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POSSIBLE IMPACTS OF EU SUCCESSION REGULATION NO 650/2012 ON TURKISH PRIVATE INTERNATIONAL LAW

European Union adopted a new Regulation on Succession in 2012 whereas all of its provisions have been in force since August 17th, 2015. This regulation is also called the Rome IV[1] Regulation. In addition to considering jurisdiction, applicable law, recognition and enforcement of authentic instruments in matters of succession, Regulation No 650/2012 also takes into account the creation of a European certificate of succession.

Some of the provisions of the Regulation will have possible impacts on Turkish Private International Law[2]. So in this presentation we will examine these impacts in three main groups.

I. Impacts of Succession Regulation on Jurisdiction of Turkish Courts

1. According to Art. 12 of 650/2012 EU Regulation if some of the assets of the deceased are located in a third country (such as in Turkey) then the competent court of a Member State may not rule on these assets (as a request of one party) in order to prevent the possibility of non-recognition or non-enforcement of its decision in that third country. So by considering this provision if a EU citizen dies whether in Turkey or not by leaving assets in Turkey, then the Turkish courts will have jurisdiction on succession matters due to art 12.

By this provision of the regulation, it is understood that forum non conveniens principle[3] is accepted. Thus, the member state court could reject its own authority in favor of the court of the country in which the

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1) Ciacchi Aurelia Colombi, Good Neighbourliness and Fundamental Rights-based Interpretations of Public Policy Clauses in EU Private International Law, 2015,Netherland, p.82 (Good Neighbourliness in the European Legal Context, (Edt. Dimitry Kochenov, Elena Basheska).

2) Turkish Private International Law will be cited as Turkish PIL hereafter. For English translation of Turkish PIL, see Boztosun Odman Ayşe,Turkish Code on Private International Law and International Civil Procedure, Yearbook of Private International Law, Volume 9, 2007, p583-604. ; Official Gazette: 12.12.2007-26728.

3) Nomer Ergin, Devletler Hususi Hukuku, 21. Edt, 2015, Istanbul, p.489.

immovable is located considering that it has a closer connection with the succession.

International jurisdiction of Turkish courts on inheritance matters is regulated by Article 43 of Turkish PIL. According to art. 43 of Turkish PIL, the court of last domicile in Turkey of the deceased has jurisdiction on succession issues. However if the last domicile was not in Turkey then the court where the property belonging to the estate is located will have jurisdiction on these succession matters. In this case, if the deceased who is a citizen of EU has an immovable in Turkey, then the court of a member state which has a jurisdiction on this inheritance case may not render a judgment on the related immovable. The member state court can waive its own juridical power in favor of Turkish courts considering that it may not be recognized and/or enforced. The member state court has the opportunity to limit its own juridical power on immovable property located in Turkey under its own initiative. Thus, the member state court could renounce from its juridical power in favor of Turkish court in accordance with forum non conveniens principle. It is clearly understood that the member state court has the right to decide on its judicial power whether to renounce from or not since the regulation uses the term “may”.

2. Choice of Court agreements in succession matters won't have any effect on Turkish Court's jurisdiction because choice of court agreements are not permitted in succession matters[4]. Besides even if the governing law of the deceased is Turkish law, Courts in Turkey could not benefit from this provision due to article 5 of the regulation because in order to have a jurisdiction to rule on succession matters, the law chosen by the deceased to govern succession must be the one of the law of Member States. Due to not being a member of EU, Turkish law could not be considered as one of the law of the Union.

II. Effects of Conflict of Laws Rules of the Regulation to the Turkish Conflict of Laws Rules on Succession

1. Regulation adopts the principle of the unity of the succession. Therefore, the law applicable to the succession will govern the succession as a whole, regardless of the nature of the assets (whether they are

4) In Turkish PIL, a foreign court may be granted as having jurisdiction by agreement of parties in cases where the local jurisdiction of Turkish Courts is not determined pursuant to the principle of exclusive jurisdiction and dispute is having a foreign element with resulting from obligational relations. (Art. 47); Çelikel Aysel/Erdem Bahadır, Milletlerarası Özel Hukuk, 13. Edt, Istanbul,2014, p.570-571.

movables or immovables). Art 23 of the Regulation states that "The law determined to succession pursuant to Article 21 or Article 22 shall govern the succession as a whole."

Whereas Turkish PIL (art 20) makes distinction in applicable law for the immovables located inside or outside of Turkey[5]. If the immovables are located outside of Turkey, then these assets will be subject to the national law of the deceased. On the other hand immovables located in Turkey will only be subject to Turkish substantive law. This means that, the heirs of the deceased for this immovable will only be determined by the Turkish substantive law.

According to art. 20/1 of Turkish PIL, succession is subject to the national law of the deceased. But there is an exception for this general rule which states that for the immovable property located in Turkey, Turkish substantive law will govern to the succession.

In other words, movables in or outside of Turkey and the immovables located outside of Turkey will be subject to the national law of the deceased. Whereas apart from this general rule, immovables located in Turkey will only be subject to Turkish substantive law.

So it can be said that, Turkey accepts scission of succession system for the immovables located in Turkey whereas accepts the unity of succession principle for movables located in or outside Turkey and also for the immovables located outside Turkey[6].

2. In Turkish PIL, inheritance shall be governed by the national law of the deceased due to the provision of art.20. So Turkish courts will have to consider the provisions of this regulation as part of a national law of the deceased only if renvoi is accepted in succession matters. In that case, 650/2012 regulation will be applied to the successions of the deceased instead of national PIL provisions on conflict of laws (art 1).

Vice versa national courts of the EU can consider the Turkish law in case of the Turkish citizen had a habitual residence in one of the Member States at the time of death even if the deceased is not having EU nationality. Because provisions on applicable law will be applied universally whether or not it is adopted by a member state due to article

5) Tekinalp Gülören/ Nomer Ergin/ Boztosun Odman Ayşe, Private International Law in Turkey, Wolters Kluwer,2012, Netherland, p.190.

6) For the critics of Turkish PIL article 20 see Ulusu Karataş A. Elif, Türk Miras Hukukunda Mirasın Kazanılmasında Halefiyet Türleri ve Türk Milletlerarası Özel Hukukundaki Yansımaları, Istanbul Üniversitesi Hukuk Fakültesi Mecmuası, Cilt 74, Sayı 2, 2015, p.381 vd.

20. The concept of "universal application" has two meanings. In the first meaning there is no need for adoption of this regulation by an internal process[7]. As for a second meaning, provisions on applicable law overrides the conflict of laws rules on succession both for EU citizens and also for foreigners in each Member State.

In Turkish law[8] some of the academicians[9] clearly rejects the application of renvoi whereas some of them[10] accepts the concept of renvoi only in favor of immovables. According to this point of view, the law applicable on foreign immovable heritage is not the substantive law of the national law of the deceased (Article 20/1 of PIL) but must be the rules of law of conflicts. Thus, it is stated that renvoi made to the law of the country in which the immovable is located will be in line with the purpose of the lex rei sitae rule and it will be appropriate to accept this renvoi.[11] Moreover according to this doctrine, the application of the renvoi will both serve the unity of decisions as a result of lex rei sitae rule and will also be more practical in terms of the deeds to be performed by the legal authorities of the country in which the immovable is located.

On the other hand, if renvoi is excluded then the provisions of the Regulation will not be taken into account in Turkish Courts.

So whenever an action is brought for a succession in Turkey, Turkish courts will have to examine the nationality of the deceased at first in order to consider whether this regulation will be applied or not as an applicable law. Because 650/2012 Regulation will not be applied for the deceased having a UK, Irish or Danish nationalities due to the Protocol 21 on the position of UK and Ireland and the Protocol 22 on the position of Denmark.[12]

Besides Turkish Courts must also examine the date of the death as

7) Due to article 288 of the Treaty on the Functioning of the European Union, Regulation is binding in its entirety and directly applicable in all Member States.

8) For more information on renvoi in Turkish law see Süheyla Balkar Bozkurt, Uluslararası Özel Hukuk'ta Bitmeyen Tartışma: Atıf (Renvoi) Teorisi, Uygulaması ve Değerlendirilmesi, Galatasaray Üniversitesi Hukuk Fakültesi Dergisi, 2014/2 Cilt 2, Yayın No:59, p.795 vd.; Ataman Figanmeşe İnci: "La Haye Sözleşmelerinde İade ve Devam Eden Atıf ve Bu Konuda Gelişen Yeni Anlayış", MHB 2002/2 (Ergin Nomer'e Armağan), p. 39-74 ; Çelikel Aysel: "Türk Milletlerarası Özel Hukukunda Atıf Prensibinin Uygulanması", MHB, 83/2, s. 1-4.

9) Ekşi Nuray, Yargıtay Kararları Işığında Milletlerarası Miras Hukuku, İstanbul, 2013, p.82 vd.

10) Çelikel Aysel /Erdem Bahadır, Milletlerarası Özel Hukuku, 2014, p.127 vd.

11) Çelikel Aysel /Erdem Bahadır, Milletlerarası Özel Hukuku, 2014, p.127 vd.

12) See preface paragraph 82 and 83 of the Regulation.

well for the application of this regulation. Because this regulation will apply only to the succession of persons' who die on or after 17th of August 2015.

Moreover if the deceased had chosen the law applicable to his succession **prior to 17th of August 2015**, then this choice would be valid in case of:

1) if it meets the conditions laid down for the applicable law to succession (art 20-38) or

2) if it is valid in application of the rules of private international law which were in force at the time the choice was made in the State in which the deceased had his habitual residence or

3) in any of the States whose nationality he possessed.

3. Although Turkish PIL doesn't consider the **"**manifestly more closely connected law" as a governing law to succession, Regulation does. So that Turkish Courts will have to consider "the manifestly more closely connected law" as a law due to the provision art 21/2 of the regulation. Article 21/2 states that: if it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the law of the habitual residence of the deceased, then the law applicable to the succession shall be the law of that other State.

4. Although Turkish PIL doesn't consider the **"**choice of law" as a governing law to succession, Regulation does.

Regulation considers party autonomy in applicable law to succession matters. So we can say that the general rule as "law of habitual residence of the deceased" can be overridden by the "party autonomy" due to the choice of the deceased. This concept is also new to some of the EU countries such as Germany or Austria.

In Turkish law, choice of law was not granted as an applicable law to succession whereas art 22 of the Regulation gives this option. According to the provision: a person may choose as the law to govern his succession as a whole either the law of the State whose nationality he possesses at the time of making his choice or the law of the State whose nationality he possesses at the time of his death.

So a legator could choose his/her nationality at the time making of his/her choice or at the time of death as a governing law to succession

considering for both movables and immovables. But this choice of law will have no effect for the immovables located in Turkey.

Besides if a person possessing multiple nationalities, then he may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of his death.

So Turkish court will have to examine whether a deceased has made a choice of law for his succession if the deceased is EU citizen. But if the deceased has more than one nationalities while having one of them is Turkish, then Turkish Courts will have to consider only Turkish nationality due to the mandatory rule of article 4/b in Turkish PIL.

5. Art 22 of the Regulation stipulates making choice of law expressly as an applicable law for disposition of property.

The choice of law for disposition of property must be made either expressly by a declaration in the form of a disposition of property upon death or by the terms of a disposition. So such kind of choice of law can be made separately either by a declaration or by the terms of disposition.

Regarding to this provision, if the deceased is an EU citizen having movables in or outside Turkey, then he can make choice of law for the disposition of that property in Turkish Courts. Whereas foreigners in Turkey rather than EU nationals couldn't benefit from this choice because art. 20 didn't grant any choice of law for the disposition of property due to making reference to the national law of the deceased.

6. Applicable law for succession will also govern the causes, time and place of the opening of succession due to Art. 23 of the Regulation.

Unfortunately, this provision of the regulation will not be considered in Turkish courts due to the provision of art 20/2 in Turkish PIL. Because according to Turkish PIL (art 20/2) grounds for the opening of succession or to its acquisition and its partition will all be governed by the law of the country of estate. Probably cause of succession are similar in all European countries which are death, declaration of disappearance or presumption of death. However imprisonment for life is not a factor for cause of a succession in Turkish substantive law.

According to EU regulation, the applicable law shall govern in particular for the causes, time and place of the opening of the succession. This law can be the choice of law made expressly by the deceased depending on his nationality.

However Turkish law differs from this policy and considers the law of the state of estate where it is located for the causes, time and opening of the succession. Nevertheless, statutory heirs, legal portion of heirs, percentage of disposable portion, reasons for disinheritance are subject to the governing law of succession.

7. Testamentary contracts are also considered in the context of Regulation (art.25). The capacity to make them are subjected to the governing law of the succession.

Whereas in Turkish law, testamentary capacity is governed by the national law of the person making the disposition at the time of disposition. So Turkish courts will have to consider Regulation provisions whenever there is a conflict on testamentary capacity. Because renvoi is accepted in Turkish PIL art. 2/3 stating that conflict of rules of the applicable foreign law shall be taken into account only with regard to disputes pertaining to the law of persons and family law.

While considering the capacity to make testamentary contracts one must also take into account whether or not renvoi is applied. Regulation considers renvoi but excludes for applicable law regarding to article 34. So that the capacity to make testamentary contracts are regulated in art 25 which are subject to the use of renvoi. Because Art. 34/2 reads that "No *renvoi* shall apply with respect to the laws referred to in Article 21(2), Article 22, Article 27, point (b) of Article 28 and Article 30."

8. According to the EU Regulation, acceptance of inheritance or disclaimer of inheritance will be subject to the governing law of succession which will differ depending whether there was a choice or not. If there was a choice of law, then the law of the State whose nationality he possesses at the time of making his choice or at the time of death will apply. On the other hand, if there wasn't any choice then the law of the State in which the deceased had his habitual residence at the time of death would be the governing law to decide acceptance or disclaimer of inheritance.

But Turkish PIL differs from this approach, providing that acceptance or disclaimer of inheritance will be subject to the governing law of the estate where it is located[13]. We are in the same opinion because in Turkish civil law, unless the inheritance is not in debt, successors have a unity succession right on the estates legally.

13) Nomer Ergin, Devletler Hususi Hukuku, 21. Bası, 2015, p.290; Tanlý Cemal, Milletlerarasý Özel Hukuk,2014, p.213.

But some of the Turkish doctrines[14] have opposite views by considering this issue in the concept of succession status.

9. Article 30 of Regulation considers the mandatory rules of the law of the states for certain immovable property or certain enterprises where they are located. These special rules will be applied to the succession due to their economic, family or special structure whether or not they are compatible with the applicable law to succession.

This consideration is important for EU courts whereas Turkish courts will only consider overriding mandatory rules in contractual relationships. So Turkish courts will not be bound with the third countries' mandatory rules in inheritance cases compared to EU Regulation.

According to article 31 of Turkish PIL, overriding mandatory rules of a third country may be given effect in the case where these rules are closely connected with a contract. Courts must consider the purpose, nature, content and consequences of these rules while giving effect to apply or not.

III. Effects of European Certificate of Succession (ECS) in Turkish Courts

According to Article 62 of the Regulation, the use of the ECS is optional and it should not be a substitute for existing national certificates.

Article 62 regulates the creation of a European Certificate of Succession which will be issued for use in another Member State. It will produce the effects listed in Article 69.

According to art. 64, the issuing authority can either be a competent court of a member state or another authority having competence to deal with matters of succession under its national law.

If the European certificate is issued by a competent authority rather than a Court of Member State, then it will not be recognized or enforced in Turkish courts. Because according to article 50 of Turkish PIL, only the foreign court judgments (by keeping the provisions of international conventions reserved) pertaining in civil suits are subject to recognition and enforcement. Besides judgments having become final are subject to the enforcement or recognition.

European certificate on succession is not a kind of court order. It is just issued by a court or a competent authority showing that, which

14) See Tekinalp Gülören /Çavuşoğlu Uyanık Ayfer, Milletlerarası Özel Hukuk Bağlama Kuralları, Istanbul, 2011, p.297.

law is applied to succession, whether the succession is testate or intestate, what are the basis of the rights or powers of the heirs, legatees, executors of wills or administrators of the estate, what are the shares and rights for each heir and their rights on assets, what are the rights of a legatee and his rights on assets and what are the restrictions on the rights of heirs.

In order to give a legal effect to this certificate we must look at its contents. Its contents are listed in art 68. The certificate lists a) the law applied to succession b) information as to whether the succession is testate or intestate, including information concerning the elements giving rise to the rights and/or powers of the heirs, legatees, executors of wills or administrators of the estate c) information in respect of each beneficiary concerning the nature of the acceptance or waiver of the succession d) the share for each heir and, if applicable, the list of rights and/or assets for any given heir e) the list of rights and/or assets for any given legatee f) the restrictions on the rights of the heir and, as appropriate, legatee under the law applicable to the succession and/or under the disposition of property upon death.

According to art. 69/5 Certificate constitutes a valid document for the recording of succession property in the relevant register of a Member State, without prejudice to rights in rem and recordings in a register of rights in immovable or movable property.

The certificate has a detailed information on succession. But whenever the certificate is submitted to the Turkish court for consideration then Turkish court will first examine whether it's a court order or not. Certificates issued by an administrative body can not be claimed for recognition or enforcement. Besides Turkish courts rejects recognition of foreign certificates on succession given by foreign courts due to not being a final award[15].

ECS can only be taken into account for the movables located in or outside Turkey. For the immovables in Turkey ECS couldn't be taken into account. Because ECS is not a final award that settles the dispute definitely. For these reasons ECS could only be considered as a discretionary proof in Turkish courts. But if the ECS is given litigiously rather than voluntarily jurisdiction, then this kind of ECS will be recognized

15) Şanlı Cemal/Esen Emre/Ataman-Figanmeşe İnci, Milletlerarası Özel Hukuk, İstanbul, 2015, 4.Edt, p.487.

or enforced in Turkey due to being a final award[16].

In our opinion, ECS will be considered as a proof showing the relative relationship (either by collateral kin or relative by marriage) of the deceased in Turkish Courts.

Certificates issued by foreign administrative authorities can only produce evidentiary effects in Turkey if they are dully legalized by Turkish consulate or have given an apostille paraphrase (ECS) itself according to the provisions of the convention on Abolishing the Requirement of Legalisation for Foreign Public Documents[17].

Regarding to the succession certificates, German courts have taken into account Turkish Succession Certificates and gave them legal effect due to the article 17 of the bilateral agreement just for the movables of the deceased. So that they were still taken into account as a final evidence rather than discretionary proof in German Courts for the movables of the deceased having Turkish nationality.

Although there was a bilateral agreement on succession matters between Turkey and Germany which is signed on the 28th of May in 1929 and published in the official gazette of Turkey on the 8th of June 1930, Turkish courts do not recognize German succession certificates due to not being final award. Because according to article 50 of Turkish PIL, foreign court judgments pertaining to civil status and having become final under the laws of that state are subject to enforcement[18]. So that the provision of art. 17 is not considered as a granting right for recognition of German Succession Certificates in Turkish Court's practice. But as we mentioned before, they can be considered as a documentary evidence showing the relationship between the heirs and the deceased

16) Nomer Ergin, Yabancı Veraset İlamlarının Tanınmasında Yargıtay Kararları, İstanbul Barosu Dergisi, 1991, Cilt 65, Sayı 10-11-12. ; Şanlı Cemal, Yabancı Veraset İlamlarının Türk Mahkemelerinde Tanınması veya Delil Olarak Kullanılması, İlhan Postacıoğluna Armağan, İstanbul, 1990, p.296 vd.

17) Ekşi Nuray, Comparison of Article 20 and 43 of the Turkish Private International Law and Procedural Law Act (PILA) with the EU Succession Regulation, Turkish and EU Private International Law –A Comparison- Edited by Paul Beaumont, Burcu Yüksel, İstanbul, 2014, p.151.

18) Çelikel Aysel/Erdem Bahadır, Milletlerarası Özel Hukuk, 13. Edt, Istanbul,2014,p.620. .012, Netherland, Nomer Ergin/ Boztosun Odman Ayşe, Private International Law, Wolters Kluwer, family law.2, Netherland, Nomer Ergin/ Boztosun Odman Ayşe, Private International Law, Wolters Kluwer, family law.

on the movables of the estate unless they are not rebutted[19].

Moreover Turkish appeal court is also in the same opinion and refuses the recognition of foreign succession certificates due not being final award of the court. In one of the decision of the Turkish Appeal Court, it was stated that, although there was a bilateral agreement on judicial assistance between Turkey and Albania, succession certificate drafted by an Albanian authorities could not be considered as an award due to not being final[20].

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19) Turkish doctrine interprets art 17 of the agreement as it was explained. See: Ergin Nomer,Devletler Hususi Hukuku, 21. Bası, 2015,539; for more information see also Hilmar Krüger, Studien über Probleme des türkischen internationalen Erbrechts: Festschrift/Liber Amicorum in Honour of Tuğrul Ansay, 2006, p.158.

20) See. 2nd Circuit of Appeal Court 21.12.2004 E.2004/13533 K. 2004/15443) (Published in Yargıtay Kararları Dergisi, Cilt 31, Sayı 2, Şubat 2005, p.181.

ABSTRACT

European Union adopted a new Regulation on Succession in 2012 whereas all of its provisions have been in force since August 17th, 2015. This regulation is also called the Rome IV Regulation. In addition to considering jurisdiction, applicable law, recognition and enforcement of authentic instruments in matters of succession, Regulation No 650/2012 also takes into account the creation of a European certificate of succession. Some of the provisions of the Regulation will have possible impacts on Turkish Private International Law. So in this paper we will examine these impacts in three main groups.

Keywords: EU Succession Regulation; Turkish Private International Law; European certificate of succession.

MOGUĆI UTICAJI EU UREDBE O NASLJEĐIVANJU BR. 650/2012 NA TURSKO MEĐUNARODNO PRIVATNO PRAVO

SAŽETAK

Evropska unija je 2012. godine usvojila novu Uredbu o nasljeđivanju, čije su odredbe stupile na snagu 17. augusta 2015. godine. Ova uredba se također naziva i Uredba Rim IV. Pored toga što razmatra nadležnost, mjerodavno pravo, priznanje i izvršenje autentičnih isprava u oblasti nasljeđivanja, Uredba br. 650/2012 također obuhvata i stvaranje evropske potvrde o nasljeđivanju. Neke odredbe Uredbe će imati mogući uticaj na tursko međunarodno privatno pravo. Zbog toga ćemo u ovom radu ispitati takve moguće uticaje u okviru tri glavne grupe.

Ključne riječi: EU Uredba o nasljeđivanju; tursko međunarodno privatno pravo; Evropska potvrda o nasljeđivanju.