Chapter III

Jurisdiction and applicable law in succession matters

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I. Introduction

Over the years it has become increasingly frequent for European Union citizens to live and die in a Member State different from their state of origin and to own property there or in another Member State.[1] Intra-EU migrations have been facilitated by the freedom of movement and residence guaranteed by primary EU law. Consequently, many family relationships begin and later end because of a crisis or death in different Member States. Migration is also increasingly a global phenomenon, and hence the same issues may arise due to migration between the EU and a third State. As families gain cross-border attributes, so do their rights to family assets. Thus, subsequent to the analysis of EU rules concerning matrimonial property regimes and the property consequences of registered partnerships, it is important to turn attention to cross-border succession matters.

National successions laws are very heterogeneous due to various traditions and cultural and social differences among Member States.[2] Major differences exist in areas such as the

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[1] This has been brought about by the economic growth and accumulation of wealth by an increasing number of families and due to internationalisation. A. Bonomi, 'Succession', in J. Basedow and others eds, *Encyclopedia of Private International Law: Volume 2*, (Cheltenham: Elgar, 2017), 1682.

[2] For an exhaustive overview of succession law rules in every single EU Member State, see the recent publication: L. Ruggeri, I. Kunda and S. Winkler eds, *Family Property and Succession in EU Member States: National Reports on the Collected Data*, (Rijeka: University of Rijeka, Faculty of Law, 2019), available at *https://www.euro-family.eu/documenti/news/psefs_e_book_compressed.pdf* (last visited on 5 June 2020). See also European Judicial Network in Civil and Commercial Matters: Succession available at *https://beta.e-justice.europa.eu/166/EN/succession?clang=en* (last visited on 5 June 2020); Successions in Europe, available at *http://successions-europe.eu/* (last visited on 5 June 2020). See also comparative publications related to some Member States: K. Reid, M. de Waal and R. Zimmermann eds, *Comparative Succession Law: Volume I: Testamentary Formalities* (Oxford: OUP, 2011); K. Reid, M. de Waal and R. Zimmermann eds, *Comparative Succession Law: Volume II: Intestate Succession* (Oxford: OUP, 2015).

determination of heirs and their shares, the right to a reserved share, the availability of succession agreements, the heir's liability for the deceased's debts, the ways in which ownership is transferred to heirs and legatees, and the estate administration. For instance, a reserved or forced share in the estate is one of the most varied features of succession law. In some European countries, it is part of the tradition and legal culture, in other countries there are trends to abandon it because it is considered out-dated, while in a third group of countries deriving from a common law tradition forced inheritance is generally not known. The issues that arise with regard to forced heirship concern the determination of the forced heirs, the rules on claw back and the calculation of the share or the regulation of the *collatio bonorum* considering that people often make gifts during their life, leaving a minor part of the assets to be shared upon death.

When it comes to matters of succession, the rules of private international law are often very different from one legal system to another, the major dividing line being between systems which embody the monist principle of unity of the estate and systems which follow the dualist principle of splitting the estate on a territorial basis.[3] National rules on jurisdiction have also enabled two or more courts to have competence concerning succession related to a single deceased person, often leading to different results and consequently the refusal to recognise foreign decisions.[4]

These circumstances have created the need to introduce common private international law rules to assist in overcoming the obstacles to the free movement of EU citizens caused by the variety of national solutions in the area of succession law.[5] Therefore, Regulation (EU) 2012/650 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession[6] (hereinafter: the Succession Regulation) was adopted so that the EU legislator could create more predictability and simplify cross-border succession, especially by stimulating EU citizens to plan in advance their succession. The common approach aims to: 1) unify the norms of jurisdiction and make a single law applicable to the succession as a whole; 2) provide for unified rules on recognition and enforcement of the different succession instruments and decisions used in different Member States;[7] 3) create an ECS, which produces effects in all Member States. Its contribution to the internal market is seen in removing obstacles to the free movement of persons who previously faced difficulties in asserting their rights in the context of succession with cross-border implications. Now, the rights of heirs and legatees, of other persons close to the deceased, and of creditors of the succession are more effectively guaranteed.[8]

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[3] A. Davì, in A.L. Calvo Caravaca, A. Davì and H.P. Mansel eds, *The EU Succession Regulation: A Commentary*, (Cambridge: Cambridge University Press, 2016), 3.

[4] A. Davì, n 3 above, 4.

[5] 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, Brussels, 14.10.2009, COM(2009)154 final, 2009/0157 (COD), 2-4.

[6] [2012] OJ L201/107. This regulation is also known by the name Brussels IV Regulation.

[7] See Chapter V, Part I, Sect. IV, below (J. Kramberger -Škerl).

[8] Recital 7 of the Succession Regulation.

The Succession Regulation takes priority over the provisions of national law dealing with cross-border succession. Some Member States have seen this as an opportunity or motivation to reform their national laws.[9] For instance, Member States have more or less systematically implemented the Succession Regulation at the national level.[10] At the same time, some Member States also reformed their substantive succession law. A case in point is Austria which changed the rights of forced heirs, increased the succession rights of the surviving spouse, and prescribed succession rights for the non-registered partner.[11] The Belgian legislator also intervened in the substantive succession law in order, among other things, to limit the reserved share, determine the valuation of gifts, and strengthen the freedom of disposition with assets.[12] This reveals a trend to increase the freedom of testation in substantive succession law, and more generally to introduce or widen party autonomy in concluding the succession agreements.[13] Interestingly, it is the unification of EU private international law which to a certain extent stimulated the changes in the substantive law of some Member States.[14]

II. Scope of application

The scope of application of the Succession Regulation is defined by three criteria: temporal, territorial and material.

[9] See eg S. Scola and M. Tescaro eds, *Casi controversi in materia di diritto delle successioni, Volume II, Esperienze straniere* (Napoli: Edizioni Scientifiche Italiane, 2019). On a proposed reform in Spain, see Asociación de Profesores de Derecho Civil ed, *Propuesta de Código Civil* (Madrid: Tecnos, 2018); G.G. Aizpurua, 'Una proposta dottrinale di riforma del sistema successorio nel Codice civile spagnolo', in S. Scola and M. Tescaro eds, *Casi controversi in materia di diritto delle successioni, Volume II, Esperienze straniere* (Napoli: Edizioni Scientifiche Italiane, 2019), 567.

[10] In Austria: Erbrechts-Änderungsgesetz 2015 – ErbRÄG 2015, BGBl I Nr. 87/2015. In Croatia. Zakon o provedbi Uredbe (EU) br. 650/2012 Europskog Parlamenta i Vijeća od 4. srpnja 2012. o nadležnosti, mjerodavnom pravu, priznavanju i izvršavanju odluka i prihvaćanju i izvršavanju javnih isprava u nasljednim stvarima i o uspostavi europske potvrde o nasljeđivanju, NN 152/14. In Germany: Gesetz zum Internationalen Erbrecht und zur Änderung von Vorschriften zum Erbschein sowie zur Änderung sonstiger Vorschriften vom 29. Juni 2015, BGBl I Nr. 26/2015. In Italy: Legge 161/2014 – Disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza all'Unione europea- Legge europea 2013-bis, Gazz. Uff. 10 novembre 2014, n. 261, S.O. (Article 32).

[11] See eg G. Christrandl, 'La recente riforma del diritto delle successioni in Austria: principi normativi e problemi' *Rivista di diritto civile*, 423 (2017).

[12] Loi du 31 juillet 2017 modifiant le Code civil en ce qui concerne les successions et les libéralités et modifiant diverses autres dispositions en cette matière, MB 1er septembre 2017; Loi du 22 juillet 2018 modifiant le Code civil et diverses autres dispositions en matière de droit des régimes matrimoniaux et modifiant la loi du 31 juillet 2017 modifiant le Code civil en ce qui concerne les successions et les libéralités et modifiant diverses autres dispositions en cette matière, M.B., 27 juillet 2018. See eg T. Dumont and H. Hooyberghs, 'Reform of Belgian inheritance law: a summary of the main changes*'* 23 *Trusts & Trustees*, 1012 (2017).

[13] See L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, especially reports: T. Pertot, Austria, 12-24; T. Pertot, Germany 273-286; R. Garretto, M. Giobbi, A. Magni, T. Pertot, E. Sgubin and M. V. Maccari, Italy 356-390; F. Dougan, Slovenia, 599-609.

[14] Other circumstances also influenced the reforms, for instance in Austria where this has been conceived in the context of the border reform related to the 200th anniversary of the ABGB.

1. Temporal scope of application

The Succession Regulation was passed in 2012 and applies as of 17 August 2015[15] to the succession of persons who die on or after that date.[16] The three-year-long *vacatio legis* is an indication of the far-reaching changes introduced by the Regulation. Therefore, only the succession of the person who passed away on or after the 17 August 2015 is subject to the Succession Regulation. In contrast, if the *de cujus* passed away before this date, the national rules of private international law of the forum apply, regardless of whether the issue of succession had been raised or proceedings commenced before or after that date. Linking *ratione temporis* application to the *de cuius*'s death is seen as advantageous because it is a matter of pure fact and is officially recorded, while the disadvantage of unpredictability[17] seems to be gradually fading away over time.

Additional rules are provided to exceptionally permit the retroactive application of the Succession Regulation if the deceased chose the applicable law before 17 August 2015, which are detailed in the section below related to the choice of law.

2. Territorial scope of application

The Succession Regulation is binding on all EU Member States, with the exception of Ireland and Denmark.[18] These two Member States have special positions under primary EU law. The former has not used the possibility to opt into the Regulation,[19] whereas the latter, while not having that option, has not taken part in the Regulation on the basis of an agreement with the EU which is an available option. Therefore, for the purposes of the Succession Regulation, these two Member States are in the same position as third States.

Regardless of these facts, the Regulation may apply in the case of a succession with a cross-border element, which is related to these Member States or any third country for that matter. For instance, if the deceased is a national of any of the excluded Member States (or any third State) the succession proceedings may nevertheless be held in a Member State provided that the deceased's habitual residence at the time of death was in the latter state. The same is true for the applicable law, as is discussed below in the sections on jurisdiction and choice of law, respectively. This results from the applicability *erga omnes* of the respective rules of the Regulation[20] and no limitation of its application *ratione personae*.

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[15] Articles 84 and 83 of the Succession Regulation.

[16] Article 83(1) of the Succession Regulation.

[17] P. Franzina, in A.L. Calvo Caravaca, A. Davì and H.-P. Mansel eds, *The EU Succession Regulation: A Commentary*, (Cambridge: Cambridge University Press, 2016), 854-855.

[18] Recital 82 of the Succession Regulation.

[19] Like Ireland, the United Kingdom did not opt into the Regulation in the first place. Hence, its position does not change due to Brexit.

[20] A. Bonomi, 'Introduction', in A. Bonomi and P. Wautelet eds, *Le droit européen des successions: Commentaire du Règlement n° 650/2012 du 4 juillet 2012* (Bruxelles: Bruylant, 2nd ed, 2012).

3. Material scope of application

The Succession Regulation's scope *rationae materiae* is defined in Article 1 thereof. It applies to "succession to the estates of the deceased person", with the exclusion of "revenue, customs or administrative matters". The latter represents a classic phrase of EU private international law indicating that only private law matters are included.[21] This is further confirmed by the Regulation's preamble which underlines that "the scope of this Regulation should include all civil-law aspects of succession to the estate of a deceased person, namely all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession".[22] Aligned with this is the provision of Article 3(a) of the Succession Regulation which states that succession means "succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession". Therefore, this includes both modes of devolution of inheritance known in Europe: the testate succession, as the expression of the freedom of testation and the intestate succession, which embodies the principle of family solidarity. Article 23 of the Succession Regulation offers a list of issues included in the scope of the applicable law, and thus also in the scope of the Succession Regulation.[23] To cover many different legal institutes in national succession laws, the definition of succession is very broad.

On the other hand, Article 1(2) of the Succession Regulation offers a long list of subjects excluded from its scope.[24] Owing to the research carried out within this project, special emphasis is put on the connection between the twin Regulations: Regulation 2016/1103[25] and Regulation 2016/1104.[26] The exclusion of particular interest concerns "questions relating to matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage".[27] Mirroring this exclusion, the twin Regulations both exclude from their respective scopes succession to the estate of a deceased spouse/partner.[28] Thus, it appears that for situations involving succession by a spouse or a registered partner, the Succession Regulation and the respective twin Regulations constitute a complementary regulatory system for the property matters of the respective parties.

Recognising the dividing line between the Succession Regulation on the one hand, and the twin Regulations on the other, is a "classical problem of characterisation".[29] Liquidation of

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[21] See recital 10 of the Succession Regulation, which, by way of example, mentions succession-related tax.
[22] Recital 9 of the Succession Regulation.
[23] See G. Nikolaidis, 'Article 1: Scope', in H. Pamboukis ed, *EU Succession Regulation no 650/2012: A Commentary* (Beck, Hart and Nomos, 2017), 24.
[24] Recital 11 of the Succession Regulation states that it does not apply to areas of civil law other than succession, and that, for reasons of clarity, a number of questions appearing to be linked to matters of succession are explicitly excluded from its scope.
[25] [2016] OJ L183/1.
[26] [2016] OJ L183/30.
[27] Article 1(2)(d) of the Succession Regulation.
[28] Article 1(2)(d) of the Regulation 2016/1103 and Article 1(2)(d) of the Regulation 2016/1104.
[29] A. Davì, n 3 above, 87.

succession could depend on the distribution of family assets governed by rules provided for the property regime between the spouses or registered partners.[30] In a given legal system, substantive family law and succession law mechanisms are used in a coherent manner to protect the surviving spouse. Where more protection is secured for a surviving spouse by virtue of the matrimonial property regime (eg by the community of property), less protection is needed under the succession regime, and *vice versa*.[31] Therefore, the rights from the matrimonial property or a comparable regime should not be confused with the "succession rights of the surviving spouse or partner" referred to in Article 23(2)(b) of the Succession Regulation.

Although the Court of Justice of the European Union (CJEU) case law on the Succession Regulation is still rather scarce, it has nevertheless already tackled the very question of the delineation between succession and matrimonial property. In *Mahnkopf*,[32] the CJEU was asked to decide whether the share allocated to the surviving spouse under § 1371 of the German BGB fell within the scope of the Succession Regulation. The case involved Mrs and Mr Mahnkopf who, during their marriage, did not conclude a marriage contract. Mr Mahnkopf neither made any dispositions *mortis causae*. Thus, being German nationals living in Germany, the spouses were subject to the German default matrimonial property regime, which consists of a separate property regime during the marriage with the equalisation of accrued gains upon its termination (*Zugewinngemeinschaft*). In addition to property in Germany, Mr Mahnkopf owned a half share in a property located in Sweden. For this reason, following the death of her husband, Mrs Mahnkopf wished to obtain the ECS from the German public notary certifying her and her son's right to inherit the half share in the property in Sweden.

The notary handed the case over to the local court which refused to issue the ECS. In its reasoning, the court stated that the share of one quarter in the estate was allocated to Mrs Mahnkopf pursuant a provision of § 1371(1) of the German BGB regulating the matrimonial property regime and thus outside the scope of the Succession Regulation. The widow appealed against the court decision, and the question reached the CJEU.

In its judgment, the CJEU first stressed the principle of Euroautonomous and uniform interpretation of the notions in EU private international law, and then, by resorting to

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[30] Recital 12 of the Succession Regulation explains: "Accordingly, this Regulation should not apply to questions relating to matrimonial property regimes, including marriage settlements as known in some legal systems to the extent that such settlements do not deal with succession matters, and property regimes of relationships deemed to have comparable effects to marriage. The authorities dealing with a given succession under this Regulation should nevertheless, depending on the situation, take into account the winding-up of the matrimonial property regime or similar property regime of the deceased when determining the estate of the deceased and the respective shares of the beneficiaries".

[31] Max Planck Institute for Comparative and International Private Law, Comments on the European 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, 74 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (2010), 522, para 9.

[32] CJEU, case C-558/16 *Mahnkopf*, judgment of 1 March 2018, EU:C:2018:138. For additional case studies of the division between succession and matrimonial matters, see F. Dougan, 'Matrimonial property and succession – The interplay of the matrimonial property regimes regulation and succession regulation', in J. Kramberger Škerl, L. Ruggeri e F.G. Viterbo eds *Case Studies and Best Practices Analysis to Enhance EU Family and Succession Law. Working Paper*, in *Quaderni degli Annali della facoltà giuridica dell'Università di Camerino* 3 (Camerino: Edizioni Scientifiche Italiane, 2019), 75.

purposive and systematic methods of interpretation, reached the conclusion that the provision at issue falls within the scope of the Succession Regulation.[33] Otherwise, the purpose of the ECS would be jeopardised. The reasoning behind this is that the "provision (at issue) does not appear to have as its main purpose the allocation of assets or liquidation of the matrimonial property regime, but rather determination of the size of the share of the estate to be allocated to the surviving spouse as against the other heirs".[34] Thus, the main purpose of the provision as identified by the CJEU is the individualisation of the exact share of the estate to be allocated to the widow. The criterion provided by the CJEU to delimit the scopes of application between the Succession Regulation and one of the twin Regulations is whether the provision "principally concerns succession to the estate of the deceased spouse (or) the matrimonial (/registered partnership) property regime".[35]

A further issue has been raised in relation to the exclusions concerning the nature of rights *in rem* and recording in a register of rights in immovable or movable property.[36] In *Kubicka*,[37] a question was addressed to the CJEU regarding the recognition, in a Member State whose legal system does not provide for legacies "by vindication", of the material effects produced by such a legacy when succession takes place in accordance with the chosen succession law. Mrs Kubicka asked the notary to draw up a will including a *legatum per vindicationem*, which is allowed by Polish law, in favour of her husband, concerning her share of ownership of a jointly-owned immovable property in Germany, while leaving the rest of the estate to her husband and children in equal shares. The notary refused to do so, invoking German law, which prohibits such legacies, because the matters of rights *in rem* and registration are excluded from the Succession Regulation. Eventually, the Polish court turned to the CJEU for an interpretation of the scope of application of the Succession Regulation.

The CJEU reasoned that the rights *in rem* exclusion captures the classification of property and rights, the determination of the prerogatives of the holder of such rights, and the number of rights *in rem* in the legal order of a Member State (*numerus clausus*).[38] Thus, it captures ownership as a right *in rem*, which is consequently outside the scope of the Succession Regulation. However, it does not capture legacy either "by vindication" or "by damnation" because they "constitute methods of transfer of ownership of an asset",[39] which remain within the scope of the Succession Regulation. Similar reasoning is presented in relation to exclusion concerning the registers of rights. Therefore, competent authorities in a Member State cannot refuse to recognise the material effects of a legacy "by

[33] This conclusion is in contrast with the proposed qualification in academic writing, eg A. Davì, n 3 above 90; B. Walther, Die Qualifikation des § 1371 Abs. 1 BGB im Rahmen der europäischen Erb- und Güterrechtsverordnungen, 6 *Zeitschrift für das Privatrecht der Europäischen Union* (2014), 325, 329, and in line with some other, eg J. Kleinschmidt, Optionales Erbrecht: Das Europäische Nachlasszeugnis als Herausforderung an das Kollisionsrecht, 77 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (2013), 723, 757.

[34] CJEU, case C-558/16 *Mahnkopf*, judgment of 1 March 2018, EU:C:2018:138, para 40.

[35] CJEU, case C-558/16 *Mahnkopf*, judgment of 1 March 2018, EU:C:2018:138, para 40.

[36] Article 1(2)(k) and (l) of the Succession Regulation.

[37] CJEU, case C-218/16 *Kubicka*, judgment of 12 October 2017, EU:C:2017:755. It has been suggested that this judgment applies *per analogiam* to the same exclusions in the twin Regulations. I. Kunda, 'Novi međunarodnoprivatnopravni okvir imovine bračnih i registriranih partnera u Europskoj uniji: polje primjene i nadležnost', 19 *Hrvatska pravna revija*, 27, 29 (2019).

[38] CJEU, case C-218/16 *Kubicka*, judgment of 12 October 2017, EU:C:2017:755, paras 47-48.

[39] CJEU, case C-218/16 *Kubicka*, judgment of 12 October 2017, EU:C:2017:755, para 49.

vindication", provided for by the law governing succession and chosen by the testator in accordance with Article 22(1) of that Regulation, on the ground that such legacy is not provided in the law of the Member State where the immovable property is located. Interpretation to the contrary would jeopardise the principle of unity of the succession enshrined in Article 23 of the Regulation.[40]

4. Cross-border implications

Despite the fact that the Succession Regulation does not provide an explicit provision to that effect, its application is dependent on the existence of cross-border implications or, as traditionally named, an international element. This is a natural consequence of the legal basis used to justify its enactment, which is Article 81 of the Treaty on the Functioning of the European Union.[41] There are also several other references in the preamble and provisions which strongly suggest that it is intended for cross-border succession only.[42]

III. Jurisdiction

The main heads of jurisdiction in the Succession Regulation are the general jurisdiction and the prorogation of jurisdiction, both intending to ensure as much consistency as possible between the competent forum and applicable law (*Gleichlauf*).[43] The remaining provisions are concerned with jurisdiction based on choice of law, subsidiary and necessary jurisdiction, as well as with coordination of the proceedings. It is worth noting here that the jurisdiction scheme is mandatory and courts of the Member State seised with a succession matter and not having jurisdiction under the Succession Regulation have, pursuant to Article 15 thereof, the duty to declare of their own motion that they lack jurisdiction.

1. General Jurisdiction

The general rule of jurisdiction in succession matters is provided in Article 4 of the Succession Regulation according to which the "courts of the Member State in which the deceased had his habitual residence (*forum firmae habitationis*) at the time of death shall have jurisdiction to rule on the succession as a whole". There are several points to be made based on this provision. Article 4 of the Succession Regulation does not provide for the territorial or subject-matter jurisdiction of the national authorities, but only for international jurisdiction, as evident from the use of the plural in the phrase "the courts of the Member State".[44] In addition, it establishes the principle of unity of succession when it

[40] CJEU, case C-218/16 *Kubicka*, judgment of 12 October 2017, EU:C:2017:755, para 57.
[41] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.
[42] See A. Davì, n 3 above, 25-27.
[43] See recital 27 of the Succession Regulation.
[44] Given that different authorities may be competent in succession matters in different Member States, the notion of 'court' has a very broad meaning to "cover not only courts in the true sense of the word, exercising judicial functions, but also the notaries or registry offices in some Member States who or which, in certain matters of succession, exercise judicial functions like courts, and the notaries and legal professionals who, in

comes to jurisdiction by stating that the jurisdiction is for the court "to rule on the succession as a whole".[45] This includes both types of succession-related proceedings, contentious and non-contentious.[46]

The most important element of the provision of Article 4 is the connecting jurisdictional criterion of the deceased's habitual residence. This connecting criterion is one of the major criteria employed by the EU legislator to concretise the principle of proximity[47] – a counterpart of the closest connection principle for the purpose of setting jurisdiction criteria.[48] In the Succession Regulation, this is described as "a genuine connecting factor (...) between the succession and the Member State in which jurisdiction is exercised".[49] Against the background of the national laws of Member States at the time of the enactment of the Succession Regulation, the adoption of this criterion represents a "historic milestone".[50]

Although some authors are surprised that the definition of "habitual residence" is not included in the Succession Regulation,[51] this is done on purpose, as in all other EU legal instruments with respect to natural persons outside the professional sphere.[52] This grants the national courts the necessary flexibility when deciding *in concreto*, whereas they may rely on the extensive criteria and guidelines provided for in the CJEU. In its case law, the CJEU has established that the interpretation of the notion of "habitual residence" should be Euroautonomous, taking account of "the context of the provisions and the objective of the Regulation" in question.[53] These explanations and various guidelines in the preambles of regulations, especially in the Succession Regulation, have led to a division between two groups: some authors believe that cross-regulation consistency in the interpretation of

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some Member States, exercise judicial functions in a given succession by delegation of power by a court". Recital 20 of the Succession Regulation.

[45] According to Article 12 of the Succession Regulation, the unity may be limited by the court seised, at the request of a party, to exclude assets located in a third State if it could be expected that the decision would not be recognised or declared enforceable there. Additionally, under Article 13 the courts of the Member State of the habitual residence of the person making a succession-related declaration have jurisdiction to receive the declaration if under the law of the Member State the declaration may be made before the court.

[46] See CJEU, case C-20/17 *Oberle*, judgment of 21 June 2018, EU:C:2018:485, para 43.

[47] See eg recital 12 of the Council Regulation (EC) no 2003/2201 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) no 2000/1347 [2003] OJ L338/1 (Brussels II *bis*) and recital 12 of the Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction [2019] OJ L 178/1 (Brussels II *ter*).

[48] I. Kunda, 'Međunarodnoprivatnopravni odnosi', in *Europsko privatno pravo: posebni dio* (Zagreb, Školska knjiga, 2020 – in print), ch 5.3.1.

[49] Recital 23 of the Succession Regulation.

[50] A.L. Calvo Caravaca, in A.L. Calvo Caravaca, A. Davì and H.P. Mansel eds, *The EU Succession Regulation: A Commentary*, (Cambridge: Cambridge University Press, 2016), 130.

[51] A.L. Calvo Caravaca, n 50 above, 140.

[52] See in respect to other earlier instruments A. Borrás, Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, (1998) OJ C221/27.

[53] CJEU, case C-523/07 *A*, judgment of 2 April 2009, EU:C:2009:225, paras 34-35; CJEU, case C-497/10 PPU *Mercredi protiv Chaffe*, judgment of 22 December 2010, EU:C:2010:829, paras 44-46.

"habitual residence" is desirable,[54] while others are more inclined to take different routes guided by the particular regulation, especially its preamble.[55]

Drawing on the previous CJEU case law on habitual residence, the notion of "habitual residence" corresponds to the "centre of a person's life"[56] or "centre of his interests".[57] The criteria to establish "habitual residence" are fact-based and most developed in the context of the Brussels II *bis* Regulation and the child's habitual residence. Two basic criteria derive therefrom: the objective criterion – the presence in the territory of the Member State qualified by the level of integration in the social environment of the respective State, and the subjective criterion – a proven intention to establish stable life in the respective State.[58] The said criteria are identified from the judgment in *A*,[59] and have later been confirmed and detailed in other cases decided under the Brussels II *bis* Regulation. They generally coincide with the guidelines in the Succession Regulation.

In determining the habitual residence *in concreto* under the Succession Regulation, the authority dealing with the succession should make "an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation".[60] The court seised is thus given the task to assess all the relevant facts of the case at hand to determine the habitual residence of the deceased. This situation thus differs from the situations in other regulations to the extent that none of the parties proving or disapproving the habitual residence under the Succession Regulation will be the one whose habitual residence is being determined. In view of this, it might be somewhat difficult for at least some of the concerned parties to know or have access to information and documents which might be relevant for the purpose of determining the deceased's habitual residence.

There is, however, a special scenario mentioned in recital 24 of the Succession Regulation, which is not intended to provide an overall understanding of the "habitual residence" there. It only deals with a situation in which the deceased for professional or economic reasons had gone to live abroad to work there, even if for a long time, but had maintained a close and stable connection with his State of origin. This takes account of the economic realities in the internal market, where persons from one Member State migrate to another

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[54] T. Kruger, 'Habitual Residence: The Factors that Courts Consider', in P. Beaumont, M. Danov, K. Trimmings, B. Yüksel eds, *Cross-Border Litigation in Europe*, (Oxford and Portland, Oregon: Hart Publishing, 2017), 741, 743-744; Borrás (2017), 117.

[55] More on the controversy see A. Rentsch, *Der gewöhnliche Aufenthalt im System des Europäischen Kollisionsrechts*, (Tübingen: Mohr Siebeck, 2017), 346.

[56] A. Bonomi, 'Article 4', in A. Bonomi and P. Wautelet eds, *Le droit européen des successions: Commentaire du Règlement no 2012/650 du 4 juillet 2012* (Bruxelles: Bruylant, 2nd ed, 2012), 174.

[57] CJEU, joined cases C‑509/09 and C‑161/10 *eDate Advertising*, judgment of 25 October 2011, EU:C:2011:685, para 49.

[58] See A. Limante and I. Kunda, 'Jurisdiction in Parental Responsibility Matters', in C. Honorati ed, *Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction* (Torino and Berlin Giappichelli and Peter Lang, 2017), 61-91.

[59] CJEU, case C-523/07 *A*, judgment of 2 April 2009, EU:C:2009:225, paras 38 and 40.

[60] Recital 23 of the Succession Regulation.

sometimes with the expectation to come back, so that their families do not follow them, but remain in the State of origin. The EU legislator instructs that in such a case "the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located". This should be seen as an exception to the general definition of the "habitual residence" which involves a genuine personal connection between the deceased and the Member State, rather than his family and the Member State.[61] Another complex scenario mentioned in recital 24 of the Succession Regulation concerns the deceased who lived in several States alternately or travelled from one State to another without settling permanently in any of them. Such a situation could be resolved, as per the EU legislator, by paying heed to his nationality or the location of his main assets in one of those States as "a special factor in the overall assessment of all the factual circumstances". Enumerating the possible scenarios and providing for the concrete factors to be taken into account is the methodological equivalent of the casuistic approach of the CJEU when dealing with the notion of "habitual residence" in the context of other legal instruments.

Regardless of the fact that the Member State court may have jurisdiction based on Article 4, there is a discretionary option for the court to decline it pursuant to Article 6(a) of the Succession Regulation. The conditions are as follows: 1) the deceased had chosen the applicable law of a Member State to govern his succession under Article 22; 2) a party to the proceedings made a request that the jurisdiction is declined in favour of the courts of the Member State of the chosen law; and 3) the court seised considers that the courts of the Member State of the chosen law are better placed to rule on the succession. In deciding whether to decline jurisdiction or not, the court seised has to make its assessment based on the practical circumstances of the succession, such as the habitual residence of the parties and the location of the assets. Additional circumstances offered in the commentaries concern special procedures in place in certain legal systems for the administration of succession.[62]

2. Prorogation of jurisdiction

Although not conceived from the outset,[63] the Succession Regulation allows the parties concerned to agree on a competent court in matters of succession (*professio fori*). Pursuant to Article 5(1), choice of court is, however, limited only to situations in which the deceased has chosen the applicable law pursuant to Article 22. If so, "the parties concerned may agree that a court or the courts of the same Member State are to have exclusive jurisdiction to rule on any succession matter". As explained below, under Article 22 of the Succession Regulation, the person may choose as applicable the law of his nationality (*lex patriae*) at the time of making the choice or at the time of death. By tying the parties' choice of court to

[61] A.L. Calvo Caravaca, n 50 above, 129 especially n 7.

[62] A. Bonomi, Article 6, in A. Bonomi and P. Wautelet eds, *Le droit européen des successions: Commentaire du Règlement no 650/2012 du 4 juillet 2012* (Bruxelles: Bruylant, 2nd ed, 2012), 197.

[63] See 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, Brussels, n 5 above.

the chosen applicable law, the key idea of the Succession Regulation to have the competent court and applicable law aligned is preserved even where parties have exercised their autonomy.[64] This choice of *lex patriae* results in prorogation of the *forum patriae*.

A further limitation of choice of court relates to the notion of the Member State, as only the court or courts of one may be chosen in accordance with the Succession Regulation. This should mean only the twenty-five Member States which are bound by the Regulation.[65] Furthermore, the deceased's choice of law of the third State prevents a choice-of-court agreement under the Succession Regulation.[66] Likewise, the choice-of-court agreement proroguing the jurisdiction of the courts of a third State according to the rules of the national law of a Member State is not possible.[67]

The Succession Regulation does not prescribe when the parties concerned may conclude a choice-of-court agreement; hence, they are free to do so either during the deceased's life or upon his death. However, there is a logical limitation to this owing to the previously mentioned limitation that the chosen court has to correspond to the law chosen by the deceased. Under Article 22 of the Succession Regulation, this can be the nationality the deceased has at the time of making the choice or at the time of death. In the former case, if the parties have chosen the competent court during the deceased's life, he may change the chosen law if he becomes the national of another Member State or if he has more than one nationality, and thus render the choice-of-court agreement invalid under Article 5(1) of the Succession Regulation.

The choice-of-court agreement has to be concluded by all concerned parties. The meaning of the phrase "concerned parties" has to be "determined on a case-by-case basis, depending in particular on the issue covered by the choice-of-court agreement". The concerned parties may be heirs (testate and intestate), legatees and other beneficiaries named in the deceased's disposition. Although some authors tend to extend the notion of "concerned parties" to cover also the creditors,[68] this does not appear reasonable in the contexts of the Succession Regulation.[69] Sometimes the agreement will have to be concluded between all parties concerned by the succession and sometimes only by some of them who would be parties to the proceedings regarding a specific issue if the decision by that court on that issue would not affect the rights of the other parties to the succession.[70]

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[64] See Recitals 27 and 28 of the Succession Regulation. See also F. Marongiu Buonaiuti, 'Article 5', in A.L. Calvo Caravaca, A. Davì and H.P. Mansel eds, *The EU Succession Regulation: A Commentary*, (Cambridge: Cambridge University Press, 2016), 150.

[65] See A. Fuchs, The new EU Succession Regulation in a nutshell, 16 *ERA Forum* (2015), 122.

[66] M. Brosch, *Rechtswahl und Gerichtsstandsvereinbarung im internationalrn Familien- und Erbrecht der EU*, (Tübingen: Mohr Siebeck, 2019), 132.

[67] H. Pamboukis and A. P. Sivitanidis, Article 5 in H. Pamboukis ed, *EU Succession Regulation no 650/2012: A Commentary* (Beck, Hart and Nomos, 2017), 121. For arguments in favour of such choice-of-court agreements, see I. Dikovska, Can a Choice-of-Court Agreement Included in a Marriage Contract Meet the Requirements of both EU Succession and Matrimonial Property Regulations?, 15 *Croatian Yearbook of European Law and Policy*, 269, 283-284 (2019).

[68] H. Pamboukis and A. P. Sivitanidis, n 67 above, 124.

[69] I. Dikovska, n 67 above, 269, 288-289.

[70] Recital 28 of the Succession Regulation. Mentioning the option that only some of the parties may be the concerned parties to the choice-of-court agreement if it addresses specific issue affecting only their rights suggests that partial choice-of-law agreements are permitted under the Succession Regulation. This is at odds with the objective of jurisdiction concentrated in a single exclusively competent court when agreeing on jurisdiction under Article 5 of the Succession Regulation. A. Bonomi, Article 5, in A. Bonomi and P. Wautelet

Thus, the agreement can be multilateral or bilateral, and will usually not include the testator.[71] In any case, this is seen as a potential problem with choice-of-court agreements if some "concerned parties" are not known or are forgotten when the agreement is entered into. There is an option to subsequently include in the choice-of-court agreement parties external to it if they co-sign it, or if they enter an appearance without contesting the jurisdiction of the court. Under Article 9 of the Succession Regulation, the chosen court will in such a situation retain its competence under the agreement. If, however, these parties external to the choice-of-court agreement contest the jurisdiction, the chosen court has to decline its jurisdiction.

In order to be valid according to Article 5(2) of the Succession Regulation, a choice-of-court agreement has to be expressed in writing, dated and signed by the parties concerned. The strict requirements of formal validity serve the purpose of legal certainty. Recognising the technological neutrality standard adopted in other EU legal instruments,[72] any communication by electronic means which provides a durable record of the agreement is deemed equivalent to writing. In such instances, there should be a digital signature or another technical means which assures with sufficient certainty that the communication originates from the person stated.[73] As for material validity, there is no special rule in the Succession Regulation. Hence, the rule of the Brussels I *bis* Regulation may *per analogiam* govern the material validity of the choice-of-court agreement in the Succession Regulation. This rule points to the law of the Member State whose courts have been chosen as competent.[74]

The effects of a valid choice-of-court agreement are that the international jurisdiction of the courts of the chosen Member State are exclusively established, while the jurisdiction of courts of other Member States are derogated.[75] This includes all types of proceedings which are otherwise subject to general jurisdiction: contentious, non-contentious and proceedings for issuing the European Certificate of Succession (ECS).[76] Consequently, pursuant to Article 6(b) of the Succession Regulation, the court seised under Article 4 on general jurisdiction or Article 10 on subsidiary jurisdiction has a duty to decline jurisdiction if the parties to the proceedings have agreed, in accordance with Article 5, to confer jurisdiction on a court or courts of the Member State of the law chosen in accordance with Article 22.

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eds, *Le droit européen des successions: Commentaire du Règlement n° 650/2012 du 4 juillet 2012* (Bruxelles: Bruylant, 2nd ed, 2012), 191.

[71] Max Planck Institute for Comparative and International Private Law, n 31 above, para 107.

[72] See eg Article 25(2) of the Regulation (EU) no 2012/1215 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I *bis*) [2012] OJ L351/1.

[73] H. Gaudemet-Tallon, 'Les règles de compétence judiciaire dans le règlement européen sur les successions' in G. Khairallah and M. Revillard eds, *Droit européen des successions internationales: Le règlement du 4 juillet 2012* (Paris: Defrénois 2013), 127, 131.

[74] Article 25(1) of the Brussels I *bis* Regulation.

[75] H. Pamboukis and A. P. Sivitanidis, n 67 above, 124.

[76] I. Dikovska, n 67 above, 269, 287.

3. Subsidiary jurisdiction

Subsidiary jurisdiction under Article 10 of the Succession Regulation is intended to offer grounds of jurisdiction for all situations and thus disable recourse to the national rules on jurisdiction.[77] It comes into play if the habitual residence of the deceased at the time of death is not located in a Member State. For such situations, there is a provision granting jurisdiction on the succession as a whole to the courts of a Member State in which the assets of the estate are located (*forum rei sitae*). The criterion of the location of the assets is informed by the principle of proximity and the principle of efficiency.[78] The *forum patrimonii* is further conditioned by the personal connections of the deceased. The grounds on which the subsidiary jurisdiction may be exercised are listed exhaustively in hierarchical order.[79] The first level of subsidiary jurisdiction is provided in favour of the Member State of the deceased's nationality at the time of death. Reference to the nationality of the deceased at the time of death should be understood as reference to any of the nationalities if he had two or more nationalities of the twenty-five Member States in which the Regulation is applicable.[80] If the first-level condition is not met, the second level jurisdiction is vested in the courts of the Member State where the deceased had his previous habitual residence, provided that, at the time the court is seised, a period of not more than five years has elapsed since that habitual residence changed.

As an exception to the principle of unity of succession for the purposes of jurisdiction, it is provided in Article 10(2) of the Succession Regulation that, if no court in a Member State has subsidiary jurisdiction pursuant to the above criteria, the courts of the Member State in which the assets of the estate are located will have jurisdiction to rule on those assets only. This limitation is quite easily applied to actions such as the reduction of donation; however, claiming the reserved share or challenging the validity of a will which comprises the entire estate, the individual assets of which are located in different (Member) States, may generate problems.[81] Based on the premise that the jurisdiction of the Member State court under the Succession Regulation cannot be extended or reduced by the court itself, the court would have to decide on the reserved share or the validity of the will with the effect only as to the property within the territory of its Member State.

In the same vein as when the Member State court has jurisdiction under Article 4, the Member State court having jurisdiction based on Article 10 of the Succession Regulation may decline it pursuant to Article 6(a) of the Succession Regulation. The conditions are also the same: 1) the deceased had chosen the applicable law of a Member State to govern his succession under Article 22; 2) a party to the proceedings made a request that the jurisdiction is declined; and 3) the court seised considers that the courts of the Member

[77] H. Gaudemet-Tallon, n 73 above, 127, 130.
[78] F. Marongiu Buonaiuti, 'Article 10', in A.L. Calvo Caravaca, A. Davì and H.P. Mansel eds, *The EU Succession Regulation: A Commentary*, (Cambridge: Cambridge University Press, 2016), 189.
[79] Recital 30 of the Succession Regulation.
[80] See *per analogiam* CJEU, case C-168/08 *Hadadi*, judgment of 16 July 2009 EU:C:2009:474.
[81] A. Bonomi, 'Article 10', in A. Bonomi and P. Wautelet eds, *Le droit européen des successions: Commentaire du Règlement n° 650/2012 du 4 juillet 2012* (Bruxelles: Bruylant, 2nd ed, 2012), 221.

State of the chosen law are better placed to rule on the succession. In deciding whether to decline jurisdiction or not, the court seised has to make its assessment based on the practical circumstances of the succession, with two key circumstances being the habitual residence of the parties and the location of the assets.

4. Choice of law as a basis of jurisdiction

There are three sets of rules in the Succession Regulation which regulate the effects of the choice of law (*professio iuris*) over the jurisdiction of the courts of the Member States. There are specific provisions in Article 6 of the Succession Regulation on declining jurisdiction in the event of a choice of law which have been discussed in the context of Article 4 on general jurisdiction, Article 10 on subsidiary jurisdiction, and Article 5 on prorogation of jurisdiction. In parallel, there are special provisions in Article 7 of the Succession Regulation conferring jurisdiction in the event of a choice of law. Lastly, there are rules on closing own-motion proceedings in the event of the choice of law.

The courts of a Member State whose law had been chosen by the deceased pursuant to Article 22 shall have jurisdiction to rule on the succession if: (a) a court previously seised has declined jurisdiction in the same case pursuant to Article 6; (b) the parties to the proceedings have agreed, in accordance with Article 5, to confer jurisdiction on a court or courts of that Member State; or (c) the parties to the proceedings have expressly accepted the jurisdiction of the court seised. Since, under EU private international law rules, the choice of law does not entail the choice of forum, or *vice versa* for that matter,[82] these rules are intended to further promote coherence between *forum* and *ius*. The instances (a) and (b) entail situations in which the court of one Member State has decided on its own jurisdiction because it believes the court of another Member State has jurisdiction. Where such a decision is made, the other courts should be bound by this decision.[83] The instance under (c) is similar to the choice-of-court agreement, save that it is limited to the proceedings in question and to the parties to it, and it does not require any formalities under the Succession Regulation.

Article 8 of the Succession Regulation provides that, if succession proceedings are opened by a Member State court of its own motion, as is the case pursuant to the succession laws of certain Member States, that court has a duty to close the proceedings if the parties agree to settle the succession amicably out of court in the Member State of the law chosen by the deceased in accordance with Article 22. By virtue of this provision, again the EU legislator puts emphasis on the desired overlap between *forum* and *ius*. Where succession proceedings are not opened by a court of its own motion, this Regulation should not prevent the parties from settling the succession amicably out of court, for instance before a notary, in a Member State of their choice where this is possible under the law of that Member State.

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[82] See eg Recital 12 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

[83] See eg CJEU, case C-456/11 *Gothaer Allgemeine Versicherung*, judgment of 15 November 2012, EU:C:2012:719, para 43. See on other grounds F. Marongiu Buonaiuti, Article 6, in A.L. Calvo Caravaca, A. Davì and H.P. Mansel eds, *The EU Succession Regulation: A Commentary*, (Cambridge: Cambridge University Press, 2016), 175.

This should be the case even if the law applicable to the succession is not the law of that Member State.[84]

5. *Forum necessitatis*

To prevent situations of denial of justice, the Succession Regulation, as other private international law regulations,[85] provides a *forum necessitatis* allowing the courts of a Member State, on an exceptional basis, to rule on a succession despite the fact that it is closely connected with a third State. Thus, Article 11 of the Succession Regulation applies under the following conditions:1) no court of a Member State has jurisdiction pursuant to other provisions of this Regulation; 2) proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the case is closely connected; and 3) the case has a sufficient connection with the Member State of the court seised. The impossibility of proceedings in a third State may occur as a result of civil war or a natural disaster, or for other reasons when a beneficiary cannot reasonably be expected to initiate or conduct proceedings in that State.[86]

6. Coordination of jurisdiction

Like other private international law instruments, the Succession Regulation provides for the coordination of jurisdiction among Member States in cases of *lis pendens* and related actions. Thus, the situation of *lis pendens* arises where there is identity of the cause of action and identity of the parties in the proceedings brought before the courts of different Member States. Following the chronological principle, any court other than the court first seised on its own motion has to stay its proceedings until such time as the jurisdiction of the court first seised is established.[87] Article 17 of the Succession Regulation further states that 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.

According to Article 18 of the Succession Regulation, related actions are those which are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable decisions resulting from separate proceedings. Where related actions are pending in the courts of different Member States, any court other than the court first seised has the discretion to stay its proceedings and wait for the decision of the court first seised to avail itself of the opportunity to receive information about the outcome of that case. In addition, if the related actions are pending at first instance, any court other than the court first seised may, on the application of one of the parties, decline jurisdiction if the

[84] Recital 29 of the Succession Regulation.

[85] See eg Article 11 of the Regulation 2016/1103, Article 11 of the Regulation 2016/1104 and Article 7 of the Council Regulation (EC) no 2009/4 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1.

[86] Recital 31 of the Succession Regulation.

[87] Time of the seising of the court is determined according to three rules in Article 14 of the Succession Regulation, two of which are already established standards in EU private international law, while the third results from the special nature of succession proceedings which may be opened of the court's own motion.

court first seised has jurisdiction over the actions in question and if its law permits the consolidation thereof.

IV. Applicable law

The Succession Regulation is an *erga omnes* regulation, meaning that it has universal application. Besides the fact that it is not subject to any reciprocity requirement, the law determined as applicable under the Succession Regulation applies irrespective of whether it is the law of any of the twenty-five Member States bound by the Regulation, the other two Member States not bound by the Regulation, or any third State.[88] In addition, the principle of unity of succession is enshrined in the formulation "the law applicable to the succession as a whole" contained in Article 21 of the Succession Regulation. This means that in principle all of the property forming part of the estate, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third State, is governed by the single applicable law determined either by subjective or objective connecting factors. The aim is to provide legal certainty and avoid the fragmentation of succession.[89]

1. General rule

Article 21 of the Succession Regulation contains the rule which determines applicable law in the absence of the parties' choice of law by virtue of the objective connecting factor. In the spirit of coherence between *forum* and *ius*, here, as well as in the context of jurisdiction, the law of the State in which the deceased had his habitual residence (*lex loci firmae habitationis*) at the time of death is the main factor. To avoid repetition, reference is made to the section on general rules on jurisdiction, where the notion of "habitual residence" was discussed in more detail. It suffices to mention that the legislator has declared that habitual residence ensures close connection with and predictability as to the applicable law.[90]
The hard-and-fast rule is made more flexible by an escape clause which applies by way of exception, where it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable by reference to the deceased's habitual residence at the time of death. In those circumstances, the law applicable to the succession is the law of that other State. Although flexibility introduced by exception clauses is generally welcomed,[91] other commentators have expressed concerns about the one in the Succession Regulation mainly because it disrupts the coherence between jurisdiction and applicable law and weakens legal certainty.[92] The EU legislator explains the need for the escape clause in

[88] Article 20 of the Succession Regulation.
[89] Recital 37 of the Succession Regulation.
[90] Recital 37 of the Succession Regulation.
[91] See generally J. Basedow, 'Escape Clauses', in J. Basedow and others eds, *Encyclopedia of Private Internationasl Law*, vol. 1, (Cheltenham, Northhampton: Edward Elgar, 2017), 668, 674; M. Župan, *Načelo najbliže veze u hrvatskom i europskom međunarodnom privatnom ugovornom pravu*, (Rijeka: Pravni fakultet u Rijeci, 2006), 27-39.
[92] A.L. Calvo Caravaca, 'Article 21', in A.L. Calvo Caravaca, A. Davì and H.P. Mansel eds, *The EU Succession Regulation: A Commentary*, (Cambridge: Cambridge University Press, 2016), 320.

exceptional cases, for instance where the deceased had moved to the State of his habitual residence fairly recently before his death and all the circumstances of the case indicate that he was manifestly more closely connected with another State. This manifestly closest connection should, however, not be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased at the time of death proves complex.[93]

2. Choice of law

The widening of party autonomy in various fields of private international law is evident in succession matters as well. Pursuant to Article 22 of the Succession Regulation, a person may choose as the law to govern his succession as a whole the law of the State whose nationality (*lex patriae*) he possesses at the time of making the choice or at the time of death. This is a unilateral choice which is reserved only for the person in relation to succession upon his death. A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.[94]

The reason to choose nationality as the only option for the choice of law has to do with the cross-border migrations mentioned in the introduction, due to which the person's succession would be subject to the new law of his habitual residence. If the person is not aware of the rules governing succession in that State, there is a risk of creating an expectation concerning the disposition of his assets upon death which would not correspond to the law actually applicable. Interestingly, people are often aware of the legal rules concerning forced inheritance. It is not an overstatement to say that in the tradition of European societies, the succession aspects of an individual's life have always been of great importance. Unlike in some other areas, people are often aware of the basic rules of succession and pay particular attention to the events that will affect their assets after their death. Such awareness and attention are, however, usually limited to the succession rules in the country of their nationality. Thus, the option to choose the law of one's nationality allows for the application of rules which the person is familiar with and had in mind when disposing of the assets or making a will in the course of his life.

Choice of law (*professio iuris*) can be made explicitly or implicitly. In the former case, it is contained in a declaration in the form of a disposition of property upon death such as a will, joint will or agreement as to the succession.[95] In the latter case, a choice of law has to be demonstrated by the terms of such a disposition of property upon death where, for instance, the deceased had referred in his disposition to specific provisions of the law of the State of his nationality or where he had otherwise mentioned that law.[96] In order to be

[93] Recital 25 of the Succession Regulation.
[94] This is in line with the CJEU, case C-168/08 *Hadadi*, judgment of 16 July 2009 EU:C:2009:474, which, however, cannot be relied on in the situation of an objective connecting factor.
[95] Article 3(1)(d) of the Succession Regulation.
[96] Recital 39 of the Succession Regulation.

determined, the tacit choice has to be clear and unambiguous.[97] Such is the situation where the disposition includes legal notions and institutes particular to the person's law of nationality, while the law of habitual residence does not know them.[98] An instance of this would be if, in a will drawn up by a Polish notary, a Polish national, residing in Germany, referred to the legacy *per vindicationem* which is not known in German but is regulated in Polish law.[99] According to Article 22(4) of the Succession Regulation, any modification or revocation of the choice of law has to comply with the requirements as to form for the modification or revocation of a disposition of property upon death.

A choice of law under this Regulation should be valid even if the chosen law does not provide for a choice of law in matters of succession. The substantive validity of the act whereby the choice of law was made, that is to say, whether the person making the choice may be considered to have understood and consented to what he was doing, is governed by the chosen law. The same should apply to the act of modifying or revoking a choice of law.[100]

3. Law applicable to admissibility and validity of dispositions upon death

There are significant differences among substantive succession laws when it comes to dispositions of property upon death, and in particular agreements as to succession. The results of recent comparative research on the succession laws of EU Member States show that some legal systems recognise such agreements, while others consider them inadmissible because they interfere with the deceased's freedom of disposal by means of a will. However, a trend of opening towards these agreements is becoming increasingly visible even in the Member States which until recently fully prohibited such agreements.[101] By introducing exceptions to a general prohibition, some legal systems are gradually making room for succession agreements.[102] Widening substantive party autonomy has taken place in Austria, Belgium, Estonia and Germany, while some others still have to take that path.[103] Therefore, the conflict-of-law rules, and especially the one on the choice of

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[97] E. Castellanos Ruiz, 'Article 22', in A.L. Calvo Caravaca, A. Davì and H.P. Mansel eds, *The EU Succession Regulation: A Commentary*, (Cambridge: Cambridge University Press, 2016), 345.

[98] D. Damascelli, 'I criteri di collegamento impiegati dal regolamento n. 650/2012 per la designazione della legge regolatrice della successione a causa di morte', in P. Franzina and A. Leandro eds, *Il diritto internazionale privato Europeo delle successioni* mortis causa, (Giuffrè, 2013), 102.

[99] Such were the circumstances in the CJEU, case C-558/16 *Mahnkopf*, judgement of 1 March 2018, EU:C:2018:138.

[100] Article 22(3) of the Succession Regulation; Recital 40 of the Succession Regulation.

[101] It is interesting to observe how in certain Member States, such as Italy, recent reforms introduced innovative legal solutions aimed at offering stronger protection to vulnerable parties, ie persons with disabilities. See L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above: R. Garetto, M. Giobbi, A. Magni, T. Pertot, E. Sgubin, M. V. Maccari, Italy, 375; report M. V. Maccari, T. Pertot, Belgium, 35, 38.

[102] See L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, especially the report M. V. Maccari, T. Pertot, Belgium; R. Garretto, M. Giobbi, A. Magni, T. Pertot, E. Sgubin, M. V. Maccari, Italy; V. Koumpli; V. Marazopoulou, Greece; M. V. Maccari, France.

[103] See the national reports for individual Member States in L. Ruggeri, I., Kunda and S. Winkler eds, n 2 above. See also in relation to Germany, T. Raff, 'Patto successorio (Erbvertrag) e testamento congiuntivo (gemeinschaftliches Testament) nel diritto tedesco', in S. Scola and M. Tescaro eds, n 9 above, 809; C. Baldus, 'Il diritto tedesco delle successioni: forme e funzionalità delle disposizioni mortis causa', in S. Scola and M. Tescaro eds, n 9 above, 785.

applicable law which the person can make in organising his succession, have an important role in ensuring acceptance of those dispositions in the Member States.[104]

The law applicable to admissibility and the substantive validity of dispositions of property upon death is dealt with in Articles 24 and 25 of the Succession Regulation separately for agreements on succession and other dispositions, while Article 26 of the Succession Regulation lists elements which pertain to the substantive validity of dispositions of property upon death. Article 27 of the Succession Regulation lays down the rules on the formal validity of dispositions of property upon death made in writing, whereas Article 28 of the Succession Regulation provides for the formal validity of a declaration concerning acceptance or waiver.

Disposition of the property upon death includes a will, a joint will and an agreement as to succession, while agreement as to succession means an agreement, including an agreement resulting from mutual wills, which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons who are party to the agreement.[105] The admissibility and substantive validity of a disposition of property upon death other than an agreement as to succession is governed by the law which, under this Regulation, would have been applicable to the succession of the person who made the disposition if he had died on the day on which the disposition was made. This is usually referred to as the hypothetical applicable law. However, a person may choose as the law to govern the admissibility and substantive validity of his disposition of property upon death the law which that person could have chosen in accordance with Article 22 on the conditions set out therein. This choice is subject to principles similar to those in Article 22. Nevertheless, there is an important distinction when a clause on choice of law is included in the will, for instance. If the clause does not specify its purpose, it should be considered as intended to cover the entire succession (under Article 22), and not only the issues of admissibility and substantive validity (under Article 24). If, however, the clause specifies that the law is chosen for issues of admissibility and substantive validity (under Article 24), it should not be interpreted more widely, except if other circumstances indicate tacit choice of law (under Article 22). In the event that the clause is limited to issues of admissibility and substantive validity (under Article 24), the remaining matters are subject to the law applicable in the absence of choice (under Article 21).[106] Any modification or revocation of a disposition of property in question is also subject to one of these laws, as the case may be.

Article 25 of the Succession Regulation deals with the remaining dispositions not captured by Article 24 – agreements as to succession. There is a difference when there is an agreement on the succession of one or more persons. An agreement regarding the succession of one person is governed, as regards its admissibility, its substantive validity and its binding effects between the parties, including the conditions for its dissolution, by the law which, under this Regulation, would have been applicable to the succession of that person if he had died on the day on which the agreement was concluded. Again, the

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[104] Recital 49 of the Succession Regulation.

[105] Article 3(1)(b) and (d) of the Succession Regulation.

[106] J. Rodríguez Rodrigo, 'Article 24', in A.L. Calvo Caravaca, A. Davì and H.P. Mansel eds, *The EU Succession Regulation: A Commentary*, (Cambridge: Cambridge University Press, 2016), 377.

applicable law is determined based on the hypothetical applicable law. An agreement regarding the succession of several persons is admissible only if it is admissible under all the laws which, under this Regulation, would have governed the succession of all the persons involved if they had died on the day on which the agreement was concluded. An agreement as to succession which is so admissible is governed, as regards its substantive validity and its binding effects between the parties, including the conditions for its dissolution, by the law, from among those referred to in the first subparagraph, with which it has the closest connection. Instead, in both situations, involving an agreement regarding the succession of one person and an agreement regarding the succession of more than one person, the parties may choose as the law applicable to their agreement as to succession, as regards its admissibility, its substantive validity, and its binding effects between the parties, including the conditions for its dissolution, the law which the person or one of the persons whose estate is involved could have chosen in accordance with Article 22 on the conditions set out therein.

Article 27 regulates the formal validity of dispositions of property upon death made in writing by means of the alternative connecting factors *in favorem validitatis*. Thus, a disposition of property upon death made in writing is deemed valid as regards form if its form complies with the law: (a) of the State in which the disposition was made or the agreement as to succession concluded (*lex loci actus*); (b) of a State whose nationality (*lex patriae*) the testator or at least one of the persons whose succession is concerned by an agreement as to succession possessed, either at the time when the disposition was made or the agreement concluded, or at the time of death; (c) of a State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his domicile (*lex loci domicilii*), either at the time when the disposition was made or the agreement concluded, or at the time of death; (d) of the State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his habitual residence (*lex loci formae habitationis*), either at the time when the disposition was made or the agreement concluded, or at the time of death; or (e) in so far as immovable property is concerned, of the State in which that property is located.

The determination of the question whether or not the testator or any person whose succession is concerned by the agreement as to succession had his domicile in a particular State shall be governed by the law of that State. The above rules also apply to dispositions of property upon death modifying or revoking an earlier disposition. The modification or revocation shall also be valid as regards form if it complies with any one of the laws according to the terms of which, under the above alternatives, the disposition of property upon death which has been modified or revoked was valid. For the purposes of Article 27 of the Succession Regulation, any provision of law which limits the permitted forms of dispositions of property upon death by reference to the age, nationality or other personal conditions of the testator or of the persons whose succession is concerned by an agreement as to succession shall be deemed to pertain to matters of form. The same rule shall apply to the qualifications to be possessed by any witnesses required for the validity of a disposition of property upon death.

Finally, validity as to form of a declaration concerning acceptance or waiver is contained in Article 28 of the Succession Regulation. A declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration designed to limit the liability of the person making the declaration, shall be valid as to form where it meets the requirements of: (a) the law applicable to the succession pursuant to Article 21 or Article 22 (*lex causae*); or (b) the law of the State in which the person making the declaration has his habitual residence (*lex firmae habitationis*).

4. Certain general issues of the conflict of laws

Renvoi is generally excluded in the Succession Regulation as it is in other EU private international law instruments (with minor exceptions). It is also fully excluded in the Succession Regulation with respect to the laws referred to in Article 21(2) – escape clause, Article 22 – choice of law, Article 27 – formal validity of dispositions of property upon death made in writing, Article 28(b) – validity as to form of a declaration concerning acceptance or waiver when the law of the State in which the person making the declaration has his habitual residence is applicable, and Article 30 – special rules imposing restrictions concerning or affecting the succession in respect of certain assets. Where renvoi is allowed, the rule in Article 34 of the Succession Regulation provides for the renvoi only under the condition that the law determined as applicable under the Regulation is the law of a third State. Where that is the case, reference to this law means reference to the rules of law in force in that State, including its rules of private international law, in so far as those rules make a renvoi: either (a) to the law of a Member State or (b) to the law of another third State which would apply its own law.[107]

The Succession Regulation provides for the adaptation of rights *in rem*. In Article 31, it states that where a person invokes a right *in rem* to which he is entitled under the law applicable to the succession, and the law of the Member State in which the right is invoked does not know the right *in rem* in question, that right has to be, if necessary and to the extent possible, adapted to the closest equivalent right *in rem* under the law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it. Both conditions may present difficulties in application: the qualification of the right *in rem* and the fact that such right "is not known" in the Member State where invoked. As regards the latter, there is a thorny path in distinguishing between the qualitative and quantitative differences.[108]

In Article 35 of the Succession Regulation, a provision is made for the public policy clause. Well-known restrictive phrasing is also used here to permit the refusal of the application of a provision of the law of any State specified by this Regulation only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

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[107] Specific scenarios are discussed in J. von Hein, Chapter 12: 'Renvoi in European Private International Law', in S. Lieble ed, *General Principles of European Private International Law*, (Alphen aan den Rijn: Wolters Kluwer, 2016), 227, 253-254.

[108] E. Calzolaio and L. Vagni, 'Article 31', in A.L. Calvo Caravaca, A. Davì and H.P. Mansel eds, *The EU Succession Regulation: A Commentary*, (Cambridge: Cambridge University Press, 2016), 445.

While the Succession Regulation does not contain a general clause on overriding mandatory provisions, it does refer to "special rules imposing restrictions concerning or affecting the succession in respect of certain assets" in Article 30. Such rules apply to the succession provided that: 1) they from part of the law of the State in which certain immovable property (*lex rei sitae*), certain enterprises or other special categories of assets are located and where the law of the State contains special rules which, for economic, family or social considerations, impose restrictions concerning or affecting the succession in respect of those assets; and 2) under the law of that State, they are applicable irrespective of the law applicable to the succession. Such special rules may relate to the succession of the business where it is allocated to those who are involved in that business, or the right of first refusal of company shares in favour of the co-heir, possibly also moral rights of the deceased's authors[109] or the preservation of cultural or other heritage.

Article 36 of the Succession Regulation addresses the issue of the territorial conflicts of laws in States with more than one legal system, which, along the lines adopted in other legal instruments, gives priority to the internal conflict-of-laws rules of the respective State to determine the relevant territorial unit whose rules of law are to apply. In the absence of such internal conflict-of-laws rules: (a) reference to the habitual residence of the deceased is to be construed as referring to the law of the territorial unit in which the deceased had his habitual residence at the time of death; (b) reference to the nationality of the deceased is to be construed as referring to the law of the territorial unit with which the deceased had the closest connection; and (c) reference to any other provisions referring to other elements as connecting factors is to be construed as referring to the law of the territorial unit in which the relevant element is located. An exception to this relates to determining the relevant law pursuant to Article 27 for the formal validity of dispositions of property upon death made in writing. These issues will, in the absence of internal conflict-of-laws rules in the State referred to, be construed as referring to the law of the territorial unit with which the testator or the persons whose succession is concerned by the agreement as to succession had the closest connection.

Article 37 of the Succession Regulation addresses inter-personal conflicts of laws in the States with more than one legal system. The reference to the law of the State which has two or more systems of law or sets of rules applicable to different categories of persons in respect of succession is to be construed as referring to the system of law or set of rules determined by the rules in force in that State. In the absence of such rules, the system of law or the set of rules with which the deceased had the closest connection shall apply.

Article 38 of the Succession Regulation states that a Member State which comprises several territorial units, each of which has its own rules of law in respect of

[109] G. Contaldi, Article 30, in A.L. Calvo Caravaca, A. Davì and H.P. Mansel eds, *The EU Succession Regulation: A Commentary*, (Cambridge: Cambridge University Press, 2016), 432-438. The author points out that neither the national conflict of law rules that break the unity of the succession nor the substantive rules on reserved share may be qualified as special rules under Article 30 of the Succession Regulation, 440.

succession, shall not be required to apply this Regulation to intra-State conflicts of laws.

V. European Certificate of Succession

Regulation 2012/650 does not only deal with private international law issues.[110] In order to achieve the objectives laid down in recitals 7 and 67 and especially to ensure that a cross-border succession may "be settled speedily, smoothly and efficiently", despite national differences, the Succession Regulation also provides for the creation of an ECS[111] (recital 8 and Articles 62 *et seq.*), a legal instrument that aims at enabling "heirs, legatees, executors of the will or administrators of the estate (…) to demonstrate easily their status and/or rights and powers in another Member State".[112]

1. Reasons for introducing the ECS

The need for a uniform certificate became evident due to the increase in successions with cross-border implications,[113] which highlighted, for example, the existence of different mechanisms of proof of the quality of heir in Europe.[114] In fact, only in some European legal orders is a domestic inheritance certificate foreseen for this purpose:[115] The person

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[110] A. Dutta, 'The European Certificate of Succession: A New European Instrument between Procedural and Substantive Law', 5 *IJPL* 38 (2015) 40. See also page 43 for issues concerning the legal basis for the legislative competence of the EU in this case.

[111] On this topic, see only: F. Padovini, 'Il certificato successorio europeo' *Europa e Diritto Privato*, 729 (2013), and in M.G. Cubeddu Wiedemann, G. Gabrielli, F. Padovini, S. Patti, S. Troiano, A. Zaccaria eds, *Liber amicorum per Dieter Henrich*, II (Torino: Giappichelli, 2012), 215; I. A. Calvo Vidal et al., *Il certificato successorio europeo*, (Napoli: Edizioni Scientifiche Italiane, 2017), *passim*; I. Riva, *Certificato successorio europeo. Tutele e vicende acquisitive* (Napoli: Edizioni Scientifiche Italiane, 2017), *passim*; A. Ciatti Càimi, 'La tutela degli acquirenti di beni ereditari e il certificato successorio europeo', in *Libertà di disporre e pianificazione ereditaria*, XI Convegno Nazionale Sisdic – Napoli, (2017) 423; M. Medina Ortega, 'The European Certificate of Succession' 11 *Anuario Espanol Derecho Int'I Priv.*, 907 (2011); T. Ivanc, S. Kraljić, 'European Certificate of Succession – Was There a Need for a European Intervention', 18 *Annals Fac. L.U. Zenica* (2016) 249; A. Dutta, n 110 above, 40 (see footnote no. 10 for further literature).

[112] See recital 67.

[113] Cf. the analysis by the German Notaries' Institute (*Deutsches Notarinstitut*): Le Successions Internationales dans l'U.E. Perspectives pour une Harmonisation – Conflict of Law of Succession in the European Union. Perspectives for a Harmonisation – Internationales Erbrecht in der EU. Perspektiven einer Harmonisierung, Würzburg, 2004, 29.

[114] This part is based on my oral presentation at the conference PSEFS – Ljubljana Project Events – 12 & 13 December 2019 'Best Practices in European Family and Succession Law'. For an abstract, see: T. Pertot, 'Devolution of Inheritance in Europe: The Role of (European and National) Certificates of Succession, in *Best Practices in European Family and Succession Law* (collection of abstracts), 39-40, available at the following link *www.euro-family.eu/documenti/eventi/best_practices_ljubljanapsefsprojectevents.pdf*.

[115] A typical example is the German *Erbschein*, issued by a court or by a judicial authority (see, for more details, T. Pertot, 'Germany', in L. Ruggeri, I. Kunda and S. Winkler eds., n 2 above, *sub* question 3.1.4, available at the following link: *www.euro-family.eu/documenti/news/psefs_e_book_compressed.pdf*; D. Schwab, P. Gottwald and S. Lettmaier, 'Family and Succession Law' (Germany) *International Encyclopaedia for Family and Succession Law*, Suppl. 86, (2017), 170-174. A judicial certificate, the so-called *Einantwortungsurkunde*, is also known in Austria (see, for further details, T. Pertot, 'Austria', in L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, *sub* question 3.1.4.). For more examples, see also A. Dutta, n 110 above, 42 (see footnote no. 11 for further literature) as well as the Collection of National Reports edited by L. Ruggeri, I. Kunda and S. Winkler, n 2 above, (see especially the answers to question 3.1.4). Cf. (in German language) R. Süß, Erbrecht in Europa (2020) and (in Italian language): A. Zoppini, 'Le successioni in diritto comparato', in R. Sacco ed,

who is identified as heir on such a certificate is usually presumed to be such[116] and is therefore authorised to enter into legal relations.[117] In contrast, in legal orders which do not know an instrument certifying the position of heir, alternative mechanisms of proof are in place.[118] For example, in legal orders based on the French tradition, the so-called *acte de notoriété* or *atto di notorietà*, issued by a public notary and certifying that a fact (eg the quality of heir) is known in a certain context, is normally used to supply proof of the status acquired. However, the public deed used for this purpose is not intended to develop a presumption and its value is only based on the sanctions foreseen for those who declare something untrue to a public official.[119]

Differences can be found in Europe also regarding the protection of third parties entering into legal transactions with those who affirm themselves to be heirs or to have succession rights. If a certificate of inheritance exists, it also aims to protect those who, relying on the accuracy of the certificate, contracted with the person identified as heir.[120] In contrast, in legal orders where such an instrument does not exists, the protection of third parties is usually guaranteed according to the rules applying to contracts with the apparent heir (cf, for example, Article 534 of the Italian Civil Code and Articles 730-4 of the French Civil Code).[121]

The first model, based on the existence of a certificate of succession, clearly gives more certainty to the heirs as regards their legitimation, ensuring the better protection of third parties as well. Nevertheless, reforms were adopted or have been proposed in order to improve the domestic instruments used to prove heirship also in legal orders traditionally following the second model. In 2001, the French legislator reformed, for example, the *acte de notoriété,*[122] "giving greater" importance to the notarial act.[123] In Italy, where a domestic

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Trattato di diritto comparato (Torino, 2002), 25. See also A. Bonomi ed, *Le droit des successions en Europe (Actes du colloque de Lausanne du 21 février 2003)*, (Genève: Librairie Droz, 2003), 89.

[116] See, for example, as regards the certificate of succession existing in the Italian districts covered by the *libro fondiario*: T. Pertot, in R. Garretto, M. Giobbi, A. Magni, T. Pertot, E. Sgubin and M. V. Maccari, Italy, in L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, *sub* question 3.1.4.

[117] See, for example, regarding the German *Erbschein*, D. Schwab, P. Gottwald and S. Lettmaier, n 115 above, Chapter 3, § 2.

[118] Cf. T. Pertot, 'Devolution of Inheritance in Europe: The Role of (European and National) Certificates of Succession', n 114 above, 39-40.

[119] For such effects of the Italian certificate of succession, which however only exist in districts covered by the *libro fondiario*, see T. Pertot, in R. Garretto, M. Giobbi, A. Magni, T. Pertot, E. Sgubin and M. V. Maccari, Italy, in L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, *sub* question 3.1.4.

[120] For the German legal system, cf D. Schwab, P. Gottwald and S. Lettmaier, n 115 above, Chapter 3, § 2.

[121] F. Padovini, 'Il certificato successorio europeo' in M.G. Cubeddu Wiedemann, G. Gabrielli, F. Padovini, S. Patti, S. Troiano, A. Zaccaria eds, n 111 above, 218; A. Fusaro, 'Linee evolutive del diritto successorio europeo' *Giustiziacivile.com*, 2 (2014).

[122] Loi n. 2001-1135 du 3 décembre 2001, relative aux droits du conjoint survivant et des enfants adultérins et modernisant diverses dispositions de droit successoral.

[123] M.V. Maccari, 'France', in L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, *sub* question 3.1.3. See also J.-F. Pillebout, *Successions. Des preuves de la qualité d'héritie*r, Juris-Classeur Civil (2003). In the Italian language: A. Fusaro, n 121 above; F. Padovini, in M.G. Cubeddu Wiedemann, G. Gabrielli, F. Padovini, S. Patti, S. Troiano, A. Zaccaria eds, n 111 above, 218-219.

certificate exists only in the districts covered by the land register (*libro fondiario*), an extension of the instrument to the whole country has recently been proposed.[124]

The advantages of a certificate of inheritance, which allows heirs and legatees to assert their succession rights, enabling executors of wills and administrators to demonstrate their powers, and which at the same time guarantees protection to third parties, led to the adoption of equivalent instruments at the European level as well.[125] As the abovementioned domestic deeds are normally not recognised by foreign authorities,[126] the creation of a uniform certificate, producing the same legal effects in all Member States, will help citizens to legitimise themselves in the case of a cross-border succession. At the same time, the ECS will give security to legal transactions by protecting third parties which act relying on the elements certified therein.

2. From the Hague Convention to the Succession Regulation

The need to simplify the transfer of the estate upon death in the case of an inheritance with cross-border implications previously led to the adoption of the Hague Convention of 2 October 1973 concerning the International Administration of the Estates of Deceased Persons,[127] which provided for the need to "establish an international certificate designating the person or persons entitled to administer the movable estate of a deceased person and indicating his or their powers".[128]

The Hague Convention only entered into force in three States (Czechia, Slovakia and Portugal). One of the reasons for its lack of success was the scant consideration given to the peculiarities of the continental legal orders.[129] In particular, the Convention envisaged the introduction of a certificate aiming at determining the person who has the power to administer the deceased's estate. It was therefore clearly based on the model of devolution of inheritance followed by the common-law legal systems, where the estate devolves upon heirs indirectly, eg only after the liabilities have been paid by a personal representative.[130]

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[124] The proposal of the Italian Notaries is available at the following link: *www.notariato.it/en/certificate-succession*. See also F. Padovini, in M.G. Cubeddu Wiedemann, G. Gabrielli, F. Padovini, S. Patti, S. Troiano, A. Zaccaria eds. n 11 above, 226. More recently: Id., 'La revisione del codice civile: semplificazione ereditaria e certificato successorio', available at the following link: *civilistiitaliani.eu/images/notizie/atti_convegno_giugno_2019/Padovini_convegno_giugno_2019.pdf*.

[125] For the historical background and an illustration of the documents that preceded the Regulation (the Hague Convention of 1973, the Vienna Action Plan of 1998, the Hague Programme of 2001, the Green Paper of 2005 and the Regulation Proposal of 2009), see: T. Ivanc and S. Kraljić, 'European Certificate of Succession – Was There a Need for a European Intervention?' 18 *Annals Faculty of Law of the University of Zenica*, 253-255 (2016).

[126] Or only with reluctance, as observed by A. Dutta, n 110 above, 42.

[127] The text of the Convention is available at the following link: *www.hcch.net/en/instruments/conventions/full-text/?cid=83*.

[128] Article 1.

[129] In this sense F. Padovini, in M.G. Cubeddu Wiedemann, G. Gabrielli, F. Padovini, S. Patti, S. Troiano, A. Zaccaria eds, n 111 above.

[130] See for England and Wales: E. Sgubin, in R. Garetto, F. Pascucci and E. Sgubin, United Kingdom, in L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, *sub question 3.1.4*. Cf. also A. Dutta, n 110 above, 44.

However, this method of devolution of inheritance is not typical of the continental legal orders, where the estate is usually directly devolved to the heirs, without being previously transmitted to a third person, who administers it. Legal orders where direct devolution of inheritance exists may then be further divided into two categories:[131] in some, the estate passes on to the heirs automatically upon the deceased's death (see eg § 1922 of the German Civil Code),[132] while in others an additional act – an acceptance of heirship[133] or a court decision[134] – is needed to assign the inheritance.[135]

Creating a certificate identifying the administrator of the estate, rather than the heirs and/or legatees, the Hague Convention was therefore clearly based on the model of indirect devolution of inheritance, which is typical of English law, but not of the civil law tradition. On the other hand, the characteristics of both models are properly considered by the Succession Regulation, which creates a certificate of succession to be used by administrators of the estate and executors of wills, but also (and especially) by heirs and legatees aiming at establishing their status and/or at exercising their rights in another Member States,[136] eg where the estate (or part of it) is located.[137]

3. The characteristics of the ECS

The Succession Regulation devotes to the ECS its Chapter VI, where detailed rules are provided regarding the application, the issuing and the effects of the Certificate.

Application

Pursuant to Article 65(1), the ECS may be issued upon application.[138] The latter, which shall contain the information listed in Article 65(3)[139] and be accompanied by relevant

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131 T. Pertot, 'Devolution of Inheritance in Europe: The Role of (European and National) Certificates of Succession', n 114 above, 39-40.

132 For the so-called *saisine*, see: B. Dutoit, 'Perspectives comparatives sur la succession ab intestat', in A. Bonomi ed, n 115 above, 16.

133 As it is, for example, in Italy (see Article 459 of the Italian Civil Code).

134 Eg in Austria. For a brief description of the proceedings, see T. Pertot, 'Austria', in L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, *sub* question 3.1.4.

135 Some peculiarities exist with regard to the succession of the State: even in the legal orders where the State acquires an heirless estate (*bona vacantia*) as an heir and not because of its "territorial sovereignty" (the existing differences are properly considered by the Regulation: cf. Article 33 and recital no. 56), the model of acquisition differs under some aspects from the one prescribed for other heirs (additionally, a limitation of liabilities for debts is usually foreseen due to the impossibility of the State to renounce the estate). For more information, see: M. Tescaro, *La successione dello Stato nel diritto italiano tra modello pubblicistico di stampo francese, modello privatistico di stampo tedesco e loro contemperamento nell'art. 33 del regolamento UE n. 650 del 2012*, n 9 above, 51; A. Ciatti, 'La successione dello Stato', in R. Calvo and G. Perlingieri eds, *Diritto delle successioni e delle donazioni*, (Napoli, 2013); P. Wautelet and M. Salvadori, in A Bonomi and P. Wautelet eds, *Il regolamento europeo sulle successioni* (Milano, 2015) Article 33; K. Reid, M. de Waal and R. Zimmermann, 'Intestate Succession in Historical and Comparative Perspective', in K. Reid, M. de Waal and R. Zimmermann eds, *Comparative Succession Law: Volume II: Intestate Succession*, (Oxford: Oxford Scholarship Online, 2015), 442.

136 Article 63(1).

137 In some opinions (see A. Dutta, n 110 above, 45), "the cross border preconditions (…) are already met if the applicant needs [the ECS] to inquire whether parts of the estate have to be collected in other States".

138 Cf. recital 72.

documents, may be submitted by heirs, legatees "having direct rights in the succession" and executors of wills or administrators[140] needing "to invoke their status or to exercise respectively their rights as heirs or legatees and/or their powers as executors of wills or administrators of the estate". An autonomous interpretation of the legal terms used to identify the applicants and the positions to be certified is necessary in order to assess whether one has the quality required by law or not.[141] It should be noted that by restricting the use of the ECS to legatees "having direct rights in the succession", Article 63(1) seems to refer only to the beneficiaries of a legacy by vindication.[142] However, in some opinions, the legatee *per damnationem* could also apply for the ECS.[143]

Issuing authority

The issuing authority is determined according to the general rules of jurisdiction (Articles 4 *et seq.*).[144] The European legislator let the Member States free to determine the authority having the competence to issue the ECS within the single legal order, deciding whether it should be a court[145] or another authority, eg a public notary, who often has the competence in matters relating to succession under national law.[146]

As a comparative analysis shows, Member States opted for different solutions. Whereas some of them assigned the competence to courts, others decided to designate public

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[139] As stated in Article 65(3) this information shall be included in the application "to the extent that such information is within the applicant's knowledge and is necessary in order to enable the issuing authority to certify the elements which the applicant wants certified". The specific form which may be used for the purpose of submitting the application of the ECS according to Article 65(2) was adopted by the Commission implementing regulation (EU) 2014/1329 of 9 December 2014 establishing the Forms referred to in Regulation (EU) 2012/650 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (see Annex 4 Form IV).

[140] Cf Articles 63(1) and 65(1).

[141] A. Dutta, n 110 above, 44, according to whom some problems may rise with regard to common law legal systems (especially England and Wales), where the model of indirect devolution of inheritance is in place (see *supra*) and where the position of heirs towards the personal representative "is more akin to the position of a legatee in continental legal systems". For the question on whether or not an acceptance of the estate is needed in order to issue the ECS, see point 2.4 of the Guide prepared by the Fondazione Italiana del Notariato and the Consiglio Nazionale del Notariato: AA.VV., *Il Certificato Successorio Europeo – CSE. Prime proposte operative*, available at *the following link: https://www.notaioricciardi.it/UFFICIO/Successioni_Donazioni/certificato%20successorio%20europeo%20-%20cse%20-%20vademecum%20(cnn).docx*

[142] O. Jauernig and R. Stürner, EuErbVO, Article 73 para 1 (Munich: Verlag C.H. Beck 2018); A. Dutta, n 110 above, 44 (in whose opinion the same restriction should also apply to heirs); C. Benanti, 'Il certificato successorio europeo: ragioni, disciplina e conseguenze della sua applicazione nell'ordinamento italiano', Nuova giur. civ. comm. 2014, II, 10-11.

[143] See the Guide prepared by the Fondazione Italiana del Notariato and the Consiglio Nazionale del Notariato, 'Il Certificato Successorio Europeo (CSE) Prime proposte operative' *CNN Notizie*, 27 agosto 2015, point 2.6. For the question on if creditors could apply for the ECS, cf. W. Burandt, D. Rojahn and S. Schmuck, EuErbVO, Article 65 para 1 (Munich: C.H. Beck, 2019).

[144] See Article 64: "The Certificate shall be issued in the Member State whose courts have jurisdiction" under the Regulation. Cf also recital 70.

[145] As defined in Article 3(2).

[146] Cf Article 64 and recital 70. Member States had to provide information to the Commission regarding the authority competent to issue the ECS by 16 January 2014 (see Article 78).

notaries,[147] for whom assuming "competence in cross-border succession proceedings (…) was [often] a kind of (…) 'initiation' into their participation in the judicial cooperation in civil and commercial matters".[148]

Issuing proceedings

By issuing the ECS, the competent authority has to follow a procedure of a rather non-contentious nature,[149] establishing facts, taking "all the necessary steps to inform the beneficiaries of the application", hearing "if necessary (…) any person involved and any executor or administrator" and making "public announcements aimed at giving other possible beneficiaries the opportunity to invoke their rights".[150] In order to bridge the gaps within the Regulation, national procedural law may apply as well.[151]

Once the application is examined and the elements to be certified established, the ECS is issued without delay by the competent authority,[152] using a specific form prepared for this purpose.[153] The original of the Certificate remains with the issuing authority, while certified copies are issued to the applicant and to those who demonstrate a legitimate interest.[154] Copies are only valid for a period of six months. Exceptionally, the issuing authority may decide for a longer period of validity. An extension of this period may be applied as well.[155] Rectification, modification and withdrawal of the ECS are regulated in Article 71 and are all under the competence of the issuing authority. The Regulation also deals with redress against the latter's decisions, providing that challenges are lodged before a judicial authority.[156] Pending a modification or withdrawal or a challenge, the effects of the ECS may be suspended by the competent authority upon request.[157]

Content of the ECS

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147 For the different solutions, see also the answers to question no. 3.3.5.6, in L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above.
148 As stated by P. Poretti in her oral presentation at the conference PSEFS – Ljubljana Project Events – 12 & 13 December 2019 "Best Practices in European Family and Succession Law". For an abstract, see Id., 'Experience of Croatian Public Notaries with the Application of the Succession Regulation, in *Best Practices*, n 114 above, 30.
149 A. Dutta, n 110 above, 45.
150 Additionally, foreign authorities may be requested to provide the necessary information (held, *e.g.*, in the national registers). Cf. Article 66.
151 A. Dutta, n 110 above, 46-47.
152 Article 67(1). However, the ECS cannot be issued "if the elements to be certified are being challenged" (a); or if "the Certificate would not be in conformity with a decision covering the same elements".
153 See Commission implementing Regulation (EU) No 2014/1329 of 9 December 2014 establishing the Forms referred to in Regulation (EU) No 2012/650 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (Annex 5 as Form V).
154 Article 70(1); cf. recital no. 72.
155 See Article 70(3).
156 For more details see: Article 72; cf recital 72.
157 Article 73(1).

The ECS shall contain the information provided in Article 68.[158] Although the list is quite extensive,[159] there are some elements which seem to be relevant, even if their indication in the ECS is not explicitly required.[160] For example, according to Article 68(1)(h), the ECS should contain information concerning the matrimonial property regime. However, it is not clear if its effects upon the deceased's death[161] could also be certified.[162]

Effects

Once issued, the ECS can be automatically used in all Member States,[163] included the one whose authorities issued it[164] and serves mostly as an instrument of legitimation for those who intend to exercise their rights and/or prove their position in another Member State.[165] In fact, the ECS is connected with the presumption that the elements which have been established are accurate and that the one mentioned as the heir, legatee, executor or administrator in the certificate has that status and/or holds the rights or the powers as stated therein.[166]

The ECS also protects *bona fide* third parties.[167] Therefore, any person who, relying on the information stated in an ECS, makes payment or passes on property[168] to a person who is identified as being entitled to receive such performance shall be considered to have performed in favour of an authorised person.[169] The protection is also extended to the person who receives property from the person mentioned in an ECS as entitled to dispose of it.[170]

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158 In the sense that an ECS may also be partial, see W. Burandt, D. Rojahn and S. Schmuck, n 143 above. Cf. S.D.J. Schmitz, Das Europäische Nachlasszeugnis, RNotZ (2017), 275. However, some elements should be contained in the ECS even if it is only partial: see point 2.14 of the abovementioned Guide prepared by the Fondazione Italiana del Notariato and the Consiglio Nazionale del Notariato.

159 O. Jauernig and R. Stürner, n 141 above, Article 73 para 4: "eine sehr detaillierte und eher abschreckende Auflistung".

160 F. Padovini, in M.G. Cubeddu Wiedemann, G. Gabrielli, F. Padovini, S. Patti, S. Troiano, A. Zaccaria eds, n 111 above, 223; A. Dutta, n 110 above, 45-46.

161 Which fall into the scope of the Regulation: see C-558/16 (*Doris Margret Lisette Mahnkopf*, 1 March 2018).

162 See A. Dutta, n 110 above, 49, footnote 37. For a brief overview of the debate on this point, see: O. Jauernig and R. Stürner, Article 73 para 4, n 142 above. According to D. Damascelli, "Brevi note sull'efficacia probatoria del certificato successorio europeo riguardante la successione di un soggetto coniugato o legato da unione non matrimoniale" *Rivista diritto internazionale privato e processuale*, 73-74 (2017), information concerning the matrimonial property regime is also covered by the presumption in Article 69(2). See, however, P. Lagarde, "Le certificat successoral européen dans l'ordre juridique français" *Contratto e impresa. Europa,* 421 (2015); P. Wautelet and E. Goossens, 'Le certificat successoral européen - perspective belge' *Contratto e impresa. Europa*, 443-444 (2015).

163 Article 69(1). The possibility of a refusal would be excluded even in the case of a violation of the *ordre public*: P. Wautelet, in A. Bonomi and P. Wautelet eds, n 135 above, Article 69 para 8.

164 Article 62(3).

165 For the "Legitimations" as well as the "Beweiswirkung" of the ECS, see: O. Jauernig and R. Stürner, Article 73 para 6, n 142 above.

166 See Article 69(2).

167 For the "Gutglaubenswirkung" of the ECS, see again O. Jauernig and R. Stürner, Article 73 para 6, n 142 above.

168 The provision of services is not mentioned: see A. Dutta, n 110 above, 48.

169 Article 69(3) and recital 71.

170 Article 69 (4) and recital 71.

The third parties' protection is not without limits as it is only afforded if the third party "acted in good faith relying on the accuracy of the information certified" in the ECS.[171] Any person who "knows that [its contents] are not accurate or is unaware of such inaccuracy due to gross negligence" is not considered worthy of protection under the Regulation.[172]

Recording on the basis of the ECS

The presumption established by the ECS is also applicable within the register proceedings,[173] representing the ECS as "a valid document for the recording of succession property in the relevant register of a Member State".[174]

However, due to the uncertainty concerning the interpretation of Articles 69(5) and 1(2)(k)(l) of the Regulation, questions arise concerning the interplay between domestic law and European law.[175] One could especially ask if the ECS replaces the deeds usually required under the national law for registration. Think, for example, of a German-Italian succession, including immovables located in Italy. If German law applies, the quality of heir would be acquired without the need for acceptance due to the so-called "*Vonselbsterwerb*" principle (see § 1922 of the German Civil Code). However, as Italian law requires the acceptance of heirship also for the transcription of *mortis causa* transactions (see Articles 2648 and 2660 *et seq.* of the Italian Civil Code),[176] the question is whether the ECS (issued, for example, by German authorities) is to be considered a sufficient deed in order to provide for entry into the Italian registers. In this regard, it was stated that the ECS could replace some of the documents usually needed for the transcription according to Italian law, eg acceptance, the deed of inheritance and the abstract of the will. Therefore, in this opinion only the "transcription note" (mentioning the ECS) should be presented by demanding the registration.[177] The conclusion seems to be in line with the Regulation, considering that: i) the latter excludes from its scope "any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register";[178] and that ii) "the

[171] Recital 71 and Article (3)(4).
[172] Cf Article 69 (3)(4) and recital 71. For the differences existing, for example, between the effects of the German and the European certificate and the protection that the two instruments recognise for third parties, see D. Schwab, P. Gottwald, S. Lettmaier, n 115 above, 173-174. Cf. T. Pertot, Germany, in L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, *sub* question 3.1.4.
[173] A. Dutta, n 110 above, 48.
[174] See recital 18 and in Article 69(5).
[175] See, for the Italian legal order, T. Pertot, Italy, in R. Garetto, M. Giobbi, A. Magni, T. Pertot, E. Sgubin and M.V. Maccari, Italy, in L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, 383, *sub* question 3.3.5.2.
[176] See T. Pertot, in R. Garetto, M. Giobbi, A. Magni, T. Pertot, E. Sgubin and M. V. Maccari, Italy, in L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, 373-374, *sub* question 3.1.4 and 383, *sub* question 3.3.5.2.
[177] F. Padovini, 'Il certificato successorio europeo', n 111 above, 222. See also A. Fusaro, *Tendenze del diritto privato in prospettiva comparatistica* (Torino: Giappichelli, 2017), 314. See, however, C.A. Marcoz, 'Nuove prospettive e nuove competenze per i Notai italiani: il rilascio del Certificato Successorio Europeo' *Notariato*, 508 (2015); A. Bonomi and P. Wautelet eds, n 135 above, 727; I. Riva, n 111 above, 137; C.M. Bianca, 'Certificato successorio europeo: il notaio quale autorità di rilascio' *Vita notarile*, 8 (2015).
[178] Article 1(2) lit. l.

authorities involved in the registration [should not be precluded] from asking the person applying for registration to provide such additional information, or to present such additional documents, as are required under the law of the Member State in which the register is kept".[179]

Interplay with national inheritance certificates

Based on the consideration that, with the creation of the ECS, the Regulation has not touched national instruments used for similar purposes,[180] which therefore coexist and may conflict with the ECS,[181] one could also ask what interplay there is between the European and domestic certificates of succession.[182]

Many questions arise due to the co-existence of a plurality of instruments to be used for the same purpose. For example, it is not clear if and how domestic certificates could also have cross-border effects.[183] Further, it is debated if an ECS can be issued in internal cases as well.[184] As domestic certificates are mostly required under national law to enter succession rights into the land registers, it could also be difficult, due to the lack of specific national provisions aiming at adapting the national law to the European law,[185] to assess if registration in the State where the immovables are located can be made on the basis of the ECS issued by the competent (foreign) authority, or if an internal certificate of succession is to be issued (in addition to the European one) by the authorities of the State, where the

[179] Recital 18. Additionally, also the authority "which issues the Certificate should have regard to the formalities required for the registration of immovable property in the Member State in which the register is kept". Of course, this requires an exchange of information on such formalities between the Member States (see recital no. 68). The ways of cooperation with foreign institutions were addressed in the oral presentation held by N. Podobnik Oblak at the conference PSEFS – Ljubljana Project Events – 12 & 13 December 2019 'Best Practices in European Family and Succession Law' (for an abstract of her presentation, see: 'Experience of Slovenian First-instant Courts with the Application of the Succession Regulation', in *Best Practices*, n 114 above, 32.

[180] Article 62(2)(3).

[181] Possible scenarios of conflict were examined by Vassiliki Marazopoulou at the conference PSEFS – Ljubljana Project Events – 12 & 13 December 2019 'Best Practices in European Family and Succession Law'. For an abstract, see: The Effectiveness of the European Certificate of Succession in View of Its Comparison with National Certificates of Succession, in *Best Practices*, n 114 above, 37.

[182] For some considerations, from the German perspective, see *eg* O. Jauernig and R. Stürner Article 73 para 7, n 142 above.

[183] A. Dutta, n 110 above, 42. Depending on their nature and design, recognition of national certificates may be based on Article 39 or Article 59. Cross-border effects of the national instruments could therefore differ.

[184] For the question about whether an extension of the ECS to internal successions would be possible, see with regard to the Italian legal order: T. Pertot, in R. Garetto, M. Giobbi, A. Magni, T. Pertot, E. Sgubin and M. V. Maccari, Italy, in L. Ruggeri, I. Kunda and S. Winkler eds, n 2 above, 383, *sub* question 3.3.5.2. For the proposal to create a domestic certificate of succession for the whole Italian territory, see above.

[185] The systematic implementation of the European Regulation at the national level such as provided by the German legislator (see Gesetz zum Internationalen Erbrecht und zur Änderung von Vorschriften zum Erbschein sowie zur Änderung sonstiger Vorschriften vom 29. Juni 2015, BGBl I Nr. 26/2015) has failed in other Member States, which rather adopted a minimum solution. See, for example, the Italian Legge 161/2014 – Disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza all'Unione europea-Legge europea 2013-bis, Gazz. Uff. 10 novembre 2014, n. 261, S.O. (Article 32). However, for a larger reform recently proposed, see F. Padovini, n 124 above.

immovables are located and the registration is to be done.[186] In attempting to give an answer to this question, one could, for example, argue that it would be against the scope of the Regulation, but even more against the statements made by the CJEU in the *Oberle* case, if additional domestic certificates, to be issued by authorities different from those competent under the Regulation, would be required in single Member States in order to provide for registration into national land registers. This solution was recently also followed by an Italian judge[187] who, despite the silence of the national law in this regard, considered the ECS a sufficient deed to provide for registration into the land register existing in some Italian districts (without the need to apply for an additional domestic certificate).[188]

[186] Think, for example, of an Austrian-Italian succession, subject to the application of the Austrian law and including immovables located in Trieste, where the *libro fondiario* exists. As a domestic certificate of succession is needed in Trieste in order to enter the succession rights in the land register, while the ECS is not expressly mentioned as a deed on which a registration may be done, one could think that a domestic certificate is still necessary for the purpose of registration into the land register.

[187] See Tribunale of Trieste, 8 May 2019, available at the following link: *www.rivistafamilia.it/wp-content/uploads/2019/10/Trib.-Trieste-_-decr_tav_8.5.2019.pdf.*

[188] § 35 of the German GBO is more explicit in this sense.