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Circulation of Authentic Instruments under Regulation (EU) No. 650/2012

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Abstract: The European legal space unites Member States with different legal systems. The majority of them recognize the concept of an authentic instrument, as the primary instrument for preventive justice and the Notary as the person and institution, in whom the state has vested the right to authenticate certain transactions and facts. Other Member States do not recognize the concept of an authentic instrument and the institution of a Notary, who is responsible for drawing such instruments. Within the European Union there is no single or unified document – a “European Authentic Instrument”. So this paper wants to draw attention upon the necessity to define the criteria an act has to comply with, in order to be considered as an “authentic instrument” and to enable its special effects to be recognized in a Member State different from the Member State of origin. In order to completely fulfil the objectives of Regulation 650 from 2012, to eliminate the obstacles to the free movement of persons within the European Union, through eliminating the difficulties in exercising their rights in the areas, related to succession with international consequences, the Regulation includes provisions, regulating the acceptance and execution of authentic instruments.

Keywords: succession with international elements; public authorities; Member States; European Union.

1 Introduction

Facilitation and encouragement of free movement of European Union citizens is a main goal and priority for its institutions. In order to achieve this goal, the European Union has developed and adopted numerous documents, reports, programs and action plans. The mobility of Union citizens is a practical reality, evidenced in particular by the fact that some 12 million of them study, work or live in another Member State of which they are not nationals.

Consequently, the European Parliament and Council adopted on the 4th of July 2012, at Strasbourg, Regulation (EU) no. 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession, which was a major step to facilitate cross border successions, revealing the need for legal certainty and easier proceedings (Council, 2014).

2 Problem Statement

The European legal space unites states with different legal systems. The majority of them – the Romano-Germanic type of states – recognize the concept of the authentic instrument, as the primary instrument for preventive justice, and the Notary as the person and institution, in whom the state has

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vested the right to authenticate certain transactions and facts, in order to guarantee their compliance with the law, their evidentiary effect(s), protection of the rights of related parties, safe-keeping and storage of such instruments, and facilitation of their execution. Such authentic instruments, drawn up in those states, whose authors in the field of succession law are usually Notaries, have an increased evidentiary effects and specific evidentiary weight, which needs to be taken into account both by private persons and public authorities, until such evidentiary effects are refuted under special legal proceedings. These authentic instruments incorporate special enforceability effects, providing, whenever necessary, the right to enforce the obligations included in them, following an alleviated procedure, compared to the one, in cases of private documents/instruments, whose enforcement is, in almost all cases, related to a court decision on the case, as part of a dispute before a court of law.

Other Member States, “Common Law” states, do not recognise the concept of the authentic instrument and the institution of a Notary, who is responsible for drawing such instruments. Even when in such states there are persons called “Notaries/Notary Publics,” in most cases their functions are limited to certifying the signatures, placed under specific documents, but without an obligation to verify the legality of the content, or the execution of transactions and statements of will, described therein (Ivanov, 2014).

It is evident from the above that within the European Union there is no single or unified document – a “European Authentic Instrument,” which is identical in all Member States (regarding name, format, procedure for drafting, scope of implementation, issuing authority). Even in the countries with Romano-Germanic legal systems, the authentic instruments drawn up, despite having some similar basic characteristics, have some differences.

Therefore, it is of utmost importance to define the criteria that should fulfil a document in order to be considered as an “authentic instrument,” so to enable the legal effects of this instrument to be recognised not just in the Member State of origin, but also in other Member States.

3 The Definition and Significant Characteristics of the ‘Authentic Instrument’

In the relations between EU Member States, the term “authentic instrument” was used for the first time in the Brussels Convention from September 27, 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters. According to art. 50 of this Convention, a document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Contracting State shall, in another Contracting State, be declared enforceable there, on application made in accordance with the procedures provided in the Convention. The instrument produced must satisfy the conditions necessary to establish its authenticity in the State of origin.

Following an interpellation on the implementation of art. 50 of the Brussels Convention, the Court of Justice of European Communities (currently the European Court of Justice), in its Unibank Decision from June 17 1999, had the opportunity to rule on the applicable criteria for an instrument, in order for that instrument to be treated as an authentic instrument, under the provisions of the Convention, thus providing the first European community definition for an authentic instrument. In this specific case, numerous documents, certifying the receipt of a loan, were signed over to Unibank – a credit institution, based in Denmark. In addition to the debtor, the documents were countersigned by a Unibank officer, in his capacity as a witness of the debtor’s signature. The documents explicitly stated that, according to Danish law, they can be used as grounds for enforcement. Since the debtor did not repay his debt, the bank decided to foreclose and, due to the fact that at the moment the debtor had

domicile in Germany, approached the German courts, requesting enforcement of the rights, as described in the documents presented, in accordance with art. 50 of the Brussels Convention. The interpellation, raised before the Court of Justice of European Communities, was whether these loan documents can be used for the procedure, as described under art. 50 of the Convention or, in other words, whether they constitute authentic instruments, according to this text of the Convention. In response, the Court of Justice of European Communities issued a Decision, which lists three conditions, that any instrument must comply with, in order to be considered as an “authentic instrument” under the Convention: 1) the instrument must be drawn up by a public authority; 2) the authentication of the instrument must apply to its content, and not just the signatures; 3) the instrument must be enforceable in the state of origin. While the first two criteria are inherent to all authentic instruments, known to Member States with Romano-Germanic legal systems, the third criterion, listed by the Court, must be treated as mandatory only in view of the specific provision of the Convention, which the Court was requested to rule on, regulating the enforcement of authentic instruments. Provided that enforcement is not necessarily a mandatory characteristic of all authentic instruments, we can assume that, according to European law, an authentic instrument is one that is drawn up by a public authority and the authentication applies to the content of the instrument (Ivanov, 2014).

This **definition for authentic instruments** is also incorporated in Regulation 650/2012, regulating cross-border/international succession matters. For the purposes of the Regulation, art.3 par.1 (i) determines the ‘authentic instrument’ as a document in a matter of succession which has been formally drawn up or registered as an authentic instrument in a Member State and the authenticity of which:

- relates to the signature and the content of the authentic instrument; and
- has been established by a public authority or other authority empowered for that purpose by the Member State of origin.

From the above definition, we can extrapolate the following **significant characteristics of an authentic instrument**, namely:

1) The document has to be established by a public authority or other authority empowered for that purpose by the Member State of origin.

Therefore, authentic instruments are not instruments, drawn up between private persons only, as well as instruments, drawn up only in the presence of witnesses.

2) The document has to be formally drawn up or registered as an authentic instrument in the Member State of origin – i.e. during the drawing up of the instrument, the respective specific formal procedure must be followed.

3) The authenticity of the document has to relate not only to the signatures but also to its content – the respective public authority, or other authority empowered for that purpose, shall verify the authenticity, not only of the parties signing the instrument, but shall also verify the legality of the transaction, described in it.

Precisely which are the public authorities, empowered to draft authentic instruments, as well as the relevant format and procedure, is determined in accordance with the legislation of each Member State, where the authentic instrument is drafted.

In view of the objectives of Regulation 650, we can add another characteristic, which such instruments must comply with, namely:

- 4) The document has to be in a matter of succession.

If a given instrument is not related to a matter of succession, even if it is fully compliant with all characteristics of an authentic instrument, its acceptance and enforcement shall not fall under the provisions of Regulation 650, but will rather fall under the provisions of other Regulations, regulating acceptance and enforcement of authentic instruments (whenever within their scope), in accordance with the obligations under international treaties, signed by the Member State of origin, and in accordance with the national legislation in the Member State of enforcement.

4 Which Instruments Fall within the Field of “Succession Matters?”

Regulation 650 defines the term “succession” as “succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession” /art.3, par.1, (a)/

For the purposes of the Regulation ‘disposition of property upon death’ means a will, a joint will or an agreement as to succession /art.3, par. 1, (d)/.

When is the Regulation applicable, and which fields are excluded from its scope, is defined under art.1, par.1 and par.2, and further clarified in Considerations (9) through (19).

Without listing all possible exceptions, it is worth noting that property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts, are excluded from the scope of the Regulation, consequently authentic instruments authenticating such transfers are excluded from the scope of the Regulation as well. /Considerations (14) and art.1, par.2, (g)/

Outside from the scope of the Regulation are also the questions relating to matrimonial property regimes, including marriage settlements as known in some legal systems to the extent that such settlements do not deal with succession matters. /Considerations (12) and art.1, par.2, (d)/

In cases when a given instrument is compliant with the definition for an “authentic instrument,” in accordance with art. 3, par.1, (i), the **Regulation provides rules, guaranteeing its circulation, namely – its acceptance and enforceability in a Member State, which is different from the Member State of origin.** In this case, we are not just talking about recognition and acceptance of the authenticity of a given instrument, without any respect to its legal effects, but for recognition and acceptance of the fundamental legal effects and consequences of the authentic instrument in the Member State of enforcement, which are precisely the strengthened evidentiary and enforcement effects (Requejo, 2013).

5 Confidence in the Origin of the Authentic Instrument

In order for an authentic instrument to invoke these fundamental legal effects in a Member State, different from the Member State of origin, the first and foremost prerequisite is the **confidence and trust in its origin.** While in the state of origin authentic instruments are treated as trustworthy by default, this is not the case when such instruments are presented in other states. Traditionally, the procedure for verification of the authenticity of instruments is the legalisation procedure, which can be defined broadly as a formal procedure, aimed at verifying and authenticating the signature of the person drawing up the instrument, his official capacity, as well as the authenticity of the seal, placed on the instrument. As a general rule, the legalisation procedure is applied towards all instruments, issued in a given state and intended for use in another state – civil and marital status certificates, court

decisions, administrative acts, instruments, requiring certification of the signatures by a Notary, real estate title deeds (Notary Acts), etc., unless there is an exemption of the legalisation requirement, in accordance with international or European treaties (multilateral conventions, bilateral treaties or Regulations). According to the Hague Convention from 5 October 1961, applicable in all EU Member States, the legalisation procedure is substituted by the alleviated Apostille procedure. Many Member States have signed bilateral agreements, which eliminate any legalisation requirements, including the Apostille.

As an expression of the trust between the Member States, motivating the introduction of the Regulation, art.74 of Regulation 650/2012 stipulates that “no legalisation or other similar formality shall be required in respect of documents issued in a Member State in the context of the Regulation,” i.e. such documents can be used in a Member State, different of the Member State of origin, without the need to follow a legalisation, apostille, or any other formal procedure.

6 Accepting the Evidentiary Effects of Authentic Instruments

The provisions of the Regulation imply not only that the Member States must trust the origins of authentic instruments, drawn up in other Member States, but that they must also accept the legal consequences of such instruments – their evidentiary and enforceability effects.

As a general rule, the evidentiary effects of authentic instruments result from the circumstance that they are accepted as unconditional evidence to the facts and statements, expressed in the instrument, as well as for the actions, performed by the drafter of the instrument. The authority, before which the authentic instrument is presented, is bound by its evidentiary effects and does not have the right to refuse/reject what the instrument certifies. In order to refute the evidentiary effects, the instrument must be successfully contested/challenged, following a specific procedure (Frimston, 2012).

Despite this general rule, the evidentiary effects of authentic instruments differ among different states, while some states are even completely unfamiliar with authentic instruments and do not treat them as having any special evidentiary effects.

The essence of **accepting the evidentiary effects of authentic instruments** is stipulated under art. 59, par.1 of the Regulation: “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.”

In order to facilitate the establishment of the evidentiary effects of any given authentic instrument, in accordance with the legislation of the Member State of origin, art.59, par.2 the Regulation, stipulates that a person, wishing to use an authentic instrument in another Member State can request from the authority, drawing the authentic instrument in the Member State of origin, to complete a **special form**, describing what are the evidentiary effects of the authentic instrument in the Member State of origin. The form must be completed in accordance with the procedure under art.81, par.2 of the Regulation.

The form is not a mandatory attribute to the authentic instrument, and is issued (completed) separately, whenever requested by the interested person. Once such a request is deposited, the authority, issuing the authentic instrument is obliged to complete such a form.

The presence of such a form is not a condition for acceptance or non-acceptance of the instrument. The form is only provided to facilitate state authorities in the Member State of enforcement and, consequently, the person using the instrument. In the case when an authentic instrument is not accompanied by such a form, the authorities of the Member State of enforcement must become acquainted with the legislation of the Member State of origin, using all possible means, including forms of judicial cooperation and, in cases of Notaries – through the European Notarial Network (Ivanov, 2014).

Acceptance and recognition of the evidentiary effects of authentic instruments is directly related not just with the confidence in their origin, but also with their content. Any **challenge** relating to the authenticity of an authentic instrument (art.59, par.2), or relating to the legal acts or legal relationships recorded in an authentic instrument (art.59, par.3) shall prevent the authentic instrument to produce its evidentiary effects in the Member State of enforcement, as regards to the matter being challenged, as long as the challenge is pending before the competent court.

The Regulation also deals with cases when **incompatible authentic instruments** are presented. According to Considerations (66) of the Regulation “should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case.” Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the competent courts (Goodchild, 2014).

The acceptance of the **enforceability effects of authentic instruments** is stipulated under art. 60 of the Regulation: “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” (art.60, par.1)

Consequently, in order for an authentic instrument from one Member State to be enforceable in other Member State, this instrument:

- has to be enforceable in the Member State of origin;
- its enforceability in the Member State of enforcement has to be admitted through a special procedure of *exequatur* – issuance of a declaration of enforceability.

7. The Procedure for Issuance of a Declaration of Enforceability

This procedure is stipulated under art.45 – 58 of the Regulation and is significantly alleviated. According to it, the respective competent authority of the Member State of enforcement shall verify only whether the instrument presented qualifies as an authentic instrument, in accordance with the definition of the Regulation, and whether the instrument is enforceable in the Member State of origin. At this stage, compliance with public policy (*ordre public*) shall not be checked. Verification of compliance of the instrument enforcement with the public policy in the Member State of enforcement is conducted only in cases when the decision on the application for a declaration of enforceability is appealed, whereas the court where the appeal is filed, shall refuse or revoke the declaration of enforceability, only if the enforcement of the authentic instrument is *manifestly contrary* to public policy (*ordre public*). (Ivanov, 2014)

The application for a declaration of enforceability shall be submitted to the court or competent authority of the Member State of enforcement. Each Member State has the obligation to communicate to the Commission which is the competent authority.

The local jurisdiction shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement.

The application procedure shall be governed by the law of the Member State of enforcement.

The application shall be accompanied by: a) a copy of the authentic instrument which satisfies the conditions necessary to establish its authenticity; and b) the attestation issued by the authority of the Member State of origin which established the authentic instrument

The attestation shall be issued by the authority which established the authentic instrument on the application of any interested party, using the form established in accordance with the advisory procedure referred to in Article 81(2). If the attestation is not produced, the court or competent authority may specify a time for its production or accept an equivalent document or, if it considers that it has sufficient information before it, dispense with its production

If the court or competent authority so requires, a translation of the documents shall be produced.

The authentic instrument shall be declared enforceable immediately on completion of the above mentioned formalities without any review as to the potential public policy (*ordre public*) issue. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

The decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant and shall be served on the party against whom enforcement is sought, accompanied by the authentic instrument.

An appeal against the declaration of enforceability shall be lodged within 30 days of service thereof. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be 60 days and shall run from the date of service, either on him in person or at his residence.

The appeal shall be reviewed by the respective court, indicated by the Member State of enforcement, following the rules of competitive procedure.

The court with which an appeal is lodged shall refuse or revoke a declaration of enforceability only if enforcement of the authentic instrument is manifestly contrary to public policy (*public order*) in the Member State of enforcement.

8. Is it Possible that an Authentic Instrument within the Scope of the Regulation, Issued by One Member State, to be in the Respective Registers (Property Register and/or other) of another Member State?

On the one hand, any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register are excluded from the scope of the Regulation – art.1, par.2 (1). On the other, in order to avoid duplication of documents, the registration authorities should accept such documents drawn up in another Member State by the competent authorities whose circulation is provided for by the Regulation. In particular, the European Certificate of Succession, issued under this Regulation should

constitute a valid document for the recording of succession property in a register of a Member State – Consideration (18) and art.69, par.5

The rules, established by the Regulation, on the acceptance and enforcement of authentic instruments among Member States, of authentic instruments issued by a another Member State, are a demonstration of the trust between the Member States and the trust in the authorities, who have been empowered with the competence to draw up such instruments. They are one step ahead in the establishment of a unified Europe, without borders, where citizens can plan their personal and professional life easier, including when planning issues, related to succession, and to execute their rights within the European Union with continuously diminishing restrictions.

Concurrently, and in view of protecting the legal security in the Union, these new rules result in a greater responsibility for the implementing authorities. Acceptance of instruments, issued by other Member States, in the absence of any legalisation procedures, acceptance of the evidentiary and enforcement effects of such instruments, implies knowledge and recognition of foreign legislation, foreign authorities, foreign forms, etc. With the rules, introduced by the Regulation, we could claim that the “burden of proof” has been reversed – i.e. it is not the citizen who has to prove the veracity and legal effects of the instrument presented by him/her and issued in another Member State, but it is the authority, where such instrument is presented, that is obliged to be aware, or get duly informed, using its own means, about the existing circumstances. This implies strengthening the forms of cooperation between the respective competent authorities of the Member States, establishment of secure and expedient mechanisms for verification of documents presented, and provision of information about their legal effects.

It is precisely for that reason, that the European Notarial Network, created by the notaries from the European Union will gain increasing importance, and its development must be our main priority (Ivanov, 2014).

The rules, established by the Regulation, on the acceptance and enforcement among Member States of authentic instruments, issued by another Member State, are a demonstration of the trust between the Member States and the trust in the authorities, who have been empowered with the competence to create such instruments.

These new rules result in a greater responsibility for the implementing authorities.

There is a necessity of strengthened forms of cooperation between the respective competent authorities in the Member States, establishment of secure and expedient mechanisms for verification of documents presented, and provision of information about their legal effects.

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