

The European Certificate of Succession and national legislation

European certificate of succession

ELRA has continued to investigate and discuss the Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of successions and on the creation of a European Certificate of Succession.

The contact points have previously suggested that the land registration aspects of the Regulation on Succession (Articles 66.5, 69.5) have not had a complete implementation across the land register systems in the EU. Regarding national implementation of European certificates of successions, ELRA has discussed the case C-301/20 regarding the validity of a certified copy not having an expiration date.

Contact points have described and discussed the legal status of an heir, legatee, executor of a will and administrator of an estate under national law (Article 63 of Regulation 650/2012) and what succession rights they may enjoy.

Contact Points have further discussed eventual problems in their countries regarding the use of European certificates of inheritance in the land register matters.

Written responses to the questionnaire were submitted by 22 ELRN member organisations.

National legislation

The procedures of succession and land registration are different and specific to each Member State, resulting from its history, rules of national law, legal culture, etc. This is why an increased understanding of the law of succession and gradual interconnection of Land Registry is necessary.

Article 82 of the Regulation requires the European Commission to present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of the Regulation, including an assessment of any practical problems with parallel succession settlements. The report is to be presented by 18 August 2025. This so-called review obligation also applies to the use of the European Certificate of Succession, in which high hopes have been placed (see Recital 67), especially regarding entries in the land register

(Recitals 67 and 68 and 18). An instrument for the publication of all information and for permanent cooperation between them is the European Judicial Network. A pragmatic tool for disseminating information to the public is the e-Justice Portal.

National implementation

The analysis of the member states implementation is important. The Contact Points are experienced land and mortgage register practitioners, associated with direct application of the law or people representing state institutions. They are familiar with using the ECS in land registry proceedings.

A vast majority of Contact Points (17 of 21 countries) answered that there are currently no problems with the use of ECS in land registry proceedings (Austria, Belgium, Bulgaria, Croatia, Cyprus, Greece, Estonia, Finland, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Sweden). There are generally few cases where a European certificate of inheritance is used. However, there are variations and statistics are not available in all countries. Austria have about 20 - 30 cases per year, Latvia had 20 cases in the last years. The Netherlands, Spain and Italy appear to receive more of these cases than the other answering Member States.

Problems that arise are solved in accordance with national procedures. If there are formal or substantive deficiencies, as a rule, countries reject the application for registration or refer the judge (Estonia) to the procedure of adaptation of Article 31 of Reg. 650/2012. Some Contact Points have also stated that most problems with the application of the ECS occurred at the beginning of the entry into force of the regulation.

Specific problems that have been pointed out by Contact Points, is the problem with the lack of property description in ECS issued by German authorities. This is since some nations require description/identification of real estate, while Regulation 650/2012 does not. Another problem is if national law requires joint ownership to be expressed as a fraction of the whole. This data is however not available in the ECS issued by German authorities.

According to article 68 par. 1 and m of Regulation 650/2012 the ECS shall contain a list of rights or assets for each heir (par. 1) and a list of rights or assets for each legatee (par. m) where appropriate. The phrasing "where appropriate" means that the information is not always obligatory.

Italy has pointed out an initial problem with the use of ECS and local certificates. A local Italian deed can only be issued by a judge, but an ECS may also be issued by a notary, and they have a completely different legal form. It was described that National Law no. 161/2014 established that the specific provisions of Royal Decree no. 499/1929 on the Trentino succession deed remained in force. This meant that in the case of local succession (without cross-border issues), the succession deed must be issued only by a judge and not by a local notary. In this country, succession deeds issued by foreign notaries are quite common, but apply only to cross-border situations (e.g. a German deceased born and raised in Germany, with a second home in Trentino). In September 2021, they had the first case involving a European succession deed issued by a notary on an Italian testator, with last residence and real estate in Trentino and also in Spain. In this case, the land registry judge approved this ECS issued not by a judge but by a local notary.

Challenges and article 69.5

According to article 69.5 a European certificate of succession shall constitute 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).

Point (l) expressly states that 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, is excluded from the scope of the Regulation. This creates a potential dilemma because even if the ECS is a valid document for recording in the land registry, additional requirements concerning land registration may apply.

The ECS is subject to the control of the national Land Registry and therefore must meet certain requirements. In some countries additional documents are required. The ECS may therefore not be sufficient on its own to obtain registration, due to the fact that the registration of rights to real estate is in fact governed by national law (*lex rei sitae v. lex registrationis*).

For example, the certificates set forth in Articles 14 and 16 of the national Mortgage Law in Spain. Many foreigners forget to present these additional documents required by Spanish regulations.

Other examples of additional requirements is proof of payment of taxes or the need to determine the overall share of the heir in certain assets. In this sense, the division, if necessary,

may not be included in the deed of inheritance. This creates a problem in determining the shares of the property.

The Dutch Contact Point has pointed out several problems:

1. The lack of an expiration date of the ECS copy.
2. The difficulty when all mandatory fields of the form are not filled in.
3. When ECS is drawn up in a foreign language.
4. Uncertainty about the status of the issuing authority.

The Dutch cadaster solves these problems using national law, either by refusing the entry (the first two situations), by calling on the applicant to submit a translation of the document by a sworn translator (the third situation) or by requesting certification of the status of the issuing authority together with a translation by a sworn translator.

National regulations on succession

All answering countries have a codified national regulation on succession law, mostly as part of the Civil Code - 50% of the answers (12/21 countries: Austria, Belgium, Estonia, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Spain, Slovakia), or a separate legislation on succession law - 25% of the answers (5/21 countries - Bulgaria, Croatia, Finland, Italy, Sweden).

Secondly, in each Member State, at least three succession rights holders are known: heir/s (all countries), legatee/s (14 countries), executor(s) of the will (14 countries).

It has been pointed out that there is no legal definition of heir or legatee in Bulgarian law. In such a situation, it is best to use a functional interpretation. Unfortunately, the Regulation 650/2012 has no rule to adapt national law to the most similar law, as it is the case for the adaptation of rights in rem under Article 31 of the Regulation.

The lack of basic knowledge about the regulations of national law on the rights and obligations of individual subjects, their duration (e.g. whether they are temporary, such as the two year period of being an executor of a will in Romania) may result in legal problems in the field of proper determination of a person authorized to rights and obligations from the real estate, including its disposal.

The legal position of the heir is generally similar and mostly uniform. There are however variations for other entities. In this respect, Member States may differ significantly in their national regulations, and it is important to protect not only the purchasers of real estate, but also third parties, e.g. purchasers of real estate, in order to implement the principle of the warranty of the land register. The regulation provides a mechanism protecting against such situations, such as a set of presumptions related to the acquired rights set forth in art. 69.2 - 4 of the Regulation and to lay down the principle of establishing certification of circumstances established under the law applicable to the succession or under any other law applicable to these matters (Article 67.1 of the Regulation). However, it may not always be sufficient.

There is a concern that there is no adaptation procedure as in Article 31 of Regulation 650/2012 in the case of rights in rem. The burden of interpretation will therefore be on the authorities registering e.g. property ownership. It would be useful to have a detailed, up-to-date information as to the national law and above all a link to the national legislation page.

However, the wide variety of national legislation may still risk creating unnecessary complications. Thus, the proper informational role of the e-Justice portal as laid down in Article 77 of the Regulation, according to which MNCs should provide brief summaries of their national legislation and procedures regarding succession, is very important. In addition to this it should also be mentioned that ELRA is a part of the EU- ADAPT project whose aim is to provide an international tool to make national rights in rem mutually understandable, deepening each ones features and making them widely accessible.

Conclusions

The ECS is a document with important information. It provides legal effects in the sphere of registering property rights. The document is likely to become even more popular as an instrument. As described above the ECS has a somewhat problematic nature and it is a pity that there is still no central register of issued ECS. Therefore, it is not possible to check how many of these documents, their copies, additions, and corrections that have been issued so far in the EU countries.

Because inheritance law differs widely in the Member State it is important to have a proper understanding of the type and status of the actors that are identified in the ECS. Therefore, it should be proposed to collect, analyze and complete information regarding the status of heirs, legatees, executors and administrators of individual Member States collected pursuant to art. 77 of Regulation 650/2012, due to the fact that the adjustment procedure as provided for in

art. 31 cannot be applied to them, which in the case of discrepancies arising from national law, may cause problems with the practical application of the ECS.

These actions would probably contribute to a greater popularity of this pragmatic, legal tool, which, unfortunately still can cause practical problems when used as an instrument for land registration.

In addition, it should be reminded that the issuing authority may request information from another member state. Article 66.5 stipulates that the competent authority of a Member State shall, upon request, provide the issuing authority of another Member State with information held, in particular, in the land registers, the 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, where that competent authority would be authorised, under national law, to provide another national authority with such information.

November 2022

ELRA
European Land Registry Association