Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 13 December 2017 [1]

Case C-558/16

Doris Margret Lisette Mahnkopf
Other party:
Sven Mahnkopf

(Request for a preliminary ruling
from the Kammergericht Berlin (Higher Regional Court, Berlin, Germany))

(Reference for a preliminary ruling — Area of freedom, security and justice — European Certificate of Succession — Scope — Possibility of recording a surviving spouse's share in a European Certificate of Succession)

I. Introduction

1. This reference for a preliminary ruling is the second in which a national court has asked the Court to interpret 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. [2]

2. The question which the national court referred in *Kubicka* [3] concerned the delimitation of the rules on succession and the rules on property. In the present case, the referring court asks the Court to resolve a matter relating to the delimitation of the rules on succession and the rules on matrimonial property regimes. By its questions, the referring court seeks to ascertain whether the surviving spouse's share of an estate under Paragraph 1371(1) of the Bürgerliches Gesetzbuch (German Civil Code; 'the BGB') may be recorded in a European Certificate of Succession. In addition, the referring court wishes to clarify what effects must be attached to any inclusion of information concerning that share in the contents of a European Certificate of Succession.

1 Original language: Polish.

2 OJ 2012 L 201, p. 107.

3 See judgment of 12 October 2017 (C-218/16, EU:C:2017:755).

II. The legal framework

A. EU law

3. Recitals 11, 12 and 71 of Regulation No 650/2012 explain:

‘(11) This Regulation should not apply to areas of civil law other than succession. 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.

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

…

(71) The Certificate should produce the same effects in all Member States. 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 evidentiary effect of the Certificate should not extend to elements which are not governed by this Regulation, such as questions of affiliation or the question whether or not a particular asset belonged to the deceased.’

4. Article 1(1) and (2)(d) of Regulation No 650/2012 states:

‘1. This Regulation shall apply to succession to the estates of deceased persons.

2. The following shall be exempt from this Regulation:

…

(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;

…’

5. Under Article 3(1)(a) of Regulation No 650/2012:

‘“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’.

6. Article 23 of Regulation No 650/2012, entitled ‘The scope of the applicable law’, provides in paragraphs 1 and 2(b):

‘1. The law determined pursuant to Article 21 or Article 22 shall govern the succession as a whole.

2. That law shall govern in particular:

…

(b) the determination of the beneficiaries, of their respective shares and of the obligations which may be imposed on them by the deceased, and the determination of other succession rights, including the succession rights of the surviving spouse or partner;

…'

7. Chapter VI of Regulation No 650/2012, entitled 'European Certificate of Succession', contains a number of provisions relating to that instrument of EU law. They include Articles 62 and 63, which explain the objective served by the creation of a European Certificate of Succession:

'Article 62

Creation of a European Certificate of Succession

1. This Regulation creates a European Certificate of Succession (hereinafter referred to as "the Certificate") which shall be issued for use in another Member State and shall produce the effects listed in Article 69.

2. The use of the Certificate shall not be mandatory.

3. The Certificate shall not take the place of internal documents used for similar purposes in the Member States. However, once issued for use in another Member State, the Certificate shall also produce the effects listed in Article 69 in the Member State whose authorities issued it in accordance with this Chapter.

Article 63

Purpose of the Certificate

1. The Certificate is for use by heirs, legatees having direct rights in the succession and executors of wills or administrators of the estate who, in another Member State, need to invoke their status or to exercise respectively their rights as heirs or legatees and/or their powers as executors of wills or administrators of the estate.

2. The Certificate may be used, in particular, to demonstrate one or more of the following:

(a) the status and/or the rights of each heir or, as the case may be, each legatee mentioned in the Certificate and their respective shares of the estate.

…'

8. Article 68 of Regulation No 650/2012, entitled 'Contents of the Certificate', provides in paragraphs (f), (h) and (l):

'The Certificate shall contain the following information, to the extent required for the purpose for which it is issued:

…

(f) details concerning the deceased: surname (if applicable, surname at birth), given name(s), sex, date and place of birth, civil status, nationality, identification number (if applicable), address at the time of death, date and place of death;

…

(h) information concerning a marriage contract entered into by the deceased or, if applicable, a contract entered into by the deceased in the context of a relationship deemed by the law applicable to such a relationship to have comparable effects to marriage, and information concerning the matrimonial property regime or equivalent property regime;

…

(l) the share for each heir and, if applicable, the list of rights and/or assets for any given heir;

…'

9. The effects of the European Certificate of Succession are determined by Article 69 of Regulation No 650/2012. Paragraphs 1, 2 and 5 thereof state:

'1. The Certificate shall produce its effects in all Member States, without any special procedure being required.

2. The Certificate shall be presumed to accurately demonstrate elements which have been established under the law applicable to the succession or under any other law applicable to specific elements. …

…

5. The Certificate shall constitute a valid document for the recording of succession property in the relevant register of a Member State, without prejudice to points (k) and (l) of Article 1(2).'

B. German law

10. In German law, the rules on property apportionment which is effected when a matrimonial property regime is dissolved are laid down in the provisions of the BGB. These include the first sentence of subparagraph 1 and subparagraph 3 of Paragraph 1931, which provide:'(1) The surviving spouse of the deceased as an heir on intestacy shall be entitled to one quarter of the estate as against relatives of the first degree, and to one half of the estate as against relatives of the second degree or grandparents. …

(2) …

(3) The provision laid down in Paragraph 1371 of the BGB shall be unaffected.

(4) …'

11. Paragraph 1371 of the BGB provides:‘(1) If the property regime is ended by the death of a spouse, the equalisation of the accrued gains shall be effected by increasing the surviving spouse’s share of the estate on intestacy by one quarter of the estate; it is irrelevant in this regard whether the spouses have made accrued gains in the individual case.

(2) If the surviving spouse does not become an heir and also has no right to a legacy, he may demand equalisation of the accrued gains under Paragraphs 1371 to 1373 and Paragraph 1390; the compulsory portion of the surviving spouse … shall be determined with reference to the spouse’s share of the estate on intestacy before it is increased.

(3) Where the surviving spouse disclaims the inheritance, he may, in addition to the equalisation of the accrued gains, demand the compulsory portion even if he would have no entitlement thereto under the provisions of the law of succession; this shall not apply if he has waived his right of intestate succession or his right to a compulsory portion by a contract with his spouse.

(4) Where descendants of the deceased spouse who are entitled to inherit, and who are not descended from the marriage ended by the death of this spouse, are in existence, the surviving spouse has a duty to grant these descendants, if and to the extent that they need them, the means for a reasonable education from the quarter additionally granted under subparagraph 1.’

III. The main proceedings

12. Lutz G. Mahnkopf died on 29 August 2015, leaving behind a widow, Doris M.L. Mahnkopf, and a son, Sven Mahnkopf. Doris Mahnkopf and Sven Mahnkopf are parties to the proceedings before the referring court.

13. Until the time of his death, the deceased was married to the first party to the proceedings. They were subject to a statutory separate property regime with equalisation of accrued gains. At the time of their marriage, both held German nationality and were resident in Germany. They had not entered into a marriage contract. The deceased made no dispositions upon death.

14. The deceased’s assets were located in the territory of Germany, with the exception of a half share in the ownership of a property in Sweden.

15. At the request of the deceased’s spouse, on 30 May 2016 the probate court issued a national certificate of inheritance, according to which the parties to the proceedings are heirs, each with a one-half share, to the estate of Lutz Mahnkopf.

16. The spouse of the deceased then applied for a European Certificate of Succession. The certificate was to be used to record the transfer of ownership of the property in Sweden to the heirs of Lutz Mahnkopf. However, that application was rejected by the national court, which held that Paragraph 1371(1) of the BGB concerns questions relating to matrimonial property regimes, which do not fall within the scope of Regulation No 650/2012.

17. The deceased’s spouse challenged that judgment by an appeal lodged with the referring court, the Kammergericht Berlin (Higher Regional Court, Berlin, Germany). At that stage, the deceased’s spouse also claimed in the alternative that the European Certificate of Succession should record for information purposes only that she succeeds to one-quarter of the estate, determined pursuant to Paragraph 1371(1) of the BGB, under the matrimonial property regime.

18. The referring court has doubts as to whether it is possible to issue a European Certificate of Succession as requested by the deceased’s spouse.

19. In its request for a preliminary ruling, the national court notes that Lutz Mahnkopf did not chose the law applicable to his succession. Consequently, under Article 21 of Regulation No 650/2012, German law applies in this regard.

20. As regards matters relating to the property relations of the spouses, the referring court notes that thus far there has been no harmonisation of the conflict-of-law rules relating to matrimonial property regimes.

21. Consequently, the law applicable to matrimonial property regimes is determined by the national conflict-of-law rules in force in the State of the forum. In German law that is Articles 14 and 15 of the Einführungsgesetz zum Bürgerlichen Gesetzbuch (EGBGB, Law introducing the Civil Code)). The referring court points out that under those provisions German law is the law applicable to the matrimonial property regime of the deceased and his spouse.

22. Notwithstanding the fact that German law is the law applicable to succession and the law applicable to matrimonial property regimes, the referring court considers that, in the context of the proceedings concerning the request for a European Certification of Succession, defining the scope of those two laws may be relevant to the contents and effects of that certificate in circumstances such as those in the present case.

IV. The questions referred and the procedure before the Court

23. In those circumstances, the Kammergericht Berlin (Higher Regional Court, Berlin) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘(1) Is Article 1(1) of [Regulation No 650/2012] to be interpreted as meaning that the scope of the regulation (“succession to the estates of deceased persons”) also covers provisions of national law which, like Paragraph 1371(1) of the [BGB], settle questions relating to matrimonial property regimes after the death of one spouse by increasing the other spouse’s share of the estate on intestacy?

(2) If the first question is answered in the negative, are Articles 68(l) and 67(1) of [Regulation No 650/2012] in any event to be interpreted as meaning that the share of the surviving spouse may be recorded in full in the European Certificate of Succession even if a portion of it stems from an increase pursuant to a rule governing matrimonial property regimes like Paragraph 1371(1) of the [BGB]?

If this question is to be answered in the negative in principle, can it nevertheless be answered in the affirmative exceptionally for situations where:

(a) the purpose of the Certificate of Succession is limited to asserting rights of the heirs in a certain other Member State to property of the deceased located there, and

(b) the ruling on succession (Articles 4 and 21 of [Regulation No 650/2012]) and — irrespective of which conflict-of-law rules are applied — the questions relating to matrimonial property regimes are to be assessed on the basis of the same national legal system?

(3) If the first and second questions are answered in the negative in their entirety, is Article 68(l) of [Regulation No 650/2012] to be interpreted as meaning that the share of the surviving spouse increased pursuant to a rule of the matrimonial property regime may be recorded in full in the European Certificate of Succession, but for information purposes only on account of the increase?’

24. The request for a preliminary ruling was received at the Registry of the Court on 3 November 2016.

25. Written observations have been submitted by the parties to the main proceedings, by the German, Belgian, Greek, Italian, Spanish and Polish Governments and by the European Commission. The German, Belgian and Spanish Governments and the Commission also attended the hearing, which was held on 4 October 2017.

V. Analysis

A. The role of Regulation No 650/2012 in the system of EU acts on judicial cooperation in civil matters

26. Regulation No 650/2012 is to apply to succession in respect of persons who die on or after 17 August 2015. In relation to those factual situations, the harmonised conflict-of-law rules replace the provisions of national law which previously varied greatly.

27. Regulation No 650/2012 thus helps eliminate obstacles to the free movement of persons within the internal market. This corresponds with the second and third sentence of recital 7 of Regulation No 650/2012, which clarifies that in the European area of justice the rights of heirs and legatees, of other persons close to the deceased and of creditors of the estate must be effectively guaranteed.

28. In this regard, Regulation No 650/2012 determines the permissibility and scope of the freedom to choose the law applicable to the succession. It consequently allows the wishes of the deceased to be reflected as fully as possible in terms of what happens to his estate.

B. The first question

29. By its first question the referring court seeks to establish whether a provision of national law like Paragraph 1371(1) of the BGB falls within the scope of Regulation No 650/2012. Under that provision, a share of the deceased's estate, equal to one quarter thereof, to which the surviving spouse is entitled under Paragraph 1931 of the BGB, is to be increased by a further one quarter of the estate where the spouses were in a matrimonial property regime based on separate property with equalisation of accrued gains.

30. The referring court is uncertain whether, in the context of Regulation No 650/2012, that provision should be regarded as rule concerning 'succession upon death' for the purposes of Articles 1(1) and 3(1)(a) of that regulation or as a 'question relating to matrimonial property regimes' excluded from the scope of Regulation No 650/2012 (Article 1(2)(d) thereof).

31. I would point out that the classification of Paragraph 1371(1) of the BGB as a provision falling either within the scope of the law applicable to succession or the scope of the law applicable to matrimonial property regimes has for many years been the subject of lively debate in legal writings.[4] Nor has this issue bypassed the courts.[5]

32. The harmonisation of the conflict-of-law rules within the framework of Regulation No 650/2012, which — in accordance with the principle of the primacy of EU law — takes precedence over national conflict-of-law rules, means, however, that that matter must be seen in a new, previously unknown context. The terms which the EU legislature employed to define the scope of Regulation No 650/2012 are autonomous in nature. This means that the classification, effected in the context of national conflict-of-law rules, of provisions like Paragraph 1371(1) of the BGB cannot have decisive significance in answering the first question referred.[6]

1. Preliminary remarks

(a) Positions of the parties

(1) Arguments in favour of classifying Paragraph 1371(1) of the BGB as a provision falling within the scope of the law applicable to the succession

33. The Greek Government's position is essentially that the share of the surviving spouse from the dissolution of the matrimonial property regime must be recorded in the European Certificate of Succession since the certificate is intended to reflect the heir's actual share in the estate. As that share must be recorded in the European Certificate of Succession, the Greek Government considers that Paragraph 1371 of the BGB must be regarded as a rule falling within the scope of Regulation No 650/2012.

34. The Italian Government takes the view that, since the application of Paragraph 1371 of the BGB is determined by the death of the spouse, that provision falls within the scope of the law applicable to the succession. As grounds for that position, it also relies on recital 9 of Regulation No 650/2012 ('the scope of this Regulation should include all civil-law aspects of succession to the estate of a deceased

4 In the period preceding the date on which Regulation No 650/2012 began to apply, the prevailing view — concerning national conflict-of-law rules — among legal writers appeared to be that Paragraph 1371(1) of the BGB is a provision which applies within the framework of the law applicable to matrimonial property regimes (H. Dörner, 'Internationales Erbrecht, Art. 25, 26 EGBGB', in *Kommentar zum Bürgerlichen Gesetzbuch, Einführungsgesetz zum BGB*, Berlin 2007, Article 25, nb. 34; W. Riering, 'Régime légal allemand et succession régie par la loi française', in *Mélanges en l'honneur de Mariel Revillard*, Paris, Editions Defrénois 2007, pp. 258-263; D.A. Popescu, *Guide on international private law in successions matters*, Onesti, Magic Print 2014, p. 18 and the literature cited therein).

5 In the judgment of the Oberlandesgericht Köln (Higher Regional Court, Cologne, Germany) of 5 August 2011 (2 Wx 115/11, *Zeitschrift für das gesamte Familienrecht* 2012, 819), the view is expressed that a surviving spouse does not receive a share of an estate under Paragraph 1371(1) of the BGB where the law applicable to matrimonial property regimes is German law and the law applicable to the succession is Turkish law. In the judgment of the Oberlandesgericht München (Higher Regional Court, Munich, Germany) of 16 April 2012 (31 Wx 45/12, Neue *Juristische Wochenschrift-Rechtsprechungs-Report* 2012, 1096), the view is stated that Paragraph 1371(1) of the BGB applies in its entirety even where the law applicable to the succession is Iranian law. Finally, in the context of German conflict-of-law rules, in its judgment of 13 May 2015, IV ZB 30/14 (*Neue Juristische Wochenschrift* 2015, 2185), the Bundesgerichtshof (Federal Court of Justice, Germany) ruled that Paragraph 1371(1) of the BGB applies as a provision of law applicable to a matrimonial property regimes. That judgment also clarified that, even if the law applicable to matrimonial property regimes is German law and the law applicable to the succession is the law of another State, the surviving spouse continues to be entitled to a share of the estate under Paragraph 1371(1) of the BGB.

6 There is no unanimity in legal writings as to the classification of Paragraph 1371(1) of the BGB in the context of Regulation No 650/2012. Some writers maintain that that provision applies as a provision of law applicable to matrimonial property regimes (see the writings cited by A. Bonomi, 'Article 1 — Champ d'application', in A. Bonomi, P. Wautelet, *Le droit européen des successions. Commentaire du règlement (UE) No 650/2012, du 4 juillet 2012*, Brussels, Bruylant 2016, p. 89; and A. Reis, 'Succession and Family Law', in S. Bariatti, I. Viarengo, F.C. Villata, *Towards the Entry into Force of the Succession Regulation*: *Building Future Uniformity upon Past Divergencies*, JUST/2013/JCIV/AG/4666, p. 45), whilst others favour its classification as a provision of the law of succession (P. Lagarde, (Heinrich) Dörner: 'Einführungsgesetz zum Bürgerlichen Gesetzbuche/IPR. Art. 25, 26 EGBGB. Anhang zu Art. 25 f EGBGB: Ausländische Rechte', *Revue critique de droit international privé*, 1996, p. 389; M. Margoński, 'Anmerkung zum Vorlagebeschluss des Kammergerichts an den EuGH vom 25. Oktober 2016, 6 W 80/16 in der Rs. C-558/16, Mahnkopf', *Zeitschrift für Erbrecht und Vermögensnachfolge*, Heft 4, 2017, pp. 212-213).

person') and Article 23(2)(b) thereof, which provides that the scope of the law applicable to the succession is to cover 'the determination of the beneficiaries, of their respective shares and of the obligations which may be imposed on them by the deceased, and the determination of other succession rights, including the succession rights of the surviving spouse or partner'.

35. A similar position is adopted by the Polish Government, which notes that an equalisation of accrued gains involves a certain form of transfer of assets and rights by increasing the share of the estate on intestacy. That transfer occurs solely by reason of the death of one of the spouses. In this regard, the Polish Government carries out a thorough analysis of the instrument laid down in Paragraph 1371(1) of the BGB and its function in German law. It points out that Paragraph 1371(1) of the BGB must be applied in conjunction with Paragraph 1931(1) and (3) thereof, a provision which certainly falls within the scope of the law applicable to the succession and refers directly to Paragraph 1371 of the BGB. Furthermore, Paragraph 1371(1) of the BGB applies only where the matrimonial property regime is dissolved by reason of the death of one of the spouses and never where it is dissolved for other reasons. Finally, in the light of Paragraph 1938 of the BGB it is possible to exclude Paragraph 1371(1) of the BGB in a will.

(2) Arguments against classifying Paragraph 1371(1) of the BGB as a provision falling within the scope of the law applicable to the succession

36. The German Government — which puts forward a view similar to that of the Polish Government in this regard, but reaches different conclusions — takes the position that in order to answer the first question referred it is necessary to assess whether the purpose of Paragraph 1371(1) of the BGB relates to 'estates' within the meaning of Article 1(1) of 650/2012 or to 'matrimonial property regimes' within the meaning of Article 1(2)(d) thereof. In that context, the German Government states that the purpose of Paragraph 1371(1) of the BGB is to effect the apportionment arising from a matrimonial property regime and therefore that it is a provision which falls within the scope of the law applicable to matrimonial property regimes. The fact that this is done by granting the surviving spouse a share of the estate is intended merely to simplify the apportionment between the heirs.

37. The Commission, like the German Government, proposes that in the situation under consideration it is necessary to adopt a functional approach and refer to the purpose of the provision concerned in national law. The Commission points out that, where there is a separation of property with equalisation of accrued gains, that equalisation occurs only at the time when that property regime is dissolved. Therefore, the purpose of that provision is not to dispose of the deceased's property amongst those close to him but rather to effect the apportionment arising from the deceased's death as one of the events leading to the dissolution of the matrimonial property regime.

38. The Belgian Government also proposes that the reply to the first question referred should be in the negative. As grounds for its position, it states that a matrimonial property regime produces effects not only during the marriage but also after its dissolution, including where that occurs by reason of the death of one of the spouses.

39. The Spanish Government states that recitals 11 and 12 of Regulation No 650/2012 leave no doubt as to the scope of that regulation by excluding questions relating to matrimonial property regimes from it.

(b) Common property regime limited to accrued gains in German law

40. Before going any further, I would like to outline briefly the German legislation to which the request for a preliminary ruling relates. I am convinced that this will enable the Court to make a comprehensive assessment of the matter at issue. I will return to these considerations later in my Opinion.

41. The statutory matrimonial property regime in German law is that of separation of property with equalisation of accrued gains, defined by the German legislature literally as a 'common property regime limited to accrued gains' ('*Zugewinngemeinschaft*'). However, there should be no doubt that what is involved in this case is a regime based on separate property. Each spouse retains his personal property and consequently there is not a separate group of assets which could take the form of common property.

42. In the event of the dissolution of that regime during the lifetime of the two spouses, primarily as the result of divorce, it is possible to effect an apportionment aimed at equalising the differences in the increase in wealth which have occurred in relation to the spouses during the property regime. Making the necessary simplifications in this respect, it can be concluded that in cases of this kind an apportionment between spouses is effected in the manner described below.[7]

43. It is first necessary to calculate the difference between the value of the property of each spouse at the time when the matrimonial property regime is dissolved and the value of the property at the time when that regime was established. Those mathematical operations will produce two values corresponding to the increase in wealth of each spouse during the matrimonial property regime. The next step is to compare the amounts thus obtained. If one is higher than the other, the spouse whose property increased less during the matrimonial property regime has a claim to payment of half the difference between the values of the increase in wealth of the two spouses (Paragraph 1378(1) of the BGB).

44. It should be noted that in order to effect the apportionment it is necessary to have available the information which allows the difference in the increase in wealth of the spouses to be determined. To that end, German law allows an inventory to be drawn up to record the initial assets at the time when the separate property regime with equalisation of accrued gains was established (Paragraph 1377 of the BGB). In addition, after the matrimonial property regime has been dissolved or in the event of proceedings being filed for divorce, annulment of the marriage or premature equalisation of accrued gains, either spouse can demand disclosure of information on the other spouse's initial assets which is necessary to equalise the accrued gains (Paragraph 1379 of the BGB).

45. However, the rules relating to apportionment set out above do not, in principle, apply where a matrimonial property regime is dissolved by reason of the death of one of the spouses.

46. Under the general rules on intestate succession laid down in the first sentence of Paragraph 1931(1) of the BGB, the surviving spouse is entitled to one quarter of the estate as against relatives of the first degree. Furthermore, Paragraph 1931(3) of the BGB provides that intestate succession is without prejudice to Paragraph 1371 of the BGB. Hence, a surviving spouse who inherits together with relatives of the first degree is entitled to one quarter of the estate pursuant to the first sentence of Paragraph 1931(1) of the BGB and, in addition, to a further one quarter of the estate pursuant to Paragraph 1371(1) of the BGB.

47. This approach makes it possible to simplify apportionment between the surviving spouse and the deceased's other heirs. It relieves the parties concerned of the arduous obligation to prove the amount of the accrued gain of each spouse. That could be made difficult by the deceased's death. Furthermore, it could become the source of unwanted conflicts between the deceased's relatives.

7 See, more broadly, D. Martiny, N. Dethloff, *Property relationship between spouses — Germany*, August 2008.

48. In addition, it is sometimes noted that waiving the need to demonstrate whether there has actually been an accrual of assets and granting the surviving spouse an additional quarter of the estate constitutes a particular 'bonus' for marriages which do not break down in the lifetime of the spouses.[8] It should be recalled that the surviving spouse succeeds to one quarter of the estate even where no such gain has accrued at all. That quarter is calculated as a portion of the estate and not as a portion of the increase in wealth of one spouse. Therefore, under Paragraph 1371(1) of the BGB a surviving spouse can obtain more than he would have been entitled to as a result of a mathematical equalisation of accrued gains. However, it is also not possible to rule out the opposite situation where that mathematical equalisation of accrued gains would be more advantageous to the surviving spouse.

49. However, that is not the only way of liquidating the matrimonial property regime on the death of one of the spouses. In several cases German law allows accrued gains to be equalised mathematically.

50. First, if the surviving spouse is not an heir or legatee of the deceased spouse, Paragraph 1371(2) of the BGB applies. The spouse can then demand a mathematical equalisation of the accrued gains. In addition to a mathematical equalisation of the accrued gains, the surviving spouse is entitled, under the second sentence of Paragraph 2303(2) of the BGB, to a compulsory share calculated on the basis of the share to which he would have been entitled on intestate succession under Paragraph 1931 of the BGB.

51. Secondly, the situation of the surviving spouse is similar where he disclaims the inheritance. He can then request mathematical equalisation of the accrued gains and also a compulsory share (Paragraph 1371(3) of the BGB) even though under German law an heir disclaiming an inheritance is not, as a rule, entitled to a compulsory share.

52. Legal writings sometimes refer to a third case, not governed by statute, in which Paragraph 1371(1) of the BGB does not apply, notwithstanding dissolution of the matrimonial property regime by reason of the death of one of the spouses. This concerns situations in which the testator makes testamentary disposals in favour of the other spouse.[9]

53. Therefore, both a testator and a surviving spouse can unilaterally prevent the application of Paragraph 1371(1) of the BGB. They do so, as a rule, by using conventional instruments of the law of succession. A surviving spouse can disclaim the inheritance and a testator can remove that spouse from the succession by means of dispositions in the event of death.

(c) Delimiting the scope of the law applicable to the succession and the law applicable to matrimonial property regimes — general remarks

(1) The lack of coordination between the law applicable to the succession and the law applicable to matrimonial property regimes

54. Various approaches aimed at safeguarding the interests of the surviving spouse upon the death of the other spouse are adopted in the law of the individual Member States. To that end, certain legislatures use instruments characteristic of the law of succession by favouring the surviving spouse over the other heirs. Other legislatures rely on approaches relating to matrimonial property regimes, whilst at the same time passing over the spouse as an heir or limiting his or her rights of succession.[10]

8 G.A.L. Droz, Les régimes matrimoniaux en droit international privé comparé, *Recueil des cours de l'Académie de la Haye*, Vol. 143, 1974, p. 98.

9 The views presented in German legal writings on this matter are set out by R. Zimmermann, 'Intestate Succession in Germany', in K.G.C. Reid, M. de Waal, R. Zimmermann, *Comparative Succession Law. Volume II. Intestate Succession*, Oxford, Oxford University Press 2015, p. 213.

10 E.D. Graue, The Rights of Surviving Spouses under Private International Law, *The American Journal of Comparative Law*, Vol. 15, 1966-1967, pp. 164-165.

55. However, it is difficult to find examples of any of these models in its pure form. Often we come across a mixed model in which the concern to protect the surviving spouse's property interests is met by means of a number of linked approaches derived from both the law of succession and the law on matrimonial property regimes. Those elements are intended to establish a coherent system, maintaining the desired balance between the interests of the surviving spouse, the other heirs and legatees and the creditors.

56. In situations having links with the law of more than just one State, the law on the succession and the law applicable to matrimonial property regimes are identified by various conflict-of-law rules. Therefore, determining the applicable law under conflict-of-law rules can lead to the operation of provisions derived from two different legal systems. Those approaches do not have to be coordinated with one another. This can be the source of numerous complications.

57. For example, the law applicable to the succession may look after the surviving spouse's property interests through the provisions concerning the spouses' property relationships and the law applicable to matrimonial property regimes can use instruments of the law of succession to that end.

58. It is also possible to foresee the opposite situation where a cumulation of individual approaches may result in the surviving spouse being favoured disproportionately. This is the case where law affording the surviving spouse particular protection through mechanisms of the law of succession is applied by way of the rules on succession and law affording that spouse particular privileges as regards apportionment relating to the dissolution of that regime is applied by way of the rules on matrimonial property regimes.

(2) Characterisation

59. The difficulties arising from the simultaneous application of rules derived from different legal systems can be limited by means of characterisation ('*qualification*', '*Qualifikation*'). This involves interpreting the terms used in drawing up the individual conflict-of-law rules in order to define the conditions for their application.

60. Since the conflict-of-law rules constitute a certain system, characterisation must be effected so that the scope of the individual conflict-of-law rules does not overlap.

61. However, it is not always possible to achieve satisfactory results by means of characterisation. In particular, it is difficult to resolve in that way problems involving the delimitation of the rules concerning the law applicable to the succession and those applicable to matrimonial property regimes. [11]

(3) Adaptation in private international law

62. Nonetheless, the deficiencies in characterisation measures can be redressed by another device of general private international law, namely 'adaptation' ('*adaptation*', '*Anpassung*'). The purpose of adaptation is to eliminate the lack of coordination between the provisions of substantive law derived from different legal systems which apply as the law applicable to the assessment of related matters.

11 See Ch. Kohler, L'autonomie de la volonté en droit international privé, *Recueil des cours de l'Académie de la Haye*, Vol. 359, 2013, p. 443.

63. Although the purpose of adaptation appears to be clearly defined, it is difficult to draw up any top-down recommendations as to how that adaption should be carried out. In any event, adaptation measures can be effected at the level of conflict-of-law rules by redefining their scope in such a way as to avoid contradictions and resolve the case pursuant to one applicable law,[12] or at the level of the rules of substantive law by amending provisions which are contrary to one another. In the most extreme case that leads to the creation of a peculiar synthesis of two legal systems.[13]

64. The considerations concerning adaptation measures are not of decisive relevance to the answer to the first question. In the present case there is no lack of coordination between the law applicable to the succession and the law applicable to matrimonial property regimes. In both those cases German law applies.

65. However, the remarks that I have made are of particular importance since they may be of great relevance in situations other than that at issue in the main proceedings. I consider that in answering the questions referred the Court should be aware of the consequences arising from the adoption of a specific decision in this case. The judgment of the Court will certainly have a significant impact on the practice of applying Regulation No 650/2012 by the national courts in other situations.

66. At the same time, I would like to point out that irrespective of what characterisation the Court adopts in relation to Paragraph 1371(1) of the BGB, it will not completely remove the need to carry out adaptation measures. Irrespective of whether Paragraph 1371(1) of the BGB is regarded as a rule of the law of succession or of the law on matrimonial property regimes, in certain cases it may transpire that it results in excessive favouring of, or excessive detriment to, the surviving spouse. There may then arise a need to effect an adaptation, the method for which will naturally depend on the specific situation.

67. Having set out the preliminary remarks relating to Paragraph 1371(1) of the BGB and to the general matters of private international law concerning characterisation, I can move on to analyse the first question referred.

2. Delimiting the scope of the law applicable to the succession and the law applicable to matrimonial property regimes in the context of Paragraph 1371(1) of the BGB

(a) Delimiting the scope of Regulations No 650/2012 and 2016/1103

68. The scope of Regulation No 650/2012 is defined in a positive sense by Article 1(1) thereof. Under that provision, the regulation relates to 'succession to the estates of deceased persons'. Article 3(1) of Regulation No 650/2012 provides that the term '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.

12 For example, where the law applicable to matrimonial property regimes protects the surviving spouse by means of provisions of the law of succession and the law applicable to the succession uses provisions of the law on matrimonial property regimes to that end, it is necessary — in the view of certain authors — to subject matters relating to the liquidation of the matrimonial property regime to the law governing the succession. Such was the view, in the period preceding the date when Regulation No 650/2012 began to apply, of A. Bucher, 'La dimension sociale du droit international privé. Cours général', *Recueil des cours de l'Académie de la Haye*, Vol. 341, 2010, p. 243.

13 In the period preceding the date when Regulation No 650/2012 began to apply, it was sometimes asserted that, if the law applicable to matrimonial property regimes was German law and another law determined the succession, Paragraph 1371(1) of the BGB would not apply. In that case it was necessary to apply Paragraph 1371(2) of the BGB and carry out a mathematical equalisation of the accrued gains in accordance with the rules applicable in the case of divorce. G.A.L. Droz, Les régimes matrimoniaux en droit international privé comparé, *Recueil des cours de l'Académie de la Haye*, Vol. 143, 1974, p. 98; M. Coester, International Aspects of German Estate Law, *Loyola of Los Angeles International and Comparative Law Review*, Vol. 53, 1981, p. 66). This view is essentially that the expression 'if the surviving spouse does not become an heir' in Paragraph 1371(2) of the BGB should be read as meaning 'if the surviving spouse does not become an heir inheriting under German law'. E.D. Graue, in *Comparative law of matrimonial property: a Symposium at the International Faculty of Comparative Law at Luxembourg on the laws of Belgium, England, France, Germany, Italy and the Netherlands*, (ed.) A. Kiralfy, Leiden, A.W. Sijthoff 1972, p. 144.

69. The scope of Regulation No 650/2012 is defined in a negative sense by Article 1(2) thereof. Article 1(2)(d) provides that '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' are to be excluded from the scope of this regulation.

70. Regulation No 650/2012 nevertheless contains no detailed guidance on the interpretation of the term 'questions relating to matrimonial property regimes'.

71. However, the EU legislature has adopted only Regulation No 650/2012 pursuant to Article 81 TFEU. Having discerned a lack of uniform conflict-of-law rules concerning the law applicable to matrimonial property regimes, the EU legislature also adopted, pursuant to Article 81(3) TFEU, 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.[14] Regulation 2016/1103 will in principle apply from 29 January 2019 (second subparagraph of Article 70(2) of that regulation).

72. Regulations No 650/2012 and 2016/1103 must be complementary and their scope must not overlap. The matters covered by Regulation 2016/1103 are thus excluded from the scope of Regulation No 650/2012 in so far as they concern matrimonial property regimes. Matters relating to succession are excluded from the scope of Regulation 2016/1103.[15]

73. In this regard the scope of Regulation No 650/2012 cannot vary depending on whether it is to be applied by the judicial authorities of the Member States participating in enhanced cooperation in relation to Regulation 2016/1103. Nor is it relevant that Regulation 2016/1103 does not yet apply. On the date when it begins to apply, the scope of Regulation No 650/2012 will remain unchanged.

74. The scope of Regulation 2016/1103 is defined by Article 1(1) thereof, under which it will apply to 'matrimonial property regimes'. Recital 18 of Regulation 2016/1103 makes it clear that the scope of that regulation should include all civil-law aspects of matrimonial property regimes, including 'the liquidation of the regime, in particular as a result of … the death of one of the spouses'.

75. However, 'the succession to the estate of a deceased spouse' will be excluded from the scope of Regulation 2016/1103 pursuant to Article 1(2)(d) thereof. This is confirmed by recital 22 of Regulation 2016/1103, according to which issues relating to the succession to the estate of a deceased spouse should be excluded from the scope of that regulation since they are covered by Regulation No 650/2012.

76. Further guidance on the scope of the two regulations is provided by the provisions on the scope of the applicable law determined pursuant to the conflict-of-law rules contained in those regulations. Article 27(e) of Regulation 2016/1103 provides that the law applicable to the matrimonial property regime will govern, inter alia, 'the dissolution of the matrimonial property regime and the partition, distribution or liquidation of the property'. Under Article 23(2)(b) of Regulation No 650/2012, 'the determination of the beneficiaries, of their respective shares and of the obligations which may be imposed on them by the deceased, and the determination of other succession rights, including the succession rights of the surviving spouse or partner', are to be governed by the law specified as applicable by the conflict-of-law rules of that regulation.

14 OJ 2016 L 183, p. 1.

15 See, to that effect, in the context of delimiting the scope of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1) and Regulation No 650/2012, the Opinion of Advocate General Kokott in *Matoušková* (C-404/14, EU:C:2015:428, point 31). The Court took a similar view in its judgment in that case, pointing out that its case-law is designed to avoid any overlap between the rules of law that those texts lay down and any legal vacuum. See judgment of 6 October 2015, *Matoušková* (C-404/14, EU:C:2015:653, paragraph 34 and the case-law cited).

77. Therefore, I consider that Regulation 2016/1103 will apply to issues relating inter alia to the determination of which property rights form part of an estate and not to assessment of the rights of the surviving spouse as regards what already forms part of the estate. For example, if the spouses were linked by a regime based on joint ownership, under the law identified by the provisions of Regulation 2016/1103 it will be necessary to establish whether movable property acquired during the marriage was a joint asset and to which of the spouses it will be allotted after that regime has been dissolved.

78. 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. Therefore, that would be an argument for finding that a provision like Paragraph 1371(1) of the BGB, as a matter relating to 'the succession to the estate of a deceased spouse' within the meaning of Article 1(2)(d) of Regulation 2016/1103 and recital 22 thereof, is not a provision covered by the rules on matrimonial property regimes.

79. The foregoing considerations may indicate that the share to which the surviving spouse is entitled under Paragraph 1371(1) of the BGB should be regarded as a matter falling not within the scope of Regulation 2016/1103, but within the scope of Regulation No 650/2012.

(b) Characterisation of the share to which the surviving spouse is entitled under Paragraph 1371(1) of the BGB in the light of the purpose of that provision

(1) Preliminary remarks

80. In their written observations, the German and Belgian Governments and the Commission note that, in answering the first question, it is necessary to analyse Paragraph 1371(1) of the BGB and determine its purpose. On that basis it is then necessary to decide whether it is a rule which falls within the scope of the law applicable to matrimonial property regimes or the law applicable to the succession. The Polish Government is also in favour of adopting this approach but draws a different final conclusion in this respect.

81. I share the view that that provision must not be interpreted in isolation from the function which it performs. Legal writers maintain that rules aimed at apportioning the assets of the deceased fall within the scope of the law applicable to the succession. However, in the case of rules on the surviving spouse's rights arising from his or her share in the increase in assets, the law applicable to matrimonial property regimes applies. [16]

82. It appears that the conflict-of-law issue under consideration in the present case requires a closer examination of the previous case-law of the Court concerning the rules on judicial cooperation in civil matters. In that case-law too, the Court refers to the function of the individual legal instruments, inter alia for the purpose of defining the scope of the individual rules on jurisdiction.

(2) Interpretation of the term 'matrimonial property regime' in the light of the rules on jurisdiction in the case-law of the Court

83. In its case-law the Court has devoted a great deal of attention to the interpretation of point 1 of the second paragraph of Article 1 of the Brussels Convention, [17] which excluded 'rights in property arising out of a matrimonial relationship' ('*les régimes matrimoniaux*') from the scope of the Convention.

16 D. Solomon, 'The boundaries of the law applicable to succession', *Anali Pravnog Fakulteta Univerziteta u Zenici*, Issue 18, 2016, p. 200.

17 Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36; 'the Brussels Convention').

84. In its judgment in *Cavel*[18] the Court clarified that the exclusion relating to 'rights in property arising out of a matrimonial relationship' in point 1 of the second paragraph of Article 1 of the Brussels Convention covers not only matrimonial property arrangements exclusively envisaged by national law but also 'any proprietary relationships resulting directly from the matrimonial relationship or the dissolution thereof'. However, the Court did not consider the situation where the death of one of the spouses was the reason for the dissolution of the matrimonial property regime. In that case the request for a preliminary ruling concerned divorce proceedings.

85. The Court referred to the position expressed in that judgment again in its judgment in *W.*[19] The main proceedings concerned the application by one spouse for the delivery up of a codicil held by the other spouse to provide evidence of the improper management of his property by the other spouse. The referring court requested from the Court inter alia an interpretation of point 1 of the second paragraph of Article 1 of the Brussels Convention in so far as that provision concerns the exclusion from the application of the convention of 'wills and succession' (first question referred) and 'rights in property arising out of a matrimonial relationship' (second question referred). The Court first addressed the second question and ruled that the matter of property management, inasmuch as it is closely connected with 'the proprietary relationship resulting directly from the marriage bond'[20] within the meaning of the judgment in *Cavel*,[21] is excluded from the scope *ratione materiae* of the Brussels Convention.[22]

86. In its judgment in *van den Boogaard*,[23] the Court ruled on whether an enforceable decision rendered in divorce proceedings ordering payment of a lump sum and transfer of ownership of certain property by one party to his former spouse falls within the scope of the Brussels Convention or whether it remains outside the scope thereof by virtue of the exclusion relating to 'rights in property arising out of a matrimonial relationship' (point 1 of the second paragraph of Article 1 of the Brussels Convention).[24] The Court held that a decision ordering a lump sum to be paid to one of the spouses concerns maintenance if the provision awarded is designed to enable one spouse to provide for himself or herself or if the needs of each of the spouses are taken into consideration in the determination of its amount. Where the provision awarded is solely concerned with dividing property between the spouses ('*la répartition des biens entre les époux*'), it will be concerned with rights in property arising out of a matrimonial relationship.[25]

(3) Reference to the case-law concerning the Brussels Convention for the purposes of interpreting the rules of Regulation No 650/2012

87. I do not consider that there are any reasons for placing a different interpretation on the terms 'rights in property arising out of a matrimonial relationship' and 'questions relating to matrimonial property regimes' in the light of the EU conflict-of-law rules, including Regulation No 650/2012, and of the EU rules on jurisdiction.

18 Judgment of 27 March 1979 (143/78, EU:C:1979:83, paragraph 7).

19 Judgment of 31 March 1982 (25/81, EU:C:1982:116, paragraph 6).

20 Judgment of 31 March 1982, *W.* (25/81, EU:C:1982:116, paragraph 7).

21 Judgment of 27 March 1979 (143/78, EU:C:1979:83).

22 Judgment of 31 March 1982, *W.* (25/81, EU:C:1982:116, paragraph 9).

23 Judgment of 27 February 1997 (C-220/95, EU:C:1997:91).

24 It should be noted that the Brussels Convention did not exclude from its scope 'maintenance obligations arising from a family relationship, parentage, marriage or affinity' as is the case under Article 1(2)(e) of 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 (OJ 2012 L 351, p. 1). Therefore, characterising the case to which that judgment related as a matter relating to maintenance obligations would allow the Brussels Convention to be applied. Today a matter of this kind would fall within the scope of 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 L 7, p. 1).

25 Judgment of 27 February 1997, *van den Boogaard* (C-220/95, EU:C:1997:91, paragraph 22).

88. The successor to the Brussels Convention is Regulation No 1215/2012. Article 1(2) of that regulation provides that it is not to apply to 'rights in property arising out of a matrimonial relationship'. In its order in *Iliev*,[26] the Court noted that Article 1(2)(a) of Regulation No 1215/2012 corresponds to point 1 of the second paragraph of Article 1 of the Brussels Convention. In that order the Court also reaffirmed the case-law concerning interpretation of the term 'matrimonial property regime' in the light of Regulation No 1215/2012.[27] Legal writers also propose that the terms contained in Regulation No 1215/2012 be interpreted in the light of the Court's judgments on the Brussels Convention.[28]

89. The scope of Regulations No 650/2012, 2016/1103 and No 1215/2012 must be complementary. I therefore consider that the exclusion of 'questions relating to matrimonial property regimes' in Article 1(2)(d) of Regulation No 650/2012 must be interpreted in accordance with the Court's case-law on the exclusion of 'rights in property arising out of a matrimonial relationship' from the scope of the Brussels Convention (point 1 of the second paragraph of Article 1 thereof).

90. I am aware that the purpose of the rules on jurisdiction and of the conflict-of-law rules to which this request for a preliminary ruling relates is not identical. However, Regulation No 650/2012 contains not only conflict-of-law rules but also rules on jurisdiction. The scope *ratione materiae* of Regulation No 650/2012, as defined by Article 1 thereof, relates to both types of provisions. Unless there are compelling reasons to the contrary, there are no grounds for placing a different interpretation on the general terms by which the regulations define their scope *ratione materiae*, depending on whether conflict-of-law rules or rules on jurisdiction are involved.

(4) Conclusions arising from the Court's case-law relating to the rules on jurisdiction

91. In the light of the remarks set out in point 90 of this Opinion, an analysis of the case-law concerning the rules on jurisdiction discussed in points 84 to 86 leads to the conclusion that the exclusion of 'matrimonial property regimes' from the scope of EU acts on judicial cooperation in civil matters relates primarily to any proprietary relationships resulting directly from the matrimonial relationship or the dissolution thereof, including the issue of the inclusion of individual assets in the deceased's estate or as property to be divided between the spouses.

92. In order to answer the first question, it is necessary to characterise Paragraph 1371(1) of the BGB as a provision applying within the framework of the rules on succession or of the rules on matrimonial property regimes, in the context of EU rules. Therefore, that provision must be interpreted in the light of the conclusions arising from the Court's case-law in order to establish its purpose and, on that basis, to dispel the doubts of the referring court.

93. A provision like Paragraph 1371(1) of the BGB applies only upon the death of a spouse. After the death of the spouse there can still be a division of assets between the estate and the property of the surviving spouse. However, in the light of the remarks set out in point 48 of this Opinion, the fundamental purpose of Paragraph 1371(1) of the BGB does not appear to be to divide the assets or liquidate the matrimonial property regime. It serves instead to define the position of the surviving spouse in relation to the other heirs. It determines the surviving spouse's share of the estate.

26 Order of 14 June 2017 (C-67/17, EU:C:2017:459, paragraph 24).

27 Order of 14 June 2017, *Iliev* (C-67/17, EU:C:2017:459, paragraphs 25 to 30).

28 P. Rogerson, in U. Magnus, P. Mankowski, *Brussels Ibis Regulation*, Cologne, Otto Schmidt 2016, p. 71.

94. The absence of a link between the surviving spouse's share under Paragraph 1371(1) of the BGB and relationships resulting directly from the matrimonial relationship becomes all the more clear when account is taken of the fact that that provision applies irrespective of whether or not there are grounds for carrying out any division of assets in the light of the rules on which the separate property regime with equalisation of accrued gains is based. [29]

95. In addition, in accordance with the remarks set out in point 53 of this Opinion, a testator can unilaterally prevent the application of that provision by using instruments of the law of succession. That, in essence, is the nature of rights of succession. Granting the testator relatively broad freedom to dispose of the estate is characteristic of the law of succession, whereas decisions on relationships resulting directly from matrimonial property regimes should, as a rule, be taken by both spouses.

96. Therefore, I consider that the fundamental purpose of a rule like Paragraph 1371(1) of the BGB suggests that it should be regarded as a provision falling under the rules on succession, not the rules on matrimonial property regimes.

(c) The effectiveness of the provisions creating a European Certificate of Succession

97. As I pointed out earlier in point 32 of this Opinion, the terms which the EU legislature uses to define the scope of Regulation No 650/2012 are autonomous in nature. The interpretation of those terms must take account of the objectives of Regulation No 650/2012, which — in line with the remarks made in point 27 of this Opinion — are to eliminate obstacles to the free movement of persons within the internal market and ensure that the rights of the heirs are effectively guaranteed in the Member States. [30] To that end, Regulation No 650/2012 creates, according to recital 8 thereof, a uniform certificate, namely the European Certificate of Succession. As is confirmed by recital 67 of that regulation, it is intended to enable succession with cross-border implications within the European Union to be settled speedily, smoothly and efficiently.

98. The effects of the European Certificate of Succession are determined by Article 69 of Regulation No 650/2012. It performs an identifying function and is to produce its effects in all Member States, without any special procedure being required (Article 69(1) of Regulation No 650/2012). Elements which have been 'established under the law applicable to the succession or under any other law applicable to specific elements' are presumed to be accurately demonstrated by the Europe Certificate of Succession (Article 69(2)).

99. The second sentence of recital 71 of Regulation No 650/2012 explains that the certificate has above all an evidentiary effect and is 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. However, according to the third sentence of recital 71 of Regulation No 650/2012, the evidentiary effect of the certificate should not extend to elements which are not governed by that regulation, such as questions of affiliation or the question whether or not a particular asset belonged to the deceased.

29 I give by way of example the situation where the property of a deceased person had a value of 100 000 monetary units at the time when the matrimonial property regime was established and did not increase during that regime, In the meantime, the surviving spouse amassed 50 000 monetary units during the regime. In that situation, in the event of a mathematical equalisation the surviving spouse would not be entitled to an equalisation of the accrued gains. In the event of divorce precisely the opposite would be the case. The surviving spouse would be obliged to pay an amount of 25 000 monetary units to the other spouse. The application of Paragraph 1371(1) of the BGB leads to a situation where the surviving spouse succeeds to an amount of 25 000 monetary units, as one quarter of the deceased's estate.

30 The Court expressed a position to that effect in its judgment of 12 October 2017, *Kubicka* (C-218/16, EU:C:2017:755, paragraph 56), holding that the interpretation of the provisions of Regulation No 650/2012 that is set out in that judgment is consonant with the objective pursued by it which is to facilitate the proper functioning of the internal market by eliminating obstacles to the free movement of persons who want to claim their rights arising from a cross-border succession.

100. Therefore, the evidentiary effect of the certificate relates only to those elements which have been established under the applicable law identified on the basis of the harmonised conflict-of-law rules contained in Regulation No 650/2012.[31] Thus, they are elements which fall within the scope of the applicable law identified under Article 23 of Regulation No 650/2012 (rules on succession) and Articles 24 to 28 thereof, which concern: the admissibility and substantive validity of dispositions of property upon death other than agreements as to succession (Article 24), the admissibility, substantive validity and binding effects between the parties of an agreement as to succession regarding the succession of one person (Article 25), formal validity of dispositions of property upon death (Article 27) and validity as to form of a declaration concerning acceptance or waiver (Article 28).

101. This leads me to conclude that only the elements established under the rules on succession (Article 23) and under the law applicable to other matters, which is defined on the basis of the harmonised conflict-of-law rules of Regulation No 650/2012 (Articles 24 to 28), are subject to the effects arising from Article 69(2) of Regulation No 650/2012. Those effects do not concern elements established by means of national conflict-of-law rules or EU conflict-of-law rules outside Regulation No 650/2012.

102. Therefore, classification of the share falling to the surviving spouse under Paragraph 1371(1) of the BGB as succession-related allows information concerning that share to be recorded in the European Certificate of Succession, with all the effects described in Article 69(2) of Regulation No 650/2012. On the other hand, treating that provision as a matter covered by the law applicable to matrimonial property regimes would not allow information on the surviving spouse's share to be covered by the presumption of accuracy.

103. That would be a further argument in favour of classifying Paragraph 1371(1) of the BGB as succession-related. The effectiveness of the provisions of Regulation No 650/2012 which create the European Certificate of Succession will thus be assured.

(d) Conclusions regarding the first question referred

104. On the basis of the guidance set out above, I consider that Paragraph 1371(1) of the BGB should not be regarded as a provision concerning questions relating to matrimonial property regimes and thus excluded from the scope of Regulation No 650/2012 under Article 1(2)(d) thereof.

105. First, that provision does not determine what forms part of the deceased spouse's estate. It concerns the rights of the surviving spouse in relation to what incontrovertibly forms part of the deceased's estate. A provision like Paragraph 1371(1) of the BGB thus concerns a question relating to 'the succession to the estate of a deceased spouse' within the meaning of Article 1(2)(d) of Regulation 2016/1103, which will be excluded from the scope of that regulation and is subject to the conflict-of-law rules in Regulation No 650/2012.

106. Secondly, that provision applies only in the event of the death of one of the spouses and irrespective of whether or not there are grounds for any division of assets in the light of the rules on which the shared property regime with equalisation of accrued gains is based.

31 P. Wautelet, 'Article 69 — Effets du certificat', in A. Bonomi, P. Wautelet, *Le droit européen des successions. Commentaire du règlement (UE) No 650/2012, du 4 juillet 2012*, Brussels, Bruylant 2016, p. 880. As regards the proposal for Regulation No 650/2012, see also J. Basedow, A. Dutta, C. Bauer et al., Max Planck Institute for Comparative and International Private Law, Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 74, 2010, nb. 323.

107. Thirdly, the aim of ensuring the effectiveness of the provisions creating the European Certificate of Succession suggests that a provision like Paragraph 1371(1) of the BGB should be classified as succession-related. Classifying that provision as such allows information on the surviving spouse's share to be included in the European Certificate of Succession, with the effects arising from Article 69(2) of Regulation No 650/2012 in all the Member States.

108. In the light of the foregoing arguments, I propose that the Court give the following answer to the first question referred: Article 1(1) of Regulation No 650/2012, in conjunction with Article 1(2)(d) thereof, is to be interpreted as meaning that the scope of the law applicable to the succession covers rules which — like Paragraph 1371(1) of the BGB — determine the surviving spouse's share of the estate, even if their application is dependent on the existence of a specific matrimonial property regime and the spouse's share of the estate replaces liquidation of that regime, but at the same time the size of that share is determined on the basis of entirely different rules from those which determine the method for liquidating that regime during the spouses' lifetime.

C. The second and third questions

109. By its second and third questions — submitted in the event that the Court's answer to the first question is in the negative — the referring court seeks to clarify whether the surviving spouse's share of the estate under Paragraph 1371(1) of the BGB may be recorded in the European Certificate of Succession even though that provision does not concern a matter falling within the scope of Regulation No 650/2012. Given the answer which I propose to the first question, there is no need to answer the second and third questions.

110. However, if the Court does not share my assessment of the first question, analysis of the second and third questions becomes necessary. I am therefore also going to suggest an answer to the second and third questions.

111. In connection with the second and third questions the referring court draws a distinction between various cases in considering whether a share to which the surviving spouse is entitled under Paragraph 1371(1) of the BGB may be recorded in the European Certificate of Succession, even though that matter does not fall within the scope of Regulation No 650/2012. All these cases essentially give rise to uncertainties as to the relationship between the contents of the European Certificate of Succession and the scope *ratione materiae* of that regulation. I therefore consider that the second and third questions should be considered together.

1. The relationship between the contents of the European Certificate of Succession and the scope of Regulation No 650/2012

112. As I have already pointed out, these considerations are hypothetical in nature. They are based on the assumption that the Court does not concur with the answer that I propose to the first question and rules that Paragraph 1371(1) of the BGB is not a provision which falls within the scope of Regulation No 650/2012. Even on that assumption, I consider that the share of the estate to which the surviving spouse is entitled under that provision may be recorded in the European Certificate of Succession.

113. First, the EU legislature does not appear to assume that only information relating to elements falling within the scope of Regulation No 650/2012 may be recorded in the European Certificate of Succession. This is confirmed by the wording of Article 68(h) of Regulation No 650/2012. Amongst the information which the certificate can contain 'to the extent required for the purpose for which it is issued', that provision refers to 'information concerning a marriage contract entered into by the deceased'. There is no doubt that the latter matter does not fall within the scope of Regulation No 650/2012.

114. Secondly, sometimes the omission of information on matters relevant to the succession, although essentially not falling within that field, would make the European Certificate of Succession a highly impractical instrument. It would not reflect the surviving spouse's actual share of the estate. That would call into question the effectiveness (effet utile) of the provisions creating the European Certificate of Succession.

115. Thirdly, the European Certificate of Succession would not then be competitive with domestic (national) documents used for similar purposes in the Member States, which would fully reflect the surviving spouse's share of the estate. Regulation No 650/2012 does not establish an obligation to use the European Certificate of Succession. The national certificates issued under the provisions in force in a particular State continue to function.

116. In the light of the arguments set out above, I consider that the share of the estate to which the surviving spouse is entitled under Paragraph 1371 of the BGB may be recorded in the European Certificate of Succession.

2. The effects of recording in the European Certificate of Succession information which does not fall within the scope of Regulation No 650/2012

117. The very possibility of recording specific information in the European Certificate of Succession does not mean that it exhibits all the features possessed by information recorded under the applicable law established under the conflict-of-law rules contained in Regulation No 650/2012.

118. I have already indicated in point 101 of this Opinion that the evidentiary effect of the certificate relates only to elements which have been established under the applicable law identified under the harmonised conflict-of-law rules contained in Regulation No 650/2012.

119. However, Regulation No 650/2012 itself does not preclude the recording therein of elements which do not have the effects specified in Article 69 of that regulation. This is confirmed, in my view, by recital 71 of Regulation No 650/2012, cited above, according to which 'the evidentiary effect of the Certificate should not extend to elements which are not governed by this Regulation'.

120. I therefore consider that the European Certificate of Succession can include information established under the rules on succession (Article 23), information established under the law applicable to other matters which is defined on the basis of the harmonised conflict-of-law rules of Regulation No 650/2012 (Articles 24 to 28) and information established under the applicable law identified under national conflict-of-law rules (or conflict-of-law rules contained in other instruments of EU law). That latter category should include information — assuming that it is not covered by the rules on succession — concerning the share to which the surviving spouse is entitled under Paragraph 1371(1) of the BGB. However, those elements must not be subject to the effects arising from Article 69(2) of Regulation No 650/2012.

3. Nature of the information concerning the share to which the surviving spouse is entitled under Paragraph 1371(1) of the BGB in the European Certificate of Succession

121. A further question arises as to what consequences must be attached to the recording in a European Certificate of Succession of information on the share to which the surviving spouse is entitled under Paragraph 1371(1) of the BGB. In its written observations and the position which it set out at the hearing, the Commission noted that, although there is no explicit basis for applying the effects provided for in Article 69 of Regulation No 650/2012 to information on the share concerned, it is necessary to adopt that approach and as it were stretch the effects arising from that provision to include information on the share to which the surviving spouse is entitled under Paragraph 1371(1) of the BGB.

122. Legal writers state that the surviving spouse's share under Paragraph 1371(1) of the BGB — provided that it is regarded as a matter covered by rules on matrimonial property regimes — may be recorded in the contents of the European Certificate of Succession, as a reference of an informational nature in the context of 'information concerning the matrimonial property regime' as referred to in Article 68(h) of Regulation No 650/2012, together with a note on the basis of which that element was established. [32] Another view, which is also suggested by the referring court in connection with the second and third questions, is based on the idea that the increase arising from Paragraph 1371(1) of the BGB must be recorded as 'the share for each heir', as referred to in Article 68(l). [33]

123. I consider that, regardless of which of those provisions will apply to the recording of information concerning the increase in the European Certificate of Succession, it must be recorded subject to the express reservation that it has been established under the law applicable to matrimonial property regimes. It does not have to be the law which would have been identified as applicable to matrimonial property regimes by the conflict-of-law rules in force in the Member State of the authority before which the person concerned uses a European Certificate of Succession issued in another Member State. This is evident from the lack of harmonised conflict-of-law rules common to all Member States to identify the law applicable to matrimonial property regimes.

124. Including in the European Certificate of Succession a reservation clarifying that the share to which the surviving spouse is entitled under Paragraph 1371(1) of the BGB falls within the scope of the law applicable to matrimonial property regimes will at the same time restrict the possibility of relying on the presumption set out in Article 69(3) and (4) of Regulation No 650/2012.

125. In the light of the foregoing considerations, I propose that, if its answer to the first question is in the negative, the Court give the following answer to the second and third questions: Articles 68(l) and 67(1) of Regulation No 650/2012 are to be interpreted as meaning that the surviving spouse's share, in the event that a portion of it stems from an increase pursuant to a rule governing matrimonial property regimes, like Paragraph 1371(1) of the BGB, may be recorded in full in the European Certificate of Succession, for information purposes only.

VI. Conclusions

126. In the light of the foregoing considerations, I propose that the Court give the following answer to the questions submitted to it by the Kammergericht Berlin (Higher Regional Court, Berlin, Germany):

Article 1(1) of 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, in conjunction with Article 1(2)(d) thereof, is to be interpreted as meaning that the scope of the law applicable to the succession covers rules which — like Paragraph 1371(1) of the Bürgerliches Gesetzbuch (BGB) — determine the surviving spouse's share of the estate, even if their application is dependent on the existence of a specific matrimonial property regime and the spouse's share of the estate replaces liquidation of that regime, but at the same time the size of that share is determined on the basis of entirely different rules from those which determine the method for liquidating that regime during the spouses' lifetime.

32 T. Ivanc, S. Kralijć, 'European Certificate of Succession — Was there a need for a European intervention?', *Anali Pravnog Fakulteta Univerziteta u Zenici*, Issue 18, 2016, p. 266.

33 D. Stamatiadis, in H. Pamboukis, *EU Succession Regulation No 650/2012: A Commentary*, Oxford, C.H. Beck, Hart Publishing 2017, p. 633.