

Project CISUR – Enhancing Judicial Cooperation on the Implementation of the Succession Regulation in Croatia and Slovenia/*CISUR – Jačanje pravosudne suradnje u primjeni Uredbe o nasljeđivanju u Hrvatskoj i Sloveniji*

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DESK RESEARCH REPORT ON THE REGULATORY AND INSTITUTIONAL FRAMEWORK FOR THE IMPLEMENTATION OF THE REGULATION IN CROATIA AND SLOVENIA

Summary

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INTRODUCTION

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 (hereinafter: Succession Regulation) was adopted on 4 July 2012. Prior to its adoption, long-standing activities and discussions took place in the European Union (EU).

As early as 1998, the adoption of a European instrument in the field of succession was a priority in the framework of the "Vienna Action Plan". Next was followed by the "Hague Program: Strengthening Freedom, Security and Justice in the European Union" of 2004, which also stressed the need to adopt a European instrument governing law issues applicable to inheritance, jurisdiction, mutual recognition and the enforcement of succession decisions and the creation of a European Certificate of Succession. The "Stockholm Program - an open and secure Europe that serves and protects its citizens" from 2009 is a step forward, inter alia by expanding the proposal and the principle of mutual recognition of succession decisions and wills, taking into account the specificities of Member States' legal systems.

The "Green Paper on Succession and Wills" was published on 1 March 2005 and included the Questionnaire on the Principles and Rules of Applicable Law on jurisdiction, recognition and enforcement of succession decisions that should be taken into account in the creation of a European Instrument for inheritance. Then, in 2009, the Proposal for a Decree on jurisdiction, applicable law, and the recognition and enforcement of judgments and authentic acts in matters of succession and the introduction of a European Certificate of Succession.

Regulation no. 650/2012 on succession contains provisions on jurisdiction, applicable law, recognition or, if so, acceptance, enforceability and enforcement of decisions, public documents and judicial settlements in matters of succession and the establishment of a European Certificate of Succession. Objective of Regulation No. 650/2012 on succession, as emphasized in the Preamble, is to facilitate the proper functioning of the internal market by removing obstacles to the free movement of persons who are currently experiencing difficulties in exercising their rights in the context of inheritance with a cross-border element.

For the correct and uniform application of the Succession Regulation, The Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014 was adopted. The latter established the forms set out in Regulation (EU) No 650/2012.

On 12 December 2014, the Act Implementing Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 was adopted in Croatia. The Act

defines the territorial jurisdiction to decide on the estate, the competent bodies and procedures within the scope of the Succession Regulation.

Slovenia generally does not adopt specific implementing measures for the implementation of European procedural regulations in national law. However, if this is the case, it is, as a rule, a partial, but not a complete regulation of the implementation. Such an example of partial regulation of the implementation is also the Act Amending the Inheritance Act (ZD-C), which added to the law an additional chapter, titled "Provisions for implementing the Regulation 650/2012/EU", in particular for determining the competent authorities for its implementation.

A. SCOPE

The scope of the Regulation is very broad. It covers all civil matters related to succession to the estates of deceased persons, that is, all forms of transfer of property, rights and obligations due to death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession. It should not apply to revenue matters or to administrative matters of a public-law nature; and also not to areas of civil law other than succession or questions relating to matrimonial property regimes, including marriage settlements as known in some legal systems to the extent that such settlements do not deal with succession matters, and property regimes of relationships deemed to have comparable effects to marriage.

The Regulation applies in all Member States, with the exception of the United Kingdom, Ireland and Denmark. These Member States were not taking part in the adoption of this Regulation and are not bound by it or subject to its application.

The Regulation applies to the succession of persons who die on or after 17 August 2015.

B. JURISDICTION

The second chapter of the Regulation regulates the field of jurisdiction as one of the most important institutes of private international law. The Regulation stipulates that the courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole. The aim of this rule of general jurisdiction is to prevent several succession proceedings before the competent authorities in several different Member States. To ensure that a genuine connecting factor exists between the succession and the Member State in which jurisdiction is exercised, the Regulation

provides that the general connecting factor for the purposes of determining both jurisdiction and the applicable law should be the habitual residence of the deceased at the time of death.

The rules of this Regulation are devised so as to ensure that the authority dealing with the succession will, in most situations, be applying its own law. If the deceased had chosen as the law to govern his succession the law of a Member State of which he was a national, the Regulation allows the parties concerned to conclude a choice-of-court agreement in favour of the courts of the Member State of the chosen law. Such a choice-of-court agreement must be expressed in writing, dated and signed by the parties concerned.

The Regulation also determines when a court which has already commenced proceedings on the basis of general jurisdiction or subsidiary jurisdiction may decline jurisdiction if the deceased in accordance with Article 22 of the Regulation has chosen the applicable law.

In addition to the general jurisdiction relating to the habitual residence of the deceased, the Regulation also provides for the subsidiary jurisdiction of the courts of the Member States if the habitual residence of the deceased at the time of death is not in one of the Member States but in a third country. Subsidiary jurisdiction comes into play if he deceased had the nationality of that Member State at the time of death; or, failing that, the deceased had his previous habitual residence in that Member State, provided that, at the time the court is seised, a period of not more than five years has elapsed since that habitual residence changed.

The Regulation provides for a *forum necessitatis* to prevent cases of denial of justice so that the court of a Member State may exceptionally decide on a succession closely linked to a third country. Member State may, on an exceptional basis, rule on the succession if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the case is closely connected.

The Regulation includes other provisions to eliminate difficulties in asserting the rights of persons in the context of cross-border succession: on Limitation of proceedings (regarding assets located in a third state); on Acceptance or waiver of the succession, of a legacy or of a reserved share; on seising of a court; examination as to jurisdiction (where a court of a Member State is seised of a succession matter over which it has no jurisdiction under this Regulation, it shall declare of its own motion that it has no jurisdiction); Examination as to admissibility (the court having jurisdiction stays the proceedings so long as it is not shown that the defendant habitually resident in another State has been able to receive the document instituting the proceedings); Lis pendens; Related actions (Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings); Provisional, including protective, measures.

C. APPLICABLE LAW

Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole is the law of the State in which the deceased had his habitual residence at the time of death (general rule). Bearing in mind that there are no uniform positions in the conflicting laws of the Member States, the principle of the unity of inheritance is the most important achievement of the European legislator: “For reasons of legal certainty and in order to avoid the fragmentation of the succession, that law should govern the succession as a whole, that is to say, all of the property forming part of the estate, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third State.”

The Regulation does not favour the law of Member States, as it stipulates that Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

However, the Regulation also provides for the possibility that a person chooses the law to govern his succession as a whole (choice of law). A person may choose the law of the State whose nationality he possesses at the time of making the choice or at the time of death. As the Regulation aims to ensure that the authority dealing with the succession will be applying its own law, it allows the parties concerned to conclude a choice-of-court agreement in favour of the courts of the Member State of the chosen law.

The general rule, which according to the Regulation is the last habitual residence of the deceased (if the person has not chosen the law), cannot answer all questions of inheritance. Specific connecting factors are needed to respond to individual aspects of inheritance law. Therefore, the Regulation includes additional rules to determine applicable law: for the dispositions of property upon death other than agreements as to succession; Agreements as to succession; rules on substantive validity of dispositions of property upon death; Formal validity of dispositions of property upon death made in writing; Validity as to form of a declaration concerning acceptance or waiver; Special rules on the appointment and powers of an administrator of the estate in certain situations; Adaptation of rights *in rem*; rules regarding Commorientes; Estate without a claimant; Estate without a claimant; Public policy (*ordre public*); and rules regarding states with more than one legal system – territorial conflicts of laws and states with more than one legal system – inter-personal conflicts of laws.

D. RECOGNITION, ENFORCEABILITY AND ENFORCEMENT OF DECISIONS

In the light of its general objective, which is the mutual recognition of decisions given in the Member States in matters of succession, irrespective of whether such decisions were given in contentious or non-contentious proceedings, the Succession Regulation lays down rules relating to the recognition, enforceability and enforcement of decisions in succession matters similar to those of other Union instruments in the area of judicial cooperation in civil matters. In accordance with the Succession Regulation, ‘decision’ means any decision in a matter of succession given by a court of a Member State, whatever the decision may be called, including a decision on the determination of costs or expenses by an officer of the court.

The Succession Regulation respects the different systems for dealing with matters of succession applied in the Member States. For the purposes of the Regulation, the term ‘court’ should therefore be given a broad meaning so as to cover not only courts in the true sense of the word, exercising judicial functions, but also the notaries or registry offices in some Member States who or which, in certain matters of succession, exercise judicial functions like courts, and the notaries and legal professionals who, in some Member States, exercise judicial functions in a given succession by delegation of power by a court. All courts as defined in the Regulation are bound by the rules of jurisdiction set out in the Regulation. Conversely, the term ‘court’ does not cover non-judicial authorities of a Member State empowered under national law to deal with matters of succession, such as the notaries in most Member States where, as is usually the case, they are not exercising judicial functions.

The Regulation allows all notaries who have competence in matters of succession in the Member States to exercise such competence. Whether or not the notaries in a given Member State are bound by the rules of jurisdiction set out in the Regulation depends on whether or not they are covered by the term ‘court’ for the purposes of the Regulation. Acts issued by notaries in matters of succession in the Member States should circulate under the Regulation. When notaries exercise judicial functions they are bound by the rules of jurisdiction, and the decisions they give should circulate in accordance with the provisions on recognition, enforceability and enforcement of decisions. When notaries do not exercise judicial functions they are not bound by the rules of jurisdiction, and the authentic instruments they issue should circulate in accordance with the provisions on authentic instruments.

A decision given in a Member State shall be recognised in the other Member States without any special procedure being required. In accordance with the Article 40 of the Succession Regulation, a decision shall not be recognised:

- (a) if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State in which recognition is sought;
- (b) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so;
- (c) if it is irreconcilable with a decision given in proceedings between the same parties in the Member State in which recognition is sought;
- (d) if it is irreconcilable with an earlier decision given in another Member State or in a third State in proceedings involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

Considerations of public interest should allow courts and other competent authorities dealing with matters of succession in the Member States to disregard, in exceptional circumstances, certain provisions of a foreign law where, in a given case, applying such provisions would be manifestly incompatible with the public policy (*ordre public*) of the Member State concerned. However, the courts or other competent authorities should not be able to apply the public-policy exception in order to set aside the law of another State or to refuse to recognise or, as the case may be, accept or enforce a decision, an authentic instrument or a court settlement from another Member State when doing so would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which prohibits all forms of discrimination.

Decisions given in a Member State and enforceable in that State shall be enforceable in another Member State when, on the application of any interested party, they have been declared enforceable there in accordance with the procedure provided for in Articles 45 to 58 of the Succession Regulation. The application for a declaration of enforceability shall be submitted to the court or competent authority of the Member State of enforcement communicated by that Member State to the Commission in accordance with Article 78 of the Succession Regulation.

The decision shall be declared enforceable immediately on completion of the formalities without any review under Article 40 of the Succession Regulation. The party

against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application. The decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State of enforcement. The declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the decision, if not already served on that party. The decision on the application for a declaration of enforceability may be appealed against by either party.

E. AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

In order to take into account the different systems for dealing with matters of succession in the Member States, the Succession Regulation guarantees the acceptance and enforceability in all Member States of authentic instruments and court settlements in matters of succession. ‘Authentic instrument’ means a document in a matter of succession which has been formally drawn up or registered as an authentic instrument in a Member State and the authenticity of which: (i) relates to the signature and the content of the authentic instrument; and (ii) has been established by a public authority or other authority empowered for that purpose by the Member State of origin.

Authentic instruments have the same evidentiary effects in another Member State as they have in the Member State of origin, or the most comparable effects. When determining the evidentiary effects of a given authentic instrument in another Member State or the most comparable effects, reference should be made to the nature and the scope of the evidentiary effects of the authentic instrument in the Member State of origin. The evidentiary effects which a given authentic instrument should have in another Member State will therefore depend on the law of the Member State of origin.

The ‘authenticity’ of an authentic instrument is an autonomous concept 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. It should also cover the factual elements recorded in the authentic instrument by the authority concerned, such as the fact that the parties indicated appeared before that authority on the date indicated and that they made the declarations indicated. A party wishing to challenge the authenticity of an authentic instrument should do so before the competent court in the Member State of origin of the authentic instrument under the law of that Member State.

The term ‘the legal acts or legal relationships recorded in an authentic instrument’ should be interpreted as referring to the contents as to substance recorded in the authentic instrument. The legal acts recorded in an authentic instrument could be, for instance, the agreement between the parties on the sharing-out or the distribution of the estate, or a will or an agreement as to succession, or another declaration of intent. The legal relationships could be, for instance, the determination of the heirs and other beneficiaries as established under the law applicable to the succession, their respective shares and the existence of a reserved share, or any other element established under the law applicable to the succession. A party wishing to challenge the legal acts or legal relationships recorded in an authentic instrument should do so before the courts having jurisdiction under the Regulation, which should decide on the challenge in accordance with the law applicable to the succession.

If a question relating to the legal acts or legal relationships recorded in an authentic instrument is raised as an incidental question in proceedings before a court of a Member State, that court has jurisdiction over that question.

An authentic instrument which is being challenged does not have any evidentiary effects in a Member State other than the Member State of origin as long as the challenge is pending. If the challenge concerns only a specific matter relating to the legal acts or legal relationships recorded in the authentic instrument, the authentic instrument in question does not have any evidentiary effects in a Member State other than the Member State of origin with regard to the matter being challenged as long as the challenge is pending. An authentic instrument which has been declared invalid as a result of a challenge should cease to produce any evidentiary effects.

A person wishing to use an authentic instrument in another Member State may ask the authority establishing the authentic instrument in the Member State of origin to fill in the form describing the evidentiary effects which the authentic instrument produces in the Member State of origin. An authentic instrument which is enforceable in the Member State of origin shall be declared enforceable in another Member State on the application of any interested party in accordance with the procedure provided for in Articles 45 to 58 of the Succession Regulation. The court with which an appeal against the decision on the application for a declaration of enforceability is lodged shall refuse or revoke a declaration of enforceability only if enforcement of the authentic instrument is manifestly contrary to public policy (*ordre public*) in the Member State of enforcement. The same system is valid for the court settlement.

In accordance with the Succession Regulation, ‘court settlement’ means a settlement in a matter of succession which has been approved by a court or concluded before a court in the course of proceedings.

Should an authority, in the application of the Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seised of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under the Regulation.

F. EUROPEAN CERTIFICATE OF SUCCESSION

In order for a succession with cross-border implications within the European Union to be settled speedily, smoothly and efficiently, the heirs, legatees, executors of the will or administrators of the estate should be able to demonstrate easily their status and/or rights and powers in another Member State, for instance in a Member State in which succession property is located. To enable them to do so, the Regulation provides for the creation of a uniform certificate, the European Certificate of Succession (hereinafter: ‘the Certificate’), to be issued for use in another Member State. In order to respect the principle of subsidiarity, the Certificate should not take the place of internal documents which may exist for similar purposes in the Member States.

The use of the Certificate is not mandatory. This means that persons entitled to apply for a Certificate is not under no obligation to do so but should be free to use the other instruments available under the Regulation (decisions, authentic instruments and court settlements). However, no authority or person presented with a Certificate issued in another Member State should be entitled to request that a decision, authentic instrument or court settlement be presented instead of the Certificate.

The Certificate should be issued in the Member State whose courts have jurisdiction under the Regulation. It is for each Member State to determine in its internal legislation which authorities are to have competence to issue the Certificate, whether they will be courts as defined for the purposes of the Regulation or other authorities with competence in matters of succession, such as, for instance, notaries.

The Certificate produces the same effects in all Member States. It is not an enforceable title in its own right but has an evidentiary effect and it is presumed to demonstrate accurately elements which have been established under the law applicable to the succession or under any other law applicable to specific elements, such as the substantive validity of dispositions of property upon death. The evidentiary effect of the Certificate should not extend to elements which are not governed by the Succession Regulation, such as questions of affiliation or the question whether or not a particular asset belonged to the deceased. Any person who makes payments or passes on succession property to a person indicated in the Certificate as being entitled to accept such payment or property as an heir or legatee should be afforded appropriate protection if he/she acted in good faith relying on the accuracy of the information certified in the Certificate. The same protection should be afforded to any person who, relying on the accuracy of the 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. The protection is ensured if certified copies which are still valid are presented. Whether or not such an acquisition of property by a third person is effective is not determined by the Succession Regulation.

The authority which issues the Certificate should 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 Succession Regulation provides for an exchange of information on such formalities between the Member States.

The competent authority issues the Certificate upon request. The original of the Certificate remains with the issuing authority, which issues one or more certified copies of the Certificate to the applicant and to any other person demonstrating a legitimate interest. This does not preclude a Member State, in accordance with its national rules on public access to documents, from allowing copies of the Certificate to be disclosed to members of the public. The Regulation provides for redress against decisions of the issuing authority, including decisions to refuse the issue of a Certificate. Where the Certificate is rectified, modified or withdrawn, the issuing authority informs the persons to who certified copies have been issued so as to avoid wrongful use of such copies.