The material limits of the European Succession Regulation

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Summary: 1. The European Succession Regulation; 2. General scope of application; 3. Excluded matters; 3.1. Status of natural persons, family relationships, legal capacity and presumed death; 3.2. Matrimonial property regimes; 3.3. Rights *in rem* and issues relating to register of rights; 3.4. Other exclusions; 4. Final notes

Abstract: Cross-border successions have their legal framework in the European Union (EU) in *Regulation No 650/2012 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* (European Succession Regulation). About this Regulation, there are sometimes some expectations, not always realistic, about the answers that it can provide, in an area where there are many divergences between the substantive law of the Member States. It is therefore important to know the limits that circumscribe the material scope of application of the Regulation, bringing to the discussion the jurisprudence of the European Union Court of Justice (ECJ).

Keywords: European Succession Regulation; material scope of application; Private International Law; cross-border successions

1. The European Succession Regulation

The *Regulation (EU) No 650/2012 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* (European Succession Regulation) has the legal framework applicable to cross-border successions in the European Union (EU). The Regulation was adopted under the policy of judicial cooperation in civil matters, that results from Article 81 of the Treaty on the Functioning of the European Union (TFEU). Judicial cooperation in civil matters is a European Union policy which attempts to bring together and establish means of cooperation between the judicial authorities of the different Member States. This policy aims to ensure that differences between the judicial systems and legal orders of the different Member States do not limit the access to justice and the effectiveness of rights[1].

The European Succession Regulation establishes uniform rules of international jurisdiction (Chapter II), a uniform conflict-of-laws system (Chapter III), a system of automatic recognition and enforcement of foreign decisions, authentic instruments and court settlements (Chapters IV and V) and, lastly, a European Certificate of Succession (Chapter VI).

The main objectives of the European Succession Regulation are to promote the elimination of obstacles to the free movement of persons and to enable citizens, within the European area of freedom, security and justice[2], to organise their succession more easily, in advance, while safeguarding the protection of the rights of heirs and legatees and of persons close to the deceased, as well as the protection of creditors of the succession (Recitals 7 and 80).

[1] About the judicial cooperation in civil matters and its origins, see Anabela Susana de Sousa Gonçalves, *Da Responsabilidade Extracontratual em Direito Internacional Privado, A mudança de paradigma*, Almedina, Coimbra, 2013, pp. 107-127 e pp. 212-226; *idem*, "Cooperação judiciária em matéria civil e Direito Internacional Privado", *Temas de Direito Internacional privado e de processo Civil Internacional*, Librum Editora, Porto, 2019, pp. 195-254.
[2] Set in Article 69 of the TFEU.

It is possible to find in the preliminary works of the Regulation, the idea that the divergence between the conflict-of-laws rules and the rules of international jurisdiction and the variety of authorities with jurisdiction to settle issues relating to international successions in several Member States created a risk of segmentation of cross-border successions, made it more difficult to settle these issues and ultimately constituted an obstacle to the free movement of persons within the EU[3]. Consequently, the unification of the conflict-of-law rules and international jurisdiction applicable in all the Member States is ultimately intended to increase legal certainty and security in the settlement of cross-border successions, to facilitate the early organisation of successions and to simplify the settlement of disputes relating to cross-border successions. The unification of these rules is complemented by a system of automatic recognition and enforcement of decisions, and mutual recognition of decisions in matters of succession, also one of the general objectives of the Regulation, as assumed in Recital 59.

At times, there seems to be some expectations, not always realistic, regarding the answers that the Regulation can give, in a matter where there are many divergences between the material laws of Member States. The aim of this brief study is to identify the limits of the Regulation, namely its material scope, and discuss the jurisprudence of the European Union Court of Justice (ECJ).

2. General scope of application

The European Succession Regulation, according to its Article 1, Section 1, applies to legal relationships that have the nature of succession to the estates of deceased persons, which "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

[3] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession*, COM(2009) 154 final, Brussels, 14.10.2009, p. 2.

transfer through intestate succession"[4]. This concept is reproduced in Article 3, Section 1, of the Regulation, and it should be remembered that, as in the case of the Union's other legal acts in the area of judicial cooperation in civil matters, the concept of succession is an autonomous concept which must be interpreted independently of the legal orders of the Member States[5].

Looking at that concept, first of all, one is dealing with cross border succession relationships, which are in contact with more than one legal order. This means, according to the case-law of the ECJ, that it is necessary to establish the location of another element relating to the succession in a State other than the State of the last habitual residence of the deceased person[6]. In this sense, a succession may be cross-border when it includes assets located in several Member States, which do not correspond to the State of the deceased's last habitual residence[7].

Secondly, Article 3, Section 1, establishes a broad concept of succession which covers any form of transmission of a person's estate by reason of death, in accordance with the principle of the unity of succession, including voluntary transfer under a disposition upon death or a transfer by intestate succession. As results from Recital 37, "for reasons of legal certainty and in order to avoid the fragmentation of the succession, that law should govern the succession as a whole, that is to say, 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".

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[4] As stated in Recital 9 and as follows from Article 3, section 1 (a) of the European Succession Regulation.
[5] The identity of objectives between the rules laid down in EU legal instruments in the field of judicial cooperation policy in civil matters and the rationality and systematic functioning of the EU legal order militate in favour of adopting concepts with identical meanings in the various legal acts regulating judicial cooperation and concepts with autonomy vis-à-vis national legal orders. This is the position of the ECJ, which has repeatedly held that the concepts used in these legislative acts must have an autonomous content from that which they have in national legal systems. See, the case law of the ECJ affirming the need for an autonomous interpretation of the concepts provided for in Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), repealed by Regulation (EU) No 1215/2012 of 12 December 2012 (Brussels I *bis*), ECJ, *Reisch Montage AG v. Kiesel Baumaschinen Handels Gmbh*, Case C-103/05, 13.06.2006, *CJ* 2006; *idem*, *Falco Privatstiftung and Thomas Rabitsch v. Gisela Weller-Lindhorst*, Processo C-533/07, de 23 de Abril de 2009, *CJ* 2009; *idem*, *Peter Pammer c. Reederei Karl Schlüter GmbH & Co. KG (C-585/08) e Hotel Alpenhof GesmbH c. Olivier Heller (C-144/09)*, Joint Cases C-585/08 e C-144/09, 07.12.2010.
[6] ECJ, *E. E. intervening parties: Kauno miesto 4-ojo notaro biuro notarė Virginija Jarienė, K.-D.E.*, Case C-80/19, 16.07.2020, ECLI:EU:C:2020:569, § 42.
[7] *Idem, ibidem*, §43; *idem*, *Vincent Pierre Oberle*, Case 20/17, 28.06.2018, ECLI:EU:C:2018:485, §32.

For this reason, in terms of conflict of laws rules, Article 23, which defines the scope of the applicable law, states in Section 1 that the *lex successionis* shall govern the entire succession, which covers any transfer of property forming part of the estate to the heirs or legatees[8]. Then, Section 2 sets out, in a non-exhaustive manner, as may be inferred from the expression *in particular*, the matters which shall be governed by the law of succession, specially: the causes, time and place of the opening of the succession; the determination of the beneficiaries, their respective rights of succession, their respective shares and the obligations that may be imposed on them by the deceased; the capacity to inherit; disinheritance and disqualification by conduct; the transfer of the assets, rights and obligations of the estate to the heirs or legatees, including the conditions and effects of acceptance or waiver of the succession or legacy; the powers of heirs, executors of the wills and other administrators of the estate; liability for the debts under the succession; the disposable part of the estate, the reserved shares and other restrictions on the disposal of property upon death; any obligation to restore or account for gifts, advancements or legacies when determining the shares of the various beneficiaries; the sharing-out of the estate.

Similarly, the principle of unity of succession is also present in Article 4, which lays down the general rule concerning international jurisdiction in matters of succession. According to that provision, the courts of the State of the habitual residence of deceased at the time of death have jurisdiction to decide the whole succession[9]. As the ECJ explained, the principle of unity of succession also implies that those courts are the only ones with international jurisdiction to take measures in respect of the whole succession, including to issue European Certificate of Succession, with the aim of ensuring the sound administration of justice, by limiting the possibility of parallel proceedings before the courts of the sevreal Member States and possible contradictions[10]. It should be noted that,

[8] ECJ, *Aleksandra Kubicka intervening party: Przemysława Bac, acting in her capacity as notary*, Case C-218/16, 12.10.2017, ECLI:EU:C:2017:755, §44.
[9] About the principle of unity of succession, see Anabela Susana de Sousa Gonçalves, "As linhas gerais do Regulamento Europeu sobre Sucessões", *Cadernos de Direito Privado*, n.º 52, 2016, pp. 3-19.
[10] ECJ, *Vincent Pierre Oberle*, Cit., § 44 and 57.

although Article 4 confers jurisdiction to the courts of a Member State, domestic jurisdiction is decided in accordance with national rules of jurisdiction[11].

Still according to Article 1, revenue, customs and administrative matters are excluded from the scope of the Regulation. This means that questions concerning the payment of revenues or any succession related tax to be paid by the estate or the intermediaries will be governed by the national laws of the Member States, as becomes clear from Recital 10.

Article 1, Section 2, excludes from the scope of application of the European Regulation on Successions a number of matters listed in the legal provision. However, as a preliminary clarification, Recital 11 explains that "for reasons of clarity, a number of questions which could be seen as having a link with matters of succession should be explicitly excluded from the scope of this Regulation". This means that the Regulation only applies to successions. It will be necessary to make a *depeçage* in relation to those matters connected with the succession, but explicitly excluded from the Regulation, and to apply to them a different law.

3. Matters excluded

3.1 Status of natural persons, family relationships, legal capacity and presumed death

According with Article 1, Section 2 (a), the status of natural persons, family relationships and similar relationships producing comparable effects are therefore excluded from the scope of the Regulation. The notion of civil statuses and family relationships encompasses as filiation, adoption, marriage, affinity, type of kinship, which may arise as preliminary issues to a succession, and may influence the final solution. With

[11] *Idem, ibidem,* § 36.

regard to these matters, the European Commission is preparing a proposal for a Regulation concerning the establishment of parenthood[12].

The Regulation does not provide a solution to the possibility of these statuses or legal relationships arising as preliminary issues to a succession issue. Taking into consideration the differences regarding the solutions of these issues by Member States, some authors have advocated treating the preliminary issue as an independent question governed by the law of personal or family status[13].

The legal capacity of natural persons is also excluded from the scope of the Regulation, according with Article 1, Section 2 (b), although it is true that this exclusion only covers the legal capacity for negotiating, since the capacity to testate is covered by the succession capacity, which is included in the scope of the applicable law under the terms of Article 23, Section 2 (c) – capacity to inherit -, and the conditions of substantive validity of dispositions of property upon death, according to Article 26, which are regulated under the terms of Articles 24 and 25 of the European Regulation on Succession.

Issues relating to the disappearance, absence or presumed death of a natural person are also not covered by the Regulation. according with Article 1, Section 2 (c). Again, this is a preliminary issue, that should be sorted out by national law of Member States, including conflict-of-law rules[14]. It should be noted, however, that the Regulation has a substantive rule in Article 32 related with this issue, which states that "where two or more persons whose successions are governed by different laws die in circumstances in which it is uncertain in what order their deaths occurred, and where those laws provide

[12] European Commission, *Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood*, COM/2022/695 final, Brussels, 7.12.2022

[13] With this opinion, Andrea Bonomi, "Article 1" *in Le droit européen des succéssions, Commentaire du Règlement n.º 650/2012 du 4 juillet 2012*, Org. Andrea Bonomi, Patrick Wautelet, Bruylant, Bruxelles, 2013, pp. 76-78; Guillermo Palao Moreno, Gabriel Alonso Landeta, "Artículo 1. Ámbito de aplicación" *in Sucesiones Internacionales, Comentarios al Reglamento (UE) 650/2012*, Dir. José Luis Iglesias Buiges, Guillermo Palao Moreno, Tirant lo Blanch, Valencia, 2015, p. 35.

[14] See Andrea Bonomi, "Article 1", Cit., pp. 81; Guillermo Palao Moreno, Gabriel Alonso Landeta, "Artículo 1. Ámbito de aplicación", Cit., p. 36.

differently for that situation or make no provision for it at all, none of the deceased persons shall have any rights to the succession of the other or others".

2.2. Matrimonial property regimes

According with Article, Section 2 (d), also out of the scope of the Regulation are issues relating to matrimonial property regimes and property regimes concerning legal relationships having comparable effects to marriage. Matters relating to the termination or liquidation of the marriage or equivalent legal relationships cannot qualify as succession matters. However, before deciding the succession, the matrimonial regime must be settled. That results from Recital 12: "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".

The exclusion of matrimonial regimes is explained by the existence of two legal instruments regarding property relationships, with cross-border implications, between spouses and registered partnerships, that were already in discussion when the European Regulation on Succession was published[15]: *Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes* (Regulation on Matrimonial Property Regimes); and *Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships*. Both Regulations are limited to

[15] European Commission, *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes*, COM(2011) 126 final, Brussels, 16.3.2011, pp. 1-29; *idem, Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships*, COM(2011) 127 final, Brussels, 16.3.2011, pp. 1-28.

cross-border relationships[16], and were drawn up within the framework of the policy on judicial cooperation in civil matters.

The main objectives of both regulations[17] are to improve the free movement of persons, to make it easier for spouses and partners to organise property relations between them and with third parties, both during the life of the couple and during the liquidation of their property, and to promote legal certainty and security in the matters subject to regulation. The European Commission justifies the regulation of these matters by reference to the interest of international couples who, having freedom of movement within the Union, are growing in number, and the practical and legal difficulties these couples encounter in the daily management of their property and its liquidation following the death or divorce of one of their members, taking into consideration the diversity of substantive and conflicting rules in the Member States on the property consequences of marriage[18]. The aim was therefore also to simplify the existing legal framework by facilitating the circulation of judgments and the recognition of rights acquired in the Union relating to the property consequences of marriage and registered partnership.

To achieve these ends, it is possible to find in both Regulations: uniform rules of international jurisdiction (Chapter II); a uniform conflict-of-law system (Chapter III); and a regime for recognition and enforcement of foreign judgments, authentic instruments and court settlements (Chapters IV and V).

For the purposes of the European Regulation, and in accordance with Article 3, Section 1(a), matrimonial property regimes must be understood as covering all civil matters in matrimonial property regimes, the day-to-day management of the spouses' property and the liquidation of such property as a result of the separation or death of one of the spouses, including not only the optional rules of national legal systems but also rules which cannot be derogated from by the will of the parties. This concept must include, in addition to the property relationships between the spouses, the relationships

[16] According with Recital 14 of both Regulations.
[17] According with Recital 73 of both Regulations.
[18] European Commission, *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes*, COM(2011) 126 final, Cit., p. 4.

between the spouses and third parties arising out of the marriage and its dissolution. Recital 18 clarifies that, for the purposes of the Regulation, the concept of matrimonial property regime includes the rules which cannot be derogated from by the will of the spouses, optional rules to which the spouses may agree, and the default rules of the applicable law, encompassing "property arrangements specifically and exclusively envisaged by certain national legal systems in the case of marriage but also any property relationships, between the spouses and in their relations with third parties, resulting directly from the matrimonial relationship, or the dissolution thereof". This concept also covers the specific powers and rights of either or both spouses with regard to property, either as between themselves or as regards third parties, as these powers and rights should fall under the scope of this Regulation", according to Recital 20.

Sometimes it can be difficult to determine whether the issue is one of succession or of property regimes. This was the case in *Doris Margret Lisette Mahnkopf*, where the ECJ ruled that a legal provision of a Member State which provides, in the event of the death of one of the spouses, for a fixed distribution of the property acquired by increasing the succession share of the surviving spouse falls within the material scope of the European Succession Regulation[19]. The ECJ reasoned that "Paragraph 1371(1) of the BGB concerns not the division of assets between spouses but the issue of the rights of the surviving spouse in relation to assets already counted as part of the estate. Accordingly, that provision 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"[20]. It therefore considered the provision in question to qualify as a matter relating to the succession of the deceased spouse and to be part of the succession matter for the purposes of the European Succession Regulation.

Nevertheless, these two legal instruments are linked, as in a succession situation it may be necessary to resolve property issues between the spouses arising from the property regime. For this reason, the European Regulation on Matrimonial Property

[19] ECJ, *Proceedings brought by Doris Margret Lisette Mahnkopf. Request for a preliminary ruling from the Kammergericht Berlin*, Case C-558/16, 1.03.2018, ECLI:EU:C:2018:138, §44.
[20] *Idem, ibidem.*

Regimes provides for ancillary international jurisdiction in matrimonial property regime matters in two situations: when there is a link with an action for succession or with an action for divorce, legal separation or annulment of marriage between the spouses. According to Article 4, if an action concerning the succession of one of the spouses is brought in a Member State in accordance with the rules of jurisdiction of the European Succession Regulation, the courts of that State will also have jurisdiction to decide on matters of the matrimonial property regime connected with the succession case.

The unity of jurisdiction in the situations listed is justified in Recital 32 to reach the sound administration of justice. In fact, when there are matters of succession or dissolution of the marital relationship to be decided by the courts of a Member State, if the courts of that State are able to decide matters of matrimonial property regimes that are connected with those actions, that will allow related matters to be decided by courts of the same State, and there will be gains in terms of efficiency, speed of justice and procedural economy. However, it is necessary to clarify that Articles 4 and 5 are not rules of territorial jurisdiction, but of international jurisdiction, which means that jurisdiction is conferred to the courts of the Member State where the disputes relating to succession and divorce, legal separation and marriage annulment are being decided, but not exactly to the court that is deciding them. The specific court to decide the matrimonial issue will be determined by the internal rules of jurisdiction of each Member State. It is so because, in certain Member States, matters of succession are entrusted to authorities other than courts, under Article 3, Section 2, of the European Succession Regulation, such as notaries appointed by the States themselves, and these authorities do not have jurisdiction to decide matters relating to matrimonial property regimes under their national law[21].

However, the advantages set out above remain, since the resolution of a succession dispute may depend on the resolution of issues relating to the matrimonial property regime and the solution of these is influenced by the divorce action. These mutual influences become easier to combine when the actions are taking place in the same State,

[21] See Pilar Peiteado Mariscal, "Competencia internacional por conéxion en matéria de régimen económico matrimonial y de efectos patrimoniales de uniones registradas. Relación entre los reglamentos UE 2201/2003, 650/2012, 1103/2016 y 1104/2016", *Cuadernos de Derecho Transnacional*, Marzo 2017, Vol. 9, N.º 1, p. 310.

avoiding problems of recognition of foreign decisions, reducing costs for the parties and increasing the speed of decisions.

With regard to the principle of unity, now at the level of the applicable law, some authors consider that sometimes the unity between the law applicable to the matrimonial property regime and to succession should be maintained, or mechanisms should be established to make it possible to maintain this unity[22]. There are legal systems which sometimes establish weaker succession rights for the surviving spouse because they benefit him or her at the time of the dissolution of the marriage through the matrimonial property regime. The opposite can also happen: legal systems that establish a supplementary matrimonial property regime that does not benefit the spouse at the time of the dissolution of the marriage, but confers stronger succession rights on the surviving spouse. It is these normative balances that can be broken when different laws are applied to the matrimonial property regime and succession[23].

These normative balances can be restored through the party autonomy, which exists in European Regulation on Matrimonial Property Regimes and the European Succession Regulation.

Article 22 of the European Regulation on Matrimonial Property Regimes allows the parties to designate or change the law applicable to the matrimonial property regime, and they can choose one of the laws listed in the rule: the law of the habitual residence of the spouses or future spouses, or of one of them, at the time the agreement is concluded; the law of the nationality of either of the spouses or future spouses, at the time the agreement is concluded. These are the two most relevant connecting factors in matters of personal status - nationality and habitual residence. These are the ones that have the greatest proximity to the spouses, or to one of them, and in the rule are paralyzed at the time of the conclusion of the agreement, eliminating any problem of mobile conflict.

Article 22 of the European Succession Regulation also allows the election of the law applicable to the succession, thus giving the possibility for the person to organize the

[22] See Javier Carrascoza González, *El Reglamento Sucesorio Europeo 650/2012, Análisis crítico*, Editorial Comares, Granada, 2014, p. 37.
[23] *Idem, ibidem.*

succession in advance according to his or her will: the person may choose, as the law applicable to the succession, the law of the State of which he or she is a national at the time of making the choice or at the time of death[24]. The purpose of the possibility of choosing the law of nationality is to recognize the importance of this connecting factor in succession matters in the conflict-of-law rules of many Member States. The limitation on nationality, on the other hand, according to Recital 38, aims to protect the legitimate expectations of persons entitled to a reserved share. This choice is justified above all in order to safeguard the legitimate expectations of the person who is to inherit when he or she has a close link with the country of his or her nationality.

By making this choice of law, it is possible to restore the normative balance between issues relating to matrimonial property regimes and succession, which could otherwise be disrupted by the *depeçage* resulting from the existence of two legal instruments on these matters.

3.3. Rights *in rem* and questions related with recording them in a register

According to Article 1, Section 2 (k), the European Succession Regulation does not apply to the nature of rights *in rem*, as well as to matters concerning the recording in a register of rights in immovable or movable property, pursuant to Article 1, Section 2 (l), which includes: the requirements for the recording of such rights, the effects arising from the recording of such rights (such as constitutive or declaratory effects), and the consequences of failing to record such rights in a register.

Regarding the nature of rights *in rem*, Recital 15 of the Regulation clarifies that the Regulation allows the creation or transfer of rights *in rem* in accordance with the law governing succession under the Regulation. However, the Regulation does not interfere with the *numerus clausus* of rights *in rem* existing in the Member States, and a Member State cannot be obliged to recognise a right *in rem* relating to property located in that

[24] About the advantages of the choice of law in the European Succession Regulation, see Anabela Susana De Sousa Gonçalves, "As linhas gerais do Regulamento Europeu sobre Sucessões", Cit., pp. 3-19.

Member State which does not exist in its legal system. This restriction is linked to the principle of the typical nature of rights *in rem* in each legal order and to the safeguard resulting from Article 345 TFEU, which states that "the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership". Therefore, the existence of rights *in rem*, the determination of their content, scope and effects are excluded from the scope of the Regulation. However, the *lex successionis* and the scope of application of the Regulation include, pursuant to Article 23, Section 2 (e), "the transfer to the heirs and, as the case may be, to the legatees of the assets, rights and obligations forming part of the estate, including the conditions and effects of the acceptance or waiver of the succession or of a legacy", *i.e.* the transfer of property by way of succession, including the forms of transfer and valid title of transfer, falls within the scope of the Regulation[25].

Nevertheless, the beneficiaries of these rights are protected because, as Recital 16 explains, the Regulation allows the adaptation of a right *in rem* unknown in a certain legal order by a closer equivalent right *in rem* under the law of that Member State, pursuant to Article 31. For that purpose, the objectives and interests of the right *in rem* in question and the effects resulting from it must be taken into account, in accordance with that legal provision. Recital 16 further states that, in order to operationalise this equivalence process, "for the purposes of determining the closest equivalent national right *in rem*, the authorities or competent persons of the State whose law applied to the succession may be contacted for further information on the nature and the effects of the right. To that end, the existing networks in the area of judicial cooperation in civil and commercial matters could be used, as well as any other available means facilitating the understanding of foreign law"[26]. In other words, the decision-maker may use any reliable means at his disposal to understand foreign legislation and to make the adaptation.

[25] With the same opinion, Guillermo Palao Moreno, Gabriel Alonso Landeta, "Artículo 1. Ámbito de aplicación", Cit., pp. 42-46.
[26] See the European Commission financed projetc EU-ADAPT: Adaptation of rights in rem in cross-border succession within EU, https://www.uc.pt/en/fduc/university-of-coimbra-institute-for-legal-research-uciler/research-projects/eu-adapt/, accessed in 9.08.2023.

This question was put to the ECJ in the *Aleksandra Kubicka* case[27], which concerned two methods of transferring ownership of an immovable property on the death of the testator, a right *in rem*, which was recognised in the two legal systems concerned, in different forms: the legacy by vindication under Polish law and the legacy by damnation under German law. Both were ways of transferring ownership of a right *in rem* at the time of the testator´s death, and this right *in rem* was recognised in both legal systems[28]. Accordingly, the ECJ concluded that Article 1, Section 2 (k) of the European Succession Regulation precludes "a refusal to recognise, in a Member State whose legal system does not provide for legacies 'by vindication', the material effects produced by such a legacy when succession takes place, in accordance with the law governing succession chosen by the testator"[29]. Although the method of transfer of the property under Polish law was by means of an institute which did not exist under German law, the place of the situation of the property, it was considered that there was an equivalence between the institutes, taking into account the legal effects of both, which would be the transfer by way of a legacy of the right of ownership of immovable property located in Germany, which German law allows[30].

The Court clarified that the figure of adaptation, provided for in Article 31 of the Regulation does not apply to the case, because German law recognises the property right which would be transferred by virtue of the Lithuanian legacy by vindication, explaining that that rule "does not concern the method of the transfer of rights *in rem*, including, inter alia, legacies 'by vindication' or 'by damnation', but only the respect of the content of rights *in rem*, determined by the law governing the succession (*lex causae*), and their reception in the legal order of the Member State in which they are invoked (*lex rei sitae*)"[31]. As what is transferred is a property right, which is recognised in German law, there is no need to resort to the adaptation.

[27] ECJ, *Aleksandra Kubicka intervening party: Przemysława Bac, acting in her capacity as notary*, Case C-218/16, 12 October 2017, ECLI:EU:C:2017:755.
[28] *Idem, ibidem,* § 49.
[29] *Idem, ibidem,* § 51.
[30] *Idem, ibidem,* § 62.
[31] *Idem, ibidem,* § 63.

The Court concludes by holding that Article 1, Section 2 (k) and (l) and Article 31 of the Regulation do not permit a refusal to recognise the real effects of a legacy by vindication resulting from the law applicable to the succession, "where that refusal is based on the ground that the legacy concerns the right of ownership of immovable property located in that Member State, whose law does not provide for legacies with direct material effect when succession takes place"[32], but recognises the legatee's right of ownership as a result of the succession.

The Regulation also does not govern matters relating to the recording in a register of rights in immovable or movable property under Article 1, Section 2 (l). As stated in Recital 18, it is for the law of the Member State of in which the register is kept, which in the case of immovable property is the law of the place where the property is located, to lay down the legal requirements and how the recording must be carried out, the authorities which must verify the legal conditions, the documentation to be submitted and the information required. The effects of recording in a register, whether declaratory or constitutive in effect, are also excluded from the scope of the Regulation. As is clear from Recital 19, "for example, the acquisition of a right in immovable property requires a recording in a register under the law of the Member State in which the register is kept in order to ensure the *erga omnes* effect of registers or to protect legal transactions, the moment of such acquisition should be governed by the law of that Member State".

If the conditions for recording in a register of rights and its effects are excluded from the scope of the Regulation, according to the ECJ "the conditions under which such rights are acquired do not constitute one of the subjects excluded from the scope of the regulation under this provision. That interpretation is supported by the principle that the law governing succession should govern the succession as a whole, as provided for in Article 23 of Regulation No 650/2012, particularly in Article 23(2)(e), which provides that it governs 'the transfer to the heirs and, as the case may be, to the legatees of the assets, rights and obligations forming part of the estate'"[33]. In other words, the conditions for the recording in a register of rights and its effects are governed by the law of the

[32] *Idem, ibidem,* § 66.
[33] *Idem, ibidem,* § 54-55.

Member State in which the register is kept. On the other hand, the conditions for the acquisition of rights by way of succession, the transfer of the immovable and movable property, rights and obligations forming part of the estate to the heirs or legatees fall within the scope of the Regulation and the scope of the applicable law, pursuant to Article 23, Section 2 (e).

Still on this exclusion, it is the law of the Member State in which the register is kept that determines the legal conditions for the recording in a register of rights, whether the documents submitted are sufficient and have the necessary information, in accordance with the law of that State, and this matter is excluded from the scope of the Regulation. In the case *R.J.R.*, a situation arose in which the recording in a register of a property right in the Lithuanian land register in respect of a property situated in that country was rejected on the ground that the European Certificate of Succession submitted in support of that application did not identify the property, which is a condition for the recording in a register of rights of property under Lithuanian law[34].

The European Certificate of Succession may be used by heirs, legatees, executors of wills or administrators to the estate to prove their status and exercise their rights or powers in another Member State and it is therefore issued for use in another Member State (Art. 63, Section 1). Its purpose is to make the resolution of cross-border successions quicker, more effective and easier by overcoming the difficulties arising from the existence of a wide variety of legal instruments, judicial and extrajudicial, existing in the Member States for the same purpose[35]. Article 63, Section 2, lists in a non-exhaustive manner some of the purposes for which the Certificate may be used. It can be used to prove: the status and rights of each heir or legatee and their respective shares of the estate; the attribution of a specific asset or assets comprising the estate to the heir or heirs or legatee or legatees; the powers of the person identified in the Certificate to execute the will or administer the estate. The Certificate will be issued by the courts of the Member

[34] ECJ, *R.J.R. v Registrų centras VĮ*, Case C-354/21, 9 Marc 2023, ECLI:EU:C:2023:184, § 35.
[35] Refering this diversity, see Andrea Bonomi, "Il Regolamento Europeo sulle Successioni", *RDIPP*, N. 2-2013, p. 320.

State which have jurisdiction in accordance with the rules of international jurisdiction set out in Chapter II of the Regulation.

The advantages of using the Certificate are related to its effects which are described in Article 69. According to Section 1 of the legal provision, the Certificate takes effect in all Member States automatically, without the need for any special procedure. Furthermore, the Certificate gives rise to a presumption of accuracy in relation to the information it contains. This follows from Article 69, Section 2, and is confirmed by Recital 71, when it clarifies that "it should not be an enforceable title in its own right but should have an evidentiary effect and should be presumed to demonstrate accurately elements which have been established under the law applicable to the succession or under any other law applicable to specific elements, such as the substantive validity of dispositions of property upon death". The Certificate will then have automatic evidential effect, but only in relation to the matters regulated by the Regulation, as clarified in the above-mentioned Recital.

Article 69, Section 5, states that the European Certificate of Succession is a valid document for the recording of succession property in the register of a Member State, even if it safeguards the exclusion provided for in Article 1, Section 2 (l), of the Regulation. In the case, the ECJ recalled that it is the law of the Member State in which the register is kept that regulates: the conditions for the recording in a register of a right; whether the right can be recorded in a register or not; the authorities that must make the recording in a register and verify whether those conditions are met; which documents must be submitted and the information that must be contained therein; the effects of recording or failing to record those rights in a register[36]. While it is true that, according to Recital 18 and Article 69, Section 5, the European Certificate of Succession should be a valid document for the recording of succession property in a register of a Member State, it follows from that Recital that "this should not preclude the authorities involved in the registration 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, for instance information or documents relating

[36] *Idem, ibidem,* § 47.

to the payment of revenue". In the case at issue, Lithuanian law required that in the application for registration, or in the documents accompanying that application, all the identification data of the immovable property concerned be provided.

Consequently, concluded the ECJ, Article 1, Section 2 (l) and Article 69, Section 5, does not preclude "legislation of a Member State which provides that an application for registration of immovable property in the land register of that Member State may be rejected where the only document submitted in support of that application is a European Certificate of Succession which does not identify that immovable property"[37]. Even so, all the other elements provided for in the European Certificate of Succession may be used by heirs, legatees, executors of wills and administrators of the estate to prove their status and exercise their rights and powers in other Member States, and the Certificate will produce all the effects deriving from it.

3.4. Other exclusions

Maintenance obligations that do not result from reason of death are governed by *Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations* (Regulation on Maintenance Obligations) and therefore naturally fall outside the scope of the European Succession Regulation, as is clear from Article 1, Section 2 (e). The Regulation on Maintenance Obligations was drawn up with the aim of enabling a decision that a maintenance creditor has obtained in one Member State to be automatically enforceable within the European Union (Recital 9), allowing for the effective and speedy recovery of this type of claim. To this end, it establishes rules on international jurisdiction, conflict rules and simplifies the procedure for recognising and enforcing maintenance decisions. Regulation on Maintenance Obligations applies to maintenance obligations arising out from a family relationship, parentage, marriage or affinity (Article 1, Section 1), and the concept of maintenance obligation must be interpreted in an autonomous way (Recital

[37] *Idem, ibidem,* § 53.

11), so that there is uniform treatment of all maintenance creditors within the Union. Otherwise, there could be inequality between maintenance creditors within the Union in identical situations, as a result of the concept of maintenance being different from one Member State to another.

The formal validity of dispositions of property upon death made orally is excluded from the scope of the Regulation [Article 1, Section 2 (f)] and must be assessed by the national law of the Member States. This exclusion is in line with Article 10 of the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, which states that Contracting States reserve the right not to recognise orally made testamentary dispositions. Since this Convention is applicable in several Member States, and taking into account Article 75, Section 1, of the Regulation, which safeguards the application of that Convention, this exclusion is justified.

In the same way, property rights, interests and assets created or transferred otherwise than by succession are excluded, under the terms of Article 1, Section 2 (g), such as by way of gifts, with the exception any obligation to restore or account for gifts, advancements or legacies when determining the shares of the different beneficiaries, a matter that falls within the scope of the applicable law under the terms of Article 23, Section 2 (i). This means that the obligation to reintegrate donations or gifts, advances or legacies in order to determine the shares of the various heirs or beneficiaries falls within the scope of *lex successionis* and of the Regulation[38].

Matters governed by the law of companies and the law applicable to other bodies, corporate or unincorporated, as well as the dissolution, extinction and merger of companies and other bodies, corporate or unincorporated [Article 1, Section 2 (h) and (i)] are also excluded from the scope of the European Succession Regulation.

Finally, the European Succession Regulation also does not apply to the creation, administration and dissolution of trusts, under the terms of Article 1, Section 2 (j). However, Recital 13 clarifies that this does not mean a general exclusion of trusts, since "where a trust is created under a will or under statute in connection with intestate

[38] See with this opinion, Andrea Bonomi, "Article 1", Cit, p. 91-102; Guillermo Palao Moreno, Gabriel Alonso Landeta, "Artículo 1. Ámbito de aplicación", Cit., p. 39.

succession the law applicable to the succession under this Regulation should apply with respect to the devolution of the assets and the determination of the beneficiaries". This means that the two issues listed that result from a trust of a succession nature will fall within the scope of the Regulation regarding the devolution of assets and the determination of beneficiaries. Furthermore, given the existence of the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*, the exclusion provided for in the Regulation should be understood restrictively as only targeting the rules relating to the functioning of the trust, *i.e.* the validity of the trust, its construction, its effects, and the administration of the trust[39].

4. Final Notes

It is important to know the material limits of the European Succession Regulation so it can be applied without excessive expectations, and it can be perceived realistically as an important instrument that allows the free movement of people; that a person can organise its succession in advance; the safeguarding of the legitimate expectations of legatees and heirs; the safeguarding of creditors of the succession; allows to achieve security, legal certainty and predictability in the resolution of international successions; to reach the simplification of disputes relating to cross-border successions.

This is the reason it is important to understand the material scope of the Regulation. This does not mean that there is no room for improvement. As other authors have emphasised, a European recording registry could be created for wills and last wills acts[40], or a European recording registry for European Certificates of Succession, so that their authenticity can be easily ascertained; to prevent fraud; to avoid situations in which authorities in different Member States are simultaneously deciding on the same succession.

[39] Since these matters are governed by that Convention, as results from its Article 8.
[40] Javier Carrascoza González, *El Reglamento Sucesorio Europeo 650/2012*, Cit., p. 45.