

# ON THE EUROPEAN CERTIFICATE OF INHERITANCE IN RELATION TO THE REGISTERED REAL RIGHTS IN IMMOVABLE PROPERTY OF THE ESTATE

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**Abstract:** This paper analyzes the procedure for issuing the European Certificate of Succession (CEM) in the context of the opening of the estate of a Romanian citizen, whose last domicile is abroad, and whose estate includes tabular real estate rights located in Romania. The paper examines the harmonization of the application of the provisions of Regulation (EU) No 650/2012, which establishes the legal framework for obtaining the European

**Keywords:** European certificate of inheritance; register of succession; *lex rei sitae*; registered real rights in immovable property; cross-border inheritance.

## Introduction

Regulation (EU) No 650/2012 of the European Parliament and of the Council (hereinafter referred to as the Regulation)<sup>1</sup> has unified important rules on conflict of laws and international jurisdiction in matters of succession and introduced an innovative tool: the European Certificate of Succession (CEM). This certificate is intended to simplify

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<sup>1</sup><https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A02012R0650-20120705>

the proof of the capacity of heir or legatee and the exercise of succession rights in cross-border situations. Once issued, the CEM is recognized in all participating member states, without the need for any special exequatur procedure. The introduction of the European Certificate has not done away with domestic succession documents (such as the certificate of autochthonous heir issued by the notary public in Romania), as the Regulation explicitly states that it does not replace domestic documents used for similar purposes (Art. 62(3)).

To understand the role and effects of the European Certificate of Succession in relation to the rights in rem in immovable property forming part of the estate, it is necessary to analyze the interaction between European law and the national rules of the State on whose territory the succession property is located (*lex rei sitae* principle). A frequently encountered practical situation is a cross-border inheritance left by a Romanian citizen whose last residence was abroad (e.g. in another EU member state) and who owned real estate in Romania. Questions arise concerning the competence of the authorities dealing with the succession, the law applicable to the transmission of the inheritance and the way in which the European Certificate of Succession<sup>1</sup> can be used for the registration in the land register of the succession rights acquired over these immovable properties.

The main objective of the present research is to highlight the harmonization (or possible disagreements) between the European and Romanian framework in the field of cross-border successions, with a focus on the effects of the EMF. Although the regulation has brought more unity and legal certainty in the field, in practice, procedural differences persist between member states, especially in terms of the *lex successionis* (law applicable to the succession) and the *lex rei sitae* (law of the place where the immovable property is situated) so that the

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<sup>1</sup> Relevant case law - including judgments of the Court of Justice of the European Union (CJEU) - and national legislative adaptations (Notaries Public Act No 36/1995, Cadastral Act No 7/1996, Civil Code, etc.) are examined to ensure the effective application of Regulation 650/2012.

succession rights over immovable property are fully recognized and enforceable against third parties. registration in the land register requirements for succession transfers. It is therefore necessary for notaries and heirs to pay particular attention to the conditions imposed by the land register publicity in Romania.

## **I. European legal framework and applicable national framework**

Regulation (EU) No 650/2012 constitutes the fundamental legal basis at EU level. It lays down the rules on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession, as well as the rules on the creation of the European Certificate of Succession.<sup>1</sup> As of August 17, 2015, successions with foreign elements will be settled according to these unified rules, which are designed to remove the difficulties that European citizens used to face in exercising cross-border succession rights.

Internally, several pieces of legislation are relevant:

- Law no. 36/1995 on notaries public and notarial activity regulates the notarial succession procedure in Romania. It was amended by Law No 206/2016 in order to facilitate the new instrument of the European Certificate of Succession. Romanian law provides that a notary public may issue a CEM only after having debated the succession and having previously issued a domestic heir certificate (or simultaneously with it). This solution is based on the consideration that the CEM does not replace the national certificate, but is in addition to it, ensuring the international circulation of the probate certificates issued domestically.
- Law no. 7/1996 on cadastre and immovable property are entered in the land register on the basis of a notarized authentic notarial deed or the land register publicity is the legal framework for the registration in the land register of real property rights, including

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<sup>1</sup> The Regulation applies in most EU member states (Denmark and Ireland have opted out), is directly applicable and takes precedence over national law in the areas it covers.

those acquired by inheritance. According to Art. 24 para. (3) of the Law, ownership and other real rights over a certificate of succession (issued by a Romanian notary public), a final court decision or an administrative act. Law 7/1996 required the notary public to immediately forward the certificate of inheritance issued for immovable property to the cadastre office for registration.

- The Romanian Civil Code (2009) contains rules on the law applicable to succession (Art. 2633 Civil Code)<sup>1</sup>. In the EU context, the applicable law is determined according to Art. 21 of the Regulation, which enshrines as a general rule the law of the habitual residence of the deceased at the date of death. The Civil Code also contains, in Art. 95 and 31, the principle of unity of succession as a mode of transmission of property and previously provided for the *lex rei sitae* rule for immovable property, but these conflicting national conflict rules have largely been replaced by EU Regulation 650/2012 for the cases it covers.<sup>2</sup>

The national notarial registers kept by the National Union of Notaries Public in Romania (UNNPR). In application of art. 22 of Law 36/1995 and the Regulation, the National Notarial Register of Succession Records (RNNES) was created. This register allows for quick verification whether a succession has already been debated or whether there are any parallel succession proceedings in error. The National Notarial Notarial Register of Inheritance Options (RNNEOS) also registers acts of acceptance or renunciation of inheritance. The importance of these instruments is underlined by the European Regulation itself, which in Recital (32) emphasizes the need to simplify the procedures that heirs have to carry out abroad.<sup>3</sup>

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<sup>1</sup> Art. 2633 Civil Code "Inheritance is subject to the law of the State on whose territory the deceased had, at the date of death, his habitual residence."

<sup>2</sup> However, the *lex rei sitae* remains applicable to real estate advertising.

<sup>3</sup> The register of succession facilitates the application of the principle of a single European Certificate of Succession, ideally a single CEM should be issued in a cross-border succession

## **II. Competence to issue the European**

Determining international jurisdiction in a cross-border succession is the first step and often a source of confusion. Regulation 650/2012 established as the main connecting factor the habitual residence of the deceased at the time of death. According to Article 4 of the Regulation, the authorities of the member state on whose territory the deceased was habitually resident at the time of death are competent to settle the succession as a whole. Therefore, if a Romanian citizen died having last resided in another EU member state, in principle the authorities of that member state will be competent to settle the succession and issue the European Certificate of Succession.

But there are also rules of alternative or suppletive jurisdiction. Article 10 of the Regulation provides for subsidiary jurisdiction in favor of the State of nationality of the deceased, if the habitual residence of the deceased at the time of death was not in a member state. In this situation, the authorities (notaries public, personnel assimilated to the courts in matters of non-contentious succession) of the member state of nationality may settle the succession as a whole if part of the succession property is located in the EU. Article 10(2) extends subsidiary jurisdiction to cases where there are succession property located in a member state and no other member state has jurisdiction. Then the courts of that member state can settle the succession limited to those assets. Thus, if a Romanian citizen had his last domicile in a third State and his immovable property is located in Romania, the Romanian notary public may have jurisdiction at least over that property (if not even over the entire succession, on the basis of nationality, under Art. 10(1)(b)). 1 lit. a).

The particular case of a Romanian with habitual residence in another EU member state and assets in Romania is more nuanced. Here, the State of residence has primary jurisdiction (Article 4). However, the heirs may agree, after the succession has been opened, that a court of the State whose law was chosen by the deceased should have jurisdiction to settle the succession (Article 5 of the Regulation). Thus, if the deceased (a Romanian citizen) chose Romanian law for his succession (Article 22)

and the heirs agree, the Romanian authorities (the Romanian notary) may take over jurisdiction, even if the habitual residence of the deceased was in another member state. In the absence of such a prorogation, jurisdiction remains with the State of residence.<sup>1</sup>

These provisions must be interpreted in the light of the European Regulation and apply only to the extent that jurisdiction is not already determined by the Regulation. Romanian notaries will first check whether the succession falls within the scope of the Regulation. If another member state is competent (e.g. the State of last residence), the Romanian notary cannot debate the succession on its merits and cannot issue certificates (neither national nor European) in that succession.<sup>2</sup> Thus, if a Romanian citizen has died having last resided in an EU member state, the Romanian notary public does not, as a rule, have the competence to discuss the inheritance, except in the case of prorogation of competence or in rare cases falling under Article 10. As a result, the succession will be settled in the state of residence, where the estate, the status of the heirs, etc. will be determined, applying the law designated by the Regulation. The competent authority in that State will issue the European Certificate of Succession. This CEM will be valid in Romania and can be used by the heirs to exercise their inheritance rights over real estate in Romania.

On the other hand, if a Romanian citizen had his or her final residence in a third state (or if the habitual residence cannot be determined), the Romanian notary will probably have jurisdiction (on the basis of citizenship, Art. 10 of the Regulation, in conjunction with Art. 101-103 of Law 36/1995). The Romanian notary will apply the Regulation in a substantive sense, determining the law applicable to the

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<sup>1</sup> The Romanian legislation (Art. 101-104 of Law 36/1995) contained also before 2015 its own rules of territorial jurisdiction for successions with foreign elements.

<sup>2</sup> The case-law of the CJEU (Oberle Judgment, C-20/17, June 21, 2018) confirms this interpretation, holding that an authority of a is bound by the jurisdiction rules of the Regulation even when issuing a national, non-contentious certificate of heirship. <https://curia.europa.eu/juris/document/document.jsf?docid=201707&doclang=RO>

succession according to its rules.<sup>1</sup> The notary will issue the national certificate of succession and, subsequently, upon request, may also issue the European Certificate of Succession. The use of EMFs is not compulsory, as heirs are free to use other means of proof. However, CMS offers significant advantages: automatic and direct recognition, standardized content, presumption of validity.

### **III. The European Certificate of Inheritance and the registration of real rights in immovable property in the Land Register - *the Lex rei sitae* perspective**

The *lex rei sitae* principle, in its traditional formulation, states that rights in immovable property are governed by the law of the place where the immovable property is located. Regulation 650/2012 has preserved this principle in a specific form: while the law applicable to succession is unique, certain aspects are excluded from the scope of the Regulation and left to the relevant national laws. One of these aspects is the formalities for the publication of land registration and the effects of the registration of rights in rem. Recital (18) of the Regulation explicitly states that a CEM should constitute a valid document for the registration of succession property in a member state. Recital (19) immediately adds, however, that the effects of the registration of a right in a register are excluded from the scope of the Regulation, so that the effect of registration (declaratory or constitutive) remains a matter of national law.<sup>2</sup> This duality requires cooperation and information between the authority issuing the CEM and the authority of the land register. The

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<sup>1</sup> The procedure before the Romanian notary will follow national rules, with the particularities imposed by the international element.

<sup>2</sup> In other words, the Regulation does not harmonize member states' land registration procedures. It ensures that the CEM is recognized as a supporting document and, in principle, must be accepted by the land registration authorities. However, the actual method of registration and the domestic legal conditions remain governed by the law of the place where the immovable property is situated (*lex registri*).

Regulation provides (recital 68) that the authority issuing the CEM should include the information necessary for the registration of immovable property.

The rules of Romanian final court judgment. Traditionally, this referred to documents issued by Romanian authorities. Nowadays, the question arises whether the Romanian cadastre office can proceed with the registration of the property right on the basis of a foreign CEM.<sup>1</sup> Romanian land register publicity rules require that the registration of inheritance rights be made on the basis of a Certificate of Succession or a final court judgment.

Practice at European level shows different solutions regarding the use of EMF in land registration procedures :<sup>2</sup>

- France does not allow direct access of the CEM to the land register without an additional domestic notarial act. The CEM must be transposed into national law.
- Belgium does not register the transfer of ownership mortis causa in the land register at all.
- Italy and Spain allow the use of EMFs, but require additional formalities (Italy requires an authentic act of acceptance, Spain requires provisional registration).
- Germany and Austria allow registration on the basis of a CEM, but with distinctions; Austria requires a title with jurisdictional force, which a Romanian notarial CEM does not have.
- The Baltic countries and Greece allow direct registration of the EMF but require additional documents.

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<sup>1</sup> The answer, in the light of EU law and domestic legislative changes, is yes, with some nuances.

<sup>2</sup> This information is detailed in the final report of the MAPE project, available at: <https://www.notariesofeurope.eu/wp-content/uploads/2023/09/MAPE-Successions-final-study.pdf> CN CN . The MAPE project stands for "Monitoring and Evaluating the Application of the EU Succession Regulation 650/2012", coordinated by the Council of Notaries in the European Union (CNUE).

- The Netherlands and Poland are mentioned as models of flexibility, registering EMFs directly without additional requirements.
- As regards Romania (together with Croatia and Lithuania), practice has shown that direct registration of succession rights on the basis of a CEM issued in another state is allowed, provided that it includes cadastral identification of the immovable property in the estate.

The practical importance of the principle of *lex rei sitae* (also called *lex registri*) is clear. The law applicable to the succession (*lex successionis*) determines who the heirs are and the extent of their rights, as well as the manner of transmission of property. By contrast, the law of the register (*lex rei sitae*) lays down the legal conditions for the registration of those rights in the land register.

A relevant jurisprudential development is the CJEU judgment of October 12, 2023, Case C-354/21<sup>1</sup>. The Court held that a CEM which does not identify inherited immovable property may be refused by the land register of another member state. The CJEU confirmed that such a requirement is *lex rei sitae* and not contrary to the Regulation. The Court emphasized that the authority issuing the CEM must take into account the requirements of the law of the land register of the place where the immovable property is located and include the property in the certificate. This case law has a particular practical impact: heirs and notaries must insist that immovable property situated abroad is listed separately in the European certificate.

Romanian law, through the provisions of the Cadastral Law and ANCPI procedures, seems ready to receive any valid certificate of inheritance, be it national or European. A CEM issued in accordance with Regulation 650/2012 is equivalent, for the Romanian registrar, to an "act

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<sup>1</sup><https://curia.europa.eu/juris/document/document.jsf?text=&docid=262971&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=763681>

issued by a public authority" by which the right in rem has been transferred, within the meaning of Art. 24 para. (3) of Law 7/1996.<sup>1</sup>

However, the effect of the registration remains that provided for by Romanian law.<sup>2</sup> The right of ownership of the heirs exists from the date of death, the certificate of succession having declaratory value. Therefore, registration on the basis of the CEM merely confirms publicly the right of the heirs. In other systems, such as the Austrian system, registration has a constitutive effect. The Regulation does not alter these principles: each member state remains free to determine whether heirs become owners automatically on death or whether they need an additional formal act.

## Conclusions

The European Certificate of Inheritance has proved to be a valuable tool for simplifying cross-border inheritances and ensuring their unity. In the case of a deceased Romanian citizen whose last domicile was abroad, the CEM is the legal bridge linking the different jurisdictions involved, allowing automatic recognition of the capacity of heir and inheritance rights throughout the EU. European and Romanian law have been harmonized in a satisfactory manner: jurisdiction is determined according to the Regulation, the Romanian notary cooperates within the limits imposed, and the Romanian land registry receives the CEM as a valid entry for the land register.

But practical challenges remain. Tabular registration procedures differ from one country to another, which can affect the useful effect of the European certificate and may require extra diligence on the part of

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<sup>1</sup> Of course, the usual formalities will be followed: certified translation, verification of authenticity and payment of fees. There will no longer be any need for judicial "homologation" or a new domestic certificate, which is a step forward for the free movement of succession documents.

<sup>2</sup> In Romania, in principle, registration has the effect of opposability against third parties, not the constitutive effect of the right

the heirs. If the succession is entirely settled abroad, heirs should ensure that the foreign notary includes all the relevant details for the Romanian (or other) real estate in the content of the CEM.

In the context of Romanian law, it can be concluded that *the lex rei sitae* principle, although not abolished by the European Regulation, has restricted its impact to a strictly formal level. Rights of succession to immovable property situated in Romania arise and are transmitted according to the law applicable to the succession (which may be Romanian or foreign), but become fully enforceable only through registration in the land register, in accordance with the requirements of Romanian law. The European Certificate of Inheritance is the instrument that facilitates this registration, saving heirs from having to resort to cumbersome recognition procedures or obtaining a new local certificate. With the EMF, heirs can quickly and uniformly prove their status and rights before the Romanian authorities.

In this way, the inheritance of a Romanian citizen with assets in Romania and links with other member states can be settled efficiently, with the guarantee that the rights in rem in the estate will be correctly and completely recorded.

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