in the EU* (the cooperation act). One major change likely to be introduced is to empower the Senate plenary to issue a reasoned opinion on the non-compliance of a given proposal with the principle of subsidiarity, with a draft opinion having been prepared by the EU Affairs Committee and a sectoral committee. The amendment of the cooperation act will make it necessary to change the Senate Rules and Regulations.

Accepted by:

Edmund Wittbrodt
Chairman
EU Affairs Committee
Senate of the Republic of Poland

Portugal: Assembleia da República

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?

The European Affairs Committee, which always triggers the scrutiny process, and the Committee on Constitutional Affairs, Freedoms, Rights and Guarantees, competent for the issues covered by this Proposal for a Regulation.

2. Was the plenary involved?

No. Even though the subsidiarity test was launched on 21 October, the parliamentary committees of the Portuguese Parliament only started their works on 12 November, following the general elections held on 27 September. Hence, the scrutiny only began on that date, imposing a reduction of the weeks available to comply with the deadline.

Therefore, there was no time to submit the issue to the Plenary and following Article 3, nr 2 of the Law 43/2006 on the Monitoring, assessment and pronouncement by the Assembly of the Republic within the scope of the process of constructing the European Union, «In cases in which there are grounds for urgency, a formal written opinion issued by the European Affairs Committee shall suffice.»

3. At which level the final decision was taken and who signed it?

The final decision was taken by the EU Affairs committee and signed by its Chairman and the Rapporteur, who was the same in both Committees involved. The official communication to the European Institutions was made by the Speaker of the Parliament.

4. Which administrative services of your parliament were involved and how?
Please specify.

Only the above mentioned Committees and the translation service.

5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

N.a.

6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?

There was no direct request for information sent to the government. Nevertheless, the government provides the Parliament with all the documents received from the EU, namely the working group documents, etc.

7. Did you consult your regional parliaments with legislative powers?

N.a.

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?

No.

9. What was the chronology of events? Please specify the dates.

As mentioned before, and despite the fact that the proposal was published in all official languages on 21 October, the scrutiny procedure could only be initiated on 13 November, when the parliamentary committees of the Portuguese Parliament began their works after the general elections held on 27 September.

13 November: the EC Affairs Committee asked the relevant Committee (Committee on Constitutional Affairs, Rights, Freedoms and Guarantees) to issue its opinion on the compliance of this Proposal for a Regulation with the principle of subsidiarity.

18 November – the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees appointed its Rapporteur.

9 December - the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees approved its report on the Proposal.

17 December – the European Affairs Committee endorsed the report from the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees and adopted a reasoned opinion on the *Proposal for a Regulation of the European Parliament and of the Council on the applicable law, jurisdiction, recognition of decisions and administrative measures in the area of successions and wills (2008/JLS/122)*, concluding that it complies with the principle of subsidiarity. Nevertheless, some issues were raised addressing the content of the proposal.

10. Did you cooperate with other national parliaments in the process? If so, by what means?

IPEX was consulted throughout the scrutiny process.

11. Did you publicise your findings? If so, by what means?

Yes, the findings were uploaded to IPEX.

Findings:

12. Did you find any breach of the principle of subsidiarity?

No. However, some other issues were raised as mentioned below in question 16.

13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.

Yes. A copy is enclosed.

14. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?

No, additional justifications would have been useful.

15. Did you encounter any specific difficulties during this subsidiarity check?

Please see the explanations provided concerning the deadlines and the specific situation of the recently established Portuguese Parliament.

16. Any other comments?

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

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*]¹¹ 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 fundamental principles of the international public policy of the Portuguese State*”. The Portuguese courts have accordingly held¹² 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.

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.

¹¹ 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*.

¹² Cfr. Decision of the Lisbon Court of Appeal, 5th May 1992, published in BMJ no. 417.



**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 legítimos*]¹³ 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 fundamental principles of the international public policy of the Portuguese State*”. The Portuguese courts have accordingly held¹⁴ 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

¹³ 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 legítimos*.

¹⁴ Cfr. Decision of the Lisbon Court of Appeal, 5th May 1992, published in BMJ no. 417.

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 legítimários*], 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**

(Ana Catarina Mendes)

The Chairman of the Committee

(Vitalino Canas)

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

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. 02/4^a-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 administrative 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

(illegible signature)

(António Ribeiro Gameiro)

The Chairman of the Committee

(illegible signature)

(Osvaldo Castro)

Romania: Parlamentul României

Evaluation of the subsidiarity check by the European Affairs Committee of the Parliament of Romania

point 3 in the Aide-mémoire for the subsidiarity check under the provisions of Protocol 2 on the Application of the Principles of Subsidiarity and Proportionality as attached to the Treaty of Lisbon on the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?

The European Affairs Committee of the Parliament of Romania, the Committee for Legal Matters, Discipline, and Immunities of the Chamber of Deputies and the Committee for Legal Matters, Discipline, and Immunities and Validations of the Senate.

The Committees for Legal Matters of both the Chamber of Deputies and the Senate formally adopted opinions stating the compliance of the Proposal with the principle of subsidiarity.

The European Affairs Committee acting in its legal capacity to adopt decisions on behalf of the Parliament, has adopted the final Opinion.

2. Was the plenary involved?

No. See point 3.

3. At which level the final decision was taken and who signed it?

The decision was taken at the level of the European Affairs Committee and was signed by the chairman, acting in conformity with article 4 of the Decision no. 52/2006 of the Romanian Parliament, empowering the European Affairs Committee to express the point of view of the Romanian Parliament on EU matters.

4. Which administrative services of your parliament were involved and how? Please specify.

The Secretariat of the European Affairs Committee (joint committee), the Secretariats of the Committee for Legal Matters of both the Chamber of Deputies and the Senate, the Directorate for EU Law of the Chamber of

Deputies, the Directorate for European Affairs of the Senate, the Divisions for the Standings Bureaus of the Chambers.

The Secretariats of the Committee for Legal Matters of both the Chamber of Deputies and the Senate prepared the evidence from relevant institutions and presented background notes to the committees.

The Directorate for EU Law of the Chamber of Deputies presented a background note to the EAC.

The Directorate for European Affairs of the Senate requested evidence from the Superior Council of Magistracy and the Legislative Council of Romania and provided information to the Senators in the EAC.

The Secretariat of the European Affairs Committee requested evidence from the Ministry of Justice, the National Union of the Public Notaries in Romania, the European Affairs Department of the Government, the Foreign Affairs Ministry, prepared the documentation requesting opinions by the Legal Matters Committees organized the information exchange with all the members of the EAC, the relevant institutions and the administrative structures in the Parliament, involved in the examination, presented a background note to the EAC members.

5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

Yes. The European Affairs Committee is a joint committee of both Chambers. The coordination took place at staff level as mentioned in point 4.

6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?

Yes. The European Affairs Committee requested and received documentation and positions from the Ministry of Justice, the Ministry of Foreign Affairs, including the Permanent Representation of Romania to the European Union and the European Affairs Department.

7. Did you consult your regional parliaments with legislative powers?

Not applicable.

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?

Yes. The National Union of the Public Notaries in Romania, the Superior Council of Magistracy and the Legislative Council of Romania.

9. What was the chronology of events? Please specify the dates.

On October 22 the European Affairs Committee Secretariat sent an e-mail message, on behalf of the chair, with the Proposal and other materials to the EAC members for consideration and feed-back. Further documenting messages were sent on November 28, December 3 and 15.

On October 22 the EAC chairman submitted the formal request to the Standing Bureaus of the Chambers, for the examination by the Legal Matters Committees in both Chambers, to be delivered until November 30. The Committee in the Chamber of Deputies adopted an opinion on November 10 and formally forwarded it to the EAC on December 16, while the Committee in the Senate adopted an opinion on December 15 and formally forwarded it to the EAC on December 16.

On October 23 the European Affairs Committee's chairman requested information and point of view from the Ministry of Justice, the Ministry of Foreign Affairs, the European Affairs Department, to be delivered until November 16.

The Ministry of Justice and the Ministry of Foreign Affairs delivered the requested evidence on November 18, and the European Affairs Department on November 24.

Other evidence followed, from the National Union of the Public Notaries in Romania, the Superior Council of Magistracy and the Legislative Council of Romania, in the interval November 9 to 26.

On October 23 the EAC Secretariat asked the Directorate for EU Law of the Chamber of Deputies to submit a background note.

On December 2 the EAC Secretariat asked the Permanent Representation of Romania to the European Union to provide information on any action taken in the EU Council. The Representation sent a Report on the first JUSTCIV Group meeting of November 6.

The final opinion was formally adopted in the EAC's meeting of December 16.

10. Did you cooperate with other national parliaments in the process? If so, by what means?

Not directly. We watched the IPEX page and informed the European Affairs Committee on the positions of the national parliaments which posted their decisions.

11. Did you publicise your findings? If so, by what means?

On the web page of both Chambers of the Parliament of Romania and IPEX.

Findings:

12. Did you find any breach of the principle of subsidiarity?

No.

13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.

No.

14. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?

Generally yes.

15. Did you encounter any specific difficulties during this subsidiarity check?

No.

16. Any other comments?

No.



PARLIAMENT OF ROMANIA

EUROPEAN AFFAIRS COMMITTEE



Bucharest, December 16, 2009

Nº. 40 / 384

OPINION

of the European Affairs Committee of the Romanian Parliament on the compliance of the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, with the principle of subsidiarity

The European Affairs Committee of the Romanian Parliament examined, in the meeting of December 16, 2009 the compliance with the principle of subsidiarity, of the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession – COM (2009) 154.

Acting in respect of Article 4 of the Decision no. 52/2006 of the Romanian Parliament, empowering the European Affairs Committee to express the point of view of the Romanian Parliament, the Committee adopts the following:

OPINION

The Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession – COM (2009) 154 fulfills the conditions provided at art. 4, paragraph (2), art. 5 paragraphs (1), (3) and (4), and in the Protocol nr. 2 of the Lisbon Treaty on the application of the principles of subsidiarity and proportionality, thus **being in accordance with the principle of subsidiarity.**

The main problem stressed during the examination of the Proposal is the insufficient protection of the rights of close family members of the deceased, to a statutory share of the inheritance, whereas the Romanian national legislation ensures to a higher degree the statutory reserve.

Viorel HREBENCIUC
Chairman

Slovakia: Národná rada

Evaluation of the subsidiarity check on the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession

1. Which parliamentary committees were involved in the subsidiarity check and how?

The Committee on European Affairs of the National Council of the Slovak Republic discussed the proposal on 9 December 2009. It did not find breach of subsidiarity and proportionality principle.

2. Was the plenary involved?

No

3. At which level the final decision was taken and who signed it?

At the level of the Committee on European Affairs; the Chairman of the Committee and the Verifier signed the Resolution of the Committee (see the attachment).

4. Which administrative services of your parliament were involved and how? Please specify.

Department for European Affairs (which is at the same time extended secretariat of the Committee on European Affairs) elaborated the analysis of the draft, which was provided to the MPs of the Committee.

5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

-

6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?

The Ministry of Justice provided preliminary opinion on the draft, which contained also implications on the compliance with the principles of subsidiarity and proportionality.

7. Did you consult your regional parliaments with legislative powers?

-

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?

No

9. What was the chronology of events? Please specify the dates.

See answer to the question No. 1.

10. Did you cooperate with other national parliaments in the process? If so, by what means?
We have monitored IPEX database continuously.

11. Did you publicise your findings? If so, by what means?
Through a standard publication of the Committee resolution on the parliamentary web site.

Findings:

12. Did you find any breach of the principle of subsidiarity?
13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.
14. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?
15. Did you encounter any specific difficulties during this subsidiarity check?
16. Any other comments?

Findings:

13. Did you find any breach of the principle of subsidiarity?
No
14. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.
No
15. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?
Yes
16. Did you encounter any specific difficulties during this subsidiarity check?
No
17. Any other comments?
-

**National Council of the Slovak Republic
Committee on European Affairs**

77th session

**344
Resolution**

Of the Committee on European Affairs of the National Council of the Slovak Republic
From December 9th 2009

Committee on European Affairs of the National Council of the Slovak Republic

Considered the proposal for a Regulation of the European Parliament and the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, KOM (2009) 154, and

A. notes

that according to the preliminary position of the Slovak Republic the discussed proposal for a Regulation of the European Parliament and the Council is in compliance with the principle of subsidiarity and proportionality,

B. states

that in the case of the referred proposal it has not found any breach of the principle of subsidiarity and proportionality and therefore it is not needed to adopt a reasoned opinion,

C. commits

the chairman of the committee

1. to submit a report about the consideration of the proposal in the National Council of Slovak Republic to the COSAC Secretariat;

to inform the Speaker of the National Council of the Slovak Republic and the Deputy Prime Minister of the Government of the Slovak Republic and Minister of Justice of the Slovak Republic about the results of the committee's sitting.

Ivan Štefanec
Ol'ga Nachtmannová
verifier

Maroš Kondrót
vice-chairman



**REPUBLIC OF SLOVENIA
NATIONAL ASSEMBLY**

Committee on EU Affairs

**Response to COSAC Subsidiarity Check on the Proposal for a Regulation of
the European Parliament and of the Council on jurisdiction, applicable law,
recognition and enforcement of decisions and authentic instruments in
matters of succession and the creation of a European Certificate of
Succession**

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?

The Committee on EU Affairs adopted a decision to conduct the subsidiarity check and to assign the Proposal for a Regulation to the Committee on Domestic Policy, Public Administration and Justice, as a working body responsible, and to the Legislative and Legal Service. The Committee on Domestic Policy, Public Administration and Justice adopted an opinion on the matter. Taking this opinion into account, the Committee on EU Affairs adopted the final position on the matter.

2. Was the plenary involved?

The plenary was not involved.

3. At which level the final decision was taken and who signed it?

The decision was taken by the Committee on EU Affairs and signed by its chairperson.

4. Which administrative services of your parliament were involved and how? Please specify.

The Legislative and Legal Service of the National Assembly conducted the check, it examined the proposal in question thoroughly and presented its findings separately. It delivered a reasoned opinion from the legal point of view.

Besides, the advisors of the Committee on Domestic Policy, Public Administration and Justice and of the Committee on EU Affairs provided their respective Committees with general information and expertise on the matter.

5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

No. The National Council conducted the subsidiarity check in its own procedure.

However, the opinion of the Commission for International Relations and European Affairs of the National Council of the Republic of Slovenia, adopted on December 8, 2009, was sent to both, the Committee on Domestic Policy, Public Administration and Justice and to the Committee on EU Affairs. Besides, on December 11, 2009, the chairperson of that Commission of the National Council presented the findings on the meeting of the Committee on EU Affairs.

6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?

On November 19, 2009, the Ministry of Justice provided the National Assembly with a written opinion on the compliance of the given Proposal for a Regulation with the subsidiarity principle.

Moreover, at the 26th urgent meeting of December 8, 2009, of the Committee on Domestic Policy, Public Administration and Justice, the State Secretary at the Ministry of Justice, presented the opinion of the Ministry establishing that the Proposal complies with both the principle of subsidiarity and the principle of proportionality.

7. Did you consult your regional parliaments with legislative powers?

There are no regional parliaments in the Republic of Slovenia.

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?

No further external expertise was used.

9. What was the chronology of events? Please specify the dates.

- October 28, 2009: On its 33rd meeting, the Committee on EU Affairs adopted a decision to conduct the subsidiarity check and assign the Proposal for a Regulation to the Committee on Domestic Policy, Public Administration and Justice and to the Legislative and Legal Service;
- December 2, 2009: The Legislative and Legal Service delivered an opinion on the compliance of the Proposal for a Regulation with the principle of subsidiarity.

- December 8, 2009: On its 26th urgent meeting, the Committee on Domestic Policy, Public Administration and Justice adopted an opinion on the matter.
- December 8, 2009: On its 22nd meeting, the Commission for International Relations and European Affairs of the National Council of the Republic of Slovenia adopted an opinion on the matter.
- December 11, 2009: On its 39th meeting, the Committee on EU Affairs adopted the final decision on the matter.

10. Did you cooperate with other national parliaments in the process? If so, by what means?

No direct cooperation has been initiated.

11. Did you publicise your findings? If so, by what means?

The findings will be released on the web page of the National Assembly as part of the minutes of the Committee on EU Affairs meeting. There will be no separate press release.

Findings:

12. Did you find any breach of the principle of subsidiarity?

No.

13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.

No.

14. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?

Yes.

15. Did you encounter any specific difficulties during this subsidiarity check?

No.

16. Any other comments?

No.

11 December 2009



**REPUBLIC OF SLOVENIA
NATIONAL ASSEMBLY**

Committee on EU Affairs

No.: 008-09/09-64/8

Date: 11 December 2009

To the Committee on EU Affairs

At its 39th meeting of 11 December 2009, the Committee on EU Affairs, upon discussing item No. 1 "Results of the conduct of the procedure of supervision of the compliance with the principle of subsidiarity in the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession", adopted the following

DECISION:

The Committee on EU Affairs establishes that the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession complies with the principle of subsidiarity as provided by Article 5 of the Treaty on European Union and by the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union.

Darja Lavtižar Bebler
Chair

Cc:

- Council of the President of the National Assembly
- Committee on Domestic Policy, Public Administration and Justice
- Legislative and Legal Service



REPUBLIC OF SLOVENIA NATIONAL ASSEMBLY

Committee on Domestic Policy, Public Administration and Justice

No.: 008-09/09-64/6

Date: 9 December 2009

To the Committee on EU Affairs

Based on mutatis mutandis application of Article 154h(2) of the Rules of Procedure of the National Assembly, the Committee on Domestic Policy, Public Administration and Justice as **the working body responsible** hereby presents the following

REPORT

on the conduct of the procedure of supervision of the compliance with the principle of subsidiarity in the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession

At its 26th urgent meeting of 8 December 2009, the Committee on Domestic Policy, Public Administration and Justice (hereinafter: the Committee) conducted the procedure of supervision of the compliance with the principle of subsidiarity in accordance with the procedure provided by the Protocol on the application of the principles of subsidiarity and proportionality (hereinafter: the Protocol), annexed to the Treaty on European Union (hereinafter: TEU) and the Treaty on the Functioning of the European Union (hereinafter: TFEU) in relation to the **Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession** (hereinafter: the Proposal).

At its 33rd meeting of 28 October 2009, the Committee on EU Affairs had adopted a decision whereby it referred the Proposal to the Legislative and Legal Service and the Committee, asking them to deliver by 2 December 2009 and 9 December 2009, respectively, their opinions as to whether the Proposal complied with the principle of subsidiarity as provided by Article 5 of TEU and the Protocol.

The Committee received written opinions from the Legislative and Legal Service and the Ministry of Justice.

Darja Lavtižar Bebler, Chair of the Committee on EU Affairs, stated in the supplementary explanation that following the discussion of the opinions from the

Legislative and Legal Service and the Committee, the Committee on EU Affairs would prepare a report to be sent to the COSAC Secretariat.

Mag. Samo Kutoš, representative of the Legislative and Legal Service, presented the main elements of the written opinion of the Legislative and Legal Service establishing that the Proposal complies with the principle of subsidiarity.

Boštjan Škrlec, State Secretary at the Ministry of Justice, presented the opinion of his Ministry establishing that the Proposal complies with both the principle of subsidiarity and the principle of proportionality.

No debate was held.

(With 9 votes "for" and 0 votes "against") the Committee adopted the following

O p i n i o n:

The Committee on Domestic Policy, Public Administration and Justice is of the opinion that the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession complies with the principle of subsidiarity as provided by Article 5 of the Treaty on European Union and by the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union.

* * *

The Committee decided to appoint Anton Colarič, Deputy Chair of the Committee, as rapporteur at the meeting of the competent working body.

Mag. Maja Briški
Undersecretary

Dr. Vinko Gorenak
Chair

Sent to:

- the Government
- the National Council
- the leaders of deputy groups
- the Legislative and Legal Service



REPUBLIC OF SLOVENIA NATIONAL ASSEMBLY

Legislative and Legal Service

No.: 008-09/09-64/5

Date: 2 December 2009

To the Committee on EU Affairs

Subject: Opinion regarding compliance with the principle of subsidiarity in the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession

On 28 October 2009, the Legislative and Legal Service of the National Assembly of the Republic of Slovenia was called upon by the Committee on EU Affairs to prepare a reasoned opinion as to whether the above Proposal complied with the principle of subsidiarity as required by the Protocol on the application of the principles of subsidiarity and proportionality (hereinafter: the Protocol), annexed to the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC).

About the principle of subsidiarity and proportionality

The principle of subsidiarity and proportionality is enshrined in Article 5(2) of TEC; according thereto, in areas which do not fall within its exclusive competence, the Community takes action (e.g. adopts legislative acts) only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States at the national, regional or local levels (negative criterion or necessity test) and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community (positive criterion or value-added test). The positive and the negative criteria must be met cumulatively. The principle of subsidiarity is defined in the third paragraph of the same article: any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaties. The manner to apply (implement) such principle is defined in Article 5 of the Protocol: any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principle of subsidiarity. There is also a specific provision whereby this statement should contain some assessment of the proposal's financial impact. The reasons for concluding that a Union objective can be better achieved at Union level should be substantiated by qualitative and, wherever possible, quantitative indicators. Last but not least, Article 5 of the Protocol requires that proposals should take account of the need for any financial or administrative burden to be minimised and commensurate with the objective to be achieved.

Subsidiarity and civil law

In addition to the general regulation of the principle of subsidiarity in Article 5 of TEC, for certain areas this principle is further structured in the provisions of the Treaties relating the specific field. This applies, for example, to judicial cooperation in civil matters to which the above Proposal refers and which is dealt with in Title IV of TEC: "Visas, asylum, immigration and other policies related to free movement of persons". Judicial cooperation in civil matters falls under "other policies related to free movement of persons". The objective of the above Title is explained in the *chapeau* of Article 61: to establish progressively an area of freedom, security and justice. In order to attain such objective, the Council may adopt measures in areas falling under Title IV, whereby the provision relevant for the Proposal under consideration is Article 61(c) on measures in the field of judicial cooperation in civil matters as provided for in Article 65. The latter states the fields of civil law which may be regulated by the Council through measures necessary for the proper functioning of the internal market, and if such civil matters have cross-border implications. The procedure for the adoption of such measures is regulated by the second indent of Article 67(5) whereby measures in the field of civil law are adopted by codecision, as provided by Article 251 of TEC.

The second indent of Article 67(5) explicitly excludes from its application any aspect concerning family law. The principal question regarding the mentioned Proposal is therefore whether the above exception also applies to the law of succession, i.e. whether the latter is a part of family law or not. The main act regulating issues pertaining to family law in Slovenia is the Marriage and Family Relations Act (Official Gazette of the Republic of Slovenia No. 69/04 - official consolidated text); pursuant to Article 1, the Act regulates marriage, the relations between parents and children and other relatives, adoption, foster care, and protection of minors and other persons incapable of caring for themselves, their rights and benefits. On the other hand, law of succession¹⁵ regulates those relations from the private property law sphere that relate to succession as the transferral of property from the deceased to other persons. Succession is indeed closely related to personal relations, family, marriage, extramarital union, as well as any social or economic community and registered same-sex partnership. However, personal relations only matter as facts to which the law of succession ties certain legal consequences, i.e. as possibilities for a person to inherit. In such case the elements of personal law do not alter the principle of property law in terms of inheritance and law of succession. Therefore, law of succession does not fall under family law nor under the exemption of the second indent of Article 67(5). Also in EU law such difference is proven by the fact that a special Regulation 2201/2003 was adopted in relation to family law, which is not based on the above provisions of the Treaty and was adopted by a different legislative procedure.

¹⁵ Taken from Karel Zupančič: *Dedno pravo*, Official Gazette of the Republic of Slovenia, Ljubljana 1991, p. 17 and 20.

Subsidiarity in the Proposal

The elements of the statement on subsidiarity and proportionality may be found in the explanatory memorandum of the Proposal in Section 1.2. The latter points to the significance of cross-border successions within the EU, stressing that the diversity of national rules on succession matters is an obstacle to the free movement of persons in the Union, as well as to the full exercise of private property law. The objective of the Proposal is to enable people living in the EU to organise their succession in advance and effectively to guarantee the rights of the persons concerned to succession. Section 3.2. titled Subsidiarity principle provides that the objectives of the Proposal can be met only by way of common rules governing international (more correct: cross-border) successions, while unilateral action by Member States run counter to this objective. It also emphasises that other international instruments do not solve this issue in a satisfactory way.

According to the Legislative and Legal Service, the introductory memorandum in principle meets the requirements of explanation of the Proposal in terms of compliance with subsidiarity. Likewise, the provisions of the Proposal comply with the principle of subsidiarity. Particularly noteworthy is paragraph 33 of the preamble, explicitly stating that the objective of the Regulation is the free movement of persons, more precisely the possibility for European citizens to organise in advance their succession in an international (more correct: cross-border) context as well as to guarantee the rights of the persons concerned (heirs, legatees, creditors of the succession, etc.). Since these objectives cannot be satisfactorily met through unilateral measures by the Member States, they may only be achieved at Community level. Also the subject matter of the provisions is undisputable in terms of subsidiarity. The main provision of the Proposal is Article 29, providing for compulsory mutual recognition of succession decisions without any special procedure. In relation to the relevant national law, Article 16 provides that the law applicable to succession is that of the State in which the deceased had their habitual residence at the time of their death, although pursuant to Article 17 a person may choose as the law to govern the succession the law of the State whose nationality they possess. Chapter VI introduces the European Certificate of Succession as a proof of the capacity of heir or legatee and of the powers of an administrator or executor of the succession. Also other provisions of the Proposal are quite characteristic of EU legal acts, specifying mutual recognition of court decisions as the basic principle of harmonisation of civil law; most typical is Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, which has a structure similar to that of the here mentioned Proposal.

Most provisions of the Regulation are indisputable in terms of subsidiarity. As regards EU jurisdiction, only Article 27 is questionable which provides when the application of the rule of law of one Member State may be refused in another member State. This is only admissible if such application is incompatible with the public policy of the forum. This involves the objection of public policy also found in certain other provisions of the Proposal. Questions could be raised with regard to the provision of Article 27(2) explicitly stating that the fact that the clauses of one Member State on the reserved portion differ from those in force in the forum may not be considered objection of public policy. The notion of public policy in relation to civil

law has been developed by the European Court of Justice, stating that such objection is only possible in the event that non-application would constitute (1) a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or (2) of a right recognised as being fundamental to within that legal order (e.g. Case C-38/98, par. 30). Since in the above Case the Court interpreted a legal act which did not have an explicit provision like the Proposal, the above argumentation should be applied by analogy; in fact, it is unclear whether or not the Court - in some sort of "constitutional" review of compliance of a secondary legislation act with the EU constituent instruments - would hypothetically repeal a similar provision. The right to the reserved portion is a right to succeed (Article 27 of the Inheritance Act), but the question is whether it is a fundamental right in the sense of the above Case. The second paragraph of Article 67 of the Slovenian Constitution provides that the manner and conditions of inheritance are established by law, but does not explicitly refer to the right to reserved portion as a fundamental human right. Therefore, one could assume that the right to reserved portion is not a fundamental right that might constitute clear grounds for an objection of public policy as defined by the Court. In other words, this means that the explicit exclusion of the reserved portion as objection of public policy in the Proposal is not contrary to the definition of the Court.

Furthermore, it needs to be stressed that the subject matter of this opinion is merely subsidiarity; in relation thereto, the explanation of Article 27 of the Proposal is satisfactory: 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. Such analysis is undoubtedly true: preserving different systems of reserved portion would lead to a re-fragmentation of the area of security, freedom and justice and would be therefore contrary to the free movement of persons which is the main objective of judicial cooperation in civil matters. Therefore, in terms of subsidiarity, the inadmissibility of the reserved portion as objection of public policy is admissible.

Based on the above findings, the Legislative and Legal Service establishes that the Proposal complies with the principle of subsidiarity.

Mag. Samo Kutoš
Undersecretary

Božo Strle
Head

Cc:
- Committee on Domestic Policy, Public Administration and Justice



Evaluation of the subsidiarity check

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?

Commission for International Relations and European Affairs was involved in the subsidiarity check in the National Council.

2. Was the plenary involved?

No the plenary was not involved.

3. At which level the final decision was taken and who signed it?

The opinion that respective Proposal is in compliance with the principle of subsidiarity was adopted by the Commission for International Relations and European Affairs. It was signed by the Chairman of the Commission.

4. Which administrative services of your parliament were involved and how? Please specify.

Secretariat of the above mentioned Commission and all technical departments which are normally in charge of the preparation and conduct of meetings of working bodies.

5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

In this particular case we did not coordinate the subsidiarity check with the other chamber (National Assembly).

6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?

Commission for International Relations and European Affairs invited Ministry of Justice to the join the session in order to present their assessment of the compliance of the Proposal with the principles of subsidiarity.

7. Did you consult your regional parliaments with legislative powers?

There are no regional parliaments in Slovenia

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?

In this particular case no non-governmental organizations, interest groups, external experts or other stakeholders were consulted.

9. What was the chronology of events? Please specify the dates.

The proposal was received on 21 October 2009. The Chairmen of the Commission for International Relations and European Affairs decided to call a Commission Meeting which was held on 8th December. Ministry of Justice was asked to attend the commission meeting and present their assessment of the compliance of the proposal with the principles of subsidiarity. Commission adopted the opinion that respective proposal is in compliance with the principle of subsidiarity. The opinion was sent to the EU Affairs Committee of the National Assembly.

10. Did you cooperate with other national parliaments in the process? If so, by what means?

No we did not cooperate with any other national parliaments in this process.

11. Did you publicise your findings? If so, by what means?

No, we did not publish our findings.

Findings:

12. Did you find any breach of the principle of subsidiarity?

No we did not.

13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.

No we did not.

14. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?

Yes, we did.

15. Did you encounter any specific difficulties during this subsidiarity check?

No, we did not.

16. Any other comments?

No.

Spain: Cortes Generales

Evaluation of the subsidiarity check

The answers from the Spanish *Cortes Generales* to the questionnaire on the evaluation of the subsidiarity check regarding the proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession are forwarded herewith:

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?

The Joint EU Committee was the Parliamentary Committee in both Chambers of the Cortes Generales which dealt with the subsidiarity check, in compliance with the ad hoc rules established by the Bureau of the Joint Committee.

2. Was the plenary involved?

Neither the Plenary of the Congress of Deputies nor of the Senate were involved in the proceedings.

3. At which level the final decision was taken and who signed it?

The final decision was taken by the Joint Committee.

4. Which administrative services of your parliament were involved and how?
Please specify.

The Secretariat of the Joint Committee provided the personal and material means for the subsidiarity check.

5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

No further coordination is needed, as the Joint Committee is made up of parliamentarians of both Chambers.

6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?

The Government, through the Secretary of State for Constitutional and Parliamentary Affairs forwarded a report on the Commission's Proposal.

7. Did you consult your regional parliaments with legislative powers?

The Chair of the Joint Committee for the European Union invited the Regional Legislative Assemblies to take part on the test. A number of them (namely, Canary Islands, Galicia, Navarre, Basque Country, Aragon, Murcia, Asturias, Castile-La Mancha, Cantabria and Catalonia) forwarded their opinions, which were taken into consideration by the Committee.

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?

The proceedings did not envisage such consultations.

9. What was the chronology of events? Please specify the dates.

*The proposal was approved by the European Commission on October 14th, with official translations circulated to National Parliaments on **October 21st**.*

*The Chair of the Joint Committee for the European Union invited the Government and the Regional Parliaments to take part in the test by submitting their opinions on the matter to the Joint Committee before **November 19th**.*

*On **December 1st**, the Bureau and spokespersons of the Joint Committee adopted a draft proposal which was submitted to the Joint Committee.*

*The Joint Committee debated the draft proposal on **December 9th**. The proposal was adopted by assent of the Committee.*

10. Did you cooperate with other national parliaments in the process? If so, by what means?

The proceedings did not envisage such cooperation.

11. Did you publicise your findings? If so, by what means?

The debate was broadcasted and webstreamed and a full transcript will be published in the Parliamentary Journal. The Resolution will be published in the Parliamentary Official Journal.

The Resolution, together with an English translation, has been uploaded to the relevant pages of the IPEX website.

The webstreaming of the full Joint Committee session can be downloaded at the following url, on the Congress of Deputies media archive site:

http://www.congreso.es/portal/page/portal/Congreso/GenericPopUp?_piref73_2138150_73_2138147_2138147.next_page=/wc/verEmision&video=mms://congresodiferido.congreso.es/archivo/09_318_32_1.asf&canal=2&nombreOrgano=Comisi3n%20Mixta%20para%20la%20Un3n%20Europea&fechaSeleccionada=9%20de%20Diciembre%20de%202009&directo

Findings:

12. Did you find any breach of the principle of subsidiarity?

No breach of the principle of subsidiarity was found.

13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.

A reasoned opinion on the Proposal was adopted.

14. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?

No objections were tabled regarding the Commission's justification.

15. Did you encounter any specific difficulties during this subsidiarity check?

No specific difficulties were encountered.

16. Any other comments?

No.

RESOLUTION BY THE JOINT COMMITTEE FOR THE EUROPEAN UNION, OF 9 DECEMBER 2009, ON COMPLIANCE WITH THE PRINCIPLE OF SUBSIDIARITY AS APPLIED TO THE PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON JURISDICTION, APPLICABLE LAW, RECOGNITION AND ENFORCEMENT OF DECISIONS AND AUTHENTIC INSTRUMENTS IN MATTERS OF SUCCESSION AND THE CREATION OF A EUROPEAN CERTIFICATE OF SUCCESSION, TABLED BY THE EUROPEAN COMMISSION ON 14 OCTOBER 2009

BACKGROUND

A. The Conference of Community and European Affairs Committees (COSAC) –acting under the provisions of the Protocol on the Role of National Parliaments annexed to the Amsterdam Treaty of 1997- initiated as from 2004 a number of pilot exercises on the implementation of an Early Warning System allowing national parliaments to verify European legislative initiatives’ compliance with the subsidiarity principle, as described in the Protocol on the Application of the Principles of Subsidiarity and Proportionality annexed to the Lisbon Treaty of 2007. Prior to the entry into force of the Treaty, these trials were not legally binding, but intended to provide national parliaments with a degree of experience once the Treaty came into effect. With the Treaty entering into force on 1 December 2009, this current test can be considered the last in the trial stage.

B. The XLII COSAC, held at Stockholm on 5 and 6 October 2009, agreed to carry out a trial subsidiarity test on the proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession.

C. The Joint Committee for the European Union, on the unanimous proposal of its Bureau and Party Spokespersons resolved, on 24 March 2009, to initiate an early warning system pilot test on the proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, under the criteria established by the Committee in its sitting of that day.

D. The proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession was approved by the European Commission on 14 October 2009, with official translations circulated to national parliaments on 21 October 2009. The eight-week deadline for the test was therefore understood to lapse on 17 December 2009.

The Chair of the Joint Committee for the European Union invited the Government and the Regional Legislative Assemblies to take part in the test, if they so desired, by submitting their opinions on the matter to the Joint Committee before 19 November 2009.

E. A report was received from the General Secretariat for the European Union, in addition to opinions from the Regional Parliaments of the Canary Isles, Galicia, Navarre, the Basque Country, Aragon, Murcia, Asturias, Castilla – La Mancha, Cantabria and Catalonia. None of them considered the draft European provision to be in breach of the subsidiarity principle.

F. The Joint Committee for the European Union, in its meeting of 9 December 2009, adopted the following:

RESOLUTION

1. Article 2 of the Treaty on European Union states that the Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties and respecting the principle of subsidiarity as defined under Article 5 of the current Treaty on European Union, which states the following: “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”.

The parliamentary test applicable in this case must therefore be limited to verifying that the European legislative initiative complies with the above principle.

Therefore, unlike some Regional Parliaments, this Resolution shall not enter into an analysis of the substance of the proposal for a Regulation, although it is acknowledged that it does give rise to a number of issues, particularly with regards to its future application in Spain.

The Protocol on the application of the subsidiarity principle provides a set of criteria that may be taken into account, such as the cross-border nature of the matter, possible conflicts that may arise from the actions of Member States in the absence of Community regulations or effects counter to the interests of Member States, or the achievement of clear comparative advantages in light of the scale or effects of the proposed action.

2. The scope of the Regulation under scrutiny includes all questions arising in civil law in connection with succession to the estates of deceased persons, regarding which it regulates four aspects: courts’ jurisdiction over the matter; the law applicable to succession as a result of death; recognition and enforcement on the part of Member States of resolutions and legal transaction in application of the Regulation; and finally the introduction of a European Certificate of Succession, with full effects in all Member States. The scope of the Regulation specifically excludes fiscal, customs and administrative considerations.

Regarding court jurisdictions, the Regulation establishes that the courts of the Member State on whose territory the deceased had habitual residence at the time of their death shall be competent to rule in matters of successions, though it also provides for referral to a court better placed to hear the case. Regulation on this matter is flexible, since it also provides for courts of a Member State to be competent on the basis of the fact that succession property is located in that Member State.

Regarding applicable law, the Regulation opts for a unified approach whereby successions are governed by a single law. As a general rule, the law applicable to the succession shall be that of the State in which the deceased had their habitual residence at the time of their death, though a person may choose to modify this rule in order that their succession be governed by the law of the State whose nationality they possess. The Regulation acknowledges the coexistence in a single State of territories with different rules of law in respect to succession – as is the case of Spain, where regional legislations coexist with the common State legislation – establishing that in such cases each territorial unit shall be considered as a State for the purpose of identifying the law applicable under the Regulation. The same applies to the special succession regimes to which certain immovable property enterprises, enterprises or other special categories of property are subjected by the law of the Member State in which they are located on account of their economic, family or social purpose. Finally, the Regulation includes a provision whereby the application of a rule of the law determined by the Regulation may be refused only if such application is incompatible with the public policy of the forum.

The Regulation asserts the principle of mutual recognition between Member States of judgements given pursuant to the Regulation, as well as of authentic instruments issued by the authorities of a Member State. The Regulation includes an exceptional and limited list of grounds for non-recognition. Therefore, aside from these exceptions, decisions given in any Member States shall be carried out in the other Member States.

The final part of the Regulation introduces a European Certificate of Succession, which does not replace internal procedures to certify the key elements of succession in case of death, but provides for full recognition in all Member States as proof of the capacity of heir or legatee and of the powers of the executors of wills or third-party administrators.

3. The aim of the Regulation, as stated in the Explanatory Memorandum, is to resolve the problems related to cross-border successions in the European Union through the establishment of a homogenous regulation that eliminates the obstacles to the free movement of persons within the European Union. Specifically, it intends 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.” The provisions set forth are therefore intended to eliminate the obstacles to the free movement of persons, which is one of the European Union’s basic freedoms.

4. The legal basis for the proposal rests on Article 61.c) of the Treaty establishing the European Community, which stipulates that, in order to progressively establish a common area of freedom, security and justice, the Council shall adopt measures in the field of judicial cooperation in civil matters, in compliance with Article 65 of the Treaty.

Article 65 states that measures in the field of judiciary cooperation in civil matters, with cross-border implications adopted in compliance with Article 67 and in the degree required for the adequate operation of the internal market, shall include, amongst others, 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”.

Finally, Article 67(5) of the Treaty stipulates that the measures provided for in Article 65 shall be adopted using the co-decision procedure laid down in Article 251 of the Treaty, except with regard to “aspects relating to family law”.

5. With regards to compliance with the subsidiarity principle, the Commission justifies the proposal’s relevance by stating that its objectives 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. On the other hand, the Commission points out that standards under international private law established to date (The Hague Convention of 5 October 1961 on the conflicts of laws relating to the form of testamentary dispositions and The Hague Convention of 1 August 1989 on the law applicable to succession to the estates of deceased persons) have failed to resolve the problems connected to this matter.

6. The Joint Committee for the European Union considers that Articles 61, 65 and 67.5 of the Treaty establishing the European Community provide sufficient legal basis for the proposed Regulation under scrutiny. Indeed, the proposal intends both to improve and simplify recognition and enforcement of decisions in civil matters, in this case related to succession, and to promote the intercompatibility of standards applicable across Member States in cases of conflicts of laws and jurisdiction, by establishing a common standard applicable to all Member States.

In terms of compliance with the subsidiarity principle, under Article 5 of the Treaty establishing the European Community, it is worth pointing out that provisions under international private law, adopted within a framework of international cooperation, have proved insufficient in solving the problems that the Regulation intends to address. On the one hand, The Hague Convention of 5 October 1961 on the conflicts of laws relating to the form of testamentary dispositions, currently in force and ratified by 16 EU Member States (including Spain), has a far more limited scope than the proposed Regulation, since it merely establishes the criteria for recognising the validity of testaments, but does not establish the connection factors that determine the law applicable to any succession –not only those under testament-, nor does it specify the jurisdiction of the courts that are competent to rule on the succession. On the other hand, The Hague Convention of 1 August 1989 on the law applicable to succession to the estates of deceased persons – which does specify connecting factors to determine the law applicable to successions – is not currently in force, since it has only been signed by four States, of which one (the Netherlands) has ratified it. Indeed, the Regulation at hand establishes a standard for successions that is different to that stipulated in the Convention on the law applicable to succession to the estates of deceased persons, in addition to extending regulation to other fields such as the competence of courts, mutual recognition and enforcement of decisions on successions or the establishment of a European Certificate of Succession.

To the advantage of European citizens, the insufficiency of current standards is thus addressed by means of a regulation that provides clear and transparent standards for determining the law applicable to succession and streamlines the transmission and acquisition of property on the basis of criteria such as mutual recognition and the establishment of a European Certificate of Successions. This step also contributes towards the fulfilment of one of the European Union’s stated objectives; namely, to progressively establish a common area of freedom, security and justice (Article 2 of the Treaty of the European Union).

Finally, the question also combines other considerations that it is worth taking into account when assessing compliance with the subsidiarity principle, such as the transnational nature of the question, or the existence of legal conflicts that, to a considerable degree, may be resolved through the new EU Regulation.

For these reasons, the Joint Committee for the European Union considers that the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, submitted by the European Commission on 14 October 2009, complies with the subsidiarity principle established in the Treaties on European Union in force.

16 December 2009

3. Evaluation of the subsidiarity check under the provisions of the Treaty of Lisbon on the Commission Proposal for a Regulation on matters of succession and the creation of a European Certificate of Succession

To facilitate the evaluation of the subsidiarity check, on behalf of the Swedish Presidency, national parliaments or chambers are kindly asked to reply to the following questions and send their answers to the COSAC Secretariat (secretariat@cosac.eu).

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?
The Committee on Civil Affairs examined the proposal.
2. Was the plenary involved?
No.
3. At which level was the final decision taken and who signed it?
The decision was taken on committee level. The Chair of the Committee on Civil Affairs signed the record of the meeting.
4. Which administrative services of your parliament were involved and how (please specify)?
The Secretariat of the Chamber (coordination of measures, see chronology of events) and the Secretariat of the Committee.
5. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?
No. However, the Ministry of Justice provided brief information on the content of the proposal.
6. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?
Not applicable.

7. Did you consult your regional parliaments with legislative powers?

Not applicable.

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?

No.

9. What was the chronology of events?

20 October: The proposal was passed on to the Committee on Civil Affairs.

3 November: The Committee received information on the content of the proposal from the Ministry of Justice. The Committee took a decision to participate in the subsidiarity check.

8 December: The Committee arrived at a decision on subsidiarity. The decision was noted in the Committee record. The record was immediately checked by the Committee through the Chair of the Committee. The Secretariat of the Committee published the record on the IPEX website (enclosed).

10. Did you cooperate with other national parliaments in the process? If so, by what means?

No.

11. Did you publicise your findings? If so, by what means?

The findings were noted in the record of the Committee meeting and published on the IPEX website.

12. Has your parliament introduced any procedural changes with regard to subsidiarity check mechanism since September 2008? If so, please specify how.

No, not for this check. However, as concerns the participation of the Swedish Parliament in decision-making in the EU under the Lisbon Treaty, the Rules of Procedure have subsequently been changed and new procedures have been created as concerns both subsidiarity checks of draft legislative acts and as concerns amendments to treaties (chapters 2, 3, 4, 5 and 10 of the Riksdag Act).

Findings:

13. Did you find any breach of the principle of subsidiarity?

No.

14. Did you adopt a reasoned opinion on the Proposal? (If so, please enclose a copy)

No.

15. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?

Yes.

16. Did you encounter any specific difficulties during this subsidiarity check?

It was noted among Committee members that, in this case, it was quite clear that the proposal was consistent with the principle of subsidiarity.

17. Any other comments?

The Committee noted potential difficulties with future proposals. For a more complex proposal, the deadline of 8 weeks was considered too short. The question was raised whether it would be possible to become properly acquainted with a complex proposal in such a brief period of time.

Extract from the Committee Record on 8 December 2009

§ 3 Subsidiarity check

The Committee has participated in the trial initiated by COSAC with respect to subsidiarity control of the Proposal for a Regulation of the European Parliament and of the 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 Inheritance Impact Assessment COM(2009) 154 final Taking into account the objectives of the Proposal, the Committee made the assessment that the objectives of the planned measure cannot be achieved to a sufficient degree by measures taken by the Member States and that therefore the objectives may be better achieved by means of a Community measure. The Proposal was thus considered to comply with the subsidiarity principle.

This paragraph was immediately declared to have been approved.

United Kingdom: *House of Commons*

Draft Regulation on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Authentic Instruments of Succession and the Creation of a European Certificate of Succession

Procedures:

1. Which parliamentary committees were involved in the subsidiarity check and how?

European Scrutiny Committee of the UK House of Commons

2. Was the plenary involved?

No

3. At which level the final decision was taken and who signed it?

European Scrutiny Committee at its meeting on 25 November 2009

4. Which administrative services of your parliament were involved and how? Please specify.

The Clerks of the Committee and the Committee's Legal Adviser

5. In case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

No.

6. Did your government provide any information on the compliance of the Proposal with the principle of subsidiarity?

Yes, a basic assessment as part of the Government's Explanatory Memorandum.

7. Did you consult your regional parliaments with legislative powers?

No.

8. Did you consult any non-governmental organisations, interest groups, external experts or other stakeholders?

No.

9. What was the chronology of events? Please specify the dates.

The document was deposited in the UK parliament on 21 October 2009. The Committee considered the proposal on 25 November 2009.

10. Did you cooperate with other national parliaments in the process? If so, by what means?

No

11. Did you publicise your findings? If so, by what means?

Yes in a published Report to the House of Commons.

Findings:

12. Did you find any breach of the principle of subsidiarity?

No

13. Did you adopt a reasoned opinion on the Proposal? If so, please enclose a copy.

No.

14. Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?

Yes on this occasion.

15. Did you encounter any specific difficulties during this subsidiarity check?

None

16. Any other comments?

No

Succession and Wills

(31015) Draft Regulation on Jurisdiction, Applicable Law, Recognition and
14722/09 Enforcement of Decisions and Authentic Instruments of Succession
+ ADDs 1–2 and the Creation of a European Certificate of Succession
COM(09) 154

Legal base	Articles 65 and 67(5) EC Treaty; QMV; co-decision.
Document originated	14 October 2009
Deposited in Parliament	21 October 2009
Department	Ministry of Justice
Basis of consideration	EM of 2 November 2009
Previous Committee Report	None
To be discussed in Council	No date fixed
Committee's assessment	Legally and politically important
Committee's decision	Not cleared; further information requested.

Background

(a) Article 65 EC Treaty provides for the adoption of measures in the field of judicial cooperation with cross-border implications, which expressly include 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 law and of jurisdiction.” The numerous instruments which have already been adopted on this basis, in particular Regulation (EC) No. 44/2001 (“the Brussels Regulation”), exclude succession from their scope.

The Document

(b) The proposal seeks to address this lacuna and establish common rules in the area of wills and succession. There are three main areas for which it proposes uniform rules.

Jurisdiction

(c) Articles 3 to 15 deal with jurisdiction, i.e., which court should deal with a succession. Courts are defined widely to include public authorities dealing with succession. As a basic rule the proposal envisages that the Member State where the deceased was habitually resident at the time of death should have jurisdiction. (Article 4). If the deceased chose the application of the law of another Member State, limited provision is made for the case to be transferred to the courts of that Member (Article 5). Rules of ‘residual jurisdiction’ address situations where a deceased was not habitually resident in any Member State at the time of their death (Article 6). In addition, the Regulation contains various supplementary jurisdictional provisions, for example provisions relating to concurrent and related proceedings (Articles 13 and 14) and the taking of supplementary provisional and protective measures (Article 15).

Applicable Law

(d) As a general rule the proposal envisages that the law applicable to the succession should be that of the state where the deceased was habitually resident at the time of death

(Article 16), whatever court or authority would have jurisdiction and even if this results in applying the law of a third country. The ‘habitual residence’ rule would also work as a default provision. In addition and as an exception to the general rule, a testator would be able to choose the law of his or her nationality to apply to the succession (Article 17).

(e) The scope of the applicable rules in the Regulation is defined in broad terms (Article 19) and would cover, for example, the validity and interpretation of any will, the capacity to inherit, the rules on the transfer of the property, responsibility for paying the debts of the estate, the rules on compulsory inheritance (i.e. rules for the benefit of relatives that cannot be changed by a will). Notably the choice of law rules would extend to “any obligation to restore or account for gifts and the taking of them into account when determining the shares of heirs”, i.e. the claw back of lifetime gifts. The Regulation would expressly permit the preservation of regimes of the Member States where there are “special succession regimes” applying to immovable property, enterprises or other “special categories of property” on account of their economic, family or social aims (Article 22). Finally, the applicable law rules of the proposal may not be applied if the determining court considers that it is incompatible with the public policy of its Member State (Article 27).

Recognition and enforcement

(f) Article 29 of the proposal provides for automatic recognition of any decision of a court of another Member State except in the very limited circumstances set out in Article 30. Article 31 excludes the possibility of review by an EU court of the substance of a decision by a competent court in another Member State. **Authentic instruments shall, as a general rule, be recognised and enforced irrespective of country of origin provided there are no public policy objections** in the Member State where recognition or enforcement is sought (Articles 34 and 35). Finally, provision is made for the creation, recognition and enforcement of a new “European Certificate of Succession” (Articles 36 to 44). Its use would not be obligatory and it would not replace existing procedures for other enforceable documents.

The Government’s view

(g) In his Explanatory Memorandum of 2 November 2009 the Parliamentary Under Secretary of State at the Ministry of Justice (Lord Bach) summarises the Government’s position as follows:

“The Government recognises the potential value of a satisfactory Regulation in this field. This reflects the increasing number of people who own assets in more than one Member State. Good uniform rules of private international law on succession would enhance legal certainty for these individuals and their heirs by replacing the current complex plethora of diverse national rules in the Member States.

“The detailed policy implications of the draft Regulation are currently being consulted on by the Government. Accordingly the implications set out below are preliminary in nature and are subject to the results of that consultation.

“The Government considers that there could be two potential benefits of the draft Regulation. The first concerns the proposed choice of law rules which would apply to all types of property and would thereby provide greater simplicity than the current rules in the UK which distinguish between moveable and immoveable property and apply different choice of law rules in relation to each type of property. The second potential benefit concerns the proposed provision for individuals to choose the law applicable to the succession to their estates. There is

no such provision under current law in the UK. This innovation could assist with estate planning and appears to be consistent with the tradition of freedom of testamentary disposition in the UK.

“The Government has identified two issues with the potential to cause significant problems. The first concerns the proposed application in the UK of provisions, which exist under the laws of many other Member States, the effect of which would be to reopen certain lifetime transactions entered in to by the deceased during his or her lifetime. Such provisions, known as ‘claw back’, are intended to support the mandatory provision for family heirs created under those laws. Their application in the UK would be contrary to our tradition of freedom of disposition of property and have the potential to cause significant legal uncertainty. The second concerns the proposed connecting factor of habitual residence which would play a central role under the Regulation in relation to both jurisdiction and choice of law. This factor is left undefined in any way and this could create significant legal uncertainty and, in some cases, lead to inappropriate results, particularly in cases where the deceased had been on a short term employment secondment to a Member State. This connecting factor would replace the connecting factor of ‘domicile’ which currently operates within the UK.

“The Government has also identified various other potentially unsatisfactory provisions in the draft Regulation. These include the following: the restrictive nature of the transfer provision (Article 5); the broad residual basis of jurisdiction (Article 6); the piecemeal approach to issues of capacity (Articles 1(3)(b) and 19(2)(c)); the broad and uncertain exclusion from the choice of law regime of certain special succession regimes (Article 22); the limitation on the application of the public policy principle as a ground for resisting recognition to default judgments (Article 30); and the perhaps overly broad provision for the recognition of the European Certificate of Inheritance (Chapter VI).

“The Government is consulting widely with those individuals and organisations most likely to be affected by this proposal, in particular the judiciary, practitioners, academics, charities and representatives of the trust industry. This consultation will relate both to the UK’s opt-in decision and thereafter throughout the negotiations on the proposed measure.”¹⁶

- (h) The Government expects that the current Swedish Presidency will arrange meetings of the Council Working Group before the end of 2009 to start negotiations on this proposal, and that the Spanish Presidency will take forward the negotiations through the Working Group as a matter of priority in the first half of 2010. The proposal is not expected to be agreed before 2011.

Conclusion

- (i) We thank the Minister for his helpful comments and his indication of the Government’s view of the proposal. We broadly share the Government’s basic position in relation to the potential benefits of Community rules in a field of growing cross-border significance.**

¹⁶ The Government’s consultation document can be found at <http://www.justice.gov.uk/consultations/ec-succession-wills.htm>

(j) This proposal has been subject to a final COSAC subsidiarity early warning simulation exercise. We do not consider that the proposed measure raises significant subsidiarity issues.

(k) At the same time we share the Government's concerns about the incompatibility of the possible or implied claw back provisions of the proposal with the established succession regime in the United Kingdom. We are also concerned about the administrative burdens imposed by rules allowing for the recovery of *inter vivos* gifts. We therefore ask the Government to indicate if it will only 'opt in' to the proposal if appropriate amendments can be obtained to exclude the claw back of lifetime gifts. We ask the Minister to send us word of any 'opt in' decision as soon as the Government's thinking may have crystallised.

(l) To a lesser extent we also share the Government's preference for a definition of 'habitual residence.' We ask the Minister why the lack of definition is likely to be of particular importance in relation to this proposal when the same criterion was used in several other recent civil judicial cooperation measures at EU level. In addition, we ask the Minister to provide us with a summary of the responses to the Government's consultation exercise.

(m) Finally, we ask the Minister to explain the Government's position with regard to the tax neutrality of the measure and, in particular, whether the current wording of Article 21 of the proposed text is sufficient to ensure this objective. We ask the Minister to assure us that the proposal will be without effect with regard to the existing regime governing inheritance tax payable on assets held in one Member State but bequeathed to a beneficiary in another Member State according the law of another State. We ask the Minister to assure us that in such cases inheritance tax will remain payable on any assets within the jurisdiction on exactly the same terms as if the deceased and his beneficiary were residents and the succession governed by domestic law, even if there is and has been no further connection between the State imposing the tax and the deceased or the beneficiary and even if the tax were chargeable at such rate as to necessitate the liquidation of the assets at below market value.

(n) We shall hold the document under scrutiny at least until we have received the Minister's reply.



HOUSE OF LORDS

EUROPEAN UNION COMMITTEE

Response to the COSAC Subsidiarity Check on the European Commission's proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession

Procedure

Which parliamentary committees were involved in the subsidiarity check and how?

The Sub-Committee on Law and Institutions (Sub-Committee E) of the House of Lords European Union Committee.

Was the plenary involved?

No.

At which level the final decision was taken and who signed it?

The decision was taken by the Sub-Committee. This Response was approved by the Chairman of the European Union Committee who has signed it.

Which administrative services of your parliament were involved and how?

The Committee Office of the House of Lords provided administrative support and legal advice for the Sub-Committee.

In the case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

There was consultation between officials advising the respective Committees.

Did your government provide any information on the compliance of the proposal with the principle of subsidiarity?

The Government provided an Explanatory Memorandum on the proposal which included comments on compliance with the principle and expanded on these comments in response to a specific request.

Did you consult your regional parliaments with legislative powers?

Yes. The European and External Relations Committee of the Scottish Parliament were unable to consider the matter within the timetable set. The Welsh Assembly responded that they were content to leave the response to the Lords as succession is not currently a devolved matter. The Northern Irish Assembly considered the proposal but had no comment to make.

Did you consult any non-government organisations, interest groups, external experts or other stakeholders?

Yes, evidence was taken from two experts (Professor Matthews and Richard Frimston) as part of a more general inquiry undertaken by Sub-Committee E in the course of its scrutiny of the Commission's proposal.

What was the chronology of events?

14 October: publication of the Commission's proposal
2 November: receipt of the Government's Explanatory Memorandum
3 November: contact made with the regional assemblies for Scotland, Wales and Northern Ireland
25 November: evidence heard from Professor Paul Matthews as part of the Committee's inquiry into the proposal
2 December: evidence heard from Mr Richard Frimston as part of the Committee's inquiry into the proposal
9 December: approval of this Response by Sub-Committee E
10 December: approval of this Response by the Chairman of the European Union Committee

Did you cooperate with other national parliaments in the process?

No.

Did you publicise your findings?

Updates on progress will be available on the website of the European Union Committee and via IPEX

Findings

Did you find any breach of the principle of subsidiarity?

The Committee concluded that the draft Framework Decision complies with the principle of subsidiarity.

Did you adopt a reasoned opinion on the proposal?

No.

Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?

The justification given under the heading "Subsidiarity" in the Commission's explanatory memorandum is limited to:

- asserting that the objectives of the proposal can only be met by way of common rules which must be identical;
- indicating that activity within the Hague Conference on Private International Law has not provided a solution to date; and
- indicating in general terms only that consultations and studies have illustrated the amplitude of the problems.

The recitals include only limited reasoning in respect of subsidiarity.

Of greatest assistance was the Impact Assessment (and its summary) which did seek to identify and quantify the underlying impediments to free movement in this area.

Did you encounter any specific difficulties during this subsidiarity check?

The Committee is undertaking a formal inquiry into the Commission proposal. In order to meet the deadline for this response, the normal 6 week period for written evidence to be submitted for that inquiry was shortened. Also it was necessary to form a view before the completion of all the sessions of oral evidence to the inquiry.

Other Comments

None

14 December 2009

LORD ROPER

Chairman of the
Committee