

## **Report on Succession Regulation (EU) No 2012/650**

### **Adaptation principle**

#### **Background**

ELRA has previously discussed various aspects of the EU Regulation 2012/650 on 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.

To a large extent the previous discussions have been about the European Certificate of Succession (ECS) and whether it is considered as a valid document for registration of ownership in the land register.

The Regulation envisages that the Certificate of Successions should constitute a valid document for the recording of succession of property in a register of a Member State (recital 18).

Following previous approaches, ELRA has found a diversity in the land register systems. It was found that the certificate is enough for registration in most countries or may be enough together with additional requirements or deeds. In some countries however it was not deemed valid at all. The previous discussions have also covered the aspect of the adaptation principle in the Regulation.

ELRA's previous research has resulted in one fact sheet with two chapters which can be found in the ELRA web site.

#### **Need for a wider approach**

The Regulation on Successions is considered by ELRA as one of the main instruments issued by the EU regarding private law. For this reason, the Board of ELRA proposed a more thorough investigation about the Regulation and its implications on the land register and the work of land registrars.

During 2020 the matter has been addressed on several occasions and a list of interesting topics has been produced, containing the following headlines:

- European certificate of succession (conflicts and problems)
- Acceptance of trusts

- Management if there is more than one ECS
- Applicable law
- Compulsory law (exceptions from the Regulation)
- Adaptation principle (If and how)
- Recognition of decisions
- Acceptance of foreign documents
- Authentic documents

During 2020 some of the topics have been discussed, questionnaires have been issued and distributed to the Contact Points and the answers have been discussed in digital workshops.

### **European Certificate of Succession (conflicts and problems)**

Previous research by ELRA had shown that a few of the Member States did not approve entries in the land register on the basis of an ECS despite the content in article 69.5 of the Regulation. In our elaborated research, the first question that was sent to the Contact Points addressed whether there were still conflicts between the Regulation and national law in any of the Member States.

On June 25<sup>th</sup> - 26<sup>th</sup> 2020, this question was discussed and it turned out that at least in theory, all countries now accept ECS as a valid document for registration.

### **Adaptation principle**

The adaptation principle is described in article 31 and recitals 15 and 16 of the Regulation.

ELRA's previous study of this principle had given the Board reason to suggest that ELRA investigate the matter further. Especially since some jurisdictions seemed to not consider adaptation at all.

The Contact Points were therefore asked if the adaptation principle is considered and used today and if there is a general strategy in the "adapting" countries of how the registering procedure applies in these cases. The question was discussed on June 25<sup>th</sup> - 26<sup>th</sup>.

The new questionnaire showed that most of the answering Member States do apply the principle of adaptation today. This is the case in Austria (but not regarding apartments),

Croatia, Estonia, Finland, Latvia, Poland, Portugal, Romania, Spain, Sweden, and the Netherlands.

Ireland and Lithuania answered that the adaptation principle is not used. A few countries such as Belgium, Bulgaria, Italy (Agenzia delle Entrate), Malta and Slovakia answered that they were not sure if the adaptation principle would be used if such a case would arise. The experience of these cases was limited, and it was not clear if any such cases had come up yet.

The countries that answered that they use the adaptation principle, showed somewhat different strategies about how adaptation is made and on what grounds. Some have domestic legislation while others rely on the general principle of adaptation in article 31 of the Regulation.

### Acceptance of trusts

According to recital 13, questions relating to the creation, administration and dissolution of trusts should be excluded from the scope of the Regulation of succession. This should not be understood as a general exclusion of trusts. Where a trust is created under a will or under statute in connection with intestate succession the law applicable to the succession under this Regulation should apply with respect to the devolution of the assets and the determination of the beneficiaries.

During a workshop, the ELRN Contact Points have considered the acceptance of trusts as one of the more important questions in relation to the Regulation and a questionnaire was therefore sent with a series of questions. These questions and answers were discussed in the workshop on 18<sup>th</sup> of September 2020.

1. Does your country/system recognize trusts and is it possible to register a trust as an owner of immovable property or as a holder of a property right?

A wide majority of the participating countries answered no. Bulgaria, Estonia, Finland, Ireland, Luxembourg, Poland, Portugal, Romania, Slovak republic, Spain and Sweden. Within this category of answering countries there are nuances and differences. Ireland for example answered that they do recognize trusts, however it is not possible to register a trust as owner of immovable property or as a holder of a property right.



Belgium answered that the legal concept of the trust does not exist. The trust carries out a dismemberment of ownership unknown under Belgian law.

A trust governed by foreign law is admitted under Belgian law if it does not infringe Belgian public policy rules. It is enforceable against the administration.

The registration of the trust as owner will depend on whether Belgium considers the trust as having legal personality or not.

To date, this question had not yet been resolved. Moreover, their land registry had never been confronted with such a question because no registration of a trust has ever been applied for in Belgium.

Croatia, Cyprus, Malta, the Netherlands and Scotland answered that they do recognize trusts and that registration is possible. Within this category there are differences as well. Cyprus answered that applications to register a trust seized on December 2019. The only way to register a property in the name of a trust is via a transfer of property. Scotland answered that trusts are recognized and widely used in Scotland, with title to immovable property taken (and registered in the property register) in the name of the trustees on behalf of the trust. In the Netherlands the trustee will be registered as the right holder, accompanied with a statement “as trustee” and the data concerning the trust and the (possible) beneficiaries.

2. If you do not register trust as owner of the title, how do you proceed in your jurisdiction? Is the application rejected or is the entry permitted in someone's name, the trustee or other?

In the countries where trusts are not registered as owner of the title, the procedure differs. Bulgaria, Estonia, Luxembourg, Romania, and Sweden have answered that the application for registration will always or at least generally be rejected or otherwise not granted. In some cases, there is a theoretical possibility for adaptation and registration in accordance with national law.

Luxembourg answered that the entry in the land registry is rejected but, in the cadaster, the entry is made with the mention “consortium of heirs”.

Belgium, Finland, Ireland, the Slovak Republic, Poland, Portugal, and Spain have answered that an adaptation principle is used, and registration is or may be granted but not for the trust itself.

3. The final question was whether the land registry registers the rules of the trust in case it allows to make the entry in its name.



Spain answered that if the entry by the name of the trust is admitted, the rules of the trust might be reflected in the entry.

Scotland answered that the trust deed (i.e., the document constituting the trust) rarely forms part of the deed conveying the immovable property to the trustees for the trust. Under the scheme of land registration that operated in Scotland previously, the Keeper (registrar) would request sight of the trust deed. However, under the current scheme implemented on introduction of the Land Registration etc. (Scotland) Act 2012, the Keeper does not require to examine or register the trust deed or satisfy herself as to the rules of the trust, rather she can rely on the applicant's certification that the deed is valid.

Finland stated that if the adaptation is possible, there is a possibility that the rules of the trust will be registered in order to show who has the right to make decisions concerning the immovable.

The remaining countries answered that the rules of the trust are not registered.

### **Acceptance of foreign documents**

Another topic that ELRA has considered to be particularly interesting is if the countries accept foreign documents.

Even though practically all countries have answered yes to this question, there is a great variety to what sort of documents that are accepted and how or to what degree that the authenticity of these documents needs to be attested or proved.

The situation appears to be somewhat unclear in Bulgaria.

Belgium answered that foreign documents are accepted but only the same documents as those accepted in Belgium, namely:

- The deeds of notaries or public officers.
- Private deeds recognised in court or before a notary.
- Judgements
- Certain acts drawn up by civil officials.

However, some of them will have to be legalized or apostilled to be accepted in Belgium.

Bulgaria answered that the entry in the Property Register is made by the order of the entry judges, who make the legal assessment whether to do or refuse the entry. In this regards, specific information shall be requested from them.

Croatia stated that they accept foreign documents that are certified in accordance with the law (apostille etc.).

Cyprus answered yes and in case of transfer in the name of a trust, they need the deed of the trust, the necessary transfer forms, as well as tax clearances of all property related taxes (municipal/community, sewerage tax, water tax).

Estonia answered yes but the foreign document has to be translated by a sworn translator.

Finland stated that they accept foreign documents, transfer actions, deeds, judgements, decisions etc. If registrar does not understand the foreign language used in the document, the applicant must provide a translation made by an authorized translator.

Ireland answered that all applications for registration have to be in the prescribed form, as laid out in the Land Registration Rules. In addition to our prescribed forms, they can accept supplementary foreign documents, but a lawyer must verify them.

Luxembourg answered that they will make no entry at all in case of successions (inheritance/legacy). Luxembourg accepts foreign documents in order to make the declaration of succession and in other matters, on behalf of the Regulation n° 2016/1191 and the Apostille Convention of 5<sup>th</sup> October 1961 (legalized or not), with a specific procedure for the private foreign documents with the need of translation, by a sworn translator or a notary.

In the Netherlands the only foreign documents that can be registered are (European) certificates of inheritance, issued by a competent issuing authority (in accordance with Regulation 650/ 2012). These certificates have to be translated into the Dutch language. No other (type of) foreign deeds, certificates or (other) documents are allowed. According to the Dutch Civil Code, only Dutch notaries are allowed to execute a deed of transfer. If a Dutch notary executes a deed in a foreign language, this deed will also not be registered. It has to be translated into Dutch by a sworn translator.

Malta answered yes. Regarding the Land Registry, they accept death certificates and wills etc.

Poland answered that they accepted foreign documents according to EU Regulation 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 and apostille procedure.

Portugal answered that according to Portuguese Civil Law (article 365. º), foreign documents can be accepted, and its legalization is only necessary if there are doubts about their authenticity. The Portuguese Land Registry (article 43. º) also allows foreign documents written in English, French or Spanish, if the registrar knows the language.



Romania stated that they accept foreign documents, notarial acts concluded in countries which have acceded to the Convention on the abolition of the requirement for the supra-national of foreign official documents, adopted at the Hague on 5<sup>th</sup> October 1961 and in countries with Romania has concluded conventions, treaties, or agreements on legal assistance in civil matters, which provide for exemption from any legalization.

Scotland answered that the Keeper does not require to examine or register the trust deed or satisfy herself as to the rules of the trust, rather she can rely on the applicant's certification that the deed is valid. In Scotland certain foreign documents can be registered in the Register of Judgments which is managed by the Keeper of the Registers of Scotland but is not Scotland's property register. Typically, foreign documents would act as an unrecorded link in title upon which the applicant or their solicitor would satisfy themselves on when preparing a conveyance for registration in the Land Register. The Keeper would rely on the applicant's certification that the deed is valid.

Slovak Republic answered that their system accepts foreign document, for example judgements of the court, inheritance documents, birth certificate, etc.

Spain answered that foreign public documents are admitted in Spain, whether they are notarial, judicial, or administrative documents. The legalisation or apostille of the document will be required (unless they are exempted from legalisation by International Treaties nor EU rules). Also, the translation of the document if it is not drawn up in a Spanish official language will be needed, unless the registrar under his or her own responsibility assumes the translation. Finally, in the case of enforceable judicial documents, a previous exequatur (a judicial declaration by Spanish Tribunals of its enforceability) will be needed too.

Sweden answered that they have no Regulations that prevent foreign documents or legal documents in a foreign language and therefore all foreign documents are allowed, even in a foreign language.

### **Authentic transfer documents**

In connection with the questions about foreign documents, ELRA has also decided to investigate if and to what extent the member countries require authentic transfer documents.

Belgium, Croatia, Cyprus, Estonia, Finland, Ireland, Malta, the Netherlands, Poland, Portugal, Romania, Scotland, Slovak Republic, and Spain have all answered that they do require authentic documents. However, some of the countries can accept non authentic documents as well, for example in Spain where in some exceptional cases, private or documents are admitted, although in these cases the authenticity of the signatures will also be required.



Belgium answered that the same rules apply as for those that are accepted in Belgium, namely: The deeds of notaries or public officers, private deeds recognized in court or before a notary, judgements and certain acts drawn up by civil officials. However, some of the documents will have to be legalized or apostilled to be accepted in Belgium.

In Bulgaria, the entry in the Property Register is made by the order of the entry judges, who make the legal assessment whether to do or refuse the entry. In this regards, specific information shall be requested from them.

Luxembourg answered that in other matters than successions, they have a procedure that consists on the legalization of the signatures of the parties, when they have private deeds/documents in specific matters. If they are foreign documents/deeds, they are submitted to the visa of the court, on behalf of which the court declares that the document/deed is in accordance with national legislation, or the parties can give the document to a notary so that he certifies the legal accordance with national law.

Sweden is the only country that answered that their system does not require authentic documents. Private transfer documents are allowed and there is no procedure for public authentication or verification of the signing parties. Public authentic documents are generally not required, even though there are a few exceptions.

### **Acceptance of foreign non authentic documents**

If you accept non authentic documents coming from other jurisdiction, do you have special requirements for them? Do you foresee to control if the signatures are authentic?

In practice, all the answering countries seem to have some kind procedure to make sure that the land registry can decide based on the documents that are provided in the application. But the requirements and procedures for this differs greatly.

Belgium\*, Estonia, Ireland\* (only supplementary and verified foreign documents are accepted), Slovak republic and Spain have answered that they have some requirements in order to control that the signatures are authentic.

In Belgium only some non-authentic documents are allowed and, In some cases, (depending on the existence of certain agreements) they will have to be legalized or apostilled in order to be accepted. The legalisation or apostille will attest to the truthfulness of the signature, the capacity in which the signatory of the deed has acted and, where appropriate, the identity of the seal or stamp with which the deed is affixed.





Scotland and Sweden have answered that they do not control that the signatures are authentic. Instead, they can require information from the applicant. In Scotland they can rely on the applicant's certification that the deed is valid.

In Sweden regarding transfers in connection to division of matrimonial property or inheritance they require information from the applicant about the applicable foreign law and what this entails. The information is usually provided by the applicant in the form of a certificate from a lawyer. Control of the signature's authenticity is generally not required.

### **Continued work**

ELRA's work in the field of the Regulation has shown a great diversity and interesting differences and similarities between the countries. We believe that there are several more interesting topics that should be investigated and discussed in the near future.

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