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EUROPEAN CERTIFICATE OF SUCCESSION – WAS THERE A NEED FOR A EUROPEAN INTERVENTION?

1. INTRODUCTION

Freedom of movement within the European Union creates numerous cross-border implications as increasing numbers of people are moving from one Member State to another due to work or pension, resulting in EU citizens owning assets in various Member States.¹ Due to various national legislations regarding succession, matters of succession with cross-border implications are very complex.

With a view to harmonising the rules on international private law, the European Parliament and the Council, on 4 July 2012, adopted Regulation No. 650/2012 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 (hereinafter ‘the Regulation on Succession’²).³

The idea of a broad ratification of the Hague conventions⁴ did not

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1) The Commission, in their Impact Assessment regarding the Regulation on Succession, emphasised that around 4.5 million people die each year in the EU and that it can also be reasonably assumed that around 9-10% of the total number of successions (ca. 450,000) involves an ‘international’ dimension. Impact Assessment, SEC (2009) 411, p. 5. Available at: <http://register.consilium.europa.eu/pdf/en/09/st14/st14722-ad02.en09.pdf>.

2) OJ L 201, 27.2.2012.

3) United Kingdom, Ireland and Denmark do not participate in the Regulation and are, therefore, not bound by it.

4) At international level, there are three Hague Conventions on succession and wills, as well as another on trusts: The Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions (entered into force in 1964). Parties to the Convention are Austria, Belgium, Denmark, Estonia, Finland, France, Greece, Luxembourg, Germany and Spain. The Convention has also come into force in other Member States, such as the Netherlands, the United Kingdom and Sweden (ratifications), Ireland and Poland (accessions) and Slovenia (as a successor of the former Yugoslavia). The Convention concerning the International Administration of the Estates of Deceased Persons (entered into force on 1 July 1993) has come into force in Portugal (ratification), the Slovak Republic and the Czech Republic. The Convention on the Law applicable to Succession to the Estates of Deceased Persons (concluded

succeed. The attempt to harmonise the European law of succession began as early as 1998 when the Vienna Action Plan was adopted (COM(98) 459 final).⁵ The next step was the adoption of the Green Paper on Succession and Wills (COM(2005) 65) which recognised the need to adopt an EU Regulation on jurisdiction, applicable law and recognition of not only judicial decisions but also administrative decisions and instruments regarding succession and wills which would also apply when the international component of the succession involves a non-EU country. The Commission adopted the Proposal for a Regulation on Succession in 2009, which initially carried a different⁶ heading (Proposal for a Regulation 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).⁷ Conciliations ensued, because the Regulation was adopted under an ordinary legislative procedure which requires the Council to decide by a

on 1 August 1989, not yet in force but already ratified by the Netherlands); The Convention on the Law applicable to Trusts and on their Recognition (entered into force on 1 January 1992), parties to the Convention are Italy and Luxembourg. The Convention has also come into force in other Member States, such as the Netherlands, the United Kingdom (ratifications) and Malta (accession).

5) 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; *Rabel Journal of Comparative and International Private Law (RabelsZ)*, Vol. 74, No. 3, pp. 522-720, July 2010, Max Planck Private Law Research Paper No. 10/2, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1594189.

6) The final version of the Regulation relates to acceptance and enforceability of authentic instruments, while the proposal referred to recognition and enforceability of instruments. The difference relates to the current Article 59 of the Regulation on Succession and Article 34 of the 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 (the proposed Article 34 envisaged recognition of authentic instruments). The Max Planck Institute research group, in their commentary to Article 34 of the Proposal, emphasised that in the Member States authentic instruments are drawn up by various authorities, which would cause problems for the authority recognising an authentic instrument in establishing its authenticity and confirming that a competent authority issued the said instrument. By contrast to judicial decisions which can have an effect of *res iudicata*, authentic instruments drawn up by a notary are subject to the applicable law. For further details see 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, *RabelsZ*, ps. 670-671. Under Slovenian law, not even directly enforceable notarial records have an effect of *res iudicata*, they are only enforceable subject to conditions.

7) COM(2009) 154 final, 14 October 2009.

qualified majority and a measure can only be adopted if the Council and the Parliament agree.⁸

The Regulation on Succession lays down provisions on jurisdiction, applicable law, recognition and enforcement of decisions. In all Member States acceptance and enforcement of authentic instruments issued in matters of succession relates to both the evidentiary effect of the instrument as well as the adoption of an autonomous concept of the authenticity of an authentic instrument, covering elements such as the genuineness of the instrument, the formal prerequisites of the instrument, the powers of the authority drawing up the instrument and the procedure under which the instrument is drawn up. The adopted Regulation is, therefore, a measure aimed at ensuring the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction.⁹ The EU's legislative power is based on Article 81 of the Treaty on the functioning of the EU (TFEU). In accordance with the preamble to the Regulation on Succession (Recital 67), the Regulation provided for the creation of a new institute of a uniform certificate, the European Certificate of Succession (hereinafter the ECS), with the aim of ensuring speedily, smoothly and efficiently that in a matter of succession with cross-border implications the heirs, legatees, executors of the will or administrators of the estate would be able to demonstrate easily their status and/or rights in another Member State.

In order to identify the objectives of the ESC and the new principles the Regulation introduces, we will analyse the practical aspects of the instrument, starting with the following case:

The deceased was a Slovenian citizen with his last habitual residence in Croatia. At the time of his death he owned immovable and movable property in Slovenia and in Croatia, and the heirs live in several countries. The deceased died without a will.

In Slovenia, probate proceedings are non-contentious, although a new Succession Act has been in preparation for some time now in accordance with which the competence for uncontested matters would be

8) The EU's Regulation on Succession – Report with Evidence, European Union Committee, 6th Report of Succession 2009–10, House of Lords, 2010. Available at: http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/united_kingdom/2009/com20090154/com20090154_lords_opinion_en.pdf.

9) The Member States have three years from the day the Regulation was adopted to verify if their national legislation conforms to the Regulation, because direct application applies to succession of persons who die on or after 17 August 2015.

transferred to notaries, similar to the Croatian legislation.

International jurisdiction relates to the question of which state should process a probate case with an international element, and is regulated by Private International Law and Procedure Act¹⁰ (hereinafter: PILPA) if the Regulation on Succession or EU treaties do not apply. Despite the fact that under the Slovenian law the succession follows the principle of universal succession, movable and immovable property should be considered separately when dealing with matters having an international element.

Slovenian PILPA provides for a combination of citizenship and location of assets in the country as connecting factors for determining international jurisdiction. If the immovable estate of a deceased Slovenian citizen is abroad, then a court in the Republic of Slovenia has jurisdiction only if, under the laws of the country where the estate of the deceased is located, the authorities of such country do not have jurisdiction. A court in the Republic of Slovenia also has jurisdiction in probate proceedings involving movable property of a deceased Slovenian citizen if the estate is located on the territory of the Republic of Slovenia or if under the laws of the country where the estate is located an authority of such country is not competent or decides not to conduct proceedings (Article 79 of PILPA).

Under the Slovenian law, district courts have jurisdiction to decide in probate proceedings as courts of first instance and higher courts have appellate jurisdiction.

The Slovenian PILPA lays down that the law applicable to succession is the law of the state of which the deceased has had citizenship at the time of their death.

In the aforementioned case, the Slovenian court would decide in probate proceedings regarding movable and immovable property located in Slovenia, while a Croatian notary, as a person authorised by the court, would render a decision regarding the immovable property located in Croatia. The heirs would receive two separate decisions.

Substantive law of the country of which the deceased has had citizenship apply to probate proceedings.

Under the Slovenian Succession Act, Slovenian courts do not have

10) Zakon o mednarodnem zasebnem pravu in postopku, the Official Gazette of the Republic of Slovenia, Nos. 56/99 and 45/08 – ZArbit.

jurisdiction to decide on the succession of immovable property located in Croatia, therefore, the courts do not have the obligation to render such a decision or include it in their decree.

Regulation (EU) No. 650/2012 regulates such situations and provides solutions at the European level, seeing that national certificates of succession issued in one Member State are not recognized in another. The main reason lies in the fact that the effects of national certificates are not unified at the European level, meaning that when individuals or competent authorities are presented with national certificates they are not familiar with the value that may be attached to such certificate. If a Slovenian bank is presented with a foreign certificate of succession, it may not know the legal nature and effects of the submitted document. Consequently, the bank would not be able to verify if the payment was transferred to the real heir. In practice, individuals or entities presented with such certificates do not know what value they can attach to the document. The bank would, therefore, most probably ask for additional evidence to ensure that the payment is made to the real heir. Thus, a certificate of succession issued under national law does not have the legal and practical effects intended if used abroad; it would normally be downgraded to a simple piece of evidence, which can be useful, but is generally not sufficient to prove the quality of being an heir.

Hereinafter we will try to clarify the most important aspects of the European Certificate of Succession, analysing the articles from the European Regulation on which it is based.

1. Historical background

If we look at the historical background of the idea of ECS, we must mention the following EU documents, namely:

1. The Vienna Action Plan (1998):
2. The Hague Programme (2001)
3. The Green paper: Succession and wills (2005)
4. The Proposal for Regulation (2009)

A model for the ECS was first established by the 1973 Hague Convention concerning the international administration of the estates of deceased persons¹¹, but the said convention has come into effect in three

11) According to the articles of the Hague Convention, the aim of the certificate was to designate the person or persons entitled to administer the movable estate of a deceased person

Member States.¹² The problem of the Convention was also the absence of uniform provisions on the conflict of laws in respect of the applicable law regarding the succession of decedents' estates.

The 1998 Vienna Action Plan¹³ had already given priority to the adoption of a European instrument in the area of successions.¹⁴ Furthermore, the Hague Programme 2001¹⁵ suggested the inclusion of the content of such instrument in an extended regulation regarding international jurisdiction, recognition and enforcement of judgments relating to the dissolution of rights in property arising out of a matrimonial relationship, to property consequences of the separation of unmarried couples and to succession. Subsequently, the 2004 Hague Programme¹⁶ for strengthening freedom, security and justice in the European Union proposed the preparation of a Green Paper in 2005 on conflict of laws, procedural rules and cooperation of authorities.

The Green Paper: Succession and Wills¹⁷ expressed the possibility of submitting a legislative proposal with an ambitious objective that has not been achieved in substance and in time. However, it contains commendable challenges, such as:

- abolishing exequatur for the recognition of judgments in matters concerning succession and establishing automatic registration of judgments in the property registers,
- promoting the evidence of status as heir by using the European certificate of inheritance so that they can assert their rights and take possession of the property,
- establishing a registration of wills in the European Union which is easy to access, and

and to indicate their powers (Article 1 of the Hague Convention 1973).

12) 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* 74 (2010) issue 3), p. 4.

13) OJ C 19, 23.1.1999.

14) Proposal for a Regulation 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, COM(2009)154 final, p. 2.

15) OJ C 12 of 15.1.2001.

16) OJ C 53, 3.3.2005, see also Presidency Conclusions – Brussels, 4/5 November 2004.

17) Brussels, 01.03.2005 COM(2005) 65 final.

- abolishing formalities for the legalisation or endorsement (apostille) of succession-related public documents issued in a Member State.

The Proposal for a Regulation 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 was published on 14 October 2009. In 2010 the Max Planck Institute for Comparative and International Private Law published a voluminous commentary on the Proposal. The commentary contains detailed explanations of each article as well as proposals for modifications and additions to the proposal. In its commentary, the Institute has welcomed the idea of an ESC but also addressed some inconsistencies.¹⁸

2. Characteristics and purpose of ECS

Generally speaking, the ECS enables heirs, legatees, executors and administrators to speedily, smoothly and efficiently demonstrate their status, rights and powers. The rules on ECS are a mixture of Private International Law, International Civil Procedure and substantive private law. The rules on ECS are very particular and in our view, it cannot be compared to anything we have seen at the European level so far.

Under the Regulation on Succession, the ECS is not mandatory (Article 62(2)) and it can be used both abroad and in the country where it was issued. However, the ECS is created mainly for situations with an international element where it is important to have a document showing who are the heirs of the estate of the deceased and other beneficiaries, and which is issued in one Member State and recognised in another. Despite the fact that the ECS does not abolish the national certificates, the use of national systems of succession and their international effects depend on the application of the rules on recognition and enforcement of decisions (Chapter IV of the Regulation on Succession) or the rules on authentic instruments and court settlement (Chapter V of the Regulation on Succession).

¹⁸) For example: in the commentary, there is a proposal for an electronic register of certificates of succession, which would ensure that the presentee presented with a copy of the Certificate of Succession has the opportunity to check whether the certificate in their hands still corresponds to the original certificate; there is a lack of rules resolving the relationship between the European Certificate of Succession and the national certificates. 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, pp. 119-120.

However, national certificates of succession issued in one Member State are, in most cases, not recognised in other Member States. One main reason is that the legal nature, as well as the conditions and effects of such certificates, vary greatly. Additionally, national certificates of succession are closely connected to the method of acquiring property upon death as foreseen by the substantive law of the respective Member State.

In a comparative overview, there are various types of certificates in the Member States which depend on the issuing authority: judicial certificates, certificates issued by notaries and private affirmations.¹⁹ Judicial certificates are issued, for instance, in Germany and Slovenia. In Germany, a special judicial certificate of succession (*Erbschein*) names the heirs and their respective shares and protects third parties by a rebuttable presumption that the persons named in the certificate as heirs are the true heirs. In Slovenia, the courts commence probate proceedings of their own motion if an estate consists of immovable property. The court issues a decision on succession in a form of a decree. Such decision is a title for heirs and other entitled individuals to assert their rights. In case the succession consists only of movable property, the court terminates probate proceedings and the hearing takes place only by motion of a heir.²⁰

Most other countries do not use judicial certificates of succession. In the systems where notaries are the issuing authority, they have a different role – the court may authorise a notary to perform a certain action or the authorisation is foreseen in the national law.²¹ The notary may act as a state authority, issuing certificates in probate proceedings which have the same effect as judicial decisions. Such system is implemented in Hungary.²² On the other hand, there are systems where a notary acts as a court authorised body (Croatia, Austria) and may also issue certificates of succession (Croatia).

In France, parties start probate proceedings before a notary, which

19) *Ibid.*, p.118.

20) S. Kraljić, V. Rijavec, Slovenia, (International Encyclopedia of Laws, Suppl. 68 (2014)). Alphen aan den Rijn: Wolters Kluwer Law & Business: Kluwer Law International, cop. 2014. p. 191.

21) K. Zupančič, V. Žnidaršič Skubic, *Dedno pravo*, Uradni list Republike Slovenije, Ljubljana 2009, pp. 270–271.

22) V. Rijavec, *Urejanje dednih zadev – prenos pristojnosti na notarje*, Pravna praksa, No. 13/2000, attachment.

issues a notarial certificate of succession. However, such certificate does not have the same effect as judicial decisions and does not become final.²³

There are some countries, like Italy, where the law does not provide for a general certificate of succession.²⁴

The Regulation on Succession does not regulate the situation where both ECS and national certificate are issued in the same probate case. ECS does not replace the internal procedures of Member States.²⁵

However, according to Fötschl²⁶, there are three different models that resolve the issue of ‘non-replacement’.²⁷ The first model offers the solution in case the ECS and the national certificate contradict each other. In such situations, the ECS would prevail and override the national certificate. In the second model, both certificates would be equal and the first one issued would be the decisive one. In the third possibility, the author suggests that the ECS and the national certificate should be seen as ‘concentric circles’, where the ECS would ‘embrace the national certificate in a soft and adoptive way’ to form organic entity without internal conflicts.

Furthermore, according to one position²⁸, the national certificate and the ECS should exist alongside each other without one prevailing over the other.

However, the ECS is not a substitute for existing national certificates or procedures, which means that the principle of subsidiarity applies. The ECS will not take the place of internal documents used for similar purposes within the Member States.

In practice, usually the competence to issue the ESC will lie with the courts or notaries of one Member State. As noted above, the relation between the national certificates and the ECS has remained unresolved. One option would be to limit the scope of use of the ESC only to suc-

23) Ibid.

24) Max Planck Comments, p. 119.

25) Recital 27 and Article 36(2) of the Regulation on Succession.

26) A. Fötschl, *The Relationship of the European Certificate of Succession to National Certificates*, (2010) 18 *European Review of Private Law*, Issue 6, pp. 1262.

27) A. Fötschl, *The Relationship of the European Certificate of Succession to National Certificates*, (2010) 18 *European Review of Private Law*, Issue 6, pp. 1260.

28) Rechberger, cited in Reinhartz in U. Bergquist, *EU Regulation on Succession and Wills: Commentary*, Verlag dr. Otto Schmidt, Köln, 2015, p. 250.

cession with a cross-border element, but such option was not implemented in the Regulation on Succession. However, the Regulation on Succession provides that the ECS would also produce effects in MSs whose authorities issued it. The second solution would be to introduce an electronic register of certificates of succession. Such option was proposed by Max Planck but was never adopted by the valid Regulation on Succession.²⁹

In their commentary³⁰, the experts at the Max Planck Institute pointed out that if in practice two or more certificates of succession would exist, such case would usually be due to a mistake made by one of the courts. Under the Regulation on Succession, the jurisdiction to issue a certificate of succession (a European or a national one) lies with the courts of one single Member State. The rules on jurisdiction regarding the European Certificate are included in Chapter II of the Regulation on Succession, which directly applies to the issue of a national certificate of succession. In accordance with the aforementioned rules, generally, only the courts of a single Member State have jurisdiction.

But nevertheless, there can be exceptional cases where more than one court would declare jurisdiction, which would mainly be due to a different interpretation of habitual residence.³¹ However, such situations can be resolved with rules on *lis pendens* (Article 17 of the Regulation on Succession) in accordance with which other courts than the court that first seized would of their own motion stay their proceedings until jurisdiction is established.

The ECS does not replace existing certificates and in Member State of the competent authority, the capacity of an heir and the powers of an administrator or executor of the estate must therefore be proven in accordance with the domestic procedure.

In the event that several ESCs are in existence, special rules on rectification, modification and withdrawal of certificate apply (Article 71 of the Regulation on Succession). The issuing authority has jurisdiction to rectify material errors or modify or withdraw the ESC because of inac-

29) The proposal included a model according to which the main function of an electronic register would be to coordinate the activities of the courts in various Member States. Additionally, every ECS would be accessible online via a personal reference code provided to persons having a legitimate interest, and allowing for a checking of the validity of a copy of the certificate and making a bona fide function of the copies. See Max Planck report, p. 120.

30) *Ibid.*, p.139.

31) There is no definition of habitual residence in the Regulation on Succession.

curate elements. The issuing authority is obligated to notify all persons to whom the certified copies have been issued.

4. Procedure for issuing an ECS

4.1. Competence and beneficiaries

The Regulation on Succession lays down who may apply for an ECS (Article 63(1) of the Regulation on Succession). In accordance with the said Article, the list is exhaustive and relates to the persons who have direct rights to the estate of the deceased. The circle of beneficiaries includes heirs, legatees and executors or administrators of the estate who 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. This means that creditors are not eligible to apply for an ECS.

As the ESC is optional, the applicant may choose to apply for the national or the European certificate. However, Article 62(2) of the Regulation lays down that ‘[t]he Certificate shall not take the place of internal documents used for similar purposes in the Member States’ (see also Recital 67).

Only authorities of one Member State have the right to issue an ECS and their competence is limited to those authorities who have jurisdiction to decide on succession in accordance with Articles 4 (general jurisdiction), 7 (Jurisdiction in the event of a choice of law), 10 (subsidiary jurisdiction) or 11 (*forum necessitates*).

Thus, generally, the authorities of the Member State in which the deceased has had habitual residence at the time of death have jurisdiction also for issuing the European Certificate of Succession (Articles 4 and 64). If the deceased had chosen the law of another Member State (not the MS of their last habitual residence), the courts of such Member State have jurisdiction under Article 7. Also, subsidiary jurisdiction under Article 10 applies (location of the assets), where the habitual residence of the deceased was not in the Member State. In exceptional cases, *forum necessitates* under Article 11 may apply, in particular if it would be impossible to get a Certificate otherwise.³²

The authority to issue an ECS should be determined by national legislation (Recital 70 of the Regulation on Succession). In accordance

32) C. Hertel, European Certificate of Succession—content, issue and effects, ERA Forum (2014), p. 398.

with the definition of the ‘court’, the term does not cover only courts but other authorities as well, including notaries if their decisions are subject to appeal and have the same effect as judicial decisions (Article 3(h) of the Regulation on Succession). Member States must communicate the competent authority to the Commission by November 2014 (Article 78(1)). Most Member States will probably designate the authorities that are also competent to issue national certificates of succession.

Under Article 63(2), the Certificate may be used in particular to prove (a) the status of an heir or other beneficiary of the estate (and their respective shares of the estate), (b) the attribution of a specific asset to the heir or the legatee, and (c) the powers to execute the will or administer the estate in another Member State. Therefore, the persons entitled to apply for an ESC are heirs, legatees, executors and administrators.

For the purposes of submitting an application, the Regulation on Succession anticipates the use of forms, however, their use is not mandatory (Article 65(2)).³³

The Regulation defines the requirements for issuing an ESC. Subject to the purpose for which an ESC would be issued, the application should contain relevant information.

The applicant has to provide the competent court with all the relevant facts they are aware of; the required information corresponds to what is required by the applicable law. Information required to be given by the applicant relates to the following: (a) details concerning the deceased, (b) details concerning the applicant (c) and, if applicable, their representative, (d) details of the spouse of the deceased, (e) details of other possible beneficiaries, (f) the intended purpose of the Certificate, (g) the contact details of the court considering succession, (h) the elements on which the applicant bases their claimed right to succession, (i) an indication of dispositions *mortis causa* made by the deceased, (j) an indication of a marriage contract of the deceased, (k) an indication of whether the beneficiaries have accepted or waived their rights to succession, (l) a declaration as to whether there is any dispute pending relating to succession and (m) ‘any other information which the

33) The forms to be used for the application for an ECS have been published and are set out in Annex 4 as Form IV. Commission implementing Regulation (EU) No 1329/2014 establishing the Forms referred to in Regulation (EU) No 650/2012 of the European Parliament and of the Council 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, O J L 359/30.

applicant deems useful for the purposes of the issue of the Certificate' (Article 65(3) of the Regulation on Succession). The aforementioned list contains all information that may be relevant under the law of any Member State. However, the applicant must indicate which information they want to be included in the ECS.³⁴

Application must be accompanied by relevant documents either in the original or by way of copies.

In general, documents in original or copy constitute necessary and sufficient proof for the accuracy of the application requirements (in the proposal, the Article laid down the obligation to attach authentic documents).

Where the required document can only be produced with disproportionate difficulties or not at all, reference to the *lex fori* is a subsidiary solution. The same applies to the discretion the competent court is granted by Article 66 in terms of taking the appropriate measures to vet the veracity of the applicant's declarations, including the request of making the declarations on oath if provided for under the *lex fori* or other forms of evidence.

4.2. Examination of the application

The Regulation provides rules for examining information provided by the applicant. During the proceedings, the issuing authority has to verify information given by the applicant. The authority may inspect information and documents either by carrying out enquiries of its own motion or by inviting the applicant to provide further evidence (Article 66(1)).

Documents relevant to prove the application should, if possible, 'satisfy the conditions necessary to establish their authenticity' in the situations where applicant was unable to produce copies of relevant documents. The authority has the discretion to accept other forms of evidence (Article 66(2)). If possible, the issuing authority may require that declarations be made on oath or by a statutory declaration in lieu of an oath (Article 66(3)). The stated means that an authority must follow national rules regarding the establishment of facts in the proceedings.

The issuing authority must take all steps necessary to inform all

³⁴ Reinhartz in U. Bergquist, EU Regulation on Succession and Wills: Commentary, Verlag dr. Otto Schmidt, Köln, 2015, p. 258.

beneficiaries of the application.³⁵ The Max Planck researchers welcomed such obligation with the argument that it would enable all beneficiaries to join the proceedings and introduce relevant information.³⁶ Furthermore, where an ECS certifies a false legal status in spite of such procedure of examination, informing the same individuals of the issue enables them to challenge it as soon as possible. The third situation likely to occur is when the notice of the application has not reached the addressee; any subsequent information about the issue of the Certificate gives such persons, potentially entitled to the succession, a second chance to draw their attention to their rights and the situation.³⁷

If such is necessary for the establishment of the elements to be certified, the authority may hear any person involved (Article 66(4)).

Article 66(5) enables a competent authority in one Member State to request from the authorities of another to provide it with documents and information (concerning, in particular, land registers, civil status registers and registers recording documents and facts of relevance for the succession or for the matrimonial property regime or an equivalent property regime of the deceased) which, under the national legislation, they would also provide to an issuing authority in their own Member State. For the circulation of such documents no legalisation or other similar formalities are required (Article 74 of the Regulation on Succession).

4.3. Issuing the ECS

The ECS must be issued in a form required by Article 67(1) of the Regulation on Succession. Contrary to the use of forms for filing an application for an ECS, which is not mandatory, the aforementioned forms are obligatory when issuing an ECS. The use of forms helps to overcome language barriers within the EU. However, the standardised form fails to serve this function when the Certificate contains additional and specific information, e.g. on restrictions on the certified rights pursuant to Article 68(n). The Regulation on Succession does not provide any rules on translation in Chapter VI. Under the Regulation, the ECS constitutes grounds for entering the inherited property in public registers, therefore, the requirements for translation should be left to the

35) Such obligation may be relevant in the situation where executor is applying for an ECS. The ECS may in such case show only rights and duties of the applicant, whereas the heir may request that their rights should also be noted in the ECS. *ibid.*, p. 268.

36) Max Planck Comment, p. 128.

37) *Ibid.*

national legislations.

The ECS must be issued without delay once the elements have been established in examination proceedings under the applicable law. The applicant must, therefore, provide information laid down in Article 65 and information that would afterwards be included in the ECS (Article 68 of the Regulation on Succession).

The Regulation on Succession also provides the grounds for not issuing an ECS, namely if:

- a) the elements to be certified are being challenged; or
- b) the ECS would not be in conformity with a decision covering the same elements.

After the issuing proceedings are complete, the issuing authority is obligated to take all the necessary steps to inform the beneficiaries of the issuance of the Certificate (Article 67(2) of the Regulation on Succession) in order to avoid applications for issuing an ECS being filed on the same succession case by other beneficiaries. Other beneficiaries may obtain a certified copy of the ECS (see Article 70 and recital 72 of the Regulation on Succession). If information concerning the rights of the beneficiaries is not included in the ECS, the beneficiary cannot use such ECS.³⁸

5. Content of the ESC (Article 68)

The purpose of the ECS is to prove the entitlement to succession. In order to fulfil its purpose, the ECS must provide as clearly and coherently as possible the persons who are entitled to succession and to what extent.

Considering the list of contents provided by Article 68(a-o) of the Regulation on Succession, an ECS would be a lengthy document. However, an ECS must include only information ‘to the extent required for the purpose for which it is issued’ (the first sentence of Article 68 of the Regulation on Succession).

5.1. List of information to be included in the ECS

The Regulation on Succession lays down all information that an ECS may contain. Such information is part of the form of an ECS that must be used by an issuing authority.

³⁸) Reinhartz in U. Bergquist, EU Regulation on Succession and Wills: Commentary, Verlag dr. Otto Schmidt, Köln, 2015, p. 270.

Similar to every judicial decision or other official document, an ECS must include information on a) the issuing authority, (b) the reference number of the file and (d) the date of issue. Moreover, the Regulation requires also a statement on ‘the elements on the basis of which the issuing authority considers itself competent to issue the Certificate’ (Article 68(c)).

The same article requires that the details concerning the applicant are included in the ECS (Article 68(e) of the Regulation on Succession). Furthermore, the ECS has to state information on the deceased: ‘surname (surname at birth, if applicable), 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’ (Article 68(f) of the Regulation on Succession).

Details concerning beneficiaries relate to information on the heirs or legatees having direct rights in the succession (surname (surname at birth, if applicable), given name(s) and identification number (if applicable) (Article 68(g) of the Regulation on Succession).

The ESC should contain 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 (Article 68(h) of the Regulation on Succession).

The ECS should include an indication of whether the deceased had entered into a marriage contract or into a contract regarding a relationship which may have comparable effects to marriage. The Regulation on Succession excludes from its scope questions relating to matrimonial property regime (see Recital 12 and Article 1(d) of the Regulation on Succession). In general, before the succession is resolved, strictly speaking, the matrimonial property regime between spouses must be resolved first.

In countries with a tradition of Germanic law, the law applicable to the matrimonial status is the law of the common nationality at the time of marriage and by default the law of the domicile. The ESC is supposed to be issued in accordance with the law applicable to the succession and the regulation excludes the law applicable to the matrimonial property in case of death. There are still no common conflict rules adopted in EU. (Proposal for a council regulation on jurisdiction, applicable law

and the recognition and enforcement of decisions in matters of matrimonial property regimes³⁹ has not been adopted yet).

Let us suppose the deceased is survived by a spouse and one child and the law applicable to the succession and to the matrimonial property regime is German law. In accordance with the German law on succession (Sec. 1924, 1931 of the German Civil Code), the respective shares would be $\frac{1}{4}$ for the spouse and $\frac{3}{4}$ for the child. However, the German default provision on matrimonial property in case of death (Sec. 1371(1) of the German Civil Code) provides for an increase of the share of the surviving spouse for another $\frac{1}{4}$ with the result that both the spouse and the only child would inherit a share of $\frac{1}{2}$ each.⁴⁰ If the Regulation on Succession is to be understood in the sense that the ECS is only based on the law applicable to succession and excludes the law applicable to matrimonial property, a German court would have to issue a certificate displaying incorrect shares of the heirs.

In Slovenia: Upon the death of a spouse, the common property is divided equally and the deceased spouse's portion becomes part of their estate. The heirs or the surviving spouse are entitled to request the court to determine a different ratio of shares. After the division has been carried out, the surviving spouse inherits under the first or second order of succession. Under the first order of succession, succession is *per capita* (Article 11 of the Succession Act⁴¹). The surviving spouse inherits along with the children of the deceased and the inheritance is divided into equal shares. If the deceased is not survived by children, their spouse inherits under the second order of succession along with the deceased's parents, i.e., *per partes*, and receives half of the inheritance.⁴²

The situations presented above justify the necessity of the ESC to contain an indication as to the extent to which the rules on a matrimonial property regime have been applied by the court in determining the

39) COM/2011/0126 final.

40) In relation to the presented situation, the theory draws attention to the possibility of the provisions of the German Civil Code Sec. 1371(1) also becoming part of the succession law. If such is true, then information falls under the sub-paragraph (j) and the provision is determined by the law of succession. *Ibid.*, p. 276.

41) Zakon o dedovanju, The Official Gazette of the Republic of Slovenia, Nos. 15/76, 23/78, 13/94 – ZN, 40/94 – decision of the Constitutional Court, 117/00 – decision of the Constitutional Court, 67/01, 83/01 – CO and 31/13 – decision of the Constitutional Court.

42) S. Kraljić, V. Rijavec, Slovenia, (International Encyclopaedia of Laws, Suppl. 68 (2014)). Alphen aan den Rijn: Wolters Kluwer Law & Business: Kluwer Law International, cop. 2014., p. 66.

heirs' shares (Article 68(h) of the Regulation on Succession). Such indication would enable individuals presented with an ECS to determine if and to what extent the certificate is to be recognised (effective) in the respective country. Furthermore, such a content of the ECS would allow the certificate to be effective to the greatest extent possible.

Additionally, Recital 12 provides that '[t]he 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'.

The matrimonial property regime determines the extent of the estate of the deceased. Information regarding the existence of the marriage contracts in the ECS is also important as to the legal effects on the extent of the estate. Namely, in most Member States⁴³ the spouses have the possibility of choosing a matrimonial property regime via a marriage contract.

Applicant also needs to provide information concerning the existence of a partnership or cohabitation contract, if relevant (see Article 65(3)(j) of the Regulation on Succession). The partnership may also be designed for partners of the same sex who are not allowed to marry or who may only register their relationship. It is also possible that the deceased lived with someone and the relationship was not registered at all. Such information is important because of the possible effects that might have on succession.

An ECS must further indicate the law applicable to the succession and the elements on the basis of which such law has been determined (Article 68(i))⁴⁴. For example, habitual residence at the time of death is important or the fact that the deceased has made a choice of law to be applied to succession.

The ECS must include information on whether there is a will or whether the succession would be intestate. Thus, the ECS has to pro-

43) For example: Austria, Belgium, Denmark, France, Germany, Netherlands, Portugal, Spain, Sweden and England. In accordance with the current Marriage and Family Relations Act of the Republic of Slovenia, the spouses may not stipulate a matrimonial property regime that would differ from the statutory community of property regime. Any agreement that determines the shares in the common property of each spouse in advance, or a contract by which a spouse renounces their share, is void.

44) See Chapter III of the Regulation on Succession.

vide information concerning the elements giving rise to the rights and/or powers of the heirs, legatees, executors of wills or administrators of the estate (Article 68 (j) of the Regulation on Succession).

In many Member States the heirs may decide on whether they accept or waive the succession (Article 68(k) of the Regulation on Succession). It is important that such information is included in the ECS, because this may determine the status of other beneficiaries.⁴⁵

The Regulation on Succession also foresees the possibility of including the share of each heir in the ECS and, if applicable, the list of rights and/or assets of any given heir (Article 68(l)). It is important to give details on the assets or rights to which each heir is entitled. In accordance with the already published forms for issuing an ECS, the issuing authority would need to indicate if the heir has acquired the ownership or other rights in the assets. Annex IV (Status and rights of the heirs) anticipates the need for specification of the assets attributed to the heirs. In case of registered assets, there should be information as to the register where assets are registered (the exact address of the immovable property, the land register, plot number, the cadastral number and the description of the property).⁴⁶

The ECS should contain information on the power to dispose of the assets of the estate, namely (Article 68(n)) ‘the restrictions on the rights of the heir(s) and, as appropriate, legatees’ and (Article 68(o)) ‘the powers of the executor of the will and/or administrator of the estate and the restrictions on those powers’.

6. Effects of the ECS

No authority or person presented with an ECS should be entitled to request that a decision, authentic instrument or court settlement be presented instead of the presented ECS. However, the persons entitled to apply for a Certificate should be free to use other instruments available under the Regulation (decisions, authentic instruments and court settlements), because the use of ECS is not mandatory (Recital 69 of the Regulation on Succession).

45)Reinhartz in U. Bergquist, *EU Regulation on Succession and Wills: Commentary*, Verlag dr. Otto Schmidt, Köln, 2015, p. 279.

46) See Implementing Regulation No 1329/2014 establishing the Forms referred to in Regulation (EU) No 650/2012 of the European Parliament and of the Council 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.

The Certificate should produce the same effects in all Member States. However, it should not be an enforceable title in its own right.

Once issued for use in another Member State, the Certificate would also produce the effects listed in Article 69 in the Member State whose authorities issued it. The ECS would be recognised in all Member States without special procedure required.

The purpose of the ECS is to prove easily, on out-of-court grounds, the heir's capacity in the Member State in which the property is located. The ECS does not substantively decide a dispute, rather it gives the presumed heir an authorisation to collect and transfer or dispose of assets abroad. In this way we could say that the ECS does replace all the extraterritorial effects of national certificates or procedures.

The ECS is not an authentic act – meaning that it does not fall under the definition of ‘authentic instrument’, which is a document in a matter of succession formally drawn up or registered as an authentic instrument in a Member State, and the authenticity of which: relates to the signature and the content of the authentic instrument; and has been established by a public authority or other authority empowered for that purpose by the Member State of origin (Article 3(i) Regulation on Succession).

ECS has an evidentiary effect and should be presumed to demonstrate accurately the elements which have been established under the law applicable to succession or under any other law applicable to specific elements. The Regulation on Succession provides that the persons named in the Certificate as the heir, legatee, executor of the will or administrator of the estate would be presumed to have the status mentioned in the Certificate and/or to hold the rights or the powers stated in the Certificate, with no conditions and/or restrictions being attached to those rights or powers other than those stated in the Certificate (Article 69(2) of the Regulation on Succession). This means that the banks would have to accept the ECS as proof that the person submitting the certificate is an heir, as stated in the certificate, and is entitled to withdraw money from a bank account, previously owned by the deceased.⁴⁷

47) The ECS may be rectified, modified or withdrawn. In the event of a clerical error, the person may ask for rectification of the ECS. Additionally, the issuing authority shall, at the request of any person demonstrating a legitimate interest or, where such is possible under national law, of its own motion, modify or withdraw the Certificate where it has been established that the Certificate or individual elements thereof are not accurate (Article 71 of the Regulation on Succession).

6.1. Good faith

Any person who makes payments or transfers the succession property to a person indicated in the ECS as being entitled to accept such payment or property as an heir or legatee should be afforded appropriate protection if they acted in good faith relying on the accuracy of information certified in the Certificate (Article 69(3) of the Regulation on Succession).

The same protection should be afforded to any person who, relying on the accuracy of information certified in the Certificate, buys or receives succession property from a person indicated in the Certificate as being entitled to dispose of such property (Article 69(4) of the Regulation on Succession). The third party is protected unless they knew that the content of the ECS is not accurate.

6.2 Is the ESC a valid title for registering property rights in a land register?

The Certificate is 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) (Article 69(5) of the Regulation on Succession). Under Article 1(2), points (k) and (l), the Regulation excludes from the scope of application the nature of rights *in rem*, as well as any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register. The Regulation does not aim at affecting the limited number of rights *in rem* known in the national law of some Member States (Recital 15 of the Regulation on Succession). The applicable law regarding the register procedures and the formalities mandatory for the entry of the property into the register is determined by *lex rei site* (Recital 19 of the Regulation on Succession).

The main question relating to the entry of immovable property is whether the ECS constitutes a reliable and sufficient document for the transfer of property rights.

Under the Regulation on Succession, an authority competent for registration may ask the person applying for registration to provide additional information, or to present such additional documents, as are required under the law of the Member State in which the register is kept (the payment of revenue, authority's consent or approval – agricultural

land). However, the Regulation does not regulate the formalities for such exchange (Recital 18 of the Regulation on Succession).

The authority which issues the ECS is obliged to have regard to the formalities required for the registration of immovable property in the Member State in which the register is kept. For that purpose, the Regulation should provide for an exchange of information on such formalities between the Member States (Recital 68 of the Regulation on Succession).

The ECS would only be a title for the transfer of property if the law of the Member State of the register permits it as a sufficient document.

It is *lex rei sitae* which determines under what legal conditions and how the registering must be carried out and which authorities, such as land registers or notaries, are in charge of verifying that all the requirements are met and that the documentation presented or established is sufficient or that it contains the necessary information. In particular, the authorities may check if the right of the deceased to the succession property noted in the document presented for registration is the right which is recorded as such in the register or which is otherwise demonstrated in accordance with the law of the Member State in which the register is kept. In the case of an unknown right *in rem*, Article 31 of the Regulation on Succession provides for the adaptation of an unknown right *in rem* to the 'closest equivalent right *in rem*' under the law of the Member State where the property is located.

7. Conclusion

One of the most important features of the Regulation on Succession is the creation of the ECS. The significance of ECS stems mainly from its use and meaning, which establishes a presumption of the status of heirs and legatees, or the presumption that the content of the ECS is authentic. Will the ECS represent sufficient basis for entering rights *in rem* in a corresponding register in another MS? It should be remembered that the requirements and effects associated with the entry in registers will be evaluated by the law of the Member State in which the register is located. ECS is not a judicial decision nor an enforceable title and cannot replace national documents or procedures, but is rather a certificate with evidentiary value which reflects elements identified by the law applicable to succession.

ECS is truly an innovative instrument in the international private

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law and represent an advantage for an heir to have available an official confirmation of their position from a competent authority. This enables the beneficiary to have a credible proof of their status, in particular in matters of succession with a cross-border element. However, the practice will show which inconsistencies and shortcomings are present in the concept of the ECS.

One good solution would certainly be the establishment of a European electronic register. Such solution was also proposed by the Max Planck expert group, who proposed a new provision to be included in the Proposal on the Regulation on Succession. In their opinion, such a register could ‘have the main function of coordinating the activities of the courts in different Member States, and could also serve as a medium for good faith protection, ensuring that the presentee presented with a copy of the Certificate of Succession always has the opportunity to check whether the certificate in his hands stills corresponds with the original certificate deposited at the issuing court’.⁴⁸

48) Max Planck Commentary, p. 120.

ABSTRACT

The main innovation of the Regulation on Succession is the creation of the European Certificate of Succession, a new cross-border instrument which ensures to prove the capacity and powers of heirs, surviving spouse, executor or administrator of the estates throughout the member states. Under the Regulation on Succession, the ECS is not mandatory (Article 62(2)) and it can be used both abroad and in the country where it was issued. However, the ECS is created mainly for situations with an international element. The ECS should produce the same effects in all Member States. However, it should not be an enforceable title in its own right. The main question is whether the ECS will represent sufficient basis for entering rights *in rem* in a corresponding register in another Member State? It should be remembered that the requirements and effects associated with the entry in registers will be evaluated by the law of the Member State in which the register is located. In the article authors discuss the most important aspects of the European Certificate of Succession, analysing the articles from the European Regulation on which it is based.

Keywords: Regulation on Succession No. 650/2012; European Certificate of Succession; evidentiary value; land register.

EVROPSKA POTVRDA O NASLJEĐIVANJU - JE LI POSTOJALA POTREBA ZA EVROPSKOM INTERVENCIJOM?

SAŽETAK

Glavna novina Uredbe o nasljeđivanju je kreiranje evropske potvrde o nasljeđivanju, novog prekograničnog instrumenta, koji osigurava dokazivanje sposobnost i ovlaštenja nasljednika, nadživjelog bračnog druga, izvršitelja ili upravitelja zaostavštine u svim zemljama članicama. Shodno Uredbi o nasljeđivanju, evropska potvrda o nasljeđivanju nije obavezna (član 62 (2)), a može se koristiti kako u inozemstvu, tako i u zemlji u kojoj je izdata. Međutim, evropska potvrda o nasljeđivanju je kreirana prvenstveno za situacije s međunarodnim obilježjem. Ona treba proizvesti iste učinke u svim državama članicama. Međutim, to ne bi trebao biti izvršni naslov u domaćem pravu. Glavno pitanje je da li će evropska potvrda o nasljeđivanju predstavljati dovoljnu osnovu za upis stvarnih prava u odgovarajući registar u drugoj državi članici? Pri tome treba imati na umu da će uslovi i učinci povezani s upisom u registre biti ocijenjeni po pravu države članice u kojoj se nalazi registar. U članku autori raspravljaju o najvažnijim aspektima evropske potvrde o nasljeđivanju, analizirajući članove iz evropske Uredbe na kojoj se ona temelji.

Ključne riječi: Uredba o nasljeđivanju br. 650/2012, evropska potvrda o nasljeđivanju, dokazna vrijednost, zemljišne knjige.