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**CCBE POSITION ON THE 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, COM(2009)154 FINAL**

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**CCBE position on the 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, COM(2009)154 final**

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The Council of Bars and Law Societies of Europe (CCBE) represents around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer member countries. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

In 2005, the CCBE has responded to the European Commission's Green paper on succession and will which can be found at: [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/ccbe\\_response\\_to\\_gre1\\_1183976708.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/ccbe_response_to_gre1_1183976708.pdf)

The CCBE welcomes the initiative of the Commission to table the 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". We especially welcome the proposal of an identical connecting factor concerning jurisdiction and applicable law as well as the proposed single scheme for the estate as a whole, avoiding the system of scission. The CCBE shares the Commission's intention to minimise the present possibilities for forum shopping and to provide legal certainty in cross border succession cases.

However, as a general observation, the CCBE would like to underline that legal certainty as to the formal validity of wills – including joint wills and agreements as to succession – cannot be reached unless the regulation as such deals expressly with formal validity. The draft regulation should be amended in that respect. Furthermore, the amendment should be in line with the rules laid down in the Hague Convention of 5 October 1961 on the conflict of laws relating to the form of testamentary dispositions. As a new element, these rules should be extended to agreements as well as to succession.

In addition to the aforementioned item of formal validity of wills and agreements, the CCBE wishes to propose the following concrete amendments to the draft regulation:

**Chapter I**  
**Scope and definitions**

<i>Text proposed by the Commission</i>	<i>Proposed CCBE amendments</i>
<i>Article 1</i> <i>Scope</i>	<i>Article 1</i> <i>Scope</i>
(...)	(...)
3.The following shall be excluded from the scope of this Regulation:	3.The following shall be excluded from the scope of this Regulation:
(...)	(...)
(e) maintenance obligations;	(e) Maintenance obligations; <b><i>rights of persons to a portion of an estate reserved for maintenance; obligations to restore or account for gifts given on the occasion of marriage or made as an advancement (dowries) and the taking of such gifts into</i></b>

<i>Text proposed by the Commission</i>	<i>Proposed CCBE amendments</i>
(...)	<b><i>account when determining the shares of heirs and the reserved portions; disinheritance and debarment from succession based on the infringement of maintenance obligations;</i></b> (...)

Justification:

As regards maintenance obligations paragraph 3 (e), it needs to be considered that the rights, obligations or restrictions are rooted in family law. However, the Commission wishes to treat succession law and family law separately from each other and to exclude family law from the scope of the regulation. If the abovementioned aspects relating to family law were not excluded from the scope of the regulation, the legal basis for the latter would need to be changed. In that case, the regulation would need to be based on Art 81 paragraph 3 of the Treaty reserved for measures with respect to family law and the co-decision procedure could not be applied anymore.

<i>Text proposed by the Commission</i>	<i>Proposed CCBE amendments</i>
<i>Article 2 Definitions</i>	<i>Article 2 Definitions</i>
For the purposes of this Regulation, the following definitions shall apply: (...)	For the purposes of this Regulation, the following definitions shall apply: (...)
(b) “court”: any judicial authority or any competent authority in the Member States which carries out a judicial function in matters of succession. Other authorities which carry out by delegation of public power the functions falling within the jurisdiction of the courts as provided for in this Regulation shall be deemed to be courts.	(b) “court”: any judicial authority <del>or any competent authority</del> in the Member States which carries out a judicial function in matters of succession. <del>Other authorities which carry out by delegation of public power the functions falling within the jurisdiction of the courts as provided for in this Regulation shall be deemed to be courts.</del>
(...)	<b><i>(c)(new) “Non-judicial authorities”: other authorities in the Member States carrying out by delegation of public power functions in matters of succession or being empowered for the purpose of establishing authentic acts or instruments with comparable status and effect formally drawn up or registered in a Member State.</i></b>
(i) “European Certificate of Succession”: the certificate issued by the competent court pursuant to Chapter VI of this Regulation.	(i) “European Certificate of Succession”: the certificate issued by the competent court <b><i>or non-judicial authority</i></b> pursuant to Chapter VI of this Regulation.
(...)	(...)
(j) “Habitual residence”: the deceased’s primary jurisdiction of residence at the time of death is to be established on the basis of all circumstances specific to each individual case including physical presence in one or more Member States, duration, regularity,	<b><i>(j)(new) “Habitual residence”: the deceased’s primary jurisdiction of residence at the time of death is to be established on the basis of all circumstances specific to each individual case including physical presence in one or more Member States, duration, regularity,</i></b>

<i>Text proposed by the Commission</i>	<i>Proposed CCBE amendments</i>
	<i>conditions and reasons for the deceased's move to that state, linguistic knowledge, economic connections, family and social relationships.<sup>1,2</sup></i>

Justification:

Article 2 (b), (c) (new) and (i):

The present text of article 2 includes non-judicial authorities in the definition of "Courts". The inclusion of non-judicial authorities appears inappropriate given the different nature and functions of the authorities concerned. In addition, separating the definition of judicial and non-judicial authorities allows for a clearer meaning of article 3 of the draft (which may then remain unchanged).

Article 2 j (new) "Habitual residence":

An identical connecting factor for jurisdiction and applicable law has the advantage that the competent court will have to apply its own jurisdiction's substantive law, with which the court is familiar. It is of utmost importance for legal certainty to introduce only one single connecting factor for the entire European Union, which should be identical for the choice of jurisdiction and applicable law, and which should also cover property regardless of its location.

In contrast to this, the choice of the connecting factor is of less importance; it could be habitual residence, domicile or nationality.

Nevertheless, habitual residence as connecting factor has raised doubts as to the clarity and predictability of its concept. It is therefore felt that the concept needs to be defined in the regulation itself - in line with already existing case law of the European Court of Justice. The definition should allow for future case law to develop the understanding of habitual residence in coherence with the same connecting factor referred to in various other European Union instruments.

## Chapter II Jurisdiction

<i>Text proposed by the Commission</i>	<i>Proposed CCBE amendments</i>
<i>Article 4 General jurisdiction</i>	<i>Article 4 General jurisdiction</i>
Notwithstanding the provisions of this Regulation 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.	<del>Notwithstanding the provisions of this Regulation 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.</del>

- 1 The Austrian delegation supports any attempt to find a clearer definition of habitual residence if habitual residence were ultimately to be the connecting factor. However, the Austrian delegation disagrees with the choice of habitual residence as connecting factor as it is a very imprecise notion that will not only lead to lengthy and complicated procedures necessary for establishing the habitual residence of the deceased but also be interpreted in various ways by the different courts in the Member States. These consequences would lead to a fragmentation of the succession itself as well as of the case law in respect to habitual residence - the contrary of what the regulation intends. Accordingly, the Austrian delegation is of the opinion that only an objective fact as connecting factor such as nationality will bring the necessary procedural facilitation and legal security.
- 2 The UK delegation proposes the following wording: " habitual residence ": the place where the deceased had fixed, with the intention of conferring a stable character, the habitual centre of his interests; to ascertain this intention, are taken into account the effective or envisaged duration of the deceased's residence in that State, as well as the temporary or long-term nature of his housing; the mere intention of returning later to his country of origin is not sufficient to characterise the deceased's intention to fix the habitual centre of his interests in that Member State.'

<i>Text proposed by the Commission</i>	<i>Proposed CCBE amendments</i>
	<p>1. (new) <i>Where the deceased has not chosen the law of another Member State to govern their succession, the courts of the Member State on whose territory the deceased had habitual residence at the time of their death, for a minimum period of two years shall be competent to rule in matters of succession.</i><sup>3</sup></p> <p>2. (new) <i>Where the deceased before his/her death has moved back to the country of his/her nationality, habitual residence established there does not require a minimum period.</i></p> <p>3. (new) <i>Where the deceased's habitual residence cannot be established and jurisdiction cannot be determined on this basis, the courts of the Member State, whose national the deceased was at the time of his death shall have jurisdiction where the deceased was a national of two or more States the nationality with the closest recent connection shall prevail.</i></p>

Justification:

The draft Regulation as it stands has the effect that the courts of the State of habitual residence at death have the primary jurisdiction, even where the law of another State has been chosen by the deceased. These amendments give the courts of the chosen jurisdiction primary jurisdiction where there has been such a choice.

Although the definition of "habitual residence" in this Regulation should be consistent with the use of the connecting factor in other instruments and ECJ case law, in addition to such a common definition, the Regulation should provide for a minimum period of residence.

The mere provision that residence needs to be "habitual" in order to constitute or change the connecting factor for the choice of jurisdiction as well as of applicable succession law is not sufficient to mitigate the risk of forum shopping - i.e. evasion of mandatory regulations like forced heir ship or claw back - through a change of residence. Where it is impossible to establish the deceased's habitual residence, a tie-break clause is recommended. A person may have two or even more residences of equal significance. The Brussels II b regulation already provides for a comparable tie-break clause in Article 13 (1): the appropriate substitute connecting factor there is the mere "presence" in a Member State. For the purpose of succession law conflict rules, "nationality" is more appropriate as a substitute connecting factor since it provides more legal certainty.

<i>Text proposed by the Commission</i>	<i>Proposed CCBE amendments</i>
<p><i>Article 5</i> <i>Referral to a court better placed to hear the case</i></p> <p>1. Where the law of a Member State was chosen by the deceased to govern their succession in accordance with Article 17, the court seised in accordance with Article 4 may, at the request of one of the parties and if it considers that the courts of the Member State whose law has been</p>	<p><i>Article 5</i> <i>Referral to a court better placed to hear the case</i></p> <p><del>1. Where the law of a Member State was chosen by the deceased to govern their succession in accordance with Article 17, the court seised in accordance with Article 4 may, at the request of one of the parties and if it considers that the courts of the Member State whose law has been</del></p>

<sup>3</sup> Please see the position of the Austrian delegation in footnote 1

<b><i>Text proposed by the Commission</i></b>	<b><i>Proposed CCBE amendments</i></b>
<p>chosen are better placed to rule on the succession, stay proceedings and invite the parties to seise the courts in that Member State with the application.</p> <p>2. The competent court in accordance with Article 4 shall set a deadline by which the courts of the Member State whose law has been chosen must be seised in accordance with paragraph 1. If the courts are not seised by that deadline, the court seised shall continue to exercise its jurisdiction.</p> <p>3. The courts of the Member State whose law has been chosen shall declare themselves competent within a maximum period of eight weeks from the date on which they were seised in accordance with paragraph 2. In this case, the court seised first shall decline jurisdiction. Otherwise, the court seised first shall continue to exercise its jurisdiction.</p>	<p><del>chosen are better placed to rule on the succession, stay proceedings and invite the parties to seise the courts in that Member State with the application.</del></p> <p><del>2. The competent court in accordance with Article 4 shall set a deadline by which the courts of the Member State whose law has been chosen must be seised in accordance with paragraph 1. If the courts are not seised by that deadline, the court seised shall continue to exercise its jurisdiction.</del></p> <p><del>3. The courts of the Member State whose law has been chosen shall declare themselves competent within a maximum period of eight weeks from the date on which they were seised in accordance with paragraph 2. In this case, the court seised first shall decline jurisdiction. Otherwise, the court seised first shall continue to exercise its jurisdiction.</del></p> <p><b><i>1. Where the deceased has chosen to govern their succession the law of a Member State other than that in which they had habitual residence at the time of their death, the courts of the Member State whose law the deceased had chosen shall be competent to rule in matters of successions</i></b></p> <p><b><i>2. If the competent court in the exercise of its jurisdiction has to apply the law of another Member State that law shall not be regarded as fact but as law. It shall be the court's responsibility to ascertain the applicable foreign regulations and case law and bear eventual costs of evidence including foreign law experts. Parties shall have the same rights of appeal including appeal on issues of law that the competent court's rules of procedure provide for in cases where law of another Member State is not to be applied.<sup>4</sup></i></b></p>

#### Justification

The draft Regulation as it stands has the effect that the courts of the State of habitual residence at death have the primary jurisdiction, even where the law of another State has been chosen by the deceased. These amendments give the courts of the chosen jurisdiction primary jurisdiction where there has been such a choice.

However, if the court has to apply foreign law, the following should be taken into consideration: the draft Regulation aims to avoid situations in which jurisdiction and applicable law differ. Where parties have chosen the law of the state whose nationality they possess in order to govern the succession according to Article 17 and Article 18 paragraph 3 of the draft Regulation, the competent court under

<sup>4</sup> The UK delegation proposes the following wording: Where the deceased has chosen to govern their succession the law of a Member State other than that in which they had habitual residence at the time of their death, the courts of the Member State whose law the deceased had chosen shall be competent to rule in matters of successions (for the justification, please see Article 4).

Article 4 can order a referral of the case to the courts of the Member State whose law was chosen, Article 5.

If such a referral does not become effective, the court will have to apply foreign law. However, there is the draw-back that the court might have no expertise in the law of the Member State and on its application by courts.

In many jurisdictions, this currently leads to a situation where the parties have the responsibility to ascertain the applicable rules and to give evidence as to the content of the foreign regulations and case law. Moreover, in most jurisdictions the parties have to bear the cost of foreign law experts and other evidence, as well as the risk that the applicable rules of the *lex causae* are not properly ascertained.

In addition to this, their rights of appeal, especially on issues of law, are restricted in comparison to situations in which *lex fori* and *lex causae* do not differ.

The burden of proof as to foreign law and additional cost risk, as well as restricted rights of appeal, are severe obstacles to effective access to justice. Although these problems are not specific to succession, but occur in the same way in connection with Brussels I and Brussels II b regulations, the Commission, Council and the European Parliament should be aware of the fact that parties in cross border cases face severe discrimination for the simple reason that their situation is connected with different jurisdictions within the European Union. The challenges of Article 81 paragraph 2 TFEU (e) – effective access to justice - and (f) – the elimination of obstacles to the proper functioning of civil procedures - will not be met by the draft regulation as long as the right of appeal is restricted and risks and costs of procedures are significantly higher in cross border cases. In this regard, it is to be noted that parties involved in succession cases are individuals, not corporations, and thus they are more vulnerable regarding limited access to justice

As language problems can be mitigated by translation, the above mentioned problems could be dealt with and solved through the proposed application of the “*iura novit curia*” principle in connection with Member State law. The proposed amendment will enhance acceptance for mutual recognition and enforcement. The application of the “*iura novit curia*” principle in connection with Member State law might also increase the willingness of the courts to apply Article 5 of the draft.

Now that the Treaty of Lisbon has entered into force and the European Judicial Network is being developed, procedural rules that discriminate against parties on grounds of cross border situations should become obsolete.

Article 46 of the draft Regulation provides for information made available to the public. This provision will be insufficient as long as courts are not obliged to investigate and ascertain for themselves foreign Member State’s rules which they are bound to apply due to this Regulation.

<b><i>Text proposed by the Commission</i></b>	<b><i>Proposed CCBE amendments</i></b>
<p style="text-align: center;"><i>Article 13</i> <i>Lis pendens</i></p> <p>1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.</p> <p>2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.</p>	<p style="text-align: center;"><i>Article 13</i> <i>Lis pendens</i></p> <p>1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised <b>relevant court</b> shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.</p> <p>2. Where the jurisdiction of the court first seised is established, any court other than the court first seised <b>relevant court</b> shall decline jurisdiction in favour of that court.</p> <p><b>3. (new) The relevant court is the court first seized except where one of the courts is a</b></p>

<i>Text proposed by the Commission</i>	<i>Proposed CCBE amendments</i>
	<i>court of a Member State whose law has been chosen by the deceased to govern their succession in which case that court is the relevant court.</i>

Justification:

The draft Regulation as it stands has the effect that the courts of the State of habitual residence at death have the primary jurisdiction, even where the law of another State has been chosen by the deceased. These amendments give the courts of the chosen jurisdiction primary jurisdiction where there has been such a choice. Please see also Justification to Article 4 and 5.

<i>Text proposed by the Commission</i>	<i>Proposed CCBE amendments</i>
<p><i>Article 14</i> <i>Related actions</i></p> <p>1. Where related actions are pending before courts of different Member States, any court other than the court first seised may stay its proceedings.</p> <p>2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.</p> <p>3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.</p>	<p><i>Article 14</i> <i>Related actions</i></p> <p>1. Where related actions are pending before courts of different Member States, any court other than the <b>relevant</b> court <del>first seised</del> may stay its proceedings.</p> <p>2. Where these actions are pending at first instance, any court other than the <b>relevant</b> <del>court first seised</del> may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.</p> <p>3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.</p> <p><b>4. (new) The relevant court is the court first seised except where one of the courts is a court of a Member State whose law has been chosen by the deceased to govern their succession in which case that court is the relevant court</b></p>

Justification:

Please see Article 13.

**Chapter III**  
**Applicable law**

<i>Text proposed by the Commission</i>	<i>Proposed CCBE amendments</i>
<i>Article 16</i>	<i>Article 16</i>



<b>Text proposed by the Commission</b>	<b>Proposed CCBE amendments</b>
<p style="text-align: center;"><i>General rule</i></p> <p>Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be that of the State in which the deceased had their habitual residence at the time of their death.</p>	<p style="text-align: center;"><i>General rule</i></p> <p><b>1. Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be that of the State in which the deceased had their habitual residence at the time of their death for a minimum period of two years.<sup>5</sup></b></p> <p><b>2. (new) Where the deceased before his/her death has moved back to the country of his/her nationality, the habitual residence established there does not require a minimum period.</b></p> <p><b>3. (new) Where the deceased's habitual residence cannot be established and applicable law cannot be determined on this basis, the law applicable to the succession as a whole shall be that of the State, whose national the deceased was at the time of his death. Where the deceased was a national of two or more States the nationality with the closest most recent connection shall prevail.</b></p>

#### Justification

It is of utmost importance that the connecting factor for jurisdiction and applicable law be identical. Thus the justification for the amendments proposed here is the same as the justification for the proposed amendments to Article 4, please see above.

<b>Text proposed by the Commission</b>	<b>Proposed CCBE amendments</b>
<p style="text-align: center;"><i>Article 17</i> <i>Freedom of choice</i></p> <p>1. A person may choose as the law to govern the succession as a whole the law of the State whose nationality they possess.</p> <p>(...)</p> <p>3. The existence and the validity in substantive terms of the consent to this determination shall be governed by the determined law.</p> <p>4. Modification or revocation by its author of such a determination of applicable law must meet the conditions for the modification or revocation of a</p>	<p style="text-align: center;"><i>Article 17</i> <i>Freedom of choice</i></p> <p><b>1. A person may choose as the law to govern the succession as a whole the law of any State whose nationality they possess <i>at the time of making the choice. Where a person is a national of a State which has two or more territorial units having their own rules of law in respect of successions they may choose the law of any of those territorial units</i></b></p> <p>(...)</p> <p><b>3. The existence and the validity in substantive terms of the consent to this determination shall be governed by the determined law. <i>A determination of the applicable law shall be valid if it is valid under any available law.</i></b></p> <p>4. Modification or revocation by its author of such a determination of applicable law must meet the conditions for the modification or revocation of a disposition of property upon death <b><i>valid under</i></b></p>

<sup>5</sup> Please see the position of the Austrian delegation in footnote 1

<i>Text proposed by the Commission</i>	<i>Proposed CCBE amendments</i>
disposition of property upon death.	<b><i>any available law.</i></b>  <b><i>An available law in relation to any determination by any person of the applicable law or modification or revocation by any person of such a determination is the law of the State in which that person had their habitual residence at the time of such determination modification or revocation or the law of any State or territorial unit which could at that time have been chosen under this Article as the applicable law.</i></b>

Justification:

(1) Article 17 does not make clear that the validity of a choice of law is to be judged as at the time when it is made, and these amendments are intended to make that clear. It is again important that the validity of such an act should be known at the time when it is done and cannot be affected by subsequent events.

(2) Article 17 does not make clear what happens where someone has more than one nationality or a state of which he is a national has more than one system within it. These amendments are intended to make clear that a person can choose any system of law comprised within any State of which he is national.

(3) Article 17 does not provide a satisfactory solution to the problem of by what law the validity of a choice of law is to be judged. Providing that it is to be judged by the chosen law goes round in circles. What is proposed here is that a choice of law or alteration of the choice of law is valid if at the time it is made of it is in accordance with the law of the person's place of habitual residence or the law of any place which that person could choose by virtue of his nationality.

<i>Text proposed by the Commission</i>	<i>Proposed CCBE amendments</i>
<i>Article 18</i> <i>Agreements as to succession</i>  (...)	<i>Article 18</i> <i>Agreements as to succession <b>and joint wills</b></i>  (...)  <b><i>5. (new) The provisions of this article apply in the same way to joint wills and to succession agreements.</i></b>

Justification

Joint wills are defined in Article 2, as are agreements with regard to succession. Joint wills are referred to in the explanatory memorandum 4.3 Article 18. Despite this, the text of the draft regulation fails to provide the necessary provisions on joint wills. This seems to have happened unintentionally by the drafters.

Joint wills should be regulated in the same way as agreements in the area of succession because in some jurisdictions joint wills can have the same effect as such agreements. Joint wills can confer rights to the future succession of one or more persons, thus restricting e.g. the freedom of the surviving spouse to dispose of property upon death in any form other than that agreed in the joint will. The deceased spouse in this case relies on the validity of the joint will and the impossibility to change it.

Where persons of different nationality draw up a joint will, the freedom of choice of applicable law as provided for in paragraph 3 needs to be respected in relation to joint wills in the same way as in

connection with agreements on succession, in order to secure the validity of the joint will for both parties involved.

<i><b>Text proposed by the Commission</b></i>	<i><b>Proposed CCBE amendments</b></i>
<p style="text-align: center;"><i>Article 27</i> <i>Public policy</i></p> <p>1. The application of a rule of the law determined by this Regulation may be refused only if such application is incompatible with the public policy of the forum.</p> <p>In particular, 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.</p>	<p style="text-align: center;"><del><i>Article 27</i></del> <del><i>Public policy</i></del></p> <p><del>1. The application of a rule of the law determined by this Regulation may be refused only if such application is incompatible with the public policy of the forum.</del></p> <p><del>In particular, 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.</del></p>

#### Justification

The CCBE is concerned that the purpose of the article it is too much focused on reserves and it is also not realistic to exclude public policy. There should be a mutual recognition of a reserve minimum.

### **Chapter V** **Authentic instruments**

<i><b>Text proposed by the Commission</b></i>	<i><b>Proposed CCBE amendments</b></i>
<p style="text-align: center;"><i>Article 34</i> <i>Recognition of authentic instruments</i></p> <p>Authentic instruments formally drawn up or registered in a Member State shall be recognised in the other Member States, except where the validity of these instruments is contested in accordance with the procedures provided for in the home Member State and provided that such recognition is not contrary to public policy in the Member State addressed.</p>	<p style="text-align: center;"><i>Article 34</i> <i>Recognition of authentic instruments</i></p> <p>Authentic instruments <b>and instruments with comparable status and effect</b> formally drawn up or registered in a Member State shall be recognised in the other Member States, except where the validity of these instruments is contested in accordance with the procedures provided for in the home Member State and provided that such recognition is not contrary to public policy in the Member State addressed.</p>

#### Justification:

Citizens rely on a legal act whether it is an authentic act under the civil law notarial system or whether it is an instrument with comparable legal effects (for example, a deed or a legal act). Citizens should not suffer in the cross-border reach of their legal actions because they have consulted a competent professional in their jurisdiction which might not be recognised by the legal system in another member state. We understand that in some countries, such as Austria, Hungary and Portugal, lawyers are entitled to prepare specific authentic acts. As an example, in Hungary lawyers are competent for the ratification of signatures for company registration and other purposes. In Nordic countries, where authentic acts do not exist, citizens would be excluded from the benefits of the future legislation. Nevertheless, in all Member States there are legally binding documents drawn up by legal professionals, and it is these which should fall within the scope of the proposal. In addition, mutual

recognition is an important principle of European legal culture. As set out in the Hague Programme, there should be respect for the different legal systems and traditions of the Member States. With the wording of Article 34 on authentic instruments as it stands today, only notarial acts are to be recognised as European authentic acts, ignoring analogous legal acts (deed, legal act by a lawyer or comparable act) which exist under national law. These principles have already been recognised in Article 46 of Regulation 2201/2003 (Brussels II bis). Article 46 states that “documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also agreements between the parties that are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgements.”

<b><i>Text proposed by the Commission</i></b>	<b><i>Proposed CCBE amendments</i></b>
<p style="text-align: center;"><i>Article 35</i> <i>Enforceability of authentic instruments</i></p> <p>A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Member State shall be declared enforceable in another Member State, on application made in accordance with the procedures provided for in Articles 38 to 57 of Regulation (EC) No 44/2001. The court with which an appeal is lodged in accordance with Articles 43 and 44 of this Regulation shall refuse or revoke a declaration of the enforceability if enforceability only of the authentic instrument is manifestly contrary to public policy in the Member State addressed or if contestation of the validity of the instrument is pending before a court of the home Member State of the authentic instrument.</p>	<p style="text-align: center;"><i>Article 35</i> <i>Enforceability of authentic instruments</i></p> <p>A document which has been formally drawn up or registered as an authentic instrument <b><i>or instrument with comparable status and effect</i></b> and is enforceable in one Member State shall be declared enforceable in another Member State, on application made in accordance with the procedures provided for in Articles 38 to 57 of Regulation (EC) No 44/2001. The court with which an appeal is lodged in accordance with Articles 43 and 44 of this Regulation shall refuse or revoke a declaration of the enforceability if enforceability only of the authentic instrument <b><i>or instrument with comparable status and effect</i></b> is manifestly contrary to public policy in the Member State addressed or if contestation of the validity of the instrument is pending before a court of the home Member State of the authentic instrument.</p>

Justification:

Please see justification to Article 34

## Chapter VII

### General and final provisions

<b><i>Text proposed by the Commission</i></b>	<b><i>Proposed CCBE amendments</i></b>
<p style="text-align: center;"><i>Article 50</i> <i>Transitional provisions</i></p> <p>1. This Regulation shall apply to the successions of persons deceased after its date of application.</p>	<p style="text-align: center;"><i>Article 50</i> <i>Transitional provisions</i></p> <p>1. This Regulation shall apply to the successions of persons deceased after its date of application, <b><i>but shall not apply to the succession of persons deceased after its date of application who have left an agreement about a succession or a joint will drawn up together with a person deceased before this Regulation’s date of application, where the</i></b></p>

<i>Text proposed by the Commission</i>	<i>Proposed CCBE amendments</i>
	<i>latter person's succession was involved.</i> <sup>6</sup>

#### Justification

Application of this Regulation shall in many cases lead to a change of the connecting factor as well as a change of the applicable law. Agreements about a succession and joint wills are considered invalid under a significant number of Member States' law. Where parties to such an agreement about succession or to a joint will are still alive, they will be able to react to a change of connecting factor and applicable law, e.g. by determining the law applicable to that agreement or will.

A person who has left a joint will or was party to an agreement about succession and who has deceased before the Regulation's date of application cannot react to a change of connecting factor and applicable law. The regulation must not have the effect that such a person's trust in the validity of the agreement or joint will - not only of the person's own dispositions but all dispositions involved in the agreement or joint will - will be betrayed.

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<sup>6</sup> The UK delegation proposes the following wording: This Regulation shall not apply to the succession of any person who dies no later than five years after its date of application who at their death have their habitual residence in a Member State whose nationality they do not possess and who have not determined the law applicable to their succession in accordance with Article 17, but otherwise shall apply to the successions of persons deceased after its date of application.