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ENN HANDBOOK
SUCCESSIONS

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INDEX

Introduction

In a context of increasing mobility across Europe, the need for a harmonized approach to managing international successions was addressed, at EU level, with the adoption of the Regulation 650/2012 (referred hereinafter as the 'ESR'), which provides a coherent legal framework for cross-border successions. This Regulation, which came into force on 16 August 2012, applies to successions provided that the deceased passed away on or after 17 August 2015. It was designed to facilitate the process for individuals with personal and financial interests in multiple countries, ensuring a more straightforward and predictable legal environment.

This Handbook is a collective effort of practitioners and experts from several EU countries. It was developed within the framework of the ENN 2024 project (co-funded by the EU) and coordinated by the Council of the Notariats of the European Union, aiming to deliver clear and reliable information for practitioners dealing with cross-border succession cases. It builds upon and refines a handbook first published just after the Regulation came into force. After more than ten years since the initial version, and with nearly a decade of practical application of the Regulation by notaries, this updated Handbook incorporates the valuable experiences and insights gained during this period. While it does not offer an exhaustive tool to apply the Regulation, it focuses on practical aspects and commonly encountered scenarios, providing essential information on key topics listed below.

When the Regulation is Applied? The Regulation applies to various aspects of succession but explicitly excludes certain topics. It is crucial for practitioners to understand the scope of the Regulation and the situations in which it can be invoked.

The Succession Regulation and Non-EU Member States. When successions involve connections to non-EU countries, the Regulation interacts with existing international conventions and bilateral agreements. This section guides practitioners in identifying and applying these agreements, which may influence applicable law, choice of law, and treatment of assets, ensuring compliance with both EU and international obligations.

Where is the habitual residence? Determining the habitual residence of the deceased is a central element of the Regulation, as it influences both the applicable law and jurisdiction. This handbook provides guidance on how to ascertain habitual residence, supported by examples including retirees, cross-border workers, and expatriates, to help practitioners navigate these often complex determinations.

Jurisdiction. Understanding jurisdiction is vital for notaries and other practitioners. This section covers the rules on jurisdiction, including the choice of court by parties involved in the succession and special rules for declarations by heirs. It also addresses the jurisdictional rules applicable when the deceased's habitual residence is located in a third state.

Which law applies? This section explains the main rules on applicable law, starting with the choice of law, outlined in Article 22, and its limitations, such as the restriction to the testator's nationality. It also covers the general application of the law of the deceased's last habitual residence, including assets in third states, and the exceptions to this rule. Additionally, the section addresses *the renvoi* mechanism under Article 34. Finally, public policy considerations provide a comprehensive understanding of the subject.

Wills and Agreements as to Succession. This section provides the reader with essential guidance on assisting clients in drafting a Disposition of Property Upon Death (DoPUD). It offers information on specific rules for agreements as to succession and provides advice on designating the applicable law, helping practitioners drafting these critical documents.

Authentic Instruments. The Regulation also covers the acceptance and enforcement of authentic instruments, such as national certificates. This section provides examples and explains how these instruments are recognized and enforced across Member States, ensuring a smoother process for practitioners and their clients.

The European Certificate of Succession (ECS). One of the Regulation's key innovations is the European Certificate of Succession. This section gives an overview of the ECS, its issuance, and its effects. It also considers post-issuance processes, including certified copies, withdrawal, modification, and rectification, highlighting the ECS's role in simplifying cross-border successions.

Throughout the Handbook, practical examples and references to relevant decisions of the European Court of Justice are included to illustrate the application of the Regulation and provide clarity. By focusing on practical guidance, this Handbook aims to equip practitioners with the knowledge and tools necessary to navigate the complexities of cross-border successions effectively.

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I
When can the Regulation be applied?

The Succession Regulation has a ***limited ambition***: it does not purport to unify the rules of succession law. Member States remain in charge of deciding how the assets of a deceased should be divided among the family members and other relatives of the deceased and whether the latter may, and if so, to what extent, freely decide what will happen to their assets after death.

The Regulation rather focuses on the ***issues specific*** to cross-border succession cases. In those cases, it is crucial that the notary finds out which law governs the succession. It may in some cases be relevant to determine which court has jurisdiction to settle a dispute. Finally, a notary may be faced with an authentic act, or a court decision issued in another Member State and wonder what consequences may be attached to such act or decision. For all these issues, the Regulation offers European solutions helping to avoid contradictory outcome.

Scope

Art. 1 par. 1 - This Regulation shall apply to succession to the estates of deceased persons. It shall not apply to revenue, customs or administrative matters.

The scope of the Regulation is limited to ***succession issues***. Notaries know that when dealing with a succession, many different legal issues will arise: there will be questions relating to the taxes which must be paid following the transfer of assets to the heirs. Before winding up the succession, a notary will have to find out, if the deceased was married, which assets belong to the deceased's estate. The Regulation only provides answers to succession issues. It does not attempt to provide answers to tax issues (Art. 1, par. 1 ESR). Nor does it offer any answer to matrimonial property issues arising when a spouse passes away (Art. 1 par. 2 (d) ESR). In some Member States, legal mechanisms exist which aim to protect surviving spouses. The Court of Justice has decided that when such a mechanism has, as its main purpose, the

determination of the size of the share of the estate to be allocated to the surviving spouse as against the other heirs, it falls under the Regulation (***CJEU, Mahnkopf, case C-558/16***). The Regulation also avoids legal issues arising when the deceased had transferred some of their assets during their lifetime, invested in a pension plan or in an insurance contract (Art. 1 par. 2 (g) ESR).

The Regulation only aims at ***cross-border successions***. In other words, the Regulation does not apply to a succession case which only has connections with a single Member State. The Regulation does not define the dividing line between purely domestic and cross-border successions. The Court of Justice of the European Union clarified that a succession possesses the required international dimension when it includes assets in several Member States and, in particular, in a Member State other than that of the last residence of the deceased (***CJEU, Oberle, case C-20/17***). When the deceased was the national of a Member State but resided in another Member State without having cut ties with the first Member State in which they still held assets, this also amounts to an international situation (***CJEU, E.E., case C-80/19***).

Transitional provisions

Art. 83 par. 1 - This Regulation shall apply to the succession of persons who die on or after 17 August 2015.

The Succession Regulation only applies when the deceased passed away ***on or after 17 August 2015***. The Regulation includes rules which aim to protect the choices made by the deceased before 17 August 2015: if the deceased made a will or an agreement as to succession before that date, it will in most cases be protected by the Regulation (Art. 83 ESR). The same applies to a choice of law made by the deceased before 17 August 2015.

II
The Succession Regulation and non-EU Member States

Relationship with existing international conventions

Art. 75 par. 1 - This Regulation shall not affect the application of international conventions to which one or more Member States are party at the time of adoption of this Regulation and which concern matters covered by this Regulation.

According to Art. 75 par. 1 ESR, the Regulation shall not affect the application of international conventions to which one or more Member States are party at the time of adoption of the ESR and which concern matters covered by the ESR. This provision aims to ensure that the Member States of the European Union do not, when applying EU law, infringe their international obligations.

Some Member States are parties to multilateral conventions which may have an impact on cross-border successions. This is the case with the ***Council of Europe's Convention on the Establishment of a Scheme of Registration of Wills*** adopted in 1972, which is in force in 10 Member States bound by the ESR or ***the Hague Convention on the conflicts of laws relating to the form of testamentary dispositions*** adopted in 1961, which is in force in 14 Member States bound by the ESR. Member States have also concluded bilateral agreements with non-Member States which, among other questions, are also dealing with succession matters. A number of Member States have for example concluded legal aid agreements with Ukraine and Russia.

While multilateral conventions are easily identifiable, it is more difficult to identify bilateral agreements concluded by Member States, as there is no comprehensive list of such agreements. Notaries should always verify whether such a convention exists in their respective Member States, when dealing with a succession matter involving a non-Member State (including Ireland and Denmark, which are not bound by the

Regulation). This may be because the succession involves nationals of non-Member State or because some of the assets are located in that state.

It must be borne in mind that there is no uniformity among bilateral agreements concluded between Member States and non-Member States. The rules included in these bilateral agreements may differ widely. They may even differ among bilateral agreements concluded by one and the same non-Member State. The notary should therefore check the content of the relevant bilateral agreement carefully.

Bilateral agreements concluded by Member States with non-Member States may have an impact not only when a notary of a Member State is called upon to settle a succession, but also when the notary is advising a client who would like to draft a will or another disposition of property upon death.

The importance of bilateral agreements when dealing with a succession involving a non-Member State

When a succession includes a connection with a non-Member State, the notary should pay due attention to bilateral or multilateral agreements potentially applicable.

This applies in the first place when the notary attempts to find out whether the deceased left a will. The Council of Europe's Convention on the Establishment of a Scheme of Registration of Wills already referred to may be used to obtain information on a will left by the deceased in those non-Member states bound by the Convention, i.e. Turkey and Ukraine. Some bilateral agreements concluded by Member States with non-Member countries, such as the Agreement on legal assistance between Poland and Ukraine, may also make it possible for notaries working in the Member State concerned to obtain a copy of the will from a non-Member State.

While registers of wills and international legal instruments making it possible to request information on the existence of a will may be very helpful, notaries should advise their clients to ensure that their will may be easily found after their death, whether the will is left in a country where the testator habitually resides or owns property or whose nationality the testator possesses.

Many bilateral agreements do not adhere to the principle of unity of the succession, which is paramount under the ESR. These agreements may include different rules for the immovable and the movable property of the deceased. It is not unusual that immovable property is governed, under these agreements, by the law of the country where the immovable is located. This is e.g. the case under the bilateral agreements concluded by Ukraine with Estonia and Poland.

The rules included in those bilateral agreements to deal with movable property may be similar to those of the ESR or be built on different principles. The agreement concluded between Estonia and Ukraine submits the movable property to the law of the last place of residence of the deceased. Accordingly, the application of this agreement should not lead to results different from those achieved under the ESR. The Polish-Ukrainian agreement on the contrary submits the movable property to the law of the country of the nationality of the deceased leading to a result which is potentially very different than under the ESR.

If a Ukrainian national dies, the result would therefore differ significantly depending on whether they lastly habitually resided in Estonia or in Poland. In the former case, the Estonian notary would have to apply Estonian law to settle the succession. In the latter case, the Polish notary is required to apply Ukrainian law to the succession of movable property located in any country and Polish law to the immovables located in Poland. In both Estonia and Poland, immovable located in Ukraine would remain governed by Ukrainian law.

These differences might impact the possibility to rely in a Member State on a national succession certificate or even an ECS delivered by the authorities of another Member State. For example, if the Ukrainian national habitually resided in Estonia, a succession certificate issued in Estonia may be called in question in Poland as under the Polish-Ukrainian legal aid agreement, the succession must be governed by another law than under the Estonian-Ukrainian agreement.

The importance of bilateral agreements when advising on a future succession involving a non-Member State

When advising a client on their future succession involving a non-EU State, the notary working in a Member State should take due consideration of the effects of a bilateral agreement concluded with this country. The differences among such bilateral agreements may have an adverse impact on the will or other disposition of property upon death that the client would like to draft.

A first point of attention should be the rules regarding the formal validity of wills. Some bilateral agreements concluded by Member States include rules dealing with this issue. These rules may differ from those of the 1961 Hague Convention. Under the bilateral agreement concluded between Estonia and Ukraine for example, a will is only formally valid if it complies with the requirements of the law of the contracting party whose nationality the testator possesses or those of the contracting party where the will was made. Notaries should also verify whether the bilateral agreements concluded by the Member State where they are acting with non-Member States include rules on the substantive validity and interpretation of a disposition of property upon death. If this is the case, some of the matters regulated by Art 24, 25 and 26 ESR may fall under the rules of the bilateral agreement and not under the ESR.

Turning to the law governing the succession, the notary should proceed very cautiously. As already indicated, some bilateral agreements indeed adopt a binary rule, submitting immovables of the deceased to another law than movables. The law declared applicable under such agreements may not coincide with the law declared applicable by the ESR. This undoubtedly makes drafting a will more complex. The complexity is compounded by the fact that bilateral agreements adopt different rules to deal with movable and immovable assets. In addition, it is impossible to predict where the testator will habitually reside at the time of death, thereby making it difficult to predict which bilateral agreement may be decisive.

An additional difficulty relates to the possibility for the testator to include a choice of law in the will. Art. 22 ESR makes it possible for testators to choose the law of their nationality. This possibility is, however, not provided by many bilateral agreements. Neither the Polish-Ukrainian agreement, nor the Estonian-Ukrainian agreement include rules on the possibility for the testator to make a choice of law, leaving the fate of such a choice uncertain under the agreements.

The Court of Justice has made it clear that under Art. 22 ESR, a third country national may validly choose the law of their nationality to govern their succession. However, the CJEU added that since the possibility to choose the applicable law was not a fundamental principle on which the ESR was based, a testator could not make use

of the possibility provided by Art. 22 ESR when the succession was governed by a bilateral agreement which did not allow the choice of law (***CJEU, OP, case C-21/22***).

While this ruling has tremendous consequences in Member States bound by bilateral agreements which do not explicitly make it possible for the testator to choose the law governing their succession, it will not affect a choice of law included in a will if the succession is dealt with by a Member State not bound by such bilateral agreement.

Example

A Ukrainian national who habitually resides in Poland, would like to make a will. The notary advising the testator should inform that the choice of Ukrainian law in the will would be disregarded if the succession is dealt with in Poland or Ukraine, as the Polish-Ukrainian agreement does not make room for such choice of law. If the testator habitually resides in the Netherlands at the moment of death, the choice of law would be exclusively governed by the ESR. It would therefore be valid. The notary should therefore fully inform the client about the impact of a bilateral agreement on a will and the risks but also the opportunities linked to moving to another country where either the ESR or different bilateral agreement might be applied.

Finally, notaries should keep in mind that bilateral agreements concluded between Member States and non-Member States may include other rules which may significantly impact a succession, such as rules on the acceptance and enforcement of authentic documents and rules on matrimonial property, which should be applied to identify what belongs to the estate of the deceased.

III
Where is the habitual residence?

The **habitual residence** is a key concept of the Regulation: it plays an important role in determining the law governing the succession (Art. 21 ESR). It is also essential to determine which courts have jurisdiction to settle disputes in relation to a succession (Art. 4 ESR).

In order to determine where the habitual residence is located, the notary should adopt a case-by-case approach, focusing on the specific circumstances of the deceased.

The Regulation does not include an express definition of the concept of 'habitual residence'. It is, however, accepted that the concept should receive an autonomous definition. Recitals 23 and 24 of the Regulation provide useful guidance helping practitioners to identify the habitual residence.

Recital 23

In view of the increasing mobility of citizens and in order to ensure the proper administration of justice within the Union and to ensure that a genuine connecting factor exists between the succession and the Member State in which jurisdiction is exercised, this Regulation should provide 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. In order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation.

Recital 23 lays down the general criteria which may be used to identify the habitual residence:

- objective criteria such as the duration and the regularity of the presence in a country. It must be noted that in contrast to other fields of law, there is no required minimum duration for the habitual residence to be established.
- subjective criteria such as the conditions and reasons for the presence in a country.

The notary should take into account all these elements to make an overall assessment of the circumstances of the life of the deceased during the years preceding their death and at the time of their death. The habitual residence established should reveal a close and stable connection with the State concerned.

Examples

Since he retired a couple of years ago, a French national resides 8 to 9 months per year in France. He spends the rest of the year in Portugal where he owns a house. Where is his habitual residence?
Taking into account the fact that the person spends significantly more time in France than in Portugal, that his residence in France appears to be stable and that he only started to reside for a long period in Portugal after he retired, we can conclude that his habitual residence is located in France.

A French woman, who has reached the age of 80, lives in France. After suffering from a stroke, she is admitted to a hospital in Switzerland, where she passes away after 3 weeks. Where is her habitual residence?
The deceased spent the last weeks of her life in Switzerland only for medical reasons. If her family members, her friends and her assets are located in France, there is no reason to doubt that her last habitual residence was established in France.

A German national works in Luxembourg where he resides during the week in a flat he bought some years ago. He spends every weekend in Germany, where he has kept an apartment in the small town where he grew up and where most of his family members still live.
Although the person spends more time in Luxembourg than in Germany, his habitual residence is located in Germany. This is where he has kept all his personal links. His residence in Luxembourg is limited to his work.

Recital 24

In certain cases, determining the deceased's habitual residence may prove complex. Such a case may arise, in particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case, the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located. Other complex cases may arise where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of those States, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances.

Recital 24 offers additional guidance for more complex cases, in which it proves difficult to identify a close and stable connection with one State. According to Recital 24, the notary may pay attention to additional criteria such as the nationality of the deceased, the location of their assets, their professional connections or their family interests.

Examples

A US citizen lives both in France and the United States. He is retired and enjoys his retirement in the two countries where he owns real estate and has established a network.
Since the deceased spent as much time in France as he did in the United States, it is difficult to determine with precision where the habitual residence of the deceased was located. At the margin, the fact that the deceased possessed the citizenship of the United States could point to this country. Please bear in mind that Art. 34 ESR could apply.

A French national moved for professional reasons to the U.A.E. where he has been seconded by his employer for the next two years. He lives in the U.A.E. with his wife and children. The spouses have kept their house in France and intend to move back to France in two years' time when their oldest child will enter the university.

This case is not clear-cut : while the spouses have made it clear that their stay in the U.A.E. is purely temporary, their presence in the U.A.E. extends over a long period of time. Since they have kept their house in France and are French nationals, it may be accepted that their habitual residence has been kept in France.

Whatever the circumstances, it is clear that each person can under the Regulation only have one habitual residence. There is no room for multiple habitual residences for the same person (***CJEU, E.E., case C-80/19***).

Under the ESR, the habitual residence must in principle be assessed at the time the person passed away. Art. 21 par. 1 ESR expressly refers to the "time of death". The same can be said of Art. 4 ESR. Under Art. 24 and 25 ESR, however, the habitual residence must be appraised before a person passes away, i.e. on the day on which the disposition of property or the agreement as to succession was made.

IV
Jurisdiction

Is the notary bound by the rules of jurisdiction of the Regulation?

The Succession Regulation includes various rules of jurisdiction. The most important one is that the courts of the Member State where the deceased habitually resided on the moment of death, have jurisdiction to hear all succession cases (Art. 4 ESR). In most of their activities, notaries are not bound by the European rules of jurisdiction: they are not required to verify their jurisdiction when assisting a client in preparing a will or an agreement as to succession or making a choice of law. A notary called upon by clients to assist in the winding up of a succession is not required to verify its jurisdiction, unless the notary acts as court which is the case in some Member States.

The rules of jurisdiction are also important when a notary is requested to issue a European Certificate of Succession (ECS). The EU Member States may freely determine which authority issues the ECS. Some Member States have given this competence to notaries, whether appointed by courts or by the heirs. In other Member States, courts have been appointed to issue ECSs. Yet, in other Member States, the power to issue ECSs has been given to administrative authorities, such as the tax office.

When a notary has the power to issue an ECS, he or she should first verify whether he or she is competent to do so according to Art. 4, 7 or 10 ESR (Art. 64 ESR).

Notaries may also be called to issue a national certificate of succession in international cases (Art. 62 par. 3 ESR). Notaries must follow the rules of jurisdiction when they issue an ECS, but notaries are not bound by these rules when issuing a national certificate of succession, unless the notary is considered to be a ‘court’ as defined in Art. 3 par. 2 ESR (***CJEU 23, W.B.; case C-658/17*** and ***CJEU, E.E., case C-80/19***). If the national certificate of succession is drawn up in the form of an authentic document, other EU Member States must recognise this document (Art. 59 ESR).

Example

A French national died in 2023 having at the moment of his death his habitual residence in Brussels (Belgium), where he had already lived for 10 years. He did not make a last will. He owned real estate in Belgium, France and Croatia and bank accounts in Belgium and Luxemburg. Which authority in the EU is competent to issue the ECS?
Because the deceased had his habitual residence in Belgium, the ECS should be requested in Belgium. Belgium has appointed notaries to issue ECSs. The Belgian notary should first verify whether they have jurisdiction under Art. 4. Once issued, the ECS is valid for all assets in the EU.

When may parties to a succession make a choice of court?

Choice-of-court agreement

Art. 5 par. 1 - Where the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the parties concerned may agree that a court or the courts of that Member State are to have exclusive jurisdiction to rule on any succession matter.

If the deceased made a valid choice of law in their last will according to Art. 22 ESR, the heirs involved in the succession procedure have the possibility to use this choice of law to agree with the jurisdiction of the courts of the Member State whose law has been chosen (Art. 5 and 7 ESR). A written document with signatures of all persons and the date of signing will do. In order for the agreement to be valid, all persons involved in the procedure must sign it. This ensures that the court chosen by the parties may apply its own law in succession cases.

Failing an agreement among all the heirs on the jurisdiction of the court, the court of the Member State where the deceased lastly habitually resided has jurisdiction according to Art. 4 ESR.

That court may decline jurisdiction if it considers that a court of the Member State whose law the deceased has chosen in their last will, is better suited to decide on the case, Art. 6 ESR (***CJEU, RK. CR, case C 422/20***).

By concluding a choice of court agreement in favour of the courts of the Member State whose law has been chosen by the deceased, the heirs can also grant the authorities of that State competence to issue the ECS. All parties concerned must sign this agreement.

Example

A German national made a handwritten last will, wherein she appointed her husband as her only heir. Her last will contains a choice for German law. She died in 2024 while living in Portugal, leaving assets in Portugal and Germany. Apart from her husband, she left a child born in a former marriage. Which authority is competent to issue an ECS?

The husband may grant jurisdiction to German authorities by making use of the possibility offered in Art. 5. If he does so, the German authority is competent to issue the ECS. Otherwise, the Portuguese authority would be competent based on art. 4 ESR.

If the child wants to start a procedure to claim his reserved share, which court is competent?

If the child and husband agree to sign a choice-of-court agreement, the German court is competent in the procedure. If, however, the husband refuses to sign the agreement, the Portuguese court will be competent based on art. 4 ESR. That court may decline jurisdiction and refer the case to a German court.

Special rule for heirs making a declaration (acceptance or waiver of succession rights)

Acceptance or waiver of the succession, of a legacy or of a reserved share

Art. 13 - In addition to the court having jurisdiction to rule on the succession pursuant to this Regulation, the courts of the Member State of the habitual residence of any person who, under the law applicable to the succession, may make, before a court, a declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration designed to limit the liability of the person concerned in respect of the liabilities under the succession, shall have jurisdiction to receive such declarations where, under the law of that Member State, such declarations may be made before a court.

In addition to the court having jurisdiction to rule on the succession pursuant to this Regulation, the courts of the Member State of the habitual residence of any person who, under the law applicable to the succession, may make, before a court, a declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration designed to limit the liability of the person concerned in respect of the liabilities under the succession, shall have jurisdiction to receive such declarations where, under the law of that Member State, such declarations may be made before a court.

Art. 13 ESR allows heirs who habitually reside in a Member State to file their declaration regarding the succession (whereby the heir accepts or waive their succession rights) either in the Member State whose courts have jurisdiction or before the authorities of the Member State of their own habitual residence. If the heir chooses to file a declaration before the authorities of the Member State of their own habitual residence, they must inform themselves the authority of the Member State having jurisdiction over the succession (***CJEU, T.N. and N.N., case C-617/20***). Another heir may also inform the other authority (***CJEU, M. Ya. M., case C-651/21***).

In order to be valid, the declaration filed by the heir should comply with either the law governing the succession or the law of the habitual residence of the heir (Art. 28 ESR).

The same rules apply to a declaration concerning the acceptance of the succession, the acceptance of a legacy or the acceptance of a reserved share, or a declaration designed to limit the liability of the heir in respect of the liabilities under the succession.

Example

A Polish national who lived in the Netherlands for 15 years, died in the Netherlands in 2024. Her estate consists of more debts than assets. Her parents are her legal heirs according to Dutch law. Both parents live in Poland. The parents can go to the court of their habitual residence in Poland to waive the succession of their daughter and do so in accordance with the formal requirements of Polish law. They must inform the Dutch authorities by themselves of the fact that they declined the estate of their daughter.

Special rule of jurisdiction when the habitual residence of the deceased is located in a third State

Subsidiary jurisdiction

Art. 10 par. (1). - 1. Where the habitual residence of the deceased at the time of death is not located in a Member State, the courts of a Member State in which assets of the estate are located shall nevertheless have jurisdiction to rule on the succession as a whole in so far as:
(a) the deceased had the nationality of that Member State at the time of death; or, failing that,
(b) 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.

In case the deceased's habitual residence at the time of death was not located in a EU Member State, Art. 10 ESR makes it possible for the courts of a Member State to have jurisdiction over the succession (***CJEU, Jurtukała, case C-55/23***).

Art. 10 Regulation distinguishes between three situations:

- If the deceased had the nationality of a Member State at the time of death, the courts of that State have jurisdiction, provided the deceased left some assets in that State;
- If the deceased did not have the nationality of a Member State at the time of death but had their habitual residence in a Member State within a period of 5 years before the court is seized, then the courts of that Member State have jurisdiction over the succession, again provided the deceased left some assets in that State;
- In cases where the deceased neither had the nationality of a Member State nor habitual residence within 5 years of their death in a Member State, the court of

the Member State in which assets of the estate are located, has jurisdiction. The jurisdiction of the court is, however, limited to the assets present on the territory (Art 10 par. 2 ESR).

The court must raise of its own motion its jurisdiction under the rule of Art. 10 ESR (***CJEU, VA and ZA, case C-645/20***).

Art. 10 ESR also applies to identifying the competent authority to issue an ECS, when the deceased lived outside the EU on the moment of death, but owned assets in a EU Member State.

Example

A man with British nationality died in 2024 having his last habitual residence in New York (USA) for the last 6 years. He owned real estate in Spain, where he had lived more than 10 years ago. Which court is competent to deal with the succession in case the heirs want to appoint an administrator who can handle the estate in Spain?

The UK is not a Member State and was anyway not bound by the Regulation when the Regulation came into force (Recital 82 ESR). The deceased neither possessed a nationality of a Member State nor had his habitual residence within 5 years in a Member State. The Spanish courts are therefore competent to decide in this case based on Art. 10 par. 2 ESR. Their jurisdiction is, however, solely limited to the assets located in Spain and cannot extend to assets located in other Member States or in third States.

V
Which law applies?

Choice of law

Choice of law

Art. 22, par 1. - A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death.
A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.

When a succession opens and no choice of law has been made, the entire succession is governed by the law of the country where the deceased had their habitual residence at the time of death (Art. 21 ESR). The law governing the succession may therefore change several times during a lifetime. This may have unintended consequences.

Example

The testator is an Austrian national. He is married and has a son. Shortly before his death, the testator establishes his habitual residence in Finland. He wishes his wife and son to share his estate as is usual under Austrian law (widow 1/3, children 2/3), so he does not make a will. As no choice of law has been made, Finnish statutory inheritance law applies on the basis of the last habitual residence.

The testator has the option of making a will in which they choose the law which will govern their succession. Notaries should always inform clients that they have the

possibility to choose the applicable law when drawing up a will.

Under the Regulation, a choice may be made for the law of any Member State or of a third country. However, when choosing the applicable law, the testator is limited to the country of their nationality. The nationality must be held at the time of the choice or at the time of death. If the testator has several nationalities, they are free to choose any one of them. It is advisable not to choose the law of a country whose nationality the testator may acquire in the future, as this would create legal uncertainty.

Example

At the time the last will has been drafted, the testator had the Spanish and the Portuguese nationality. In his last will he chooses Spanish law as the applicable law. A few years later, he renounces his Spanish nationality and dies in Portugal. Spanish succession law applies, even though the testator was no longer a Spanish citizen when dying, since the testator possessed Spanish nationality when making the choice.

However, it is not possible to combine several succession laws.

Example

*A testator with Austrian nationality who has his habitual residence in Finland cannot choose Finnish succession law for his Finnish log cabin and Austrian succession law for his Austrian apartment (**CJEU, UM, case C-277/20**).*

It is also not possible to choose the law of the country of the habitual residence.

Example

The testator with Austrian nationality who has his habitual residence in Finland cannot choose Finnish succession law.

Furthermore, it is not possible to choose in a last will the Member State whose courts have jurisdiction to settle the succession (Art. 4 ESR). That always depends on the last habitual residence at the moment of death.

If the deceased made a choice of law, this opens the possibility for the heirs to agree in writing, after the testator passed away, that the courts of the Member State whose law has been chosen, have jurisdiction (Art. 5 ESR). By doing so, the heirs may grant jurisdiction to another court than that of the Member State of the last habitual residence of the deceased.

Example

An Austrian national with habitual residence in Finland made a choice of law in favour of Austrian law. His widow and son can agree that the estate will be administered by an Austrian court.

When drafting an agreement as to succession, Art. 25 ESR needs to be considered as well.

The law applicable in the absence of a choice of law

General rule

Art. 21 - 1. Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death.

Art. 21 ESR provides that the succession is governed by the law of the last habitual residence of the deceased. The habitual residence of the deceased must be assessed at the time of death.

Under this provision, a succession is governed by a single law. It does not matter whether the habitual residence of the deceased is located in a Member State or in a third State. Likewise, the place where the assets of the deceased are located is indifferent. The nature of the assets is also indifferent.

Together with Art. 4 ESR which grants jurisdiction to the courts of the Member State in which the deceased lastly habitually resided, Art. 21 ESR guarantees that the court seized will in most cases apply its own law.

Examples

An Italian national who passed away, resided habitually in Italy. She had assets in Italy and in France. Her succession will be governed by Italian law, the law of her last habitual residence. This law governs the entire succession, including the assets located in France.

A Turkish national who habitually resided in Turkey, passes away. Her assets were scattered between Turkey, Germany and France. If a notary working in a Member State is called to deal with the succession, they will apply Turkish law to the entire succession, save where Art.34 leads to another result.

Specific situations

The ESR includes various mechanisms which could serve to displace the law of the last habitual residence.

General rule

Art. 21 - 2. Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State.

A first mechanism can be found in Art. 21 par. 2 ESR. This provision makes it possible, by way of exception, to apply the law of a State with which the deceased was manifestly more closely connected than with the State of their last habitual residence. Art. 21 par. 2 ESR does not offer an alternative connecting factor, which could be used to replace the law of the last habitual residence. Rather, it is an exception which should be used when the main rule fails to identify a law which presents a sufficient connection with the estate. It should not be confused with situations in which it is difficult to identity the last habitual residence of the deceased.

The mechanism provided by Art. 2 par. 2 ESR cannot be applied if the deceased made a choice of law.

Example

A French national has been working for almost 10 years in Shanghai, where he resided with his family. He had scheduled to move back to France in a couple of months, because his contract was about to expire. He passed away after starting to plan his move back to France.

It is clear that the last habitual residence of the deceased was located in China, where he resided for almost 10 years with his family. There is nonetheless room to contemplate the application of French law, given that the deceased was a French national who had the firm intention to move back to France with his family.

Cross-border successions and renvoi

Renvoi

Art. 34 - 1. The application of the law of any third State specified by this Regulation shall mean the application of the rules of law in force in that State, including its rules of private international law in so far as those rules make a renvoi:
(a) to the law of a Member State; or
(b) to the law of another third State which would apply its own law.

Under the ESR, the law declared applicable must be understood as the rules governing the succession. No account should be taken of the conflict-of-laws rules of the governing law, if this is the law of a Member State bound by the Regulation.

Art. 34 ESR introduces, however, a possibility to take into account the *renvoi*: when, under the Regulation, the succession is governed by the law of a third State, the notary should first verify the private international law rules of that law. If these rules refer to the law of a Member State, the *renvoi* should be accepted and the law of the Member State should be applied (Art. 34 par. 1 (a) ESR). The same applies if the conflict-of-law rules of the third State refer to the law of another third State: the renvoi should be accepted if the third State would apply its own law (Art. 34 par. 1 (b) ESR).

Example

A French national passed away in Tunisia, where he has been residing for a longtime. The deceased owned assets in France and Tunisia. He did not leave a will.

According to Art. 21 ESR, his succession is governed by Tunisian law. Tunisia being a third State, the notary should find out which law governs the succession under Tunisian private international law. According to the relevant conflict-of-laws rule of Tunisia, successions are governed by the national law of the deceased. Art. 34 par. 1 (a) ESR therefore requires that the notary applies French law to the entire succession.

Under Art. 34 ESR, *renvoi* is excluded in a number of circumstances. The most important one is that *renvoi* is not possible if the deceased made a choice of law. Likewise, *renvoi* is also excluded when the law governing the succession was determined using the exception mechanism of Art. 21 par. 2 ESR.

Cross-border successions and public policy

Public policy (ordre public)

Art. 35 - The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.

When the Regulation leads to the application of foreign law (e.g. under a choice of law rule), the notary should apply the provisions of the foreign law. However, when the notary finds out that the foreign law is built on very different principles and/or enshrines very different values, the notary should determine whether the actual application of the relevant provision of foreign law would not contradict, in the circumstances of the case, with the fundamental values of the Member State in which the succession is wound up.

Example

The testator has the nationality of the country X and made a choice of law with regard to the inheritance law of Country X. The testator passed away in France. The inheritance law of Country X would thus be applicable in principle. However, if it appears that the application of a provision of the law of X cannot be reconciled with the fundamental values of the French legal system or of the EU as a whole (e.g. because the law of X treats daughters differently from sons), the notary should refuse to apply this provision.

This would be conceivable, for example, if a country's legal system differentiates on the basis of religious affiliation, gender or birth. However, it is essential that the distinction actually has an impact on the outcome. Depending on the specific situation, a case-by-case assessment must therefore be carried out. If the notary comes to the conclusion that the applicable law includes a provision whose application must be barred, he should refuse to apply this provision but, if possible, he should continue to resort to the applicable law to solve the case.

VI
Wills and agreements as to succession

This section deals with the validity of wills and agreements as to succession. The law governing the succession as a whole (Art. 21 ESR) as well as a choice of law, which might be useful in the will or agreement as to succession (Art. 22 ESR), is not the topic of this section.

When approaching the validity of a will or an agreement as to succession in an international authentication procedure, the following four questions may provide some initial guidance.

Is there already a will or an agreement as to succession?

It is important to check whether the clients have already drawn up a will. In this case, drafting a new will might not be necessary. It might even be the case that a new will cannot be drawn up due to the binding effects of an agreement as to succession. The European Network of Registers of Wills Association (ENRWA) might help to clarify this question.

What requirements of formal validity need to be respected?

The law applicable to the formal validity of a disposition upon death is governed by Art. 27 ESR. However, as with wills, Art. 75 par. 1 ESR requires to give priority to Art. 1 of the ***1961 Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions*** if the Member State in question is a party to that Convention. Both the ESR and the Convention try to maintain the validity of the disposition upon death. As a matter of principle, if it is valid according to the place where the will is authenticated, there is no need for concern.

When authenticating a will, what requirements of substantive validity need to be respected?

Dispositions of property upon death other than agreements as to succession

Art. 24 par. 1 - A. disposition of property upon death other than an agreement as to succession shall be governed, as regards its admissibility and substantive validity, by the law which, under this Regulation, would have been applicable to the succession of the person who made the disposition if he had died on the day on which the disposition was made.

Pursuant to Art. 24 par. 1 ESR, the substantive validity, as defined by Art. 26 ESR, is governed by the law which would have been applicable to the succession of the person who makes the disposition if he or she would die on the day on which the disposition is made. As a matter of principle, this is the habitual residence (Art. 21 ESR) except if the person has chosen another law (Art. 22 ESR).

However, pursuant to Art. 24 par. 2 ESR, it is possible to choose the law which the person could choose according to Art. 22, i.e. the law of the State whose nationality he or she possesses.

What changes when authenticating an agreement as to succession?

Agreements as to succession

Art. 25 par. 1 - An agreement as to succession regarding the succession of one person shall be governed, as regards its admissibility, its substantive validity and its binding effects between the parties, including the conditions for its dissolution, by the law which, under this Regulation, would have been applicable to the succession of that person if he had died on the day on which the agreement was concluded.

If the agreement as to succession only contains dispositions regarding the succession of one person, the conflict of law rules are quite similar to those governing a will (Art. 25 par. 1 and par. 3 ESR).

If the agreement contains dispositions regarding the succession of several persons, Art. 25 par. 2 ESR contains special rules. As to the admissibility (subparagraph 1),

i.e. the question of whether a legal order allows agreements as to succession, it is necessary to check the applicable law for each party separately. Only if the laws applicable to the hypothetical successions of both parties allow agreements as to succession, it is admissible. As to the further substantive requirements and binding effects (subparagraph 2), one among these laws has to be chosen: the law with which the agreement has the closest connection. Whereas subparagraph 1 is particularly restrictive, subparagraph 2 entails significant legal insecurity.

This is why in these cases, it is particularly advisable to make use of the choice of law option provided by Art. 25 par. 3 ESR. According to that provision, the parties to the agreement can choose the law of the nationality of each of them.

Example

A French-German bi-national couple have their habitual residence in France. They wish to commit themselves to being each other's heirs. In the absence of a choice of law, an agreement as to succession with this content would not be possible because the applicable French law does not allow such agreement. However, pursuant to Art. 25 par. 3 ESR, the couple can choose German law to govern the admissibility, substantive validity and the binding effects of the transaction. German law admits agreements as to succession also as regards mutually binding dispositions of property upon death.

VII
Authentic instruments

The Regulation includes rules guaranteeing that authentic instruments issued in Member States in succession matters may easily circulate in other Member States. These rules are important given the role played by various authentic instruments in succession matters. Wills, agreements as to succession, declarations of acceptance or waivers of succession as well as contracts between the parties on the division of the estate are among the most common authentic acts notaries are used to work with. Other authentic instruments include inventories of assets, national certificates of succession, as well as contracts aimed at dividing the property of the deceased. The Regulation provides that authentic instruments drawn up in another Member State are equated with those drawn up in the receiving Member State.

The Regulation includes an autonomous definition of the concept of ***authentic instrument*** in matters of succession: a document is an authentic act if it is officially i.e., formally, drawn up or registered as an authentic instrument in a Member State, provided that the authenticity refers to the signature as well as the content of the authentic instrument (Art. 3(1)(i) ESR).

The document must further have been established by a public authority or another authority that is empowered for this purpose by the Member State of origin. Recital 62 ESR indicates that the 'authenticity' of an authentic instrument covers various items, such as the genuineness of the document, the formal prerequisites of the document, the power of the authority drawing up the document and the procedure according to which the document was drawn up. Moreover, the authenticity of the authentic instrument also covers the factual elements recorded by the relevant authority in the authentic instrument, such as the fact that the parties appeared before that authority on the date indicated and made the declarations indicated. Certainly, the authenticity of an authentic instrument should not be confused with the material validity of the document as a legal transaction.

A document considered authentic in the Member State in which it was established can only be brought under the provisions of the Regulation relating to authentic instruments

if it qualifies as authentic for the purposes of the Regulation. However, if the party wishes to challenge the authenticity of the authentic instrument, it should do so before the competent court in the Member State of origin of the authentic instrument according to the law of that Member State. If the authentic instrument is challenged in the Member State of origin, that authentic instrument does not produce any evidentiary effects in another Member State as long as the challenge is pending before the competent court. Pursuant to Recital 65 of the Regulation, an authentic instrument declared invalid as a result of a challenge ceases to produce any evidentiary effects.

The Regulation refers to the "Member State of origin" to indicate the Member State in which the authentic instrument was drawn up, while "Member State of enforcement" means the Member State in which the declaration of enforceability or the enforcement of an authentic instrument is sought (Art. 3(1) ESR).

Acceptance of authentic instruments

Art. 59 par. 1 - An authentic instrument established in a Member State shall have the same evidentiary effects in another Member State as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy (ordre public) in the Member State concerned.

Pursuant to the provisions of Art. 59, par. 1 ESR, an authentic instrument drawn up in a Member State has the same **evidentiary effects** in another Member State as in the Member State of origin or the most comparable effects, provided that it is not clearly contrary to public order i.e. *ordre public* in the Member State in which the acceptance of that instrument is requested. When determining the evidentiary effects of an authentic instrument in another Member State, the nature and scope of the evidentiary effects of that authentic instrument in the Member State of origin must be taken into account. Under Art. 59 par. 1 ESR, a notary may grant an authentic instrument from another Member State the "most comparable effects" it could have under local law. This could offer a solution if the effects of an authentic act under the law of the Member State of origin are unknown under local law.

To facilitate the circulation of authentic instruments from one Member State to another, Art. 59 par. 2 ESR provides that 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 provided by Implementing Regulation 1329/2014 describing the evidentiary effects which the authentic instrument produces in the Member State of origin. The evidentiary effects that an authentic instrument

should have in another Member State will therefore depend on the law of the Member State of origin (Recital 61 ESR).

Acceptance of the evidentiary status of an authentic instrument in all Member States is automatic and immediate. There is therefore no need to obtain a decision from the court of the Member State in which the document is to be used in order for the document to benefit from its evidentiary effects. A special value of the Regulation lies in the equalisation of authentic instruments drawn up in another Member State with those of the Member State of acceptance, because provisions of the Regulation extend the effects of authentic instruments to all Member States, without any need for a court or another authority of the Member State addressed to intervene.

Enforceability of authentic instruments

Art. 60 par. 1 – 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.

Regarding the declaration of ***enforceability*** of an authentic instrument, Art. 60 par. 1 ESR extends to authentic instruments the procedure used for judicial decisions. In the case of enforcement, the authority which established the authentic instrument shall, on the application of any interested party, issue an attestation using the relevant form.

The application for declaration of enforceability must be submitted to the court or the competent authority of the Member State of enforcement, which the Member State has notified the Commission about. Local jurisdiction is determined according to the place of habitual residence of the party against whom enforcement is sought, that is, according to the place of execution.

The procedure for submitting an application is regulated by the law of the Member State of enforcement. The applicant must submit some documents to the competent authority, i.e. a copy of the authentic instrument that meets the conditions necessary to establish its authenticity, the attestation issued by the competent authority that issues the authentic instrument in the Member State of origin using the form for which the template can be found in Annex 2 of ***Commission Implementing Regulation 1329/2014*** and translation if required by the competent authority.

Pursuant to Article 74 ESR, no legalisation or other similar formality shall be required for documents issued in a Member State in the context of this Regulation.

VIII
The European Certificate of Succession (ECS)

What is the European Certificate of Succession?

The ECS is a uniform document issued in a Member State bound by the Regulation that enables heirs, legatees having direct rights in the succession, and executors of wills or administrators of the estate to prove more easily their status and exercise their rights and/or their powers over assets located in other Member States. The ECS may be used, in particular, to demonstrate:

- the status and/or the rights of each heir or each legatee and their respective shares of the estate;
- 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);
- the powers of the person to execute the will or administer the estate (Art. 63 ESR).

The use of the ECS is ***not mandatory***. It therefore does not replace national documents used for similar purposes in the Member States. National certificates may, when they are issued as authentic documents or court decisions, benefit from the acceptance or recognition rules of the ESR. Notaries may advise their clients to seek an ECS instead of a national document when the succession includes assets located in other Member States, or when one of the heirs habitually resides abroad.

The ECS circulates freely, without any need for an apostille or a legalisation (Art. 74 ESR). It produces effects in the destination Member State without any special procedure being required (Art. 69, par. 1 ESR). Once issued for use in another Member State, the ECS may also produce effects in the issuing Member State (Art. 62, par. 3 ESR).

Issuance of an ECS

Each Member State decides which authority within its territory has competence to issue an ECS: it can be a court or another authority which, under national law, has

competence to deal with matters of succession. The European e-Justice portal offers ***a list of the authorities that can issue an ECS in each Member State.***

Competence to issue the Certificate

Art. 64 - The Certificate shall be issued in the Member State whose courts have jurisdiction under Article 4, Article 7, Article 10 or Article 11. The issuing authority shall be:
(a) a court as defined in Article 3(2); or
(b) another authority which, under national law, has competence to deal with matters of succession.

An ECS can only be issued by the authorities of the Member State which has jurisdiction under the ESR to deal with the succession (Art. 64 ESR). These may be:

- the authorities of the Member State where the deceased had their last habitual residence (Art. 4 ESR), or
- the authorities of the Member State of the deceased's nationality, where, by a disposition mortis causa, they chose their national law to govern their succession, provided the parties concerned have agreed to choose the courts of that Member State, or where a party requests the authority seized to decline jurisdiction in favour of the authorities of the Member State of which the deceased was a national (Art. 7 ESR), or
- the authorities of a Member State in which assets of the estate of the deceased are located provided the habitual residence of the deceased at the time of death is located in a third State (Art. 10 ESR), or
- the authorities of a Member State bound by the Regulation if a succession, which in principle comes under the jurisdiction of a third State, cannot be settled in that State (Art. 11 ESR). The case must have a sufficient connection with the Member State of the court seized.

An ECS is not automatically issued: it must be requested after a person's death. Only the heir, legatee, executor of the will or administrator of the estate can apply for an ECS (Art. 63 par. 1 ESR).

To apply for an ECS, one may use the European standard form laid down in the EU Regulation (Art. 65 par. 2 ESR; ***CJEU, Klaus Brisch, case C-102/18***). The form may be found in Annex 4 of ***Commission Implementing Regulation 1329/2014***.

Upon receipt of the application for an ECS, the issuing authority will inform all other

possible heirs of the application so that they can invoke their rights (Art. 66 par. 4 ESR). It will then examine the request in order to decide, taking into account all the elements, if it may or may not issue an ECS (Art.66 ESR).

The issuing authority shall not issue the Certificate in particular if:

- the elements to be certified are being challenged; or
- the Certificate would not be in conformity with a decision covering the same elements (Art. 67 par. 1 ESR).

If the authority decides to issue the certificate, it must use and fill in a standard, pre-printed form (Art. 67 par. 1 ESR). The form may be found in Annex 5 of ***Commission Implementing Regulation 1329/2014***. The e-Justice Portal makes it possible to create and complete a PDF of the ECS ***online***.

The authority that issues the ECS must fill in the data required in the certificate in accordance with the law applicable to the succession (Art. 67 par. 1 ESR). The certificate includes information such as:

- details of the deceased and of the person who applied for the ECS;
- details of all possible heirs;
- the property regime of the deceased's marriage or registered partnership (i.e. the rules that govern how property should be divided between spouses or registered partners so that the share of the deceased can be transferred to their heirs);
- the law applicable to the succession and how that law has been determined;
- whether or not the deceased left a will;
- the share of the estate that corresponds to each heir;
- the powers of the executor of the will and/or the administrator of the estate.

Only the items necessary to meet its purpose must be filled in by the issuing authority. The standard form which must be used to issue the ECS may be accompanied by a number of annexes, which include additional information, such as information on the matrimonial property regime of the deceased. The issuing authority will also inform all heirs of the issuance of the ECS (Art. 67 par. 2 ESR).

Effects of the ECS

Effects of the Certificate

Art. 69 par. 1 - The Certificate shall produce its effects in all Member States, without any special procedure being required.

Once issued, the ECS may be used in all Member States bound by the Regulation. The Regulation provides that the ECS produces its effects in all Member States "without any special procedure being required" (Art. 69 par. 1 ESR). This means that the ECS may directly be presented to a bank, a notary, an insurance company or a debtor of the deceased, without first being verified by a court or any other authority. This is essential in order to settle cross-border successions speedily and smoothly.

Effects of the Certificate

Art. 69 par. 2 - 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.

The ESR defines further the various effects of the ECS. In the first place, an ECS creates a presumption that the various elements which are mentioned in the certificate are accurate. This applies for example to the law applicable to the succession, which must be mentioned in the ECS. It also applies to the status and the rights of the heirs and legatees: the information included in the ECS in this respect is deemed to be accurate. In other words, these heirs and legatees are presumed to have the status mentioned in the ECS and to hold the rights or the powers stated in the ECS.

Effects of the Certificate

Art. 69 par. 3 - Any person who, acting on the basis of the information certified in a Certificate, makes payments or passes on property to a person mentioned in the Certificate as authorised to accept payment or property shall be considered to have transacted with a person with authority to accept payment or property, unless he knows that the contents of the Certificate are not accurate or is unaware of such inaccuracy due to gross negligence.
Par. 4 - Where a person mentioned in the Certificate as authorised to dispose of succession property disposes of such property in favour of another person, that other person shall, if acting on the basis of the information certified in the Certificate, be considered to have transacted with a person with authority to dispose of the property concerned, unless he knows that the contents of the Certificate are not accurate or is unaware of such inaccuracy due to gross negligence.

The presumption is reinforced by two additional rules. Art. 69 par. 3 ESR provides that a third party who made a payment or transferred property to an heir or legatee whose rights are mentioned in an ECS, shall be deemed to have transacted with a person with authority to accept payment or property. The third party is in other words protected if it later appears that another heir is entitled to the amount paid or the property transferred. A similar protection applies when a third party bought or otherwise received an asset of the deceased from a person mentioned in the ECS as having the right to dispose of such asset (Art. 69 par. 4 ESR). In the two cases, the protection extended by the ECS to the third party ceases to exist when the third party knew or should have known that the contents of the ECS are not accurate.

Effects of the Certificate

Art. 69 par. 5 - The Certificate 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).

When the estate of the deceased included real estate, the Regulation also provides that the ECS is a “valid document” granting access to real estate registers in the other Member States. Each Member State remains, however, fully in charge of the requirements and the effects of the recording of property in a real estate register (Art. 1 par. 1 (l) ESR)). Recital 18 of the Regulation clarifies that the law of the Member State in which the register is kept,

determines under what legal conditions and how the recording must be carried out. If a Member State requires, for the registration to be possible, that the relevant immovable property is clearly identified, it may refuse to register the title of an heir or legatee if it appears that the ECS does not include such information (***CJEU, R.J.R. v. Registrų centras VĮ, case C-354/21***).

The ECS provides significant assistance to heirs, legatees and other beneficiaries of a succession asserting their rights. It may, however, be challenged after it has been issued, as will be explained in the next section.

The ECS post issuance

In order to use the ECS in other Member States, the heir or legatee should request a certified copy of the certificate from the issuing authority (Art. 71 par. 1 ESR). A certified copy of the certificate is only valid for a period of six months (Art. 71 par. 3 ESR), which may be exceptionally extended.

The ECS may fail to reflect the exact position of heirs, legatees or other beneficiaries of the succession. This may be due to an error or an omission. Art. 71 ESR makes it possible to request that an ECS be rectified, modified or even withdrawn. This may be necessary because of a clerical error or when the ECS is affected by a more serious flaw, such as when the issuing authority did not correctly identify the law governing the succession. An ECS may be rectified, modified or even withdrawn by the issuing authority. In order to avoid further use of the ECS, the issuing authority is required, when it rectifies, modifies or withdraws an ECS, to immediately inform all persons to whom certified copies of the ECS have been issued.

Decisions taken by the issuing authority may be challenged before the courts of the Member State of the issuing authority (Art. 72 ES). A challenge may be brought against the decision to issue the certificate. It may also be brought against the decision to rectify, modify or withdraw the certificate. In all situations, the precise details of the challenge are left by the Regulation to the law of the Member State of the issuing authority.

The Regulation does not require Member States to set up a register which would include information on all ECSs issued. Some Member States have set up such a register. This makes it easier for notaries to verify whether an ECS has already been issued in a Member State. The registers of four Member States have been interconnected as part of the European Network of Registers of Wills (ENRW).

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