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European Inheritance Certificate

1. Introduction

Conflicts of inheritance law in Europe are becoming more frequent. This is migration processes. As a result, situations have become commonplace when the countries of citizenship and place of residence of the testator, the location of the property and the place of the will do not match, the heirs are citizens or residents of different states. Conflicts arise, the question of recognition and enforcement of foreign judgments and notarial acts arises. Some of these problems can be solved thanks to Regulation (EC) 650/2012 of the European Parliament and of the Council of 4 July 2012 on competences, applicable law, recognition and enforcement of decisions, adoption and enforcement of notarial deeds of succession, and the establishment of a European certificate of inheritance ". Although the Regulation entered into force on 16 July 2012, it will apply only to cases of inheritance of persons who died after 17 August 2015. The Regulation does not unify the substantive inheritance law of Member States and does not affect legal relations in which there is no foreign element.

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2. The structure and mechanism of normative resolutions

As of August 17, 2015, the EU countries have a law that changes the rules of inheritance of real estate: previously foreigners who own real estate in Europe (not in their country of origin) inherited property in accordance with the laws of the country where the object was located. Under the new rules, the default inheritance procedure is the country where the deceased was at the time of death, but the owner of the property may prefer the law of his country of citizenship, be it an EU country or any other country. The law applies in all EU countries except the United Kingdom, Denmark and Ireland, where foreigners will be subject to British, Danish and Irish laws, respectively².

An inheritance decision taken in one EU country is automatically recognized in all other countries of the Union. This is confirmed by the European Certificate of Succession³.

In the presence of a will, the property is divided according to the instructions of the deceased. If there is no such document, the property is transferred to relatives in the manner prescribed by law⁴.

In most EU countries, there are several stages of inheritance: usually inherited first by the children, parents and wives of the deceased, then – brothers, sisters, grandparents, then the interests of other relatives and dependents are taken into account. For example, in Germany⁵ there are three degrees of kinship, and in Finland there are two categories of heirs: the first includes spouses and children, the second – all the others. Usually the right of inheritance comes automatically. There are also deadlines within which the heir must file a return with the tax

² Konaykov M. A. (2017) Klyuchevyie novellyi Reglamenta № 650/2012 («Rima IV») I vozmozhnost ih primeneniya na territorii EAES [Key short stories of the Regulations № 650/2012 (“Rome IV”) and their possibility applications on the territory of the EAEU]. *Voprosyi rossiyskogo i mezhdunarodnogo prava*, no. 7A, pp. 27–35. [in Russian].

³ Carrascosa G. J. (2014) Reglamento sucesorio europeo y actividad notarial. *Cuadernos de derecho transnacional*, no. 6(1), pp. 5–44.

⁴ Dutta A. (2009) Successions and Wills in the Conflict of Laws on the Eve of Europeanisation, *RabelZ Bd.*

⁵ Röthel A. (2010) Ist unser Erbrecht noch zeitgemäß? Gutachten A zum 68. Deutschen Juristentag, *Verhandlungen des 68. Deutschen Juristentags*, A17.

authorities: in Germany it is three months, in Italy – one year, in Spain and France – six months. There are also deadlines for the heir to waive inheritance rights. In Germany, for example, it is six weeks after the heir learns of the transfer of property.

In addition to the pan-European law on inheritance, there are national laws governing the payment of inheritance tax, as well as who has the right to property and what share children and wives must receive.

3. The structure and mechanism of normative resolutions

Article 62 of the Inheritance Regulation states that it creates a European Certificate of Inheritance for use in another Member State. Therefore, its creation is possible only when the inheritance is cross-border in nature, which is manifested in the fact that the inherited property is located in different Member States⁶; however, the applicant's mere residence in another Member State is not sufficient for the inheritance to be considered cross-border and, accordingly, a European Certificate of Succession to be issued.

The history of the Inheritance Regulation and its final text show that the European Certificate of Inheritance is not an authentic or enforceable document, but rather a document that means that it does not need to be recognized for use in the country where it was created (as a court decision)⁷.

The European Certificate of Succession is created to resolve cross-border inheritance issues quickly and without hindrance (paragraph 69 of the Preamble to the Inheritance Regulation), which in turn is possible if the heirs or testators, executors or testators or administrators have the opportunity to easily prove their status or rights. Member States, for example, where the inherited property is located⁸. The purpose of

⁶ Kresse B. (2016) Article 62: Creation of a European Certificate of Succession in Calvo Caravaca. Cambridge.

⁷ Stamatiadis D. (2017) Hart Publishing. Nomos, Athens, Munchen, Oxford, Baden-Baden.

⁸ Regulation (EU) N° 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and

the European Inheritance Certificate is disclosed in Article 63 of the Inheritance Regulation, according to which:

1. The Certificate is intended for use by heirs, testators who have direct rights to inherit and executors of wills, inheritance manager.
2. The certificate may be used, in particular, to prove one or more of the following status and rights of each heir or, depending on the circumstances of each testator, the certificate of their respective shares in the inheritance, ownership of a certain asset or certain assets from the circumstances of the waiver specified in the certificate, the authorized person specified in the certificate for the execution of the will or inheritance management. Pursuant to Article 62 (2) of the Inheritance Regulation, the use of a European Certificate of Inheritance is not mandatory, which is why other documents may be used to prove inheritance rights. I emphasize that the European Certificate of Succession should not replace internal documents that may exist for the same purposes in the Member States.

In this regard, the doctrine of private international law of the European Union considers the question of whether it is possible to issue a national inheritance certificate and the ESI for the same inheritance. According to researchers at the Institute for Comparative Private International Law, Max Planck, the rules of individual Member States that prevent the issuance of more than one national inheritance certificate can be applied to prevent the issuance of a national inheritance certificate and the ESS on the same inherited property. However, if the national law of the Member State does not contain such rules, the question of the possibility of issuing both certificates remains open, as the Inheritance Regulations do not contain an answer to it.

Article 62 (3) of the Inheritance Regulation provides that it does not replace internal documents issued for the same purposes in a Member State. However, once issued for use in another Member State, the certificate shall have the effect specified in Article 69 of the Inheritance Regulation in the Member State whose authorities issued it.

The effects of the ECJ are set out in Article 69 (2) of the Inheritance Regulation. The first part of this article stipulates that the ESI takes ef-

on the creation of a European Certificate of Succession. *Official Journal of the European Union*, 201.

fect in all Member States without the need for any other procedure. By virtue of Article 69 (2) of the Inheritance Regulation, the ESS is considered to be able to accurately prove elements that have been established in accordance with the law applicable to the inheritance or in accordance with any other law applicable to specific elements.

Article 69 (3) of the Inheritance Regulation provides that any person who, acting on the basis of information certified by the ESS, makes a payment or transfers property to a person designated by the ESS shall be deemed to have entered into a transaction with a person authorized accept the payment or property, unless she knows that the content of the ESS is inaccurate or unaware of such inaccuracy due to gross negligence.

If a person mentioned in the ESS as authorized to dispose of inherited property disposes of such property for the benefit of another person, that other person, if he acts on the basis of information certified by the ESS, is considered to have entered into transactions with a person who authorized to dispose of the relevant property, except when she knows that the content of the ESS is inaccurate or unaware of such inaccuracy due to gross negligence.

In addition, in accordance with Article 69 (5) of the Inheritance Regulations, the ESS is a valid document for recording hereditary property in the relevant register of a Member State.

The provisions of Article 69 of the Inheritance Regulations give commentators reason to conclude that the ESS gives rise to three types of consequences: the presumption of the accuracy of the information recorded in the ESS; public trust in the ESS; the lawfulness of the entry in the relevant registers of the Member States of inheritance.

The original ESC is kept by the issuing authority. This authority shall issue one or more certified copies to the applicant and to any other person who proves his legitimate interest (Article 70 (1) of the Inheritance Regulations. The issuing authority shall keep a register for the purposes of Articles 71 (3) and 73 (2)). Certified copies shall be valid for a limited period of 6 months, as indicated in the copy by reference to the expiry date. In exceptional, duly justified cases, the issuing authority of the ESC shall, by way of exception, may be a longer period of validity, a certified copy of the ESS. In the event of a clerical error, the issuing authority shall, at the request of any person who has proved a legitimate interest

or on its own initiative, correct the ESS (Article 71 (1) of the Inheritance Regulations). In addition, at the request of any person who has proved a legitimate interest, or, if possible under national law, or on his own initiative, the issuing authority shall amend or revoke the ESC if it has been established that the Certificate whose individual elements are inaccurate (Article 71 (2) of the Inheritance Regulations)⁹.

Surveys on the exercise of jurisdiction over inheritance cases are one of the essential differences between the provisions of Rome IV and those of Russian law. From the point of view of Art. 4 of the Regulation, the jurisdiction to deal with matters of inheritance is exercised by the courts of the Member State of the European Union in whose territory the testator resided at the time of death.

This provision is a very important novelty of European legislation. One of the objectives of the authors of the Regulation is to provide citizens with the opportunity to use the benefits of the internal market with legal certainty, which is enshrined in paragraph 37 of the Preamble. In order for this possibility to arise, heirs and heirs must know in advance exactly which right will apply to their inheritance relationship.

In order to ensure the free movement of human resources throughout the EU and to alleviate bureaucratic barriers to cross-border inheritance, the authors of Rome IV departed from the previously accepted principle of determining the applicable law on the basis of the testator's nationality. In accordance with "Rome IV", the principle of permanent residence of the testator is already used by default. The permanent residence of the testator at the time of death, by virtue of the direct instruction of "Rome IV", is intended to serve as a general conflict of interest for the purposes of determining jurisdiction and applicable law in each particular case of inheritance.

The second fundamentally new provision of the Regulations is predetermined by the aim not only to ensure legal certainty in matters of inheritance, but also to avoid the fragmentation of inherited property. Therefore, from the point of view of the Regulations, the inherited property is no longer "fragmented" on the basis of its nature. In other words,

⁹ Dikovska I.A. (2020) Mizhnarodne spadkuvannia v YeS ta Ukraini: napriamy adaptatsii prava Ukrainy do prava YeS [International heritage in the EU and Ukraine: directions of adaptation of Ukrainian law to EU law]. Kyiv: Alerta. [in Ukrainian].

the right to be applied to each specific inheritance case in accordance with the provisions of the Regulation applies to both movable and immovable property, regardless of whether such property is located in another EU member state or outside the European Union.

At the same time, it is important to note that the text of the Regulations does not contain its own definition of the concept of “permanent residence”, but the mechanism of its definition is prescribed.

The obligation to carry out the procedure for determining the permanent residence of the testator is assigned by the Regulations to the relevant authorities in whose competence this particular inheritance is located. In carrying out this procedure, the competent officials shall be guided, *inter alia*, by such criteria as the length of stay of the testator in the State concerned, the regularity of such stay, and the conditions and reasons for such stay. The permanent residence of the testator determined by the specified scheme must meet the requirement of having a close and permanent connection with the state in question.

At the same time, determining the close connection of the deceased with a particular state may be complicated by many factual circumstances, examples of which are given in paragraph 24 of the Preamble.

For example, determining permanent residence can be quite difficult in situations where the testator has been forced to go abroad, including for a long time, for economic or professional reasons. To determine the permanent place of residence, the authors of the Regulation propose to take into account the fact of the presence or absence of close and permanent connection with the state of origin, which the testator maintained during his stay or stay abroad.

As noted, the ESS can only be issued in one Member State for use in another Member State, so the question of the implementation of the rules governing the issuance of ESS circulation to Ukrainian law may not arise at present. At the same time, we consider it useful to study the experience of legal regulation and use of the EU to understand how inheritance can occur when the inheritance is located in different Member States, as well as to facilitate the implementation of the Inheritance Regulation in Ukraine when it becomes a member of the EU¹⁰.

¹⁰ Kukharev, O.E. (2016). Do pytannia shchodo zabezpechennia vykonannia spadkovoho dohovoru pislia smerti vidchuzhuvacha [On the issue of ensuring the perfor-

The steady trend in recent years of introducing foreign legal institutions and structures into national legislation necessitates in-depth research that would allow them to adapt to Ukrainian realities¹¹.

4. Conclusions

An important novelty of the Regulation is also the development of the European Certificate of Inheritance. The use of this certificate is not mandatory and it does not cancel or replace similar national documents of the member states of the European Union. At the same time, the ESS is recognized in all EU countries (except Denmark, Great Britain and Ireland) as a document confirming the rights and status of heirs, testators, executors of the will and guardians of the inherited property.

European law is based on the principle of division of inherited property by its nature and contains a conflict of reference to the last permanent residence of the testator. The laws of the Member States do not contain provisions in a single document confirming the status and powers of heirs and executors of the will by analogy with the European Certificate of Inheritance, which, despite some lack of mandatory use of the certificate and coexistence of the certificate along with similar national documents is a significant milestone on the path to European integration. At the same time, it should be noted that integration processes in the European Union are more intense than similar processes in the post-Soviet space. Therefore, it can be assumed that inheritance can undergo significant changes.

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¹¹ Kukhariev O.E. (2019) Kliuchovi pytannia adaptatsii spadkovoho zakonodavstva Ukrainy do zakonodavstva krain Yevropeiskoho Soiuzu [Key issues of adaptation of the hereditary legislation of Ukraine to the legislation of the European Union]. *Yevropeiski perspektyvy*, no. 2, pp. 181–187. [in Ukrainian].

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Summary

Today's world, in the absence of borders, people are increasingly changing their place of residence, owning real estate, holding bank accounts and owning other property in different countries. This can not but have consequences in inheritance. This, in turn, can create some difficulties, cause disputes between the heirs and will undoubtedly affect the costs of registration of the inheritance. Another common problem is that a will made in one country may not have legal force in another country where it must be enforced. These and many other issues could not remain unresolved at the EU. A common approach to many inheritance issues has been found through the adoption of the Regulation of the European Parliament and of the Council N° 650/2012 of 4 July 2012 on jurisdiction, law enforcement, recognition and enforcement, adoption and enforcement of authentic instruments in matters of inheritance and the creation of a European Certificate of Inheritance. This provision came into force on August 17, 2015 and applies to cases of inheritance that occurred after that date. Inheritance cases are processed by one competent authority (court or other authority) in one state, and decisions taken in such cases are recognized in other EU member states without any special formalities. This should significantly improve and facilitate the inheritance procedure within the European Union, with the exception of Denmark, Ireland and the United Kingdom, which do not participate in this regulation. We will consider these questions in our research.

Keywords: Heir, cross-border nature of inheritance, inheritance regulations, inherited property, disposal of inherited property, Member State, European Union.