Article 1

Scope

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1. This Regulation shall apply to succession to the estates of deceased persons. It shall not apply to revenue, customs or administrative matters.
2. The following shall be excluded from the scope of this Regulation:
   (a) the status of natural persons, as well as family relationships and relationships deemed by the law applicable to such relationships to have comparable effects;
   (b) the legal capacity of natural persons, without prejudice to point (c) of Article 23(2) and to Article 26;
   (c) questions relating to the disappearance, absence or presumed death of a natural person;
   (d) 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;
   (e) maintenance obligations other than those arising by reason of death;
   (f) the formal validity of dispositions of property upon death made orally;
   (g) property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts, joint ownership with a right of survivorship, pension plans, insurance contracts and arrangements of a similar nature, without prejudice to point (i) of Article 23(2);
   (h) questions governed by the law of companies and other bodies, corporate or unincorporated, such as clauses in the memoranda of association and articles of association of companies and other bodies, corporate or unincorporated, which determine what will happen to the shares upon the death of the Members;
   (i) the dissolution, extinction and merger of companies and other bodies, corporate or unincorporated;
   (j) the creation, administration and dissolution of trusts;
   (k) the nature of rights in rem; and
   (l) 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.

Summary

I. Overview

1. Article 1 defines the material scope of the ESR. According to the first sentence of article 1.1, the ESR applies to 'succession to the estates of deceased persons'. The second sentence excludes central matters of public law. Paragraph 2 of the provision excludes certain matters of private law with links to succession matters. The main objective of this paragraph is the coordination of the ESR with other EU regulations. In addition, some matters are excluded because there was no sufficient consent on how to regulate them on the level of harmonised EU law. Since the ESR brings together 'provisions on jurisdiction, on applicable law, on recognition or, as the case may be, acceptance, enforceability and enforcement of decisions, authentic instruments and court settlements and on the creation of a European Certificate of Succession'[1] in order to facilitate

[1] Recital 8 ESR.

'[t]he proper functioning of the internal market ... by removing the obstacles to the free movement of persons who currently face difficulties in asserting their rights in the context of a succession having cross-border implications',[2] it goes without saying in article 1 that the application of the ESR requires a conflict of laws.[3]

2. Legal terms and notions to which the ESR makes reference are to be interpreted autonomously. Legal terms and notions of other instruments of the European law must be taken into account in order to achieve a coherent interpretation, in particular for legal terms and notions relating to the material scope of other instruments, because both the definition of the material scope for this instrument in article 1.1 ESR as well as several of the exclusions in article 1.2 ESR aim at coordinating the numerous instruments of European private international law. This coordination includes instruments on procedural law as well as instruments on the choice of law. Last not least, the definition of the material scope in article 1 ESR determines the applicability *ratione materiae* of the European Certificate of Succession in article 63 *et seq*. ESR [see art. 63 *et seq*.].

3. For example, article 1.2(f) Brussels I-*bis* regulation[4] should be interpreted to the effect that there be neither an overlap nor a *lacuna*.[5] Civil matters involving an incidental question on succession law, e.g. the acquisition of the claim in question by succession, appear to be covered by the Brussels I-*bis* regulation.[6] The incidental question should be determined according to the law selected by the ESR in order to produce the same result irrespective of which Member State's authorities decide about the claim.[7] The ESR applies, in turn, if a question of succession law

[2] Recital 7, sentence 1.

[3] A. Davì and A. Zanobetti, *Il nuovo diritto internazionale privato europeo delle successioni* (Torino, 2014), p. 25; J. Carrascosa González, *El Reglamento Sucesorio Europeo 650/2012 de 4 julio 2012: Análisis crítico* (Granada, 2014), p. 23.

[4] Regulation (EU) no. 1215/2012 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 (recast), OJ 2012 no. L351, 20 December 2012.

[5] A. Dutta, 'Art. 1 EuErbVO', Kommentierung der europäischen Erbrechtsverordnung, *in* Münchener Kommentar BGB, 6th ed., vol. X (München, 2015), para. 4.

[6] ECJ, case C-347/08, *Vorarlberger Gebietskrankenkasse* v. *WGV-Schwäbische Allgemeine Versicherungs AG* [2009] ERC I-08661, para. 44, *per obiter dictum*: 'where the statutory assignee of the rights of the directly injured party may himself be considered to be a weaker party, such an assignee should be able to benefit from special rules on the jurisdiction of courts laid down in those provisions. This is particularly the situation, as the Spanish Government states, of the heirs of the person injured in an accident'.

[7] Dutta, 'Art. 1 EuErbVO', para. 4.

constitutes the main question of the proceedings, for example proceedings for a negative declaratory judgment that the defendant is not an heir or otherwise beneficiary.

4. In regulating international jurisdiction as well as choice of law, the ESR may be considered a new generation of EU instruments on private international law that so far mainly focused either on the one or the other subject.[8] The comprehensive approach of private international law instruments[9] continues in respect of the instruments on matrimonial property regimes and property consequences of registered partnerships.[10] Under such a comprehensive approach the interpretation of legal terms and notions on the level of jurisdiction and on the level of choice of law tends to blur.[11] Nevertheless, it may remain necessary to make distinctions for both of these levels of private international law, even if the respective terms or notions have an identical wording or are defined generally for a comprehensive instrument.

II. Succession

5. According to article 1.1, sentence 1, the ESR applies to succession to the estates of deceased persons. Recital 9 explains that the scope of the ESR should include 'all civil-law aspects of succession'.[12] These are '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'. On the basis of this explanation, article 3.1(a) ESR defines 'succession' as covering all

[8] Council Regulation (EC) no. 1346/2000 of 29 May 2000 on insolvency proceedings, OJ 2000 no. L160, 30 June 2000 (that will be replaced as from 26 June 2017 by Regulation (EU) no. 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJ 2015 no. L141, 6 June 2015) already includes jurisdiction, recognition as well as choice of law.

[9] See e.g. Carrascosa González, *El Reglamento Sucesorio Europeo*, p. 22: 'Reglamento triple'.

[10] 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; 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 will be applicable as of 29 January 2019 in the Member States participating to the enhanced cooperation, i.e. Belgium, Bulgaria, Cyprus, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden.

[11] Dutta, 'Art. 1 EuErbVO', para. 1.

[12] Carrascosa González, *El Reglamento Sucesorio Europeo*, p. 29: 'concepto omnicomprensivo'.

forms of transfer of assets, rights and obligations by reason of death, either by voluntary transfer, such as by will or testamentary contract, or intestate succession. Article 23.2 ESR supplements this definition by providing a non-exclusive list of issues that are covered by succession law. Article 24 *et seq*. ESR provide for special choice-of-law rules in relation to issues that form part of 'succession' in the sense of article 1.1 ESR.

6. Recital 11 makes clear that the ESR should only apply to succession matters, not to other matters of civil law potentially related with succession matters. In order to clarify this limitation article 1.2 ESR contains a list of those matters of civil law that are often raised in connection with succession matters but that are excluded from the scope of the ESR. Finally, 'succession' should be interpreted consistently with 'wills and succession' in the sense of article 1.2(a) Brussels I and I-*bis* regulations. Any matter excluded from the scope of the ESR must be connected to the applicable law by recourse to the national choice-of-law rules of the Member States including, as the case may be, those emerging from international treaties implemented in the respective Member States. Nothing prevents the Member States from making use of the choice-of-law rules of the ESR for issues excluded from the material scope of the ESR. The application of the ESR, however, then entirely grounds on the respective national legal order, for example by way of analogy in order to close a *lacuna* in the national choice-of-law rules.

III. Exclusion of Public Matters

7. Article 1.1, sentence 2, excludes revenue, customs or administrative matters. Recital 10 explains that these matters are excluded insofar as they are 'of a public nature'. In particular, it is for national law to determine how taxes and other liabilities of a public-law nature are calculated and paid, whether these be taxes payable by the deceased at the time of death or any type of succession-related tax to be paid by the estate or the beneficiaries. Article 23.2(g) ESR does not apply for such 'debts under the succession' [see art. 23 no. 12]. Likewise, it is for the national law to decide whether the release of succession property to beneficiaries or the recording of succession property in a register may be made subject to the payment of taxes. This list of tax issues in recital 10 is not exclusive but only identifies the most typical succession-related tax matters.

8. Beyond these specific succession-related matters of public law, the terms 'revenue', 'customs' and 'administrative matters' should be interpreted consistently with the same terms in article 1.1, sentence 2, Rome I regulation;[13] article 1.1, sentence 2, Rome II regulation;[14] and article 1.1, sentence 2, Brussels I and I-*bis* regulations.[15] All of these instruments restrict themselves to civil matters because article 81 TFEU empowers the EU to enact measures for judicial cooperation (only) in 'civil matters'. The autonomous distinction between civil and public matters relies on the question whether one party of the legal relationship acted in exercise of specific powers vested to it as a body of public law or on the grounds of a public competence as opposed to powers vested in any (private) person, i.e. 'powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals'.[16] Articles 1.1, sentence 2, of the respective EU instruments make reference to the most apparent and most widely accepted examples of such powers. It is the function rather than the legal form or employment of the person exercising the power in question that determines the decision between public and private matters.[17] For example, claims arising from social welfare upon death of the deceased are administrative matters in the sense of article 1.1, sentence 2, ESR. Article 30 ESR provides in this respect that where the law of the State in which certain immovable property, certain enterprises or other special categories of assets are located contains special rules which, for economic, family or social considerations, impose restrictions concerning or affecting the succession in respect of those assets, those special rules shall apply to the succession in so far as, under the law of that State,

[13] 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), OJ 2008 no. L177, 4 July 2008.

[14] Regulation (EC) no. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007 no. L199, 31 July 2007.

[15] See footnote 4.

[16] ECJ, case C-292/05, *Lechouritou and Others* v. *Dimosio tis Omospondiakis Dimokratias tis Germanias* [2007] ECR I-01519, para. 34; ECJ, case C-265/02, *Frahuil SA* v. *Assitalia SpA* [2004] ECR I-01543, para. 21; ECJ, case C-266/01, *Préservatrice foncière TIARD SA* v. *Staat der Nederlanden* [2003] ECR I-04867, para. 30; ECJ, case C-172/91, *Volker Sonntag* v. *Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann* [1993] ECR I-01963, para. 20 *et seq.*

[17] ECJ, case 172/91, *Volker Sonntag* v. *Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann* [1993] ECR I-01963, para. 23, with respect to the function of a teacher vis-à-vis his pupils as being outside the exercise of sovereign powers, irrespective of his status as a civil servant under public law in the legal system of a Member State.

they are applicable irrespective of the law applicable to the succession [see art. 30].

9. Furthermore, the nature of a matter does not change by transfer of a claim from one person to another.[18] For example, a claim based on public law does not change into a claim of private law just by assignment or succession.

IV. Exclusion of Civil Matters

10. Article 1.2 ESR contains a list of twelve subject matters of a civil law nature that are excluded from the scope of the ESR. These subject-matters often appear in connection with succession matters[19] but they are not to be dealt with by the ESR because according to recital 11 the ESR 'should not apply to areas of civil law other than succession'. The list of excluded matters is exhaustive.[20] Thus, civil matters outside the list of article 1.2 ESR but also outside 'succession' in the sense of article 1.1, sentence 1, ESR are equally outside the material scope of the ESR. This applies, for example, to the question whether and to what extent and in what way rights, claims, debts and property exist that form part of the estate.[21]

11. The list in article 1.2 ESR partly contains matters that are already dealt with by other EU instruments. This applies, for example, to point (e) (maintenance obligations).[22] One of the excluded matters (matrimonial property and property consequences of partnerships) has been, subsequently to the adoption of ESR, dealt with by other EU instruments and others might be in the future.[23] Finally, there is a number of matters that, at least at the moment, are deliberately left to the respective national conflict rules.

[18] M. Weller, 'Art. 1 Rome I Regulation', in G.-P. Calliess (ed), *Rome Regulations: Commentary on the European Rules of the Conflict of Laws* (Alphen aan den Rijn, 2015), para. 8.

[19] Davì and Zanobetti, *Il nuovo diritto internazionale privato europeo*, p. 26.

[20] Compare the wording of the non-exclusive list in article 23.2 ESR: 'in particular', '*notamment*', '*insbesondere*', A. Bonomi, 'Article 1', in A. Bonomi and P. Wautelet, *Le droit européen des successions. Commentaire du Règlement n° 650/2012 du 4 juillet 2012* (Bruxelles, 2013), p. 74.

[21] Bonomi, 'Article 1', p. 74.

[22] Council Regulation (EC) no. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ 2009 no. L7, 10 January 2009.

[23] See the regulations quoted in footnote 10.

12. As far as issues are outside the material scope of 'succession' for the purposes of the ESR, the Member States' law applies, unless there is another EU instrument. The Member States are free to characterise such issues as succession law by virtue of their own legal order and to apply to these issues their own national conflicts law. If a Member State removes the national conflicts law on succession, it is likely that such a Member States seeks to adjust its own law exactly along the lines of 'succession' in the sense of the ESR.[24] It may also be the case that such a Member State refers to the choice-of-law rules of the ESR for issues not covered by 'succession' under the ESR but covered by 'succession' as understood by the national law.[25] In that latter case the Member State makes use of the ESR by virtue of its own national law. It is a matter of interpretation of the national law which of these options has been chosen.

A. Status of Natural Persons and Family Relations (point (a))

13. Article 1.2(a) excludes the status of natural persons from the scope of the ESR, as well as it excludes family relationships and functionally comparable relationships. Both provisions should be interpreted consistently with article 1.2(a) and (b) Rome I regulation, article 1.2(a) Brussels I-*bis* regulation, and, as far as the natural status is concerned, with article 1.2(a) Brussels I regulation, and finally, as far as family relations and comparable relations are concerned, with article 1.2(a) Rome II regulation.

1. Status of Natural Persons

14. The concepts for determining the civil status – e.g. mother, father, child, married, divorced etc. – of natural persons differ strongly amongst the Member States.[26] In its green paper on the recognition of the effects of civil status records, the European Commission discussed the option of such a recognition on the basis of harmonised choice-of-law rules.[27] So far, however, there are no such rules in sight. Therefore, the EU legislator left this issue to the Member States' choice-of-law rules.

[24] Dutta, 'Art. 1 EuErbVO', para. 9.
[25] Davì and Zanobetti, *Il nuovo diritto internazionale privato europeo delle successioni*, p. 25.
[26] European Commission, green paper, 'Less Bureaucracy for Citizens: Promoting Free Movement of Public Documents and Recognition of the Effects of Civil Status Records', COM(2010) 747 final, 15 December 2010, para. 4.1, p. 11.
[27] European Commission, green paper, 'Less Bureaucracy for Citizens' (see footnote 26), para. 4.3(c) and question 9, p. 15.

The connection used by these rules varies between nationality, domicile and habitual residence.[28]

15. The status of natural persons often occurs as a preliminary question in connection with succession matters, in particular for the question of who is beneficiary (article 23.2(b) ESR) and whether there are reserved shares and other restrictions on the disposal of property upon death as well as claims which persons close to the deceased may have against the estate or the heirs (article 23.2(h) ESR). The exclusion is understood to cover the status of natural persons in particular in respect to such incidental questions to succession matters.[29] For example, it is the succession law determined by the ESR that decides whether an adoption or a registered partnership results in the position of a beneficiary whereas the question whether the respective person is validly adopted or whether there is a valid registered partnership is not dealt with by the ESR.

16. A follow-up question is how the incidental questions (of status or of other issues) should be dealt with. Basically, two approaches are discussed, namely either applying the choice-of-law rules of the *lex causae*, i.e. the choice-of-law rules of the law applicable to the main question ('dependent connection' because the selection of the applicable law to the incidental question depends on the *lex causae*), or the choice-of-law rules of the *lex fori* ('independent connection'). As far as the courts or even the legislator of the Member States explain themselves on this issue (which is hardly ever the case) there seems to be an overall tendency to resort to the choice-of-law rules of the *lex fori* rather than to those of the *lex causae*.[30] Under this approach, the incidental question will always be decided in the same way before the courts of the respective Member State, irrespective of the main question that raised the incidental question. Thus, the legal order of the respective Member State remains as coherent as possible in that a 'marriage' of two particular spouses is always regarded as a valid marriage irrespective of the context in which this question arises ('internal harmony').

17. However, such an internal harmony results in international disharmony in respect to the main question because the courts of different Member States will come to different results depending on their respective decisions on the incidental question. It is argued, therefore, that incidental questions should be decided according to the choice-of-law rules of the *lex causae*, i.e. those of the applicable succession law. This

[28] Bonomi, 'Article 1', p. 76.
[29] Bonomi, 'Article 1', p. 76.
[30] Bonomi, 'Article 1', p. 77.

would have the effect that from the perspective of substantive law, the incidental question will always be decided as if it had to be decided by the courts of the State that provides for the *lex causae*. Of course, procedural differences will remain from State to State and may still result in different decisions. Thus, 'international harmony' cannot be guaranteed by resorting to the choice-of-law rules of the *lex causae*.

There is no express rule in the ESR on how incidental questions should be dealt with. One may conclude that the Member States may choose as they wish.[31] One may suggest that both approaches should be used alternatively in order to enhance the chances for a positive result, for example, on the preliminary question of 'fatherhood' to the benefit of the 'child'.[32] But such a *favour validitatis* for assessing parentage may be unjustified if third persons, for example other children of the deceased person, would suffer disadvantages. One may further hold that by resorting to the choice-of-law rules of the *lex causae* the testator receives the possibility to choose the applicable law for his family relations via choosing the applicable succession law although a direct choice is usually not allowed.[33] But it would appear somewhat illogical to opt for a dependent connection only if there is no choice of law for the succession issues.[34] Rather, one should develop a general approach.

18. In principle, the most promising general approach in European private international law appears to be an independent connection because the more European conflicts rules (for the main question) come into existence, the more an independent connection of the incidental questions that makes use of these European conflicts rules also for incidental questions stabilise the uniformity of decisions within the internal market and furthers the relevance of the European conflicts rules.[35] For example, if an incidental question appears in the wording of a European choice-of-law rule for selecting the applicable law and if there is already another European choice-of-law rule that deals with this incidental question for the case that this question appears as main question, it should be a matter of coherence to resort to the European choice-of-law rule in both cases.

[31] Bonomi, 'Article 1', p. 78.
[32] For example, P. Lagarde, 'Observations sur l'articulation des questions de statut personnel et des questions alimentaires dans l'application des conventions de droit international privé', in A. E. von Overbeck (ed), *Conflits et harmonisation – Kollision und Vereinheitlichung – Conflicts and Harmonization* (Freiburg, 1990), p. 521 *et seq.*
[33] Bonomi, 'Article 1', p. 78. [34] But compare Bonomi, 'Article 1', p. 78.
[35] M. Weller, 'Europäisches Internationales Privatrecht, Allgemeiner Teil', in C. Teichmann and M. Gebauer (eds), *Enzyklopädie Europarecht – Europäisches Privat- und Unternehmensrecht* (Baden-Baden, 2015), § 8, paras. 72–82.