

# Does the European Certificate of Succession Ensure the Direct Exercise of Successor Rights in Member States of the European Union?

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**ABSTRACT:** The European Certificate of Succession (ECS) represents the tool which allows successors, legatees, will executors or administrators of the successor goods to prove their statute and exercise their rights in another member state of the European Union. Its main objective is the direct exercise of successor rights in member states. However, in Romania, the issue of an ECS by the public notary requires the previous or simultaneous issue of a national inheritance certificate. Also, in Romania, even if the heir presents an ECS issued in another member state, his rights over immobile goods will only be acquired by registration in the cadastral register, an operation which does not register in the ECS database, as this is not an authenticated document. The current paper aims to analyze the utility and possibility to implement the ECS, in relation to national legal provisions.

**KEYWORDS:** Regulation, cross border succession, European Certificate of Succession, national certificate of succession, publicity registers

## Introduction

The freedom to circulate and reside in member states of the European Union represents one of the four fundamental freedoms, regulated by the Universal Declaration of Human Rights, the European Charter of Fundamental Rights of the European Union as well as in the Justice Court Decision of September 17<sup>th</sup>, 2002, in case C-413/99, Baumbast. The freedom of circulation and residence entails the fact that all citizens of the European Union can freely circulate on the territory of all member states, they can reside, study, work and so on. When they are established in another state, European citizens marry, acquire goods and eventually die. This has caused for over 450.000 annual inheritance cases with foreign elements to be registered within the European Union.

Even if civil law is Roman in its essence, the law regarding inheritance in European states is significantly different. The most serious problems occur when citizens who belong to a certain member state have established their residence on the territory of another member state and acquired good on the territory of several countries (Dinu 2014). This instance caused the need to pass some measures meant to align European laws and avoid discrimination within the European Union and also solve uncertainties and difficulties regarding the exercise of citizens' rights within a succession procedure with foreign elements.

Given this context, after numerous attempts, on July 4<sup>th</sup>, 2021, the European Parliament and the Council of the European Union passed the EU 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 (the Regulation).

This regulates "all aspects of civil law regarding the patrimony of a deceased person, namely all forms of transfer of goods, rights and obligations with death cause, whether the transfer of goods is voluntary, based on a death cause or a transfer in the form of an *ab intestat* succession". The Regulation represents the first clear manifestation of institutional harmonization of successor law in the European Union. Its main purpose is that of eliminating legal barriers which prevent the free movement of persons who currently face difficulties in asserting their

rights in the context of a succession having cross-border implications (Point 7 of the Regulation preamble).

In order to facilitate the assertion of successor rights in all member states, the Regulation creates a new tool, namely the European Certificate of Succession (ECS). In fact, the suggestion of creating a unique European tool was phrased since 2005, within the French Notary Congress, when the idea of creating such a certificate was first suggested.

### **General aspects regarding the European Certificate of Succession**

The ECS is a new, unique and unified international proving tool (Bunea 2021) which is issued upon request by European competent authorities, which allows legal or testamentary successors, executors or administrators of a successor patrimony to assert their successor rights in other member states. The ECS is acknowledged only by the jurisdictions which signed the Regulation. The role of the ECS is that of facilitating the speedy resolve of succession procedures with foreign elements by creating a unique and unified model of regulation of the aspects of a cross border succession, thus avoiding the formalities of different national jurisdiction.

According to article 64 of the Regulation, the Certificate shall be issued in the member state whose courts have jurisdiction under Article 4, Article 7, Article 10 or Article 11 of the Regulation. Article 4 regulates the general competence: the courts of the member states in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole. “This principle is, without a doubt, the spine of the succession system established by the Regulation...” (Zańucki 2016), is an expression of the relation between a certain deceased, a state and the laws of that state (Zańucki 2018). Article 7 determines the competence in case of *professio juris*, whereas article 10 establishes the subsidiary competence and article 11 determines the competence based on *forum necessitatis*. We must also state that these rules pertain to international competence, not internal one.

The authority which issues the ECS can be, according to article 64 of the Regulation, the court or another authority which, under national law, has competence to deal with matters of succession.

According to article 3 of Law no. 206/2016 for the modification of Government’s Emergency Ordinance no. 119/2006 for some measures required to enforce community regulations at the time Romania became a member of the European Union, as well as for the modification of law no. 36/1995 on public notaries and notary activity, the ECS is issued upon request of any of the people stated in article 63 first alignment of the Regulation (namely legatees having direct rights in the succession and executors of wills or administrators of the successor mass), the public notary who issued the succession certificate with respect of the competence rules stated in the Regulation.

In case the archive of the public notary who issued the succession certificate in accordance with Romanian law is kept by the Public Notaries Organization, the European Certificate of Succession will be issued by the public notary named by the president of the Directing College of the Organization.

In case the quality of successor, the extent of the successor mass and/or the extent of successor rights and obligations of the heirs were established by court order, the European Certificate of Succession is issued by the court who ruled on the matter.

Thus, by corroborating the provisions of the Regulation with internal provisions which enforce the Regulation, we can state that, in Romania, the authorities which can issue an ECS are the courts of law and the public notaries which are competent in the matter of succession. For this reason, the rules of international competence stated in articles 4, 7, 10 and 11 of the Regulation will be applied to both authorities but only when they issue an ECS.

Practice raised the question of whether a public notary who drafts, upon request from all interested parties, a national succession certificate based on national regulations is seen as “a court

of law” as meant by the Regulation, thus subject to the competence rules stated by the Regulation. On May 23<sup>rd</sup>, 2019, the Court of Justice of the European Union ruled on this matter, in case C-658/17 asserting that, in order to state that an authority exercises a certain judicial function, given the specific nature of the activity it provides, it must be provided with the competence to solve any potential litigation which might occur between successors. The notary succession procedure is exclusively non contentious and it can be finalized only upon express agreement from all parties. Furthermore, the public notaries perform a liberal profession which entails the rendering of services in exchange for a fee. Finally, the Court of Justice concluded that the competence rules stated in Regulation no. 650/2011 apply to courts and public notaries in member states in which they exercise judicial duties in the matter of succession (for example Austria, Hungary, Germany, the Czech Republic), but they do not apply to notaries who do not perform judicial duties, as is the case of Romanian public notaries. Thus, in Romania, even if the Regulation is in force, establishing the competence in issuing an internal succession certificate by the public notaries will pertain to Romanian internal law.

### **The judicial characteristics of the European Certificate of succession and the way in which it influences the direct exercise of successor rights**

The legal characteristics of the ECS are stated in the Regulation; however, they are determined by the internal laws of each member state.

*The ECS has a uniform character.* It causes the same effects in all member states of the European Union. It is drafted in only one original document; the issuing authority keeps the original and issues one or more certified copies to all interested parties and any party who can prove legitimate interest. The certified copies are valid for a limited time of six months, with the possibility to extend the period of validity, in exceptional cases, which are justified accordingly.

*The ECS is of facultative character.* According to article 62 second alignment of the Regulation, the use of ECS is not mandatory. This means that the parties which request such a certificate are not obliged to do so. However, the ECS was created to allow the speedy, simple and efficient resolve of succession procedures with foreign elements. This is why, upon request by interested parties (heirs, legatees with direct rights on the succession mass, will executors or administrators of the succession mass) the competent authorities are required to issue such a certificate.

In lack of an ECS, the citizens would be required to perform the succession procedures in all member states where the successor goods are located, thus exposing them to the possibility of dealing with contradictory internal provisions.

The use of ECS allows the citizens of member states to avoid the formalities of the same succession procedure in all member states where the goods of the successor mass are located and eliminates the possibility of issuing national certificates of succession with contradictory provisions. For example, in case of a German citizen with last known residence in Germany, who owns goods in Romania, the issue of an ECS by the competent authorities in Germany removes the obligation of the heirs to prove their quality of successors in front of the Romanian public notary, thus simplifying the succession procedures.

*The ECS is of an accessory character.* The ECS cannot exist as a self-serving tool, as it is co-dependent on the internal certificate of succession. It can be issued only simultaneously or subsequently to the issuing of a Romanian certificate of succession, but never independent from the national certificate of succession, as stated in article 3 of Law no. 206/2016, above mentioned. This ensures the respect of the principle of subsidiarity. Doctrine (Pătrăuș and Ofrim 2019, 82) claimed that this provision is contradictory for the following reasons: the national certificate of succession is issued upon request and with agreement of all successors, in contradiction with the provisions of the Regulation which state that the ECS is issued upon request of any successor with the previous notice of all other successors. We believe this statement is not entirely correct as the

provisions of article 66 of the Regulation require all competent authorities to undertake all necessary measures stated in internal law, in order to verify the information and documents presented by the person who made the request; the measures stated by internal law entail the consent of all other successors. As a consequence, we believe there are no contradictions between national and European provisions, as the Regulation states, in point 34 of preliminary considerations that the Regulation “should provide for general procedural rules similar to those of other Union instruments in the area of judicial cooperation in civil matters”.

However, we cannot ignore the inconsistency between the provisions of article 69 first alignment of the Regulation, according to which the ECS shall produce its effects in all member states, without any special procedure being required and the provisions of article 3 of law no. 206/2016 above mentioned, which states a previous internal procedure, namely the previous or simultaneous issue of a national succession certificate.

*The ECS is a proving tool.* The ECS is not an authentic act and is not enforceable; its only purpose is to prove a certain fact. According to article 62 second alignment of the Regulation, the certificate can be used especially in order to prove one or more of the following:

- The statute and/or rights of each successor or each legatee mentioned in the certificate and the specific parts of successor mass of each heir;
- The assigning of a certain good or certain goods of the successor mass to the successor/successors and the legatee or legatees mentioned in the certificate;
- The duties of the person mentioned in the certificate as a will executor or administrator of the successor mass.

According to article 69 second alignment of the Regulation, the certificate shall be presumed to accurately demonstrate elements which have been established under the law applicable to the succession or under any other law applicable to specific elements. The person mentioned in the Certificate as the heir, legatee, executor of the will or administrator of the estate shall 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.

This provision entails the fact that the Romanian public notary will not be able and will not be required to request evidence in regard to the quality of successor, thus presuming that all mentions of the ECS are accurate. Of course, this is a relative presumption which can be overturned by contrary evidence, which can result in the rectification, change or withdraw of the ECS.

The Regulation states that the ECS is a valid title for the registration of successor goods in the corresponding register of the member state. However, the Regulation does not provide specific regulations for the nature of real rights and any registration in a property rights register regarding mobile goods or immobile goods, including legal requests for such a registration, as well as the effects of registration or lack of registration of such rights in a specific register.

In regard to real rights, especially those regarding immobile goods, they are excluded from the enforcement of the Regulation as “they would have the same legal regime as the territory itself, being linked (“absorbed”) by the territory, thus representing an object of power and discretion of that specific state. This means that legal aspects regarding the means by which one can acquire real rights over immobile goods, the content of these rights, the limitations and restrictions, including their means of exercise, but especially the conditions needed for their formation, transmission and demise are subject to *rei sitae* law” (Popescu 2014, 24).

In regard to the registration of real rights in publicity registers, doctrine stated that the European lawmaker’s option to exclude it from the Regulation is justified by the public function of these registers (Jacoby 2013).

The need to register goods, especially immobile ones, in publicity registers is not new in European systems of law, but the registration rules are different in member states.

Thus, the Romanian Civil Code states in article 885 the fact that, provided that there are not contrary legal provisions, the real rights over immobile goods are acquired between parties and in regard to third parties, only by registration in the cadastral register, based on the act or fact which justifies the registration.

This provision has a legitimate purpose, namely to ensure increased safety of civil legal relations. At the same time, it has an adequate character, able to reach the legitimate purpose, needed to ensure the certainty and accurate character of legal relations and respects a just balance between the general interest in regard to knowing the legal situation of immobile goods, the existence of a unified situation, the reality and accurate information contained in public registers on one hand and the individual interest of the party, on the other hand, namely that of having a speedy registration of his property right.

Registration in the cadastral register operates in agreement with the provision of article 888 of the Civil Code, based on an authentic notary act, a definitive court decision, a certificate of succession or an administrative act (under the conditions stated by law).

Special Law no. 7/1996 of cadaster and immobile publicity states, in article 24 third alignment that the property right and any other real rights over an immobile good will be registered in the cadastral register based on the authentic notary document or a certificate of succession, issued by a Romanian functioning public notary, a definitive and irrevocable court decision or an act issued by administrative authorities, in case the law allows it.

By searching the legal texts, we notice that acquiring real rights over immobile goods located on Romanian territory is achieved based on the following acts: authentic act issued by a public notary who legally functions in Romania, a certificate of succession issued by a public notary who legally functions in Romania, a definitive and irrevocable court decision of a Romanian court or an act issued by competent administrative authorities. Thus, the ECS, as it only represents a proving tool and not an authentic act, can never determine the registration of successor goods in the Romanian publicity registers, as it does not meet any of the conditions stated by law.

In regard to these legal provisions, we notice that, despite the provisions of the Regulation, the registration of successor goods in the publicity registers is not possible if the Romanian public notary did not issue a national certificate of succession. Thus, it can be considered that the relationship between ECS and *lex rei sitae* is determined by the scope of Regulation (EU) No. 650/2012 (Stoica and Dumitrache 2017, 103).

## Conclusions

The ECS is a valuable European tool, designed to facilitate the solving of cross border issues in regard to succession. It provides certain advantages as opposed to national documents, as it is of a unique format, valid throughout all member states, as well as by the reduction of translation fees. Also, it is an extremely important proving tool in regard to the quality of successor, the extent of successor rights and the duties of the people appointed in it, as administering subsequent evidence is no longer possible or necessary.

However, the ECS does not solve one of the most important issues: registration of the transfer of property rights in the publicity registers. Although, according to article 63 of the Regulation, the certificate is designed for the use of successors, legatees with direct rights over the succession, will executors or administrators of the successor mass who must prove their statute in a member state or exercise their successor rights in another member state, we can assert that, as opposed to internal legal provisions, its use is reduced to the proving of the quality of successor, as it is not a valid title which enables the exercise of successor rights.

For these reasons, in order to provide its efficiency, a European institutional cooperation is required in regard to the registration of real rights and the enforcement of measures needed to unify the laws in the matter of publicity registers.

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