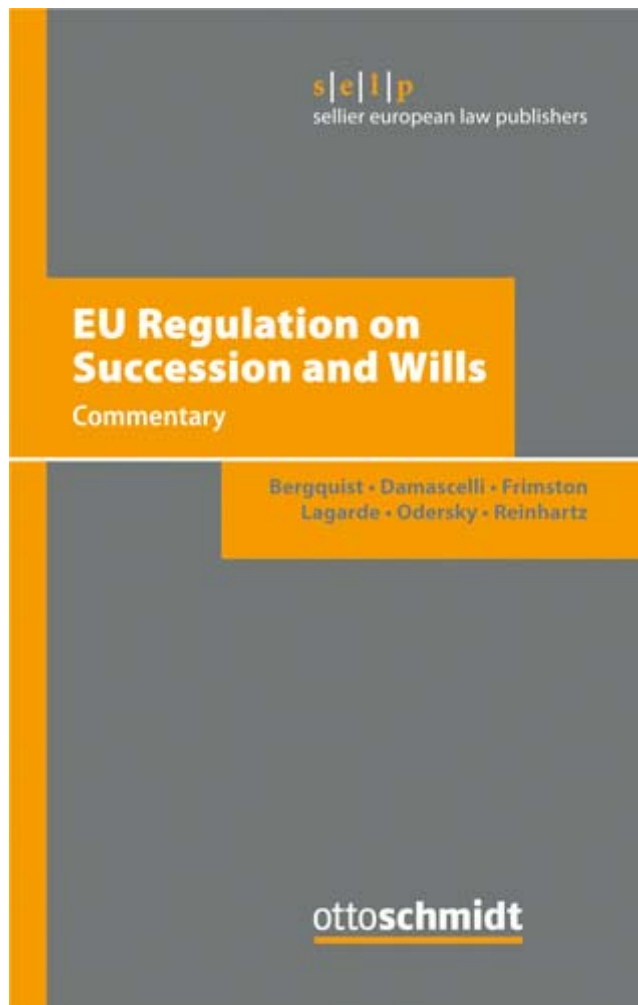


Leseprobe zu



Bergquist/Damascelli/Frimston/Lagarde/Odersky/ Reinhartz

## **EU Regulation on Succession and Wills**

Commentary

2015, rd. 390 Seiten, Kommentar, 12 x 19cm

ISBN 978-3-504-08001-3

**74,80 €**

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protect legal transactions, the moment of such acquisition should be governed by the law of that Member State.’

## Article 2: Competence in matters of succession within the Member States

This Regulation shall not affect the competence of the authorities of the Member States to deal with matters of succession.

This Article has no particular model. 1

There is no reference to it in the Explanatory Report or in a recital. 2

Its meaning would appear to be declaratory and without any particular effect, save to underline the fact that the Regulation deals with the private international law issues of succession and that in the absence of any such issues, the competence of Member States continues unaffected by the Regulation. 3

Whilst the Regulation does not always expressly state as much, it will only be invoked where a cross border element is involved. For example, Art. 62(3) states that the European Certificate of Succession shall not take the place of internal documents. 4

In practice, it should usually be clear, when a cross border element exists. 5

## Article 3: Definitions

1. For the purposes of this Regulation:
  - (a) ‘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;
  - (b) ‘Agreement as to Succession’ means an agreement, including an agreement resulting from mutual wills, which, with or without consideration,

### Article 3

- creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement;
- (c) 'joint will' means a will drawn up in one instrument by two or more persons;
  - (d) 'Disposition of Property upon Death' means a will, a joint will or an Agreement as to Succession;
  - (e) 'Member State of origin' means the Member State in which the decision has been given, the court settlement approved or concluded, the authentic instrument established or the European Certificate of Succession issued;
  - (f) 'Member State of enforcement' means the Member State in which the declaration of enforceability or the enforcement of the decision, court settlement or authentic instrument is sought;
  - (g) 'decision' means any decision in a matter of succession given by a court of a Member State, whatever the decision may be called, including a decision on the determination of costs or expenses by an officer of the court;
  - (h) 'court settlement' means a settlement in a matter of succession which has been approved by a court or concluded before a court in the course of proceedings;
  - (i) 'authentic instrument' means a document in a matter of succession which has been formally drawn up or registered as an authentic instrument in a Member State and the authenticity of which:
    - (i) relates to the signature and the content of the authentic instrument; and
    - (ii) has been established by a public authority or other authority empowered for that purpose by the Member State of origin.
2. For the purposes of this Regulation, the term 'court' means any judicial authority and all other authorities and legal professionals with competence in matters of succession which exercise judicial functions or act by delegation of power by a judicial authority or act under the control of a judicial authority, provided that such other authorities and legal professionals offer guarantees with regard to impartiality and the right of all parties to be heard and provided that their decisions under the law of the Member State in which they operate:
- (a) may be made the subject of an appeal to or review by a judicial authority; and
  - (b) have a similar force and effect as a decision of a judicial authority on the same matter.

The Member States shall notify the Commission of the other authorities and legal professionals referred to in the first subparagraph in accordance with Article 79.

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## I. Definitions

Art. 3 sets out the definitions of some of the terms used in the Regulation. 1

As described in relation to scope, above, the CJEU has held that interpretation of EU Regulations requires independent, community wide, autonomous principles.<sup>1</sup> 2

Thus even in circumstances, when the court of the forum will apply its own national law principles, these must have regard to the autonomous interpretation of the terms and definitions set out in the Regulation. 3

### 1. Succession

The 1989 Hague Succession Convention is silent as to the meaning of ‘succession’, but it is clear from paragraph 39 of the *Waters* Report that in that Convention the term concerns devolution, but excludes the transmission of assets. 4

In the Regulation, ‘succession’ has a much broader meaning and includes both devolution and transmission, although with some limitations. 5

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<sup>1</sup> For example Case 29/76 in relation to the Brussels *Ibis* Regulation.

**Article 3 paras. 6–13**

- 6 Whilst the term ‘estate’ is not defined, the definition of succession in Art. 3(1)(a), indicates that ‘estate’ is to be given a very broad meaning.
- 7 Recital 9 confirms that the Regulation is wide ranging and “includes all civil-law aspects of succession, 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 on death or a transfer on intestate succession.”<sup>2</sup>
- 8 Paragraph 4.1 of the Explanatory Report, states that ‘the concept of “succession” must be interpreted in an autonomous manner and encompasses all the elements of a succession, in particular its handover, administration and liquidation’.
- 9 Throughout the Regulation, it should be recalled that definitions will only apply in circumstances in which the Regulation applies. This will not be the case, in relation to matters outside its scope. Thus, this definition must exclude matters such as property rights excluded by reason of Art. 1(2)(g).

**2. Agreement as to Succession**

- 10 This point has Art. 8 of the 1989 Hague Succession Convention as a model.
- 11 This topic is dealt with at some length in Paragraphs 90 to 93 of the *Waters* Report.
- 12 Paragraph 93 of the *Waters* Report indicates that the French donation entre époux would be included within this definition so far as it relates to a gift of a future estate, whereas a donation-partage as a gift of existing property would not be within the definition.
- 13 These paragraphs of the *Waters* Report are helpful both in understanding the agreements that are likely to be included in the definition and

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<sup>2</sup> This Recital is clearly based upon the definition of succession described in paragraph 28 of the *Waters* Report.

also the common law perspective in which such agreements have historically not been included.

### 3. Joint Will

This point has Art. 4 of the 1961 Hague Wills Convention as a model. 14

It is presumed that the definition will have an autonomous meaning within the EU and thus a wider definition than that currently used by some Member States, such as Germany. 15

### 4. Disposition of Property upon Death

This point has the 1989 Hague Succession Convention as a model, although the term is used in that convention, without any definition. 16

The 1961 Hague Wills Convention, by contrast, refers to ‘testamentary dispositions’. 17

Paragraph 41 of the *Waters* Report indicates that whilst the term is not defined in the 1989 Hague Succession Convention, it ‘excludes inter vivos dispositions having immediate proprietary effect; it is upon the death of the person so disposing, and not in any respect at any earlier time, that the disposition (or transfer) takes place.’ 18

Art. 1(2)(g) does in an event exclude gifts from the scope of the Regulation, but the distinction between a Disposition of Property upon Death and a disposition of property not upon death, will on occasion be a difficult question. 19

The interpretation of a Disposition of Property upon Death, will be governed together with other matters of material validity defined under Art. 26, by the relevant applicable law under Art. 24 and 25 dealt with in Chapter III. 20

### 5. Member State of origin

This point has Brussels *Ibis* Regulation Art. 1.2 (d) as a model, extended to include reference to the European Certificate of Succession. 21

22 See below for a discussion as to the definition of ‘Member State’.

### 6. Member State of enforcement

23 This point has Art. 1.2 (e) Brussels *Ibis* Regulation as a model, although with fewer limitations.

24 See below for a discussion as to the definition of ‘Member State’.

### 7. Decision

25 This point has Art. 1.2(a) Brussels *Ibis* Regulation as a model, although extended from the narrower meaning of ‘judgment’. There is however no paragraph including protective measures within the definition. That issue is considered in Chapter IV.

26 The definition of ‘court’ is dealt with in Art. 3.2 below and includes a wide definition of judicial authority and legal professionals with judicial competence.

### 8. Court settlement

27 This point has Art. 1.2 (b) Brussels *Ibis* Regulation as a model, although extended to include all courts including courts in a third State.

28 The definition of ‘court’ is dealt with in Art. 3.2 below and includes a wide definition of judicial authority and legal professionals with judicial competence.

### 9. Authentic instrument

29 This point has Art. 1.2(c) Brussels *Ibis* Regulation Art. 1.2 (c) as a model, although extended to include authentic instruments drawn up or registered in any Member State, provided that it has been established by an empowered authority in the Member State of origin.

30 Chapter V deals in detail with the issues involving authentic instruments.



## 10. Court

Art. 3(2) extends the definition of court to include non-judicial authorities exercising a judicial authority, subject to certain limits. 31

Recital 20 sets out that ‘This Regulation should respect the different systems dealing with matters of succession applied in the Member States. For the purposes of this Regulation, the term ‘court’ should therefore be given a broad meaning so as 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 some Member States, exercise judicial functions in a given succession by delegation of power by a court. All courts as defined in this Regulation should be bound by the rules of jurisdiction set out in this Regulation. Conversely, the term ‘court’ should not cover non-judicial authorities of a Member State empowered under national law to deal with matters of succession, such as the notaries in most Member States where, as is usually the case, they are not exercising judicial functions.’ 32

Paragraph 4.1 of the Explanatory Report sets out that ‘More often than not, successions are settled out of court. The concept of courts used in this Regulation is used in its broadest sense and includes other authorities where they exercise a function falling within the jurisdiction of the courts, in particular by means of delegation, including notaries and court clerks. 33

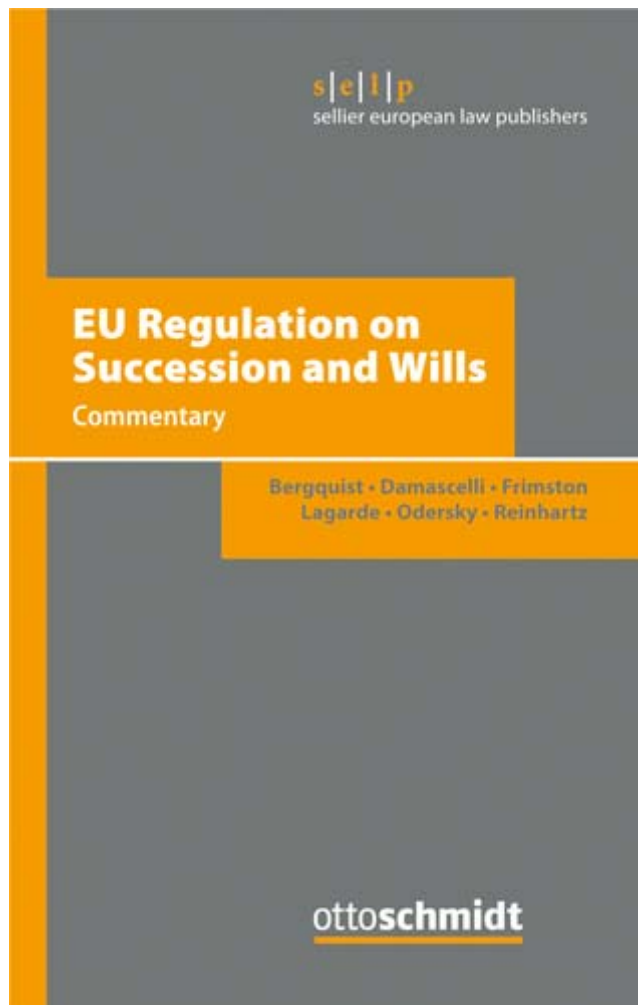
It is clear therefore, that notaries and legal professionals are only included within the definition of ‘court’, in the more unusual case and to the extent that and when they are actually exercising a judicial function. 34

## II. Matters Not Defined in the Regulation

Some terms in the Regulation are not specifically defined. 35

Some of these, such as the term ‘estate’ whilst not defined will usually be straightforward to interpret. 36

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## Preface

We, the authors of this Commentary, hope that it will be a useful handbook for those practitioners working with international succession law in all the countries of the European Union. With this in mind, this Commentary has been published in English, German and French.

We were (almost) all members of the EU Commission's expert group set up to draft the EU Regulation on succession.

We are from six different Member States. Some of us are professors and some practising lawyers. With this background, we hope to be able to look at the Regulation from different angles and with different experiences.

Although there has been one main author for each chapter, we have all had the opportunity to comment on what each of the others has written. However, on one point we have not been able to come to a common opinion.

The authors of the various chapters of the commentary on the Regulation can be found on page iv.

We want to thank the publishers, Verlag Dr. Otto Schmidt for the work with the English and German versions and Dalloz for the French version.

We also want to thank *Anne Villeneuve* (French), *Bernard Vowles* (English) and *Christoph Altvater* (German) for translation work, and *Ann-Christine Wiklund* and *Kerstin Ulveland* for secretarial work.

December 2014

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