THE POLICE ACADEMY „Alexandru Ioan Cuza”
DOCTORAL “LAW” SCHOOL

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SUMMARY OF DOCTORAL THESIS

“THE EUROPEAN CERTIFICATE OF INHERITANCE IN THE CONTEXT OF A UNIFORMIZATION OF EUROPEAN SUCCESSION LAW”

“CERTIFICATUL EUROPEAN DE MOȘTENITOR ÎN CONTEXTUL UNIFORMIZĂRII DREPTULUI SUCCESORAL EUROPEAN”

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BUCHAREST, 2020

The interest shown in the subject of this scientific study has been supported and explained by the fact that, in my capacity of notary public, I instrument noncontentious succession procedures which, in the current context of an increased mobility of people and capital within the European space, oftentimes showcase elements of extraneity. Therefore, the role of the notary public in preparing and solving a national succession matter, in general, and international succession matters, in particular, is paramount, and heavily influences the unional harmonization of practical solutions released in the instrumentation of inheritances with an extraneity character.

The coming into force of EU Regulation no. 650/2012 of the European Parliament and Council on jurisdiction, applicable law, the recognition and enforcement of court decisions and the acceptance and execution of authentic succession documents and on the creation of a European certificate of inheritance, on August 17th 2015, has been a "fascinating challenge" for those law practitioners faced with the situation of having to apply a unified European legislation on succession (deemed to be the most stable civil law institution), which has marked the transformation of the field of inheritances into a topic with a vast scope transgressing borders.

In this context, the subject of this scientific research is novel and of great actuality in the Romanian and European legal landscape, proving to be quite generous, entailing a few difficulties in its approach, yet being instrumental in opening the way to diverse argumentation.

This scientific endeavour started off with a presentation of notarial succession procedures seen through the lens of national legislation, i.e. Law no. 36/1995 on notaries public and the notarial activity, the Regulation for enforcing Law no. 36/1995 corroborated with the relevant legal provisions on this subject

matter contained by the Civil Code, the Civil Procedure Code and other civil regulations that are incidental on succession-related matters. Most successions are instrumented as part of the noncontentious succession procedure, such that concrete examples from the experience of notaries public, mentioned herein, are a useful part of the body of cases placed under careful review.

The main analysis of the thesis focused on the detailed study of European norms as stipulated under EU Regulation no. 650/2012, the clarification of the new legislative concepts and legal institutions enshrined by the European legislator with respect to international successions finalized with the issuance of the European certificate of inheritance, as well as the manner of implementing this recent enactment.

The review of the legal norms on succession matters regarding the transmission of inheritance from European states such as France, Germany, Austria, Italy and the United Kingdom, which has completed the present scientific research, has also facilitated the identification of the particular features of succession-related laws in the five states mentioned above and has served as a verification tool for checking the alignment of domestic law to European tendencies.

Consequently, when drafting the thesis, consideration was given, besides domestic law, to the relevant norms on succession from other European states, the focus having been placed on identifying practical aspects, in line with a predominantly utilitarian perspective.

Throughout the thesis I have tried to emphasize those legal details that are useful for the practical resolution of all those aspects that are becoming ever more increasing and that refer to domestic and international successions. The present research highlights the necessary distinctions that a practitioner should make, both

when instrumenting an inheritance under national legal provisions, and when solving an inheritance carrying transborder aspects.

In conceiving and drafting this scientific study we have used various research methods such as: the logical method, the comparative method, the systemic method grounded on empirical observations as well as the historical method.

In order to carry out this scientific endeavour I have consulted many bibliographical sources, both national and international, including a few that are very recent, and then highlighted the new European legislative approaches on international succession aspects.

Hence, the thesis has been structured in six chapters, as described below:

Chapter 1 entitled *"Notarial Succession Procedure Stipulated by Law no. 36/1995 on Notaries Public and the Notarial Activity*" comprises a review of the course of the notarial succession procedure as provided under Law no. 36/1995 on the notaries public and the notarial activity, and analyses the theoretical aspects seen through the lens of notarial practice regarding: the opening of the notarial succession procedure, the development of the succession procedure, the right to succession option and the affidavits of the succession beneficiaries, the establishment of the mass of common goods, the completion of the succession procedure via the issuance of the national certificate of inheritance, as well as fiscal issues.

This chapter looks at the date and opening of the inheritance from the perspective of Civil Code regulations emphasizing the practical importance of these two coordinates, stressing the various cases in regards of which the notary public must offer pertinent solutions.

We have highlighted the utility of the provisions of the Regulation enforcing Law no. 36/1995 on the notarial succession procedure and its alignment with the

spirit of the entire civil legislation on such matters. In my view, the provision contained by the Regulation enforcing Law no. 36/1995 (comprised in Art. 236) referring strictly to a special procedural activity of the notary public does not contravene to the provisions of the Civil Code (Art. 954 Civil Code) and does not modify the legal provisions referring to the proof, in general, of a person's death. Therefore, the proof of death is done, in all cases, with the death certificate.

A detailed study of the final conclusion of the notarial succession procedure has been conducted, marking its completion as regards the following: the contents of the final conclusion, the possibility of distributing the movable assets received by inheritance once the final conclusion has been drafted, the frequent incidence in practice of the successions debated upon before the expiry of the succession option time bar.

An analysis of the inheritance certificate has been done further to emphasizing that its issuance is in the strict power of the notary public, highlighting its probatory force and the functions of the certificate of inheritance, followed by a presentation of the contents of the certificate of inheritance and description of its legal nature.

I have acquiesced with the doctrine on such matters qualifying a certificate of inheritance as an act of voluntary jurisdiction issued by the notary public when finalizing a noncontentious procedure and administering a body of evidence.

Without stating that I have succeeded in dealing with all possible aspects that could come up throughout the course of the notarial succession procedure, I deem that I have managed to emphasize the most important and frequent practical issues that notaries public can encounter. All these matters have been analysed through the perspective of succession material law, relevant doctrine and notarial practice.

Chapter 2 entitled *"Premises of Enshrining the European Certificate of Inheritance"* presents the sustained efforts made throughout time, at international level, in view of harmonizing succession law, and lists the many legal instruments adopted in this regard.

In the context of a strenuous legislative process, Europe has managed to adopt EU Regulation no. 650/2012 envisaging the simplification of debates on international succession matters, the new European norms being aimed at reducing the legal difficulties occurring in the case of a deceased person who possessed estates in a different European Union member country.

Chapter 3 entitled *"Scope of Applicability of EU Regulation no. 650/2012"* subjected to analysis the scope of applicability of the European enactment, having in mind three coordinates: material, spatial and temporal, showcasing a series of exclusions from the material scope of applicability of the Regulation.

Amongst the exclusions enumerated by the European legislator there are issues regarding the liquidation of matrimonial regimes or patrimonial regimes with similar effects to those of marriage.

I have shown that, further to adopting European Regulations no. 2016/1103 and 2016/1104 on matrimonial and partner-related regimes recorded, to date, within the EU, the domain of matrimonial regimes with elements of extraneity has been regulated differently. In the case at hand, Romania will not apply the two European Regulations and, in the absence of any other international conventions, it shall apply the provisions of the private international law norms contained by the Civil Code.

Since the EU Regulation no. 650/2012 stipulates that its norms "should not apply to the patrimonial aspects of matrimonial regimes", and Regulation (EU) 2016/1103 excludes from its scope of applicability those aspects regarding succession from the patrimony of a deceased spouse, I have stated that the

European Court of Justice has the power to pronounce itself on the legal provisions existing at the crossroads between the two European Regulations, as well as on delimitations between the law on succession and the law on patrimonial matters of the matrimonial regime.

Chapter 4 entitled *"Jurisdictional Competence of Private International Law on Succession Matters and the Principles Enshrined by the EU Regulation no. 650/2012"* reveals the change of paradigm performed by the European legislator on matters of international successions by enshrining a unique law and competency applicable, in principle, and established in line with the criterion of "habitual residence" of the *de cuius* at the death date. The chapter also explains the rationale at the basis of stipulating the general rule on matters of competency (jurisdiction), respectively the European legislator's desire to grant competency to settle cases of inheritance to a sole authority, the one from within the usual radius of the deceased's residence, at the time of death, so as to avoid multiple succession procedures conducted before the authorities in different member states.

I have mentioned that the general rule set forth in Art. 4 – "the last habitual residence" cannot apply if, at the time of death, the *de cuius* did not have a habitual residence on the territory of a member state. In this case, the Regulation confers the competency, secondly, to the courts of law in the member states, provided that there are some connections with the member state of the notified court, either via the deceased's citizenship, or via his/her previous habitual residence, or, moreover, in the absence thereof, via the presence of certain estates or goods making up the mass of succession. In all the hypothetical cases provided for at Art. 10, the placement of the estates making the object of the succession goods on the territory of a member state represents a condition for granting secondary competency to its courts of law.

I have analysed the succession principles governing the Regulation and highlighting the practical legal efficacy of the European norms.

Chapter 5 deals with "*The Testament in the View of the EU Regulation no. 650/2012 and the Law Applicable to Succession*" stressing the importance of the testament as necessary legal instrument for succession planning with the aim of giving legal certainty and predictability to the heirs. It has been underlined that the testament should contain a clause choosing the law applicable to the succession so as to prevent any confusing situations that might possibly occur, giving also a few examples of innovative solutions that the professionals may conceive by creatively making use of the entire range of possibilities offered by private international law.

Most practical difficulties are caused by testaments concluded abroad, requiring the notary to become aware of the testamentary forms used in European states, reason for which the latter have also been presented in this chapter.

The institution of resending has been analysed so as to determine the law applicable to the succession; also, the conditions in which a person may choose the law applicable to their own succession case have been described, detailing the scope of applicability of *lex successionis*, and showing that, in all international succession cases in which foreign laws are applicable, the Romanian notary is facing the issue of having to be cognizant of the contents of such law, emphasizing, in such case, the legal instruments used in order to obtain them and becoming familiar with the respective foreign law on succession matters.

Chapter 6 dedicated to *"The European Certificate of Inheritance"* (CEM) reviewed this legal institution, which is deemed to be the most essential innovation enshrined in the EU Regulation no. 650/2012, guaranteeing legal certainty to the beneficiaries of international successions (i.e. heirs, legatees, testament enforcers or administrators of succession patrimony), by dealing with the aspects below:

- notion, legal character, purpose and probatory force;

- contents of the European certificate of inheritance;
- effects of the European certificate of inheritance;
- procedure of obtaining the CEM, as well as its issuance, modification, withdrawal.

The issuance of the European certificate of inheritance must be performed when the deceased's habitual residence was located in a different state or when the assets from the mass of succession goods over which rights are invoked are located in a different state than the one of issuance.

I have shown that the probatory force of the CEM is not the one characterizing authentic deeds, the certificate only setting forth the relative presumption regarding the fact that the persons mentioned in the certificate have the capacity of heirs, legatees, testament enforcers or administrators of succession goods, that these persons do have the statute indicated in the certificate and that they are holders of the rights or powers mentioned in the CEM.

Based on the comparative method, the common features characterising the national certificate of inheritance and the European certificate of inheritance have been identified, highlighting the specificities of each legal act, then concluding that:

- the coexistence of the two certificates of inheritance, national and European, does not appear to be impossible or prohibited, yet their issuance will be influenced by the applicability of different provisions, respectively the ones enshrined at domestic level or the ones set forth at European level;
- it is possible to issue the two acts for the same deceased person, such documents bearing legal equivalence;
- in case of discrepancies between the two acts, the national certificate of inheritance will prevail (due to its complexity);

- the coexistence of the two acts would be legitimate, nevertheless, because they generate different effects (the Romanian certificate of inheritance contains elements that do not appear in the CEM).

I believe that, in comparison with current domestic legislation, the CEM has limited powers precisely because it does not have the value of an authentic deed and it is not an ownership title, it does not have enforceability power, being limited in terms of its validity period.

To conclude, I have highlighted that, as regards real estate publicity, in the form it is currently regulated in Romania, it cannot be stated that the CEM is a valid title to be recorded, aspect that diminishes its practical value.

Yet, the nondebatable feature of the European succession certificate is its direct recognition in all EU member states, without further requiring any other procedure for recognition/enforcement in the destination state so as to prove the statute or the exercise of the inheritor's rights in a different EU member state.

The intention of the European legislator when adopting the Regulation was to set forth faster and less costly procedures that could be completed in a reasonable time with lower court charges. Only the practice can now confirm whether this intention can be achieved.

Chapter 7 is entitled *"Landmarks of Succession Law Systems in Various European States in regards of Inheritance Transmission*"; the review outlined here contains a presentation of specificities of the legislation on succession matters in five European states, starting off with the succession system applicable in each of these states, according to the classification of succession systems provided by specialized literature, into three categories, according to the criterion of distinction, from comparative law, operated between the transfer of succession goods and the responsibility of the heirs for succession liabilities.

The comparative review of the succession systems in different European states has highlighted the legislative diversity in regards of the following aspects: composition of classes of heirs, establishing the size of succession quota pertaining to legal heirs, the existence, legal nature and size of succession reserve, the circle of reserve heirs, how the heirs will bear succession liabilities, the conditions of form and effects of the *mortis causa* provisions, etc., and underlined the opportunity of predictability in succession cases so as to prevent contradictory solutions passed by different states in the same type of case.

The analysis conducted in this chapter has constituted the normative basis for suggesting a few proposals of *lege ferenda* referring to the Romanian succession law with a view to aligning national legislation to legal solutions and European tendencies.

In the final section of the research I have outlined a set of **conclusions and proposals of *lege ferenda*** regarding the modification of both the national legislative framework, and European legislation, as follows:

• The first proposal of *de lege ferenda* formulated herein refers to the amendment of the 30-day term stipulated by Art. 243 para 3 of the Emergency Government Ordinance no. 57/2019 on the Administrative Code, to one year (which is also the time set for succession option), after the lapse of which the secretary of the administrative-territorial unit would have the obligation to notify the Chamber of Notaries Public on opening succession procedures.

In practice, further to this notification to the chamber of notaries public, the succession case shall be distributed to a notary. Difficulties arise, nevertheless, because of a deadline that is too short, i.e. 30 days, after the lapse of which succession beneficiaries are usually “surprised” by the summons of the notary public, even if they might not wish to solve the inheritance issue at that time due to

a lack of financial resources required for taxes and charges or because they do not want that the inheritance to be solved by the random notary designated by the chamber but by another competent notary they wish to appoint. In the latter case, the notary public notified by the chamber is in the situation of incurring procedural costs (for recording the case, summoning the succession beneficiaries, performing verifications with national notary registers, etc.) and then finding that the succession beneficiaries are not willing to pay these costs and request the transfer of the case to a different notary.

To avoid such situations that can prove to be unpleasant for the notary public, I believe that the aforementioned term should be modified to one year (the same as the term set for the succession option), after the lapse of which the secretary of the administrative-territorial unit would have the obligation to notify the chamber of notaries public.

In my opinion, this proposal of legislative modification is in agreement with the rule according to which the notary shall issue the inheritance certificate after the fulfilment of the one-year term for succession option since the date of opening the inheritance procedures. Only as an exception, the notarial succession procedure may be finalized also before the expiry of the term for the succession option "if it is obvious that there are no other persons entitled to the succession" (according to Art. 115 para 1 of Law no. 36/1995).

I have shown that, when establishing the mass of succession goods it is essential to have the consent of the heirs as regards the quality of common or own goods of certain assets, as well as the identification of the quota of common goods that have belonged to the *de cuius*.

In this sense, the notary will apply the provisions of Art. 1133 para 2 Civil Code "In order to establish the composition of the succession patrimony, the notary public shall firstly proceed to liquidating the matrimonial regime" corroborated

with Art. 108 para 2 of Law no. 36/1995 “In the successions regarding common goods of the succession author and of the surviving spouse, their contribution quota to acquiring the goods and the undertaking of obligations shall be set with the agreement of the heirs, as recorded in the final conclusion or, as the case may be, in the authenticated liquidation act.” In the light of these legal norms, the notary may acknowledge the liquidation of the matrimonial regime of the deceased both via a liquidation act concluded in authenticated form previously to drafting the final succession conclusion and via the final conclusion. ***I think that the drafting of Art. 108 para 2 of Law no. 36/1995 is not very rigorous since it speaks about the strict consent of the heirs. In practice, the liquidation of the deceased’s matrimonial regime entails the consent of the heirs and, obligatorily, the consent of the surviving spouse, since it would not be possible to liquidate the matrimonial regime without the agreement of the surviving spouse (even if the latter waived his/her rights to the inheritance)*.**

• I think that*, de lege ferenda*, it is required for the Romanian legislator to take a stand as regards the recognition of recorded partnerships and the establishment of civil effects in the bill of a succession law, even if these institutions are generally created in opposition with marriage (and the option of the partners in their favour is similar, most often than not, to a rejection of marriage, as a form of co-habitation).

As regards the reserve of privileged ascendants, in my opinion, this institution should be subject to revision, as it is no longer justifiable in the context of a decline of extended family as compared to the standard family. The technical solution of the French legislator in the sense of suppressing the reserve of privileged ascendants seems to me to be better aligned with the current tendencies of the family concept manifestations.

• **To conclude, I propose, *de lege ferenda*, a suppression, from the Romanian succession law, of the parents' reserve, in order to create a more ample openness of legal provisions for the last wishes of the deceased to the benefit of the surviving spouse (possibly surviving partner under PACS should legislative provisions recognize this form of cohabitation in the future)**.

Furthermore, the technical legislative solution used in Germany, differentiating between donations disposed towards third parties in terms of the regime of reductions, function of the time of their conclusion, setting forth a gradual reduction regime, after the date of realizing the donation, is, in my opinion, more adequate, and should be followed by the Romanian legislator, since, in its rigid conception, all donations are subjected to reduction regardless of the date of their conclusion. We consider that a more flexible view should be mandatory in this case, in the sense that a donation towards a third party, older than 10 years since the date of death, should not be relevant in succession terms, as it is not subjected to reduction, precisely in order to make the donating party's animus donandi prevail and thus guarantee the safety of the civil circuit.

The present scientific study aimed at establishing a portfolio of conclusions based on which we could determine, as a corollary, the legal efficiency of EU Regulation no. 650/2012, respectively of the European Certificate of Inheritance.

The issuance of the national certificate of inheritance and subsequently of the European certificate of inheritance represents, in the aforementioned context, the result of instrumenting the researched procedure and guarantees the drafting of a document in line both with domestic legislation and European law.

The present scientific endeavour could be a starting point for a unitary, correct and stable practice harmonizing matters of national succession law with European succession law.

In this context, Romanian notaries' mission is somewhat difficult to accomplish: to appropriate the provisions of this European enactment and apply them in actual practice.