



Towards the entry into force of the succession regulation:  
building future uniformity upon past divergencies



The project is co-funded by  
the Civil Justice Programme  
of the European Union



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SEMINAR AND EXCHANGE OF BEST PRACTICES | MADRID, 30 OCTOBER 2015  
Jurisdiction, competence and application of the EU Regulation 650/2012

# THE COMPETENCE OF CIVIL NOTARIES UNDER EU REGULATION 650/2012

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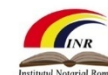
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This Regulation should allow all notaries who have competence in matters of succession in the Member States to exercise this competence.

Whether or not the notaries in a given Member State are bound by the rules of jurisdiction set out in this Regulation should depend on whether or not they are covered by the term '**court**' for the purposes of this Regulation. (Recital 21)

For the purposes of this Regulation, **the term ‘court’** means any judicial authority and **all other authorities** and legal professionals with competence in matters of succession which exercise judicial functions or act pursuant to a delegation of power by a judicial authority or act under the control of a judicial authority, provided that such other authorities and legal professionals **offer guarantees with regard to impartiality and the right of all parties to be heard**, and provided that their decisions under the law of the Member State in which they operate:

- (a)** may be made the subject of an appeal to or review by a judicial authority; and
- (b)** have a similar force and effect as a decision of a judicial authority on the same matter. (art.3.2 R)

Acts issued by notaries in matters of succession in the Member States should circulate under this Regulation.

- When notaries exercise **judicial functions**, they are bound by the rules of jurisdiction (articles 4 -11), and the decisions they make should circulate in accordance with the provisions on the recognition, enforceability and enforcement of decisions.
- When notaries **do not exercise judicial functions**, they are not bound by the rules of jurisdiction, and the authentic instruments they issue should circulate in accordance with the provisions on authentic instruments. (Recital 22)

**In this context, we question** whether the rules of jurisdiction of the European regulation extend to **non-contentious proceedings (*giurisdizione volontaria*)**, as in this case, the Regulation will affect the international competence of Spanish notaries to handle probate **proceedings in matters of Voluntary Jurisdiction.**(arts. 55-67 Notaries Act), which includes the **Notarial Declaration of Heirs.**

**In favor of exclusion:** The judicial function seems to imply the duality of parties and an adversarial principle (arts. 3.2 and 40 letters b), c) and d) of the R).

**In favor of the inclusion of voluntary jurisdiction in the competence rules of the Regulation:**

1.- It is more in line with its objectives. (Recital 7)

2.- Article 29 of the Regulation (and Recital 43) regulates how a competent authority of a Member State should proceed when its internal law provides for the mandatory appointment of an administrator, and they must apply a foreign law to the succession and, in many cases the appointment of administrators is based on a voluntary jurisdiction case

3.- In terms of recognition, Recital 59 R, the term "resolution" not only includes what has been handed down in contentious proceedings, but also that obtained in a voluntary jurisdiction case.

4.- Article 3.1 g) classifies any decision as a resolution.

## **Spanish Law:**

### **A. Voluntary jurisdiction files:**

**Persons who died prior to 17 August 2015:** international competence: art. 22 quáter letter g) LOPJ. Territorial Jurisdiction: Articles 55, 57, 61, 64, 66 and 67 LJV.

**Persons who died on or after 17 August 2015:** International competence: arts. 4-11 R 650/2012. Territorial jurisdiction, articles 55, 57, 61, 64, 66 and 67 LJV.

**Inheritance acts of voluntary jurisdiction should be considered by the Commission as judgments and be certified as such, as requested by the Government of Spain (arts. 3.2 R 650/2012 and Forms I, IV and VR 1329/2014).**

**B. Other activities** are governed by the principle of the free choice of notary (arts. 3 and 126 RN).

# THE COMPETENCE OF CIVIL NOTARIES TO ISSUE A EUROPEAN CERTIFICATE OF SUCCESSION

**INTERNATIONAL COMPETENCE:** Article 64 and Recital 70:

- Forums with a cascade structure?
- Alternative competence?

**“Internal” COMPETENCE of THE SPANISH NOTARY.**

- The Final Provision 26 LEC introduced by Law 29/2015.



## THE COMPETENCE OF CIVIL NOTARIES TO ISSUE A EUROPEAN CERTIFICATE OF SUCCESSION

Competence to issue the Certificate, Article 64: The Certificate shall be issued in the Member State whose courts have jurisdiction under Article 4, Article 7, Article 10 or Article 11.

The issuing authority shall be:

- (a) A court as defined in Article 3(2); or
- (b) Another authority which, under national law, has competence to deal with matters of succession.

The Function of Notaries in Spain fits comfortably with paragraphs a) and b) of Article 64 R, but in either of the two cases, Recital 70, when a Certificate is issued by a Notary, they must comply with the international competence rules of Article 64 R.

## FORUMS WITH A CASCADE STRUCTURE?

It has been debated whether the international competence to issue the Certificate is a unique competence, or if we can refer to an alternative competence.

In the event of a **unique competence, one forum prevails over another**; the **preamble and articles of the UE Regulation** support this theory:

- Recital 27 and Recital 70
- The Jurisdiction of art.10 (Subsidiary Jurisdiction) is not intended to affect the competence rules of the Member State or the general Jurisdiction rules, but instead has to be understood in its real sense, namely that it is only applied when the habitual residence of the deceased at the time of death is not in a Member State.
- We believe that the efficient processing of succession cases (avoiding duplicities), reducing costs and legal certainty is achieved more effectively if the international competence of Civil Notaries to issue a Certificate has a cascade structure: the third parties concerned – creditors and heirs– have a single point of reference, and a single Member State is competent.

## ALTERNATIVE COMPETENCE?

According to this theory, any of the authorities will be competent to issue the European Certificate of Succession (the notary from any Member State) who are competent **under any forum** established by Article 4 (habitual residence), 7 (forum of nationality) and 10 (where the property is located, also fulfilling the requirements of article 10, namely that the deceased is not habitually resident in a member State and has assets of the estate in a Member State and:

- a) The deceased had the nationality of that Member State at the time of death,  
or
- b) Regardless of whether they were national of a member State, of a third State or were stateless, the deceased has assets in an Member State where they ordinarily resided but died having changed their habitual residence to a third State, provided that, at the time the court is seised, a period of no more than five years has elapsed since that habitual residence changed.

# THE COMPETENCE OF SPANISH NOTARIES TO ISSUE A EUROPEAN CERTIFICATE OF SUCCESSION

DF 26 of the Spanish Civil Procedure Act introduced by Law 29/2015 of 30 July on international legal cooperation in civil matters conceives the certificate as a public document that is elaborated “a posteriori” to a succession act authorised by a notary and which certifies all or any of the elements of the act, considering the same notary who authorized the act as being competent, or otherwise their replacement or successor.

**Law 29/2015 of 30 July** introduces Final Provision (FP) 26 into Law 1/2000 of 7 January on Civil Procedure, which states:

"14. Issue of a European Certificate of Succession by a Notary Public.

1. On request, it is the duty of the notary who declares the succession or any of its elements, or anyone who lawfully replaces or succeeds them in their office, to issue the certificate provided for in Article 62 of EU Regulation 650/2012 using the form provided in Article 67 of the same Regulation. The request for the issue of a succession certificate may be submitted using the form provided for in Article 65.2 of the regulation.
2. The issue of this certificate, which shall be considered a public document under Article 17 of the Law on Notaries, shall be recorded in a note affixed to the master document substantiating the act of succession, to which the original certificate shall be attached, giving a authentic copy to the applicant. If it cannot be attached to the master document, a note must be included referring to the subsequent act to which the original copy of the certificate must be incorporated."

## ANALYSIS

**1.-** Final Provision 26 of the Civil Procedure Act does not consider the certificate as a public document which is the result of an autonomous procedure (in which circumstances are accredited that are subject to certification), but as a document that is to be added to the master document of inheritance authorized by a notary, (circulating the copy), in a similar way to the European enforcement order. However, there is the possibility that any replacement or successor of the original notary public who has to issue a certificate based on a succession document authorized by their predecessor may not have all of the necessary information to issue it, or otherwise that the circumstances requiring certification are not sufficiently accredited. In this case the most usual solution to complete the procedure would be to initiate a subsequent act.

**2.-** The existing text assumes that, necessarily, when a Certificate of succession is requested, some type of succession procedure has taken place in Spain, a situation that is not always be the case, as we will see in the following two example cases. The Regulation refers on multiple occasions to a Spanish Authority as being the competent authority for issuing the Certificate, and it is likely that no Spanish Notary will have declared the succession or any of its elements.

## CASE STUDIES

1. Mr. Taboada, who has Spanish nationality, “vecindad civil” in Galicia, and whose last usual residence was in Argentina, dies on the 17<sup>th</sup> of August 2015, leaving properties in Galicia and a bank deposit in Italy; he has made his will with a Notary in Buenos Aires, leaving everything to his wife and children in equal parts. A Spanish authority is competent to issue the Certificate (Article 10 1.a) of the R) as the deceased has property in Spain and had Spanish nationality at the moment of his death. The Spanish authority has to apply substantive Argentinean law, and there is no *renvoi* (arts. 20 and 34 ). No Spanish notaries have declared the succession, and the Italian Bank requests an ECS from a competent Spanish authority in order to hand over the funds to whoever is certified as being entitled to them. The heirs are not interested in distributing the estate (they are negotiating with the siblings of the deceased), and all the certification needs to indicate is the amount that corresponds to each of the heirs and all of them, present or duly represented, will transfer the funds once the respective duties have been paid.



2. Mr. Puig, who has Spanish nationality, “vecindad civil” in Catalonia and usual residence in Italy, wants to plan his succession. He has visited his notary in the Italian city where he lives, who, together with a notary in Catalonia, has awarded a will disposing of his property according to the succession law of Catalonia, and expressly exercises the *professio iuris* in favour of the law of his nationality/legal residence in Catalonia. He dies on 17<sup>th</sup> August 2015 with property in different Member States, and his heirs agree that a Spanish notary should issue the certificate of succession so that it can be used in the member states where the deceased has property. Their father made use of the *professio iuris* and they want to turn to an authority that applies its own Law; there is no notary in the whole of the Spanish state who has declared the succession or any part of it.

**3.-** In practice, the Certificate (in the same way as the German *Erbschein* certificate of succession) **can be** a prior document or “prelude” to the succession process. In this case we should consider the contents of Recitals 67 and 69, remembering that the contents of the certificate (article 68) can contain **two pieces of information** that are **optional** (the text states “*if applicable*”), regarding the acceptance or rejection of the inheritance by each heir, and information on the rights and/or property corresponding to each particular heir. In this case, the certificate may be requested before processing the inheritance or the acceptance and awarding of the inheritance, even though it is testate. See art. 14LH

4- The function of the competent public authority in drawing up the European Certificate of Succession is complex, even when “subsequently” “the applicant may use the form” or “the form established in accordance with the Advisory Procedure”, arts. 80, 81.2, 65.2 and 67 of the Regulation. The main issues of Private International Law, Competence, Applicable Law, recognition, the acceptance of documents and cooperation between authorities will all be present, and this is an instrument at the service of the objectives of the European Union.

## **Perhaps, it would have been better if...**

- The idea of “autonomy” had been preserved in the procedure to issue the Certificate.
- An internal territorial competence had been set up, expressly regulating forums with a cascade structure, harmonising the forums for internal territorial competence for notaries in Spain with those defined in the Regulation, by regulating the international competence of the authorities to draw up and issue the Certificate.
- The Regulation allows for the choice of forum, and we believe that this is something that should be taken into account, as the first forum of international competence is the forum of state of which the deceased is a national (art. 7 of the Regulation) providing this is a Member State, that the deceased has validly chosen the Law of the country of which they are a national as the law that will be applied to their succession, and that the choice of court is made by the interested parties (art. 5.1 of the Regulation). If a choice-of-court agreement is reached, the principle of free choice of a notary public is better adapted to the system, and as it is the interested parties themselves who are requesting the Certificate who are choosing the jurisdiction (arts. 5.1, 7.b), 63.1 and 64 of the Regulation), then the matter of internal notarial competence is easily resolved.