The European Certificate Of Succession

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Key words: European private law, inheritance law, European Certificate of Succession, Regulation (EU) No 650/2012, successor, legatee, heir, estate, individual assets, cross-border succession.

ABSTRACT:

The current article deals with the European Certificate of Succession, which is considered by experts as one of the main novelties introduced by Regulation (EU) No 650/2012. The article takes a look The European Certificate of Succession (ECS),its explanation, creation, purpose and contents.

Açar sözlər: Avropa xüsusi hüququ, vərəsəlik hüququ, avropa vərəsəlik sertifikatı, 650/2012 saylı Nizamnamə, vərəsə, vəsiyyət üzrə vərəsə, qanun üzrə vərəsə, əmlak, fərdi aktivlər.

Xülasə:

Bu məqalə ekspertlər tərəfindən qəbul edilən Avropa Vərəsəlik Sertifikatı ilə bağlıdır (650/2012-ci il tarixli Qərar). Məqalədə Avropa Səadət Sertifikatı (ECS), onun izahı, yaradılması, məqsədi və məzmunu nəzərdən keçirilir.

Ключевые слова: Европейское частное право, закон о наследовании, Европейский сертификат о правопреемстве, Постановление (ЕС) № 650/2012, наследник, наследник, наследник, имущество, индивидуальные активы, трансграничная преемственность.

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Резюме:

Эта статья относится к европейскому сертификату о правопреемстве, который считается экспертами одним из главных новшеств, вводимых европейскими правами. Статья затрагивает темы европейского правопреемства, его определение, создание, цель и содержание.

1. Introduction

The European Certificate of Succession (ECS) is considered by experts as one of the main novelties introduced by '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 (ECS)', published in the Official Journal of the European Union of 27 July 2012, which entered into force on 16 August 2012, and which applies – at it is well known – to all successions opened starting on 17 August 2015.

The creation of the Certificate and the rules governing it are provided for by the provisions of the above-mentioned Regulation (Articles 62 to 73). Such provisions do not have the same nature as Private International Law ones – aiming at resolving conflicts of different national laws in transnational contexts – but they are, rather, Uniform Substantive Law provisions, in that an instrument has been created in all the Countries where the EU Regulation is in force, allowing the heirs, legatees, executors of the will or administrators of the estate to demonstrate easily their status and/or rights and powers in another Member State.

The usefulness of a standard instrument is

obvious, given the considerable increase in cross-border successions, which is due to multiple factors, including the increasing number of people who move easily throughout the borderless European Union, thus also leading to an increasing number of unions of nationals from different Member States, often entailing the acquisition of estate throughout the European Union territory. Therefore, the European Certificate of Succession was introduced, 'in order for a succession with cross-border implications within the Union to be settledsmoothly, speedilyand efficiently'.

Unlike the İnternational Private Law in the European Union Law the European Certificate of Succession (ECS) was created as a new and independent evidentiary instrument, attesting the status as heir, as well as the other statuses provided for by the relevant succession rules and regulations.

The Regulation (Articles 71 and 73), provides for the rules and procedures specifically pertaining to the rectification for a clerical error, the modification, the withdrawal, or the suspension of the effects of the ECS. It is worth highlighting the possibility to lodge a challenge before the judicial authority in the Member State of the issuing authority, pursuant to Article 72 of the Regulation. Notwithstanding the provisions of Article 72 envisaging the lodging of any challenge 'in accordance with the law of the Member State of the issuing authority', paragraph (2) also envisages the possible outcomes of said challenge.

All the above allows defining the ESC as an instrument suigeneris, with special,unique, and independent features and effects,issued by an authority – to bedesignated by each Member State – in accordance with the relevant provisions ofthe Regulation and of the relating Implementing Regulation.

Pursuant to Article 62(1) of the EU Regulation, the ECS is 'issued for use in another Member State',in addition to, pursuant to paragraph(3), 'once issued for use in another Member State' it shall also produce its effects in the Member State whose authorities issued it.

For this reason, the need for a cross-border element in the succession is obvious. However, commentators of the ECS have wondered whether that should be an objective and proven feature of the succession (that is, whether the existence of any possession or rights in the territory of a different State should be proven a priori) or, rather, it may be enough to prove the need for the applicant to invoke his status or to exercise his rights as heir, legatee, and/or his powers as executor of will or administrator of the estate in another Member State, with no need to predetermine whether there actually is any possession in the territory of said State? Given the literal meaning of this provision – which should be read together with Article 63 of the Regulation defining the purposes of the ECS, which include not only the attribution of the estate assets (paragraph (2)(b), but also, and probably most importantly, proving the applicant's status, rights and powers (paragraph (2)(a) and (c)) – it may be sufficient for the applicant to prove the issuing authority his need to use the Certificate in another State, including to ask for information about any debts or receivables of the deceased, or to investigate the estate or the existence of any heir or legatees (for executors of wills). There are no private provisions establishing how the applicant should prove the international nature of the succession. It will be up to the authority to examine, on a case-by-case basis, the documents produced and the information submitted in the application, in order to form an opinion. Except, no penalties are envisaged should an ECS be issued without any element of transnationality being there, or should such elements indicated in the documents submitted actually turn out not to exist. In such circumstances, the Certificate issued shall – in the best-case scenario– be deemed null and void, thus being incapable to produce any effect vis-à-vis third parties.

2. The creation of the Certificate and its use

Pursuant to Article 62(3), once issued for use in another Member State, the ECS shall also produce its effects in the Member State whose authorities issued it. This provision may be particularly relevant, but may also cause some interpretation problems. First of all, there seems to be no doubt that an ECS requested by an heir for use in another Member State where the deceased hold, for instance, a bank account, may also be used within the Country where it was issued to invoke his status as an heir, thus becoming, for the person concerned, a viable instrument to be attributed assets or

to prove his rights, without having to rely on internal instruments that, at times, are quite complex to obtain. But such cases appear to be quite anomalous, as the heir of a deceased person who owned assets in another Member State shall be entitled to also use the ECS in the Country of issuance, while any heir of a deceased person who had no assets or rights outside the national territory shall not have such option.

Moreover, the fact that the ECS is not mandatory may create situations in which it may coexist with a different internal certificate issued under national law. For instance, an heir could request a document issued under domestic law (such as, for example, a notarised document in France), before becoming aware of the transnational nature of the succession, and he may subsequently request a European Certificate of Succession, after becoming aware that there are some assets forming part of the estate that are located in another Member State.

In such instances, when the two aforementioned documents carry the same information, no major problem arises and the heir may use both of them. However, should new facts become known (such as the existence of a previously unknown will), the two documents might differ. When this happens, there are no provisions resolving the conflict. Any third party who might interact with the heir shall rely on the document he is submitted. The only option envisaged is the possibility to challenge the decision made by the issuing authority (Redress procedure, Article 72 of the Regulation). Should the Certificate be confirmed, it should prevail, although the aforesaid third party may still ignore its existence.

Lastly, it is also worth mentioning the possibility to use the Certificate in a Country the ECS does not apply to. In fact, an heir who has obtained an ECS for use in a Member State may also submit it to the authority of a Country the EU Regulation under consideration does not apply to. In that event, the effects of the Certificate shall depend on the domestic laws of that Country, which may even attribute some effects to the ECS, considering the powers attributed to the relevant issuing authority, on a case-by-case basis.

3. The purpose of the Certificate

Pursuant to Article 63 of the EU Regulation, The European Certificate of Succession is intended for exclusive use by:

- Heirs, legatees having direct rights in the succession,
- Executors of wills;
- Administrators of the estate;

It is an imperative list, and Article 65 of the Regulation also ascertains who is entitled to submit an application for a Certificate. As many have pointed out, creditors of the deceased are not in the list of persons who can submit said application, nor are other persons having entered into any contract with the deceased but not meeting any of the requirements detailed in the list (including, for instance, any bank that, being a debtor in that it holds the money deposited by the deceased, may intend to apply for a Certificate). The list of the persons entitled to use the Certificate referred to in Article 63(1) is shorter than the list of persons who may, later on, request its rectification, change, or withdrawal (Article 71, 'any person demonstrating a legitimate interest'), which shows the express intention of the European legislator to specify who they are and minimise their number.

However, a comprehensive analysis of the relevant provisions does not allow identifying the need for the applicant that intends to use the Certificate to demonstrate that there are already existing conflicts with any third party, requiring him to prove his status with reference to the estate. Actually, he shall only need to explain (and prove, by producing the relevant documents when submitting the application) his need to prove his status in his relations with any third parties (such as, for instance, banks or tax authorities), including to obtain information on any assets or rights. However, as it has already been pointed out, he should need to use the Certificate in another Member State. Evidence of his status for the purposes of using the Certificate and showing the cross-border nature of the succession under consideration does not necessarily need to be a special one, as the applicant is simply required to attest his status by producing own statements and basic reliable documents, which shall be verified by the issuing authority.

Moreover, any person having only indirect rights in the succession shall not be entitled to submit an application. This includes, for instance, possible alternative heirs appointed

when the first persons having title to inherit, the heir's heirs, any heir subject to a condition precedent, etc. waive the succession. Such persons may only submit an application for an ECS when they acquire any of the statuses or qualifications referred to in Article 63, under the law applicable to the succession. In the event of any conflict relating the applicant's status and, hence, should the applicant's position vis-à-vis the estate be questioned (for instance, including, for issues concerning the law applicable to the succession and the subsequent identification of the heirs and legatees), Article 67(1)(a) of the EU Regulation shall apply. Therefore, the issuing authority shall not issue a Certificate, because the elements to be attested are being challenged.

Pursuant to Article 63(2), the Certificate may be used, especially, 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;

b) The attribution of a specific asset or specific assets forming part of the estate to the heir(s) or, as the case may be, the legatee(s) mentioned in the Certificate;

c) The powers of the person mentioned in the Certificate to execute the will or administer the estate.

This is an illustrative list, which is useful to explain the uses of the Certificate and to clarify its purposes, but it is not exhaustive or mandatory. Actually, the ECS may also be used for purposes other than those referred to in Article 63, such as simple searches relating to assets and rights, needs relating to a court case, or the search for additional heirs. The list provided for in the Regulation is actually quite broadly worded and, in fact, the definitions provided essentially cover any situation in which it may be useful to use the Certificate. Such situations include the search for assets or information, which heirs have the powers to carry out (thus being included in the purposes referred to in Article 63(2)(a); similarly, the heirs also have the powers to appear in a court case, and those powers and status may also be attributed by the law applicable to the succession to an administrator of the estate (thus falling under the provisions of sub-paragraph (c)). Article 63 also provides for 'the attribution of a specific asset or specific assets forming part of the estate to the heir(s) or, as the case may be, the legatee(s)'. This is one of the provisions clarifying that it is possible for a Certificate to simply attest some individual aspects, without necessarily covering the entire succession. Among the stated above 'individual assets' are also rights of claim or contractual positions making the objects of specific attribution or taken over by the heirs (including, for instance, a preliminary purchase agreement or a company contract).

Article 63 does not regulate the effects of the Certificate and the legal consequences of its use; they are expressly regulated and provided for by Article 69 of the Regulation, which shall be dealt with later on.

4. The contents of the European Certificate of Succession (Article 68)

At the end of the application examination and verification prodecure laid down in Article66, the issuing authority of each Member State shall issue the Certificate without delay (with the exception reffered to in Article 67).

Article 68 of the Regulation specifies the information to be contained in the Certificate, and openly provides for such information to be included 'to the extent required for the purpose for which it is issued'. This provision – which confirms the possibility to issue a partial ECS not including all the information listed in Article 68 and in the Form19 – is a consequence of the provisions of Article 65, under which the certifying authority shall certify the elements that Applicant wants certified.

Part of the aforementioned information is to be mandatorily included in any Certificate, and lacking it, the Certificate would be unusable. The following information is mandatory: (a) The name and address of the issuing authority;

(b) The reference number of the file;

(c) The elements on the basis of which the issuing authority considers itself competent to issue the Certificate;

(d) The date of issue;

(e) Details concerning the applicant (whose status and rights referred to in Article 63 shall be inferred from the Application and, in any case, from the Certificate as a whole);

(f) Details concerning the deceased;

(i) The law applicable to the succession and the elements on the basis of which that law has been determined;

(j) Information as to whether the succession is testate or intestate

The aforementioned information – which is to be deemed essential considering the Certificate's intended function and use – is also expressly indicated as being mandatory in the Form (sections 1, 2, 3, 4, 5, 6, 7 and 8) as it is marked by a star sign.

As it is well known, determining the law applicable to the succession may not be easy. As a matter of fact, in some cross-border situations, it may be practically very complex to determine the real 'habitual residence' of the deceased in accordance to the Regulation

The authority shall specify what elements allowed establishing that a given law is the one applicable to the succession under consideration, with such determination not acquiring in any case the res judicata status, as the Certificate's effects do not include those of a court decision. Actually, the effects of the ECS are detailed in the Regulation, which also provides for the possibility to challenge the authority's decisions (pursuant to Articles 71, 72 and 73 of the Regulation).

Depending on the Application and on the purpose of the Certificate, the latter may include additional optional (variable) information:

(g) Details concerning the beneficiaries;

(h) Information concerning ant contract entered into by the deceased, or the matrimonial property regime or equivalent property regime of the deceased;

(k) Information concerning the nature of the acceptance or waiver of the succession;

(l) and (m) the share for each heir and/or the list of rights and/or assets for any given heir and any given legatee;

(n) Any restrictions on the rights of the heir(s) and legatee(s);

(o) The powers of the executor of the will and/or the administrator of the estate;

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