UNIVERZITA MATEJA BELA
V BANSKEJ BYSTRICI

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(eds.)

ZBORNÍK PRÍSPEVKOV Z MEDZINÁRODNEJ ŠTUDENTSKEJ VEDECKEJ KONFERENCIE PRO-LEGAL DEŇ ŠTUDENTOV PRÁVA A DOKTORANDOV 2025

Recenzovaný zborník vedeckých príspevkov

2025

BELIANUM

Univerzita Mateja Bela v Banskej Bystrici
Právnická fakulta

Zborník príspevkov z medzinárodnej študentskej vedeckej konferencie PRO-LEGAL Deň študentov práva a doktorandov 2025

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2025

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Príspevky neprešli jazykovou korektúrou.
Za obsahovú a jazykovú stránku textu sú zodpovední autori publikovaných príspevkov.

ISBN 978-80-557-2267-2
EAN 9788055722672
https://doi.org/10.24040/2025.9788055722672

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Mónika Rácz[1]

WERE THE OLD BILATERAL CONVENTIONS MORE HARMONIOUS THAN THE EU SUCCESSION REGULATION?

Abstract

In this paper, the author reviews the bilateral conventions on legal assistance in matters of succession law and compares them with the EU Inheritance Regulation. Which has harmonised succession more smoothly? Which made easier or more difficult the work for notaries?
Is it easier to determine the nationality of the deceased or his habitual residence at the time of death? Citizenship is clear, it was the basis of the old bilateral treaties for establishing jurisdiction and applicable law, but the rights attached to it may lead to another country. This complicates the work of the legal practitioner. At the same time, establishing habitual residence, which is the cornerstone of the European Succession Regulation, can require a serious investigation, for which notaries are not equipped, do not have the necessary powers to take evidence and are not experienced.

Keywords: *bilateral conventions on inheritance law, EU Succession Regulation, notarial probate proceedings, private international law.*

Introduction

The European Union's legislators were driven by a desire for legal unification when they created the EU's Succession Regulation, which replaced most of the old bilateral legal aid conventions. The treaties on legal assistance in the area of family law have only narrowly regulated succession. Jurisdiction and applicable law were based on the nationality of the testator. In addition, the sovereign inheritance law of each State, based on its historical roots was respected. The EU Regulation on succession[2] appears to have only tangentially interfered with national succession laws by stipulating residence, but in reality, it made a significant change. It used to be enough to look at the deceased's identity card or passport to establish nationality, but establishing habitual residence can now require a serious investigation. Especially if the deceased was resident in several countries at the same time. Even if it is not possible to establish where the habitual residence was at the time of death, there may have been a closer link with another country. The Inheritance Regulation requires a thorough examination of the circumstances.

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[2] REGULATION (EU) No 650/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF THE EUROPEAN UNION (of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the recognition and enforcement of decisions in matters of succession and the creation of a European Certificate of Succession ("Brussels IV") https://eurlex.europa.eu/legal-content/HU/TXT/PDF/?uri=CELEX:32012R0650

Hungarian notaries, although the Regulation elevates them to the status of courts, were not equipped to do so and do not have the necessary powers of investigation and taking evidence. If we compare the bilateral conventions on legal assistance in matters of succession law with the EU Inheritance Regulation, arising some important questions. Which has harmonised succession more smoothly? Which made easier or more difficult the work for notaries? Is it easier to determine the nationality of the deceased or his habitual residence at the time of death? Citizenship is clear, it was the basis of the old bilateral treaties for establishing jurisdiction and applicable law, but the rights attached to it may lead to another country. This complicates the work of the legal practitioner. At the same time, establishing habitual residence, which is the cornerstone of the European Succession Regulation, can require a serious investigation, for which notaries are not equipped, do not have the necessary powers to take evidence and are not experienced. So we have to find out:

Was not it easier to harmonise the inheritance procedures of two states than the different succession regimes of the 27 Member States?

1. International bilateral conventions in modern Eu law of succession.

Generally, as in ancient times, the law of succession in the modern era varies from one legal system to another. The continental law of succession differs from country to country, but it also differs from English law of succession, but the common law jurisdictions are also different and diverse, and therefore some legal harmonisation is needed, says Iván Siklósi[3] , and he says that there has been no overall harmonisation of succession law at international or European level, but there is a need to harmonise certain areas. I note that this statement, made in 2023, already shows that the European Union Succession Regulation has not fundamentally overturned the Member States' rules on succession law. However, it is important to review the difference between the provisions of bilateral legal assistance conventions among states on family law/inheritance law and the provisions of the European Regulation on Succession.

2. Features of Bilateral Conventions.

The essence of bilateral conventions is summarised in the "Vienna Convention on the Law of Treaties 1969[4]as follows: a "treaty" means a written agreement between States and governed by international law". Dalma Takó considers written agreements to be international treaties, which are governed by international law, and which are intended to create, modify or terminate rights and obligations under international law, and on this basis defines bilateral treaties as those concluded between two subjects of international law with the capacity to contract. The two parties may be two nations or two international organisations, or a nation and an international organisation. It is possible for a bilateral treaty to involve more than two parties;

[3] Iván Siklósi: Some main issues of the development of the law of succession in the medieval and modern legal history, with a modern comparative legal perspective. Budapest, Orac Publishers 2023. 13-15.
[4] Decree-Law No 12 of 1987 on the proclamation of the Treaty on the Law of Treaties, signed at Vienna on 23 May 1969https://jogkodex.hu/jsz/becsi_egyezmeny_1987_12_tvr_1240949

for example, bilateral treaties between Switzerland and the European Union.[5] According to László Kecskés[5] , bilateral international treaties are based on the principle of equal treatment or domestic equality of laws, i.e. the nationals of the contracting parties have the same succession status as their own nationals, both in terms of capacity to inherit and other rules of succession. According to Kecskés, legal assistance treaties are bilateral treaties which also stipulate that if there is a provision restricting the domestic legal personality of an estate in the countries of the contracting parties, "the law of the place where the property is located shall apply mutually" (e.g. Article 47 of the Hungarian-Polish Legal Assistance Convention or Article 8 of the Hungarian-Austrian Bilateral Convention on the Regulation of Succession). The publication of "The Hungarian National Chamber of Notaries on the 10th anniversary of its existence" (published in 2002)[6] , also states that the number of bilateral international conventions regulating international succession disputes has increased in the preceding decades, thus aiding with practitioners: - Assistance treaties (e.g. on the regulation of inheritance matters between the Hungarian People's Republic and the Republic of Austria. 1965., or between the Hungarian People's Republic and the Republic of Austria on the avoidance of double taxation in the field of heritance and estate taxes. Vienna 1975.) or the Hungarian - Czechoslovakian conventions on legal assistance [7] and Consular agreements (e.g. between the Hungarian People's Republic and the Lao PDR. Budapest 1983.) According to László Kecskés, both legal aid conventions and consular conventions typically deal with succession law problems. At the international level, they are intended to regulate the following areas of succession law: equal treatment, conflict of laws rules on applicable law, private international law regime of testate succession, jurisdiction, insurance/administration/disbursement of estates, avoidance of double taxation. For inter-state contracts: movable property governed by the last nationality of the testator, while immovable property is governed by the location of the estate. This determines the applicable law. This was the situation in 2002.

3. The EU Succession Regulation is a try to unify the legal rules.

In the event of succession by the State: applicable law under the provisions of the conventions on legal aid, in the case of movable property, the succession is to the State of which the deceased was a national at the time of death. In the case of an inheritance of immovable property, the State in whose territory the property is located.

Jurisdiction: the principle of "dismemberment of the estate" is applied in bilateral international conventions. In the case of movable property, the State of which the deceased was a national at the time of death is competent to administer the succession, while in the case of

[5] Keiser, Andreas (November 30, 2012 - 17:00) Swiss still prefer bilateral accords with EU Swissinfo.ch https://www.swissinfo.ch/eng/banking-fintech/swiss-still-prefer-bilateral-accords-with-eu/34078538

[5] László Kecskés: Succession and family law issues in Hungarian private international law. MOKK Budapest. (2002) 36.

[6] Kecskés (2002). 29.

[7] Act LXI of 1991 on the proclamation of the Treaty between the Hungarian People's Republic and the Czechoslovak Socialist Republic on Legal Assistance and the Regulation of Legal Relations in Civil, Family and Criminal Matters, signed in Bratislava on 28 March 1989

immovable property, the place where the property is situated is competent. The rights and obligations of the States when the succession is opened:

-Obligation to notify the other state concerned (consular, diplomatic representation)

-securing/administering the estate and delivering it to the rightful claimant. Authorised officials of the consular/ diplomatic mission of the State concerned are entitled to represent their nationals, to act in probate matters. Also, to hold the estate in temporary custody and deliver it to the beneficiary after creditors have been satisfied and taxes/duties have been deducted. The estate is disbursed in accordance with the foreign exchange rules. Heirs may participate in the probate procedure in person or by proxy.[8]

4. Bilateral family law Conventions in Private International Law[9]

Since the 1950s, Hungary has concluded such agreements with Romania, Poland, Albania, Bulgaria, Mongolia, Korea, Czechoslovakia, Slovakia, etc.[10] The general rule in legal assistance conventions is that the law of succession of the country where the testamentary disposition was made applies. In this case, the revocation of the will is also valid. In the case of bilateral legal assistance treaties between Hungary and Austria, the Soviet Union and Vietnam, Kecskés states that the making and revocation of a will is formally valid if it complies with the law of the country where it was made or where the testator had his domicile/ habitual residence at the time of death. Let us now look at what prompted the European Union legislators to create the Inheritance Regulation.

The timeliness of the European Succession Regulation.

Vékás summarises the answer by saying that the Amsterdam Treaty (1999) amended the EU statutes so that from then on "the private international law and procedural law of the Member States may be unified by regulations in the areas listed in Article 81 TFEU"[11] , as it is probably easier to unify jurisdiction, recognition, enforcement rules and conflict of laws rules by creating decisional harmony than to harmonise substantive succession law. Vékás also points to the important fact that the conflict-of-law rules of the EU Succession Regulation Agreement determine the applicable law in a general way. He points out that the substantive law of succession in the Member States is very diverse and varied, in particular as regards succession in law, the legal institutions of testamentary succession, the legal institutions of the compulsory portion, whether a declaration of acceptance by the heir is required or ipso iure the transfer of the estate takes place, whether it is possible to renounce the inheritance. He also gives examples to illustrate these important differences. There is uniformity in legal succession across the EU

[8] Kecskés (2002) 36.
[9] Kecskés (2002) 43.
[10] For example: „The Treaty between the Hungarian People's Republic and the Czechoslovak Socialist Republic on legal Assistance and the regulation of legal relations in civil, family and Criminal matters”
Signed in Bratislava on 28 March 1989.”
[11] Lajos Vékás: Divergent substantive inheritance rights in the background of a uniform European private international law (MJ 2019/6., 325-334) 325.

Member States, with testate succession taking precedence over legal succession on the basis of the principle of favour. There is also uniformity in the statutory succession of descendants. However, the succession order of ascendants, lateral relatives, can vary considerably. For example, "different systems of parental succession may operate."[12] Also noteworthy, in his view is the Hungarian system of intestate succession, which is unparalleled in European legal systems. Another difference is that under Hungarian law the free transfer of the estate must be proved, whereas in French inheritance law, the grandparent is the legal heir to the share of the estate of the parent who has died without descendants, according to the legal institution of "la fete successorale." It also points to significant differences in the case of succession by the State and the municipality, both in terms of the legal title (inheritance or undomesticated property) and the conditions for succession (under Hungarian and German law, the State only inherits in the absence of an heir and cannot reject the estate, whereas under Italian law, for example, the State is the legal heir beyond a certain degree of kinship). Another significant difference, Vékás notes, is that in the EU Member States, the legal institution of the compulsory portion exists (I will not go into the details of its Roman legal origin and its Roman legal effect for lack of space), while in the Anglo-Saxon countries, this legal institution protecting the surviving spouse, the family left behind and ensuring survival is not known. The status of the surviving spouse also varies in European legal systems, and may be a beneficiary or heir, or a mixture of the two, or may inherit only in the absence of descendants. Emilia Weiss writes that the widow's right to inheritance appeared in the law codes (BGB, ZGB, ABGB) at the turn of the 19th and 20th centuries, to some controversy, but that if there are descendants, the widow only receives a beneficial right, since she is "competing" with the children, but if there are none, she is entitled to the property of the ascendants/descendants - heir at law. In French law, this solution is still "alive and controversial".[13]

Different rules made conflict in the Member States' succession law.

It can be seen from the above that succession law is extremely diverse, making it a difficult task to achieve any degree of harmonisation. Prior to the EU Succession Regulation, Member States regulated succession law and all its legal institutions at national level, says Eszter Kőfalusi[14], and points out that the harmonisation effort could raise a number of questions. Among other things, jurisdiction, applicable law, the right to choose the law, the conditions for becoming heir, the beneficiaries in the case of legal succession, the proportion of assets to be left in the estate, the rules on restrictions on the freedom to make a will, and another important question. "How can the formal validity of wills be established and how can heirs find out if the deceased has left a will in another state?" Let we have a look at the different rules where there is

[12] Lajos Vékás: Differing substantive succession rights in the background of a uniform European private international law (MJ 2019/6., 325-334) 326.
[13] Emilia Weiss: The historical development and evolution of the legal status of the surviving spouse. Budapest, Akadémiai Kiadó, 1984. 45.
[14] Eszter Kőfalusi: Inheritance Law Issues in the European Union. in Family Child Property. (Szeibert Orsolya ed.) Family law study volume. Budapest, HVG -ORAC 2012. ISBN: 978 963 258 169 9. 499.

a conflict of law in the succession laws of the different Member States, which made it necessary to create the EU Succession Regulation because of the major differences. We are assisted in this by Eszter Kőfalusi, who has explored these diverse procedures in depth. Jurisdiction[15] is determined by the nationality of the deceased for Austria, Czech Republic, Germany, Greece, Hungary, Italy, Poland, Portugal, Slovakia, Slovenia, Romania, Spain, Sweden, and Slovakia. By contrast, the last habitual residence is linked to Denmark, Estonia, Finland, Ireland, Lithuania, France, the Netherlands, Luxembourg, Scotland (and also in the United Kingdom). Authorities:[15] in most Member States the procedure is notarial, but in some Member States it is conducted by a court. The initiation and conduct of the probate procedure**:**[16] shows a truly diverse picture in the Member States, which justifies the EU legislative intention to create the EU Succession Regulation

Central and Eastern Europe

In Hungary, Poland and Romania, the proceedings are conducted in the jurisdiction of the last place of residence of the deceased. In the Czech Republic, probate proceedings are compulsory but are conducted by a notary. In Slovakia, a notary is appointed to act before a court. In Poland, a notary, or a court act in probate matters, while in Hungary it is a non-judicial procedure before a notary, who is a court of first instance. In the event of a dispute, a court acts. The same procedure applies in Romania. In Romania, the probate procedure is conducted by a notary, appointed on the basis of the last place of residence of the testator, and in the event of a dispute a court will decide. In Bulgaria, on the other hand, there is no compulsory procedure, but in the event of a succession dispute, notarial advice is provided.

Western Europe

In Western Europe, the procedures are also varied. In Austria, it is initiated ex officio by the court of the deceased's place of residence and is conducted by a notary on his or her behalf. In Germany, too, the transfer of the estate takes place in the court of the deceased's last place of residence, regardless of the location of the assets. In France, a notary is required if there is real estate in the estate. In the event of a dispute, unlike in Hungary, it is not decided by a court but by a notary chosen by the heirs but appointed by the court. In Belgium, there is no compulsory procedure for the administration of estates, but in the event of a dispute over the estate, a court will decide. The Dutch and Spanish and Portuguese procedures are similar. In the Netherlands, in the case of wills and contracts of succession, the notary is competent. In the event of a dispute, a court is responsible. In Spain and Portugal, in the case of a will, a notary is competent and in the case of a succession dispute, a court. In Greece, the rules are different, with a notary for real estate and tax advisers for movable property.

The Baltic States and others

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[15] Kőfalusi (2012) 500.-501. [15]
Kőfalusi (2012) 500.
[16] Kőfalusi (2012) 500.

The Baltic States also represent several variations. In Estonia, it is initiated by a notary on the application of the entitled person, in Latvia a notary conducts it, while in Lithuania there is a mixed system of probate - notaries and courts. Even in Scandinavia, one might think, there is no uniformity**.** In Sweden, like in Hungary, the procedure is non-litigious, but takes place in the court of the testator's last place of residence. In Finland, the court appoints the competent authority. In the United Kingdom, the common law system is incomparably different. The testator appoints an executor, or the court appoints an administrator. In Cyprus, the probate court operates.[16]

The collision rules.[17]

The conflict-of-law rules were different before the EU Succession Regulation in the area of succession law. In many states, the habitual residence of the deceased was the connecting element (e.g. Belgium, Bulgaria, Finland, France, Estonia, Luxembourg, Lithuania, Belgium, Luxembourg, Finland). In other states, the law of the deceased's nationality was the link factor (e.g. Hungary, Austria, Belgium, Czech Republic, Slovakia, Germany, Poland, Slovenia, Spain, Portugal, Greece, Italy, Portugal, Greece, Spain.) But within and beyond this, there are differences in many legal institutions (e.g. movable and immovable property, the right of choice of law, different rules on compulsory portions or wills, which cannot be listed for reasons of space (but it is clear from the above that the harmonisation of succession law is a very difficult and necessary but necessary task. Zsuzsa Wopera[18] also highlights the fact that by 2009 it had already become clear that "Community provisions that were previously considered to be appropriate do not always stand the test of practice" and that sometimes it is precisely the desire for uniform rules on applicable law that is preventing the development of a single European conflict of laws.

The EU Succession Regulation - difficulties in implementation.

The introduction of the Regulation has brought about a major change in Hungarian succession law, says Tibor Szőcs (and I note, in other EU Member States as well). In Hungary, it is no longer the nationality of the testator but his or her habitual residence that is decisive.[19] In his opinion, this also poses risks, as probate proceedings may be initiated in several Member States and there may be difficulties in identifying foreign real estate and assets and in interpreting the content of documents (land register, company certificate). There may also be complications in the case of legal instruments which are unknown in some jurisdictions. An example is given by Tibor Szőcs: the "widow's quarter", [20] which is specific to German inheritance law (Ehengattenviertel). Following the introduction of the EU Succession Regulation, a case

[16] Kőfalusi (2012) 500.-501.
[17] Kőfalusi (2012) 502.-503.
[18] Zsuzsa Wopera: European family law. Matters relating to marriage, custody and maintenance in European Community law and other sources of law. HVG-ORAC Budapest, 2009. ISBN: 978 963 258 0685 43.p.
[19] Szőcs (2021) 8.
[20] Szőcs (2021) 9.

concerning this very legal instrument, unknown both in Hungary and in other EU Member States, was brought before the Court of Justice of the European Union. It is characterised by being partly of an inheritance nature and partly of a matrimonial property nature.[21] The EU Succession Regulation has ruled on this issue in a judgment in which it "draws a distinction between matrimonial property law and succession law."[23] The three judgments handed down by 2021 do not, of course, affect Hungary, as there is no widow's quarter in Hungarian succession law, but they are significant because the EU Succession Regulation's judgments are the so-called "ninth interpretative decision", explains Tibor Szőcs, (as the EU Matrimonial Property Regime was not yet in force), and notes that the EU Succession Regulation has classified the German widow's quarter as an inheritance law institution falling within the scope of the Rome Statute.[22] This was necessary because the widow's quarter under § 137 1 BGB is linked both to matrimonial property law (legal basis) and to the law of succession (extent of the legal succession). So, we can see that litigation has already started in the field of the application of the EU Succession Regulation. Lajos Vékás also examines the conflict of law of the place of location (registration) in probate proceedings.[23] In his opinion, the EU Succession Regulation requires the creation of a unity of law within the EU, which "has had to overcome serious difficulties".[24] This may be due to the fact, that in succession cases with a relevant foreign element, the law of succession (lex successionis), the law of location (lex rei sitae) and the law of registration (lex registrationis) may conflict. There may also be a conflict between the principle of the severability of rights in rem[25] and the principle of succession in rem (succession in the event of death) and the principle of the unity of the estate and the principle of the dismemberment of the estate, which is followed by several EU Member States. It is clear from all this that the introduction of the EU Succession Regulation has brought problems as well as relief.

Summary

The birth of the EU Succession Regulation was significant because, in the words of Lajos Vékás, which is in line with the text of the Regulation, it unified the rules on jurisdiction/applicable law/recognition and enforcement of decisions in matters of succession; the rules on the acceptance and enforcement of authentic instruments in matters of succession and introduced the European Certificate of Succession. In Tamás Balogh's view, the EU Succession Regulation will also help practitioners to ensure that decisions taken in accordance with its provisions are recognised ipso iure in the other Member States without any further legal action. In his opinion, it is also an important step forward that the European Certificate of

[21] Szőcs 374. In Vékás (ed.) (2021.)
[23] Szőcs 353. In Vékás (ed.) (2021.)
[22] Szőcs 375. In Vékás (ed.) (2021.)
[23] Lajos Vékás: "Inheritance versus place of location (place of registration) law. in Lajos Vékás (ed.): Private International Law Regulations in the Practice of the Court of Justice of the European Union. HVG-ORAC Publishers Budapest (2021.) 376.
[24] Vékás 377. In Vékás (ed.) (2021.)
[25] According to the principle of the separateness of rights in rem, the types of rights in rem are determined by law (cumulative legislation). Vékás 379. In Vékás (ed.) (2021.)

Succession introduced by the EU Succession Regulation is a "sui generis EU legal instrument"[26] , which has the same legal effect in all Member States on the basis of the same connecting element and the same applicable law - the habitual residence of the deceased at the time of death. This facilitates the work of law enforcement, as the forum and the ius. By way of example, if the testator had his habitual residence in Hungary at the time of his death, the Hungarian authority may proceed in the succession case and, in the absence of choice of law, apply Hungarian substantive succession law, irrespective of the testator's nationality. With regard to habitual residence, Balogh said that "it was not surprising that this became the connecting rule, as it fits in with the legislative trend of the European Union, following the rules of the regulations previously adopted in the field of judicial cooperation in civil matters."[29]

However, it also **makes it more difficult for law enforcers**, as habitual residence is not an exact concept like nationality but has to be established by the authority. I believe, on the basis of the literature, that since notaries in Hungary are involved in probate matters, they have a much more difficult task than, for example, the French authority, since the probate proceedings are conducted by a court there, which has the means of proof that Hungarian notaries do not have. In my opinion, the primary reason for the creation of the EU Succession Regulation was the increasing number of EU citizens exercising their right of free movement and residence in the European Union, and the growing number of people settling in other Member States, irrespective of their nationality, where they may have inheritance or succession issues. Iván T. Berend shares the same view, revealing that the issue of immigration is not new. Muslims settled in Europe in large numbers as early as the Second World War. For example: Turks in Germany, Pakistanis and Bangladeshis in Great Britain, Algerians, and Moroccans in France. Today they represent between 2-9% of the local population. 272 million migrants have crossed borders worldwide since 2015. The main destinations are the EU and the US.[27] I believe there could be an increase in the number of successions with a relevant foreign element in the EU.

All this leads to the conclusion that the EU Succession Regulation is double-faced: harmonization with difficulties. At one side helps the notaries, courts, because nowadays increasing the number of successions with relevant foreign elements. But it also caused difficulties in notarial probate procedures. The EU Regulation has raised notaries to the rank of judge, made it compulsory to establish the last habitual residence of the deceased - in the absence of choice of law, but this is often difficult to determinate. The testator may have had a closer connection with another country or resided in several countries at the same time. Before, it was enough an identity card or a passport to establish the nationality of the testator, now maybe a full investigation needs to find out the last habitual residence. This mean real difficulties for notaries. Therefore, I am still asking:

Wasn’t it easier to harmonise the interests of 2 countries than 27 member states?

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[26] Tamás Balogh: Recent problems with the application of the European Succession Regulation. Notaries' Gazette (202/3.) 24-25.

Tamás Balogh: Recent problems with the application of the European Succession Regulation. Notaries' Gazette (2020 / issue 3) 24.

[27] Iván Berend T. (2021) 211.-213.

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