



## Entrepreneurial aspects of the EU Succession Regulation

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*ABSTRACT: This article investigates entrepreneurial aspects of succession law under the EU Succession Regulation. The subject area of entrepreneurial succession takes on a new dimension in a cross-border context. It is now the rule that there is at least one foreign connection within an entrepreneurial family: this may be the case due to a foreign nationality, a foreign habitual residence of the entrepreneur or the existence of company assets abroad, etc. Consequently, the entire process of business succession is strongly influenced by rules of private international law and must be viewed from a new – namely international – standpoint. Each EU Member State has its own conflict of law rules with regard to succession law, which provides an answer to the question of which law should be applied when there is an interference with other legal systems. For the territory of the EU, there has been an EU-wide inheritance law since August 2015 that answers this question – the so-called EU Succession Regulation, which also applies to entrepreneurs in their legal status as natural persons. Despite the fact that company law is explicitly excluded from the scope of application of the EU Succession Regulation, its interfaces with company law are of great practical relevance for the succession of the deceased entrepreneur. The aim of this article is to highlight the various legal aspects of the business succession under the EU Succession Regulation and distinguish them from the rules of private international law.*

*KEYWORDS: Entrepreneur – EU Succession Regulation – EU Member States – conflict of law rules – company law.*

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## 1. Introduction

The EU Succession Regulation (also known as Brussels IV; hereinafter “*the Regulation*”)<sup>1</sup> represents the baseline for business succession in the territory of the European Union (the “*EU*”); this follows from the mere fact that the legal position of the entrepreneur is embodied by a natural person. While in most cases, the company itself does not cease to exist upon the death of the entrepreneur and continues to operate, the rights and obligations of the deceased entrepreneur in the business may be affected as a result. Hence, in the event of the death of an entrepreneur, the question arises as to what legal consequences are triggered by this. In this respect, the procedure following the death of an entrepreneur is analogous to the procedure on the death of a non-entrepreneur; the first step is to verify whether the scope of application of the Regulation is opened up and which national court has international jurisdiction for the case in question. Afterwards, the legal matters that are not subject to the law of succession according to the provisions of the Regulation are to be excluded from its scope of application. In this context, the list of exceptions under Article 1(2) of the Regulation plays an important role, as it clarifies which matters of the succession law are to be judged on the basis of national conflict of law rules and thus, do not fall within the scope of the Regulation. For these reasons, it is necessary to examine the elements of a cross-border business succession in more detail.

## 2. Scope of application of the Regulation

### 2.1. General remarks

The most important aspect of the scope of application of the Regulation concerns the question of which national law is applicable in inheritance proceedings upon the death of any person, whether an entrepreneur or not. As regards this question, the relevant legal provision is enshrined in Article 21 of the Regulation. According to this provision, the entire succession by reason of death of an entrepreneur as a natural person is governed by the law of the Member State in which the deceased had his habitual residence at the time of his death, unless the Regulation provides otherwise.

It should be noted that the term “*habitual residence*” is not legally defined in the Regulation, but in the Preamble as the place where the centre of the deceased’s life is located in family and social terms.<sup>2</sup> The decisive factor is therefore, on the one hand, the actual place of residence and, on the other hand, the relationship to this place. In this context, the entirety of the entrepreneur’s life circumstances in the last years before his death is to be considered, while the place of death, nationality or domicile registration are of no legal significance. If, for example, the majority shareholder of an Austrian company spends the rest of his life in his villa on the French Riviera, his centre of life is located there, and consequently French law is also applicable in the event of death.<sup>3</sup>

The entrepreneur may also opt for a choice of law through a declaration in the form of a testamentary disposition (e.g. last will).

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<sup>1</sup> Regulation (EU) No. 650/2012 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, OJ 2012, L 201/107.

<sup>2</sup> EU Succession Regulation, recital 23.

<sup>3</sup> See Gerold M. Oberhumer and Clemens Jauer, *Unternehmensnachfolge* (Vienna: Manz Verlag, 2019), 128.

This choice of law can be in favour of the law of the Member State whose nationality he possesses either at the time of his declaration or at the time of his death [Article 22(1) and (2) of the Regulation]. The choice of law declaration may be made explicitly or implicitly. However, if the entrepreneur has two or more citizenships, the law of one of these Member States may be chosen [Article 22(1) sentence 2 of the Regulation]. If, for example, the deceased entrepreneur bequeaths a package of shares to his heirs in a testamentary disposition, and if he repeatedly refers in his last will to the provisions of the Austrian Civil Code by using legal terms that are typical of Austrian inheritance law, this may, according to the circumstances of the individual case, be deemed an implied choice of law in favour of Austrian law.<sup>4</sup>

## ***2.2. Temporal scope of application***

Since August 17, 2015, the amended EU Succession Regulation, which was published in the Official Journal of the European Union on July 27, 2012, has entered into force in the EU.<sup>5</sup> Originally, according to Article 84 of the Regulation, it became effective on the twentieth day following its publication in the Official Journal, i.e., on August 8, 2012.

Pursuant to Article 83 of the Regulation, it is applicable to the estate of persons who died after August 16, 2015.<sup>6</sup> For deaths prior to 17 August 2015, the former legal regime remained in force, under which applicable law was determined by the nationality of the deceased entrepreneur at the time of his death. In addition, the rules of the Hague Convention on the Form of Testamentary Disposition<sup>7</sup> and intergovernmental agreements took precedence over national conflict of law rules.<sup>8</sup>

Article 83(2) to (4) of the Regulation sets out transitional provisions for all testamentary dispositions made before August 17, 2015 and a choice of law applicable to such disposition. As per Article 83(2) of the Regulation, the choice of law is effective if the deceased entrepreneur opted for the law applicable to his estate before August 17, 2015 and it meets the legal requirements of Chapter III of the Regulation or if it was effective under the rules of private international law in force at the time of the choice of law was made in the Member State where he resided or in a Member State whose nationality he possessed.

By virtue of Article 83(3) of the Regulation, the same applies to a testamentary disposal made prior to 17 August 2015 with regard to its validity, provided that it was validly made in accordance with the national conflict of law rules of the state of the habitual residence or the state whose citizenship the entrepreneur possessed at the time of the making of the disposal. For a testamentary disposition made before 17 August 2015 with regard to the law of nationality, that law shall be deemed to be the choice of law pursuant to Article 83(4) of the Regulation if the deceased entrepreneur died after 16 August 2015.

<sup>4</sup> See Oberhammer and Jaufer, *Unternehmensnachfolge*, 130.

<sup>5</sup> EU Succession Regulation, recital 39.

<sup>6</sup> See Thomas Traar, "Artikel 1 EuErbVO" in *Die EU-Erbrechtsverordnung: Internationales Zivilverfahrensrecht*, ed. Alfred Burgstaller *et al.* (Vienna: LexisNexis ARD ORAC, 2016), para. 8; Robert Fucik, "Allgemeine und Schlussbestimmungen" in *EuErbVO-Kommentar*, vol. 2, ed. Astrid Deixler-Hübner and Martin Schauer (Vienna: Manz Verlag, 2020), paras. 1 *et seq.*

<sup>7</sup> Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, accessed August 23, 2022, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=40>.

<sup>8</sup> Brigitta Lurger and Martina Melcher, *Internationales Privatrecht* (Vienna: Verlag Österreich, 2017), 159.

### 2.3. Territorial scope of application

The direct applicability of the Regulation in the EU Member States is laid down in Article 85 of the Regulation. Certain Member States are, however, excluded from the scope of the Regulation. As such, Denmark is not required to comply with the judicial cooperation measures as it is not bound by the Regulation; in order for the Regulation to be applicable, a special agreement would have to be concluded with the EU. Similarly, the United Kingdom (regardless of “Brexit”) and Ireland are also not tied to the Regulation; for it to be directly applicable, an “*opt-in declaration*” would be required here.<sup>9</sup> Furthermore, the Regulation is also not legally binding on the states of Andorra, Monaco, San Marino and the Vatican. On the other hand, the scope of application of the Regulation is extended to the territory of third countries such as Guadelupe, Martinique, Saint Barthélemy.<sup>10</sup> Therefore, in the event of the death of an entrepreneur, the peculiarities of the territorial scope must also be taken into account.

### 2.4. Material scope of application

The material scope of the Regulation is defined in Article 1 and applies to the entire estate upon the death of the entrepreneur. According to Article 3(1) lit (a), it encompasses “*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*”.<sup>11</sup> Article 3(1) lit(d) specifies the dispositions of property upon death by referring to “*a will, a joint will or an agreement as to succession*”, so that last wills, testamentary dispositions and inheritance agreements made by the entrepreneur are also covered thereby.<sup>12</sup> While the Regulation does not provide a legal definition for the institute of testamentary disposition, joint will and contract of inheritance are governed by Article 3(1) lit (b) and (c) of the Regulation. It should be noted, however, that these provisions are independent of the respective national law and are therefore, to be interpreted autonomously.<sup>13</sup> Thus, the EU judicial bodies are entitled to rule on questions of doubt in the interpretation of these legal provisions and to further shape the respective legal standards through their case-law.

The provision of Article 1(1) of the Regulation is supplemented by that of Article 23(2) of the Regulation, which describes the scope of the Regulation in a demonstrative manner (“*in particular*”), meaning that the scope of the Regulation is not determined conclusively.<sup>14</sup> In this respect, the legal matters concerning the grounds for opening inheritance proceedings (lit a), the determination of the beneficiary shares of decedent (lit b), the capacity to inherit (lit c), any disinheritance and disqualification by conduct (lit d), the acceptance of the inheritance as well as conditions for the acceptance of the inheritance (lit e), on the rights of heirs, executors of testamentary estates and other administrators of estates (lit f), liability for the estate (lit g), claims to a compulsory

<sup>9</sup> See Elisabeth Scheuba, “Internationales Erbrecht – Europäische Erbrechtsverordnung” in *Erbrecht und Vermögensnachfolge*, vol. 2, ed. Michael Gruber et al. (Vienna: Verlag Österreich, 2018), § 42 para. 10; See Lurger and Melcher, *Internationales Privatrecht*, 160.

<sup>10</sup> Traar, “Artikel 1 EuErbVO”, § 1 para. 10.

<sup>11</sup> See Anatol Dutta, “Internationales Erbrecht” in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. 7, ed. Franz Jürgen Säcker et al. (Munich: Verlag C. H. Beck, 2018) § 1 EuErbVO para. 2.

<sup>12</sup> Oberhammer and Jauffer, *Unternehmensnachfolge*, 129.

<sup>13</sup> Dutta, “Internationales Erbrecht”, § 1 para. 9.

<sup>14</sup> Traar, “Artikel 1 EuErbVO”, § 1 para. 2.

portion (lit h), additions to the compulsory portion (lit i) and division of the estate (lit j) are governed by Article 23(2) of the Regulation and apply accordingly to the entrepreneur in his legal position as a natural person.

Article 1(1) of the Regulation expressly provides for the exclusion of tax, customs and administrative matters, as these do not fall within the scope of the Regulation.<sup>15</sup> As a whole, Article 1(2) of the Regulation sets out a list of exceptions for all legal matters that do not fall within the scope of application of the Regulation but are to be dealt with according to national conflict of law rules. The individual aspects of the scope of application of the Regulation must, for this reason, be examined in more detail in relation to the business succession.

### 3. International jurisdiction according to the Regulation

According to Article 4 of the Regulation, international jurisdiction is determined by the place of habitual residence of the person at the time of his death, with the same considerations applying to the determination of habitual residence as to the determination of jurisdiction.<sup>16</sup> The jurisdiction of national courts extends not only to the estate which the deceased entrepreneur held at the time of death in the Member State concerned, but also to the property which was located in the third state.<sup>17</sup> Apart from the scope of application of the Regulation, international jurisdiction is determined by national statutory provisions of private international law.<sup>18</sup>

The parties may agree on the jurisdiction of a court other than the competent court under Article 4, provided that the entrepreneur as testator has made a choice of law pursuant to Articles 5 and 22 of the Regulation; (nevertheless, the agreement must be in writing in order to be effective and it has to be dated and signed by the parties in accordance with Article 5(2) of the Regulation.

### 4. Delimitation of the Regulation from choice of law rules

#### 4.1. Exclusion of the administrative, custom and tax law matters

As already indicated, the Regulation solely applies to civil law aspects of succession upon death. Article 1(1) of the Regulation expressly excludes administrative and custom law matters as well as tax law matters. With regard to cross-border business succession and death of an entrepreneur, these legal issues are not without significance but in fact, play an important role.

In the area of administrative law, the transferability of the trade license concerning cross-border business succession must always be taken into account if the trade license is tied to the person of the deceased entrepreneur. This may be relevant, for example, if a sole proprietor has his habitual residence in one Member State, while the registered office of the company is located in another Member State. Thus, the question arises as to what legal consequences the death of the entrepreneur entails for the trade license. Considering that Article 1(1) of the Regulation excludes this issue from the scope of application limiting the scope of application of Regulation

<sup>15</sup> See under chapter 4.1.

<sup>16</sup> See chapter 2.1.

<sup>17</sup> Thomas Traar, "Der Verordnungsvorschlag der Europäischen Kommission zum internationalen Erbrecht", *Interdisziplinäre Zeitschrift für Familienrecht*, no. 1 (2010): 42.

<sup>18</sup> Peter G. Mayr, "Jurisdiktionsnorm", in *Kommentar zur ZPO*, vol. 5, ed. Walter H. Rechberger and Thomas Klicka (Vienna: Verlag Österreich, 2019), § 106 para. 17.



to civil law aspects, it must be assumed that the trade law is governed by the law of the Member State in which the business license was originally obtained.

In addition, questions of inheritance tax law matters fall under the exclusion of administrative law.<sup>19</sup> While some Member States no longer cover inheritance and gift taxes,<sup>20</sup> certain inheritance transactions with a foreign connection are exempt and the inheritance tax laws may continue to apply to them.<sup>21</sup> It should be noted that the law of the Member States may differ, so not only the domicile or habitual residence of the heirs/deceased, but also the nationality or registered office of the company may be legally relevant. In addition to inheritance tax, income tax and real estate transfer tax are also excluded from administrative law, which should be taken into account in business succession.<sup>22</sup> Here, it must be verified whether a double taxation agreement exists between the States concerned and what legal effects it produces.<sup>23</sup>

#### 4.2. List of exceptions in Article 1(2) of the Regulation

The listing of exceptions in Article 1(2) of the Regulation is of considerable importance for the demarcation of succession law from the national conflict of law rules. This also plays an important role for the question of international business succession, as it applies to the delimitation of company law (lit h to i), the establishment and dissolution of a trust (lit j) and the law-governing obligations (lit l). Other exemption provisions are also of importance, where specific borderline areas of business succession are indirectly affected. Therefore, the relevant subareas of the exemption provisions with regard to business succession will be discussed and examined.

##### 4.2.1. Status of natural persons and family relationships (lit a)

The status of natural persons, family relationships and relationships that have comparable effects under the applicable law, have been expressly excluded by the legislator from the scope of application of the Regulation [Article 1(2) lit (a)].<sup>24</sup> This exception covers family relationships with the deceased,<sup>25</sup> as well as adoption and acknowledgement of paternity.<sup>26</sup> To some extent, this may also concern business succession where questions of paternity and adoption arise in relation to a person. If, for example, the descendants of an entrepreneur inherit the shares in a limited liability company by way of legal succession and it later turns out that the descendants are not biologically descended from the entrepreneur, all legal issues in this regard – insofar as they contain elements of conflict of laws – will not be governed by the rules of the Regulation. It is a preliminary question, which is why reference is to be made to national conflict of law rules for clarification purposes.<sup>27</sup>

<sup>19</sup> Raymond Halaczinsky, “Europäische Erbrechtsverordnung und deutsche Erbschaftbesteuerung”, *Zeitschrift für die Steuer- und Erbrechtspraxis*, no. 4 (2019): 87.

<sup>20</sup> Austria and Slovakia are the only countries in the European Union where no gift tax is levied.

<sup>21</sup> Christian Huber *et al.*, *Jetzt seid Ihr dran! Unternehmensnachfolge richtig steuern* (Vienna: LexisNexis ARD ORAC, 2016), 102 *et seq.*

<sup>22</sup> For more detail see Christian Huber *et al.*, *Unternehmensnachfolge richtig steuern*, 105 *et seq.*

<sup>23</sup> Dutta, “Internationales Erbrecht”, § 1 para. 10.

<sup>24</sup> See EU Succession Regulation, recital 11.

<sup>25</sup> See Consanze Fischer-Czermak, “Anwendbares Recht” in *Europäische Erbrechtsverordnung*, ed. Martin Schauer and Elisabeth Scheuba (Vienna: Manz, 2012), 25.

<sup>26</sup> Dutta, “Internationales Erbrecht”, § 1 para. 9.

<sup>27</sup> Traar, “Artikel 1 EuErbVO”, § 1 para. 9.

As regards the law of succession and the question of which person is entitled to certain rights under inheritance law, however, it should be noted that this legal aspect falls within the scope of the Regulation.<sup>28</sup> On the other hand, according to Article 1(2) of the Regulation, legal questions on the existence and dissolution of the marriage or registered partnership with the deceased entrepreneur also falls outside its scope. If such questions arise in connection with the succession of a business, they must be assessed separately in accordance with the relevant national conflict of laws rules. This may be relevant, for example, for spouses who have run the business in the form of a partnership and have initiated a petition for divorce but have not completed it due to the death of the spouse, if it is not apparent which assets form part of the matrimonial property and which belong to the partnership business. The legal issues relating to the dissolution of the marriage are governed by the Rome III Regulation. All other legal questions are governed by the substantive law of the Member States;<sup>29</sup> they must therefore, be resolved as a preliminary question, in accordance with the respective national conflict of law rules.<sup>30</sup>

#### 4.2.2. *Legal capacity of natural persons (lit b)*

Article 1(2) lit (b) of the Regulation contains an exception regarding the legal capacity of natural persons.<sup>31</sup> This includes the legal capacity, capacity to contract as well as the procedural capacity.<sup>32</sup> The testamentary capacity under inheritance law is also derived from the general legal capacity and capacity to contract, which must also be taken into account in this respect for the cases of business succession with a foreign connection, if there are doubts about the testamentary capacity of the entrepreneur at the time of the drawing up of a testamentary disposition. Article 26(1) lit (a) clarifies, nonetheless, that the question of the validity of a testamentary disposition upon death is regulated by the Regulation. It follows that testamentary capacity is governed by the law of the Member State in which the testamentary disposition was made.<sup>33</sup> As regards the capacity to inherit, Article 23(2) lit (c) of the Regulation provides that the inheritability shall be determined in accordance with the Regulation. Consequently, the capacity to inherit is thus subject to the law of the Member State in which the succession to the entrepreneur's death has taken place and not by the rules of private international law.

#### 4.2.3. *Matrimonial property regime (lit d)*

The matrimonial property regime is exempt from the scope of the Regulation.<sup>34</sup> The matrimonial law is governed by the Regulation (EU) 2016/1103<sup>35</sup> and Regulation (EU) 2016/1104 on matrimonial property regimes unless the spouses have

<sup>28</sup> Dutta, "Internationales Erbrecht", § 1 para. 12.

<sup>29</sup> Peter Mankowski, "Anwendungsbereich und Begriffseinstimmungen" in *Kommentar zur EU Erbrechtsverordnung*, vol. 2, ed. Astrid Deixler-Hübner and Martin Schauer (Vienna: Manz, 2020), Article 1 para. 14.

<sup>30</sup> For more details see chapter 4.2.3.

<sup>31</sup> See Article 1 (2) lit (a) Rome I Regulation.

<sup>32</sup> Traar, "Artikel 1 EuErbVO", § 1 para. 10 *et seq.*

<sup>33</sup> Andreas Köhler, "EuErbVO", in *Nachfolgerecht*, vol. 2, ed. Ludwig Kroiß *et al.* (Baden-Baden: Nomos, 2019) § 1 para. 8.

<sup>34</sup> See EU Succession Regulation, recital 12.

<sup>35</sup> Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in matters of jurisdiction, applicable law and recognition and enforcement of decisions in matters relating to matrimonial property regimes, OJ 2016 L 183/1.

made a choice.<sup>36</sup> Pursuant to Article 3(1) lit (a) of the Regulation (EU) 2016/1103, matrimonial property regimes include all property relationships arising directly from marriage or civil partnership and their dissolution, i.e. all property rights resulting from the fact that the deceased entrepreneur was married or living in a registered civil partnership up to the time of his death.<sup>37</sup> Matrimonial property regime is often difficult to circumscribe due to its close connection with the inheritance law regime. Comprehensibly, the deceased may only bequeath what was considered to be part of his property at the time of his death. If the relevant EU-matrimonial property law now also provides that the joint assets are to be divided between the spouses or registered civil partners under matrimonial property law, only the share of the deceased and not that of the other spouses or registered civil partners fall within this separated estate.<sup>38</sup> This can also lead to ambiguities in the division between the aforementioned assets, which may also affect business successions if the spouses or civil partners jointly operated a business (e.g. partnership business) and conducted cross-border activities. Answers to possible legal questions arising from such constellations can be found in relevant provisions mentioned above and, to this end, remain exempt from the Regulation as far as the post-marital division of business assets is concerned.<sup>39</sup>

#### 4.2.4. *Other property rights, interests, and assets (lit g)*

For the assessment of cross-border business succession, the distinction between legal transactions *inter vivos* and *ex mortis causa* is of significance due to the possibility of anticipated succession. The entrepreneur can settle the succession of the business in advance and does not have to wait until the time of death to dispose thereof in a legally effective manner. The aforementioned legal differentiation is reflected in the provision of Article 1(2) lit (g) of the Regulation, according to which all rights, interests and assets that arise or are transferred by means other than by succession upon death are excluded from the scope of the Regulation. This is also relevant to the transfer of a business by way of a gift agreement between family members, which is a frequent occurrence in practice. Gifts, as legal transactions *inter vivos*, are bound by the law of obligations.<sup>40</sup> A teleological reduction in the sense of *argumentum a maiore ad minus* reveals that the law of obligations is applicable to succession of a business by way of a gift; here, the legal question of offsetting against the compulsory portion is assessed according to the law of succession.<sup>41</sup> For the cases of business succession by way of gifts, further restrictions may arise in individual Member States as a result of the statutory requirement of a notarial deed and in the case of minors.<sup>42</sup> Gifts are regulated by the Rome I Regulation, which

<sup>36</sup> Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in matters of jurisdiction, applicable law and recognition and enforcement of decisions in matters relating to matrimonial property regimes of registered partnerships, OJ 2016 L 183/30.

<sup>37</sup> Heinrich Dörner, "Ausgewählte Probleme des neuen Erbkollisionsrecht" in *Die Europäische Erbrechtsverordnung*, ed. Anatol Dutta and Sebastian Herrler (Munich: C.H. Beck, 2014), 6.

<sup>38</sup> Traar, "Artikel 1 EuErbVO", § 1 para. 12 *et seq.*

<sup>39</sup> Traar, "Artikel 1 EuErbVO", § 1 para. 15.

<sup>40</sup> Dutta, "Internationales Erbrecht", § 1 para. 22.

<sup>41</sup> See chapter 2.4.

<sup>42</sup> Such a notarial requirement for gifts to minors exists for certain cases, for example, in Austria; see Oberhurner and Jauffer, *Unternehmensnachfolge*, 20 *et seq.*



has to be considered when cross-border business succession is anticipated.<sup>43</sup> The same applies to gifts on account of death, which are excluded from scope of application of the Regulation and are subject to Rome I Regulation.<sup>44</sup>

#### 4.2.5. *Company law (lit h-i)*

For cross-border business succession in the event of an entrepreneur's death, the exception in Article 1(2) lit (h-i) of the Regulation is of utmost importance, for it draws a dividing line between succession law and company law. Article 1(2) lit (h) excludes from the scope of the Regulation company law, the law of associations and other bodies, such as clauses in a company's memorandum and articles of association governing the fate of the shares of the deceased partner's shares. The same applies to the legal issues of dissolution, liquidation and merger of companies, associations, or other legal entities (lit i).

Almost all types of legal entities fall under this exception – partnerships, corporations, associations, foundations, etc. – whereby the corporate structure or legal personality is of no legal relevance.<sup>45</sup> On the other hand, sole proprietorships and civil law partnerships are not deemed to be legal entities and are disregarded.<sup>46</sup> By analogy with Article 1(2), legal entities and associations under public law are also excluded.<sup>47</sup> Company law regulates all issues relating to the inheritability of the partnership status in partnerships. Company law has particular significance for the succession clauses in partnership agreements and for the legal consequences of the death of a partner on the existence of the partnerships,<sup>48</sup> this question, however, does not arise in the case of corporations, since their continued existence is not affected by the death of the shareholder. By contrast, the question of who inherits the shares of a joint-stock company in the case of cross-border corporate succession is determined by the inheritance law of the Regulation and not by company law.<sup>49</sup>

In addition, certain types of succession clauses are to be regarded as *inter vivos* agreements, such as the entry clause, which in certain legal systems is regarded a contract for the benefit of third parties.<sup>50</sup> Company law also governs rights of pre-emption or repurchase as well as any restrictions on shares and reservations of consent.<sup>51</sup>

Company law also takes precedence over the law of succession in matters relating to the liability in a company. Accordingly, succession law determines the statute of limitations for the liability of partners.<sup>52</sup> Similarly, Article 1(2) lit (i) of the Regulation governs legal issues relating to transformation operations of a company (e.g., mergers and demergers, spin-offs), etc. These legal matters also do

<sup>43</sup> Dutta, "Internationales Erbrecht", § 1 para. 32.

<sup>44</sup> EU Succession Regulation, recital 14; see also Dutta, "Internationales Erbrecht", § 1 para. 22.

<sup>45</sup> Jan Peter Schmidt, "Anwendungsbereich und Begriffsbestimmungen" in *Internationales Erbrecht*, ed. Anatol Dutta and Johannes Weber (Munich: C.H. Beck, 2016), Article 1 para. 96.

<sup>46</sup> Jan Peter Schmidt, "EuErbVO" in *BeckOGK BGB*, vol. 43, ed. Bamberger *et al.* (Munich: C.H. Beck, 2017), Article 1 para. 37.

<sup>47</sup> Mario Leitzen, "EU-ErbVO: Praxisfragen an der Schnittstelle zwischen Erb- und Gesellschaftsrecht", *Zeitschrift für Erbrecht und Vermögensnachfolge*, ZEV (2012): 520.

<sup>48</sup> Schmidt, "Anwendungsbereich und Begriffsbestimmungen", Article 1 para. 97.

<sup>49</sup> See Heinrich Dörner, "EuErbVO: Die Verordnung zum Internationalen Erb- und Erbverfahrensrecht ist in Kraft!", *Zeitschrift für Erbrechts und Vermögensnachfolge* (2012): 508.

<sup>50</sup> See chapter 4.2.4.

<sup>51</sup> Mankowski, "Anwendungsbereich und Begriffsbestimmungen", Article 1 para. 99.

<sup>52</sup> Mankowski, "Anwendungsbereich und Begriffsbestimmungen", Article 1 para. 72.

not fall within the domain of inheritance law but are subject to company law.<sup>53</sup> The transformation operation of a company is therefore, determined by the national conflict of law rules.<sup>54</sup>

#### 4.2.6. Trusts (lit j)

The legal construct of the trust represents an important legal solution to a business succession. A trust is defined as “*the legal relationships created – inter vivos or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose*”.<sup>55</sup> In effect, it is a legal relationship between two persons, namely the “*settlor*” and “*trustee*”, but not a distinct corporate entity with legal personality.<sup>56</sup> The wording of Article 1(2) lit (j) of the Regulation states that the setting up, administration and dissolution of the trust are excluded from the scope of the Regulation. However, this provision should be understood in the context Recital 13 of the Regulation, which clarifies that the exception for the creation, administration and dissolution of a trust is not to be understood as a general exclusion.<sup>57</sup> Thus, if a trust is established by will or *ex lege* under intestate succession, the law of succession under the Regulation applies to the transfer of assets and the designation of the beneficiary.<sup>58</sup> This gives the trust a somewhat greater significance in the cross-border context of a business succession, especially since a complete exclusion of the trust from the scope of application of the EU Inheritance Regulation – contrary to the wording of Article 1(2) lit (j) of the Regulation – does not apply and thus, the inheritance law option of business succession in the form of a trust is still conceivable in this context.

#### 4.2.7. Rights in rem (lit k)

Article 1(2) lit (k) excludes rights *in rem* from the scope of the Regulation. The EU legal norms indirectly regulate some aspects of property law without, however, establishing a concrete reference.<sup>59</sup> This already emerges from the fact that property law is a legal matter reserved to the Member States according to Article 345 TFEU. Since there are no regulations either at EU level or in other intergovernmental conventions that would comprehensively regulate property law issues, the Member States have to rely on their conflict of law rules. In the legal systems of most Member States, the *lex rei sitae*, i.e., the place where the property is actually and physically located, has prevailed as the connecting factor.<sup>60</sup> Real estate, in particular, is at the top of the list of rights *in rem* because of its immobility, but also due to its higher market value.

<sup>53</sup> Christian Schall and Simon Ulrich, “EuErbVO” in *Internationaler Rechtsverkehr in Zivil- und Handelssachen*, vol. 59, ed. Reinhold Geimer and Rolf Schütze (Munich: C.H. Beck, 2020), Article 1 EuErbVO para. 54.

<sup>54</sup> Traar, “Artikel 1 EuErbVO”, § 1 para. 29.

<sup>55</sup> Article 2 of Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition, accessed August 23, 2022, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=59>.

<sup>56</sup> Michael Nueber, “Typische Fragestellungen der Praxis” in *Private Client Arbitration-Familienvermögen und Schiedsgerichtbarkeit*, Astrid Deixler-Hübner *et al.* (Vienna: Linde, 2020), 124.

<sup>57</sup> Peter W. Vollmer, “Die neue europäische Erbrechtsverordnung – ein Überblick”, *Zeitschrift für die Steuer- und Erbrechtspraxis* (2012): 229; Schmidt, “Anwendungsbereich und Begriffsbestimmungen”, Article 1 para. 105.

<sup>58</sup> Dutta, “Internationales Erbrecht” § 1 para. 29; Schmidt, “Anwendungsbereich und Begriffsbestimmungen”, Article 1 para. 105.

<sup>59</sup> Dörner, “Ausgewählte Probleme des neuen Erbkollisionsrecht”, 152.

<sup>60</sup> See section 31 of Austrian Private International Law Act.

Real estate is also of particular importance for cross-border business succession, as all legal issues relating to real estate belongings of a business are always judged according to the law of the state in which the real estate is located, regardless of where the business is domiciled. Other rights *in rem*, such as liens, land register law or other property law issues, may also arise in the course of a company succession. Apart from that, the institute of vindication bequests also falls under the property law and can be of importance as a form of singular succession in the setting of business succession. Notwithstanding the fact that some Member States have not codified this legal institution, a number of jurisdictions are familiar with the vindication bequest as an instrument of singular succession.<sup>61</sup> Here, therefore, it is necessary to identify the relevant conflict of law rules in each individual case in order to find a solution for all questions that arise in connection with rights *in rem* when structuring business succession in a cross-border context.

## Conclusion

In summary, the Regulation in question can be applied or leveraged for business succession and, as such, does not constitute a complete set of rules for succession of an entrepreneur in the territory of the EU. With respect to transnational business succession, its main function is to delimit the subject matter of business succession from company law and the corresponding rules of private international law. Attention should be paid to the fact that a considerable part of business succession is subject to the company law of the respective EU Member States and has to be assessed accordingly. In this sense, the EU Inheritance Regulation is to be understood as a regulation of business succession that is suitable for determining the legal status of an entrepreneur as a natural person and the associated business-related rights and obligations in the first place. In short, it should be noted that the delimitation of European business succession under the EU Inheritance Regulation from national conflict of law rules has not been conclusively clarified, as there are still some questions of interpretation regarding the demarcation to be drawn. The interpretation of the scope of application falls within the competence of the Court of Justice of the European Union, which will crystallise in the future as case law evolves, so this factor should continue to be carefully considered.

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<sup>61</sup> Mankowski, “Anwendungsbereich und Begriffsebstimmungen”, Article 1 para. 124.