USE OF STANDARD FORMS IN EU CIVIL JUDICIAL COOPERATION: THE CASE OF THE EUROPEAN CERTIFICATE OF SUCCESSION

L'USO DI FORMULARI STANDARD NELLA COOPERAZIONE GIUDIZIARIA CIVILE: IL CASO DEL CERTIFICATO SUCCESSORIO EUROPEO

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Abstract: The present paper analyses the recent judgment of the Court of Justice of the European Union in the *Brisch* case. The reference for preliminary ruling concerns the optional or mandatory nature of the application form established by the Succession Implementing Regulation for the issue of an European Certificate of Succession. The present paper tackles the general framework, from the current CJEU's case law on the Succession Regulation's provisions on the ECS, to the main procedural issues. Then, an analysis of the case and of the CJEU's reasoning is offered. The concluding remarks submit some considerations on the impact of the standard forms established by the EU Regulations within the civil judicial cooperation.

Keywords: European Certificate of Succession, Standard Forms, Succession Regulation No 650/2012, Implementing Regulation No 1329/2014.

Riassunto: Il presente contributo analizza la recente sentenza *Brisch* della Corte di giustizia dell'Unione europea. La domanda di pronuncia pregiudiziale verte sulla natura del modello di domanda di emissione del certificato successorio europeo, previsto dal regolamento di esecuzione del regolamento sulle successioni transfrontaliere. Pertanto, il contributo affronta lo stato attuale della giurisprudenza della Corte di giustizia sul certificato successorio europeo e le regole procedimentali fondamentali per il suo ottenimento. Quindi, è analizzato il caso con particolare attenzione alla motivazione della Corte. Infine, le conclusioni presentano alcune considerazioni più generali sul valore e sugli effetti dei moduli standard, previsti nei regolamenti dell'Unione in materia di cooperazione giudiziaria civile.

Parole chiave: certificato successorio europeo, moduli standard, regolamento 650/2012 sulle successioni transfrontaliere, regolamento d'esecuzione 1329/2014.

I. Introduction

1. The EU Succession Regulation[1] is a complex piece of legislation with a "quadruple nature". After establishing rules on international jurisdiction, on choice of law and on recognition and enforcement of judgments – as many EU Regulations on civil judicial cooperation do[2] - , it introduces a new EU uniform document, the European Certificate of Succession (hereafter: ECS). Its novelty depends on two elements. Firstly, the EU had never established the use of a uniform certificate for cross-border cases within the civil judicial cooperation before. Rather, other EU Regulations in this area aim at facilitating transnational recognition and enforcement of national judgments and public documents through the use of standard forms or models. In some cases, these are attached to the text of the Regulation concerned[3]; in others, as the Succession Regulation, the EU Commission has enacted implementing Regulations containing the form(s)[4]. Nevertheless, these forms are far from being a unified common European document: they are means in order to simplify mutual recognition of national acts. Secondly, not every Member State envisages the use of certificates for internal successions[5]. The availability of a uniform document (although useful for cross-border cases only) can be perceived as a new legal instrument with which practitioners and private parties need to increase confidence.

2. The number of preliminary rulings requested from national Courts demonstrates the practical difficulties stemming from the use of the ECS[6]. Being the Succession Regulation applicable as from 17th August 2015, 4 requests of preliminary ruling on the 6 related to this Regulation refer to the ECS[7]; one is still pending[8]. These numbers, although not particularly high, confirm that national Courts feel quite at ease with the already experienced EU methods of private international law, but still need some guidance in order to manage correctly the ECS[9]. The EUFams II Report[10] confirms this consideration, pointing

[1] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107.

[2] EC/EU Regulations usually have "double" or "treble nature". The former includes rules on international jurisdiction, recognition and enforcement of judgments; examples thereof are Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1; Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction [2019] OJ L178/1. The latter is comprehensive of choice of law rules, as Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1.

[3] For example, this is the case of Regulation No 4/2009, which contains 8 attachments, each providing for standard forms.

[4] Article 80 of the EU Succession Regulation delegates to the Commission the power to adopt implementing acts establishing the forms. Accordingly, Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014 establishing the Forms referred to in Regulation (EU) No 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2014] OJ L359/30 was approved.

[5] F. Padovini, "Certificato successorio e autorità di rilascio italiana", *Nuove Leggi Civili Commentate*, 2016, p. 1104; P. Wautelet, "Article 62", en A. Bonomi, P. Wautelet (sous la dir.), *Le droit européen des successions. Commentaire du Règlement* n°650/2012 du 4 *juillet 2012*, Bruxelles, Bruylant, 2016, pp. 772 ff.; E. Goossens, "A Model for the Use of the European Certificate of Succession for Property Registration", *European Review of Private Law*, 2017, p. 523.

[6] Another meaningful example of the practical difficulties is illustrated by T. Krūmiņš, "Application of the EU Succession Regulation in practice: The case of Latvia and beyond", *Journal of Private International Law*, 2019, pp. 365-392.

[7] CJEU 12 October 2017, *Kubicka*, C-218/16, ECLI:EU:C: 2017:755 on article 1, para. 2 of the Succession Regulation; CJEU 1 March 2018, *Mahnkopf*, C-558/16, ECLI:EU:C:2018:138 on the scope of the ECS; CJEU 21 June 2018, *Oberle*, C-20/17, ECLI:EU:C:2018:485 on article 4 of the Regulation in connection with the jurisdiction to issue national succession certificates and the ECS; CJEU 17 January 2019, *Brisch*, C-102/18, ECLI:EU:C:2019:34 on the procedure to obtain an ECS; CJEU 23 May 2019, *WB*, C-658/17, ECLI:EU:C:2019:444 on article 3, para. 2 of the Regulation.

[8] Pending Case *E. E.*, C-80/19, Request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas (Lithuania) lodged on 4 February 2019, on the rules of international jurisdiction of the Succession Regulation.

[9] According to P. Wautelet, "Article 62", *op. cit.*, p. 782 the high formalism of the ECS might induce practitioners to prefer national documents.

[10] EUFams II, Facilitating Cross-Border Family Life: Towards a Common European Understanding. An Empirical Study on European Family and Succession Law, Q. C. Lobach/ T. Rapp, 31 May 2019, available at http://www2.ipr.uni-heidelberg.de/eufams/index-Dateien/microsites/download.php?art=projektbericht&id=2.

out that many practitioners find the model for the ECS uselessly complicated and the Certificate itself poor in its function.

3. The present paper focuses on the last judgment of the Court of Justice of the European Union (hereafter: CJEU) on the ECS, the *Brisch* case. Its relevance resides with the clarification of the duties imposed to private parties when applying for an ECS, but it is not confined to it. Indeed, it can help understanding the legal value of the other forms available within the EU civil judicial cooperation and the impact of the simplification of the judgments' circulation within the EU. Therefore, the present paper recalls the main features of the procedure to obtain the ECS, then describing the facts of the *Brisch* case. From the reasoning of the judgment, some more general considerations on the value of the forms are submitted.

II. The European Certificate of Succession: procedural aspects

4. The ECS is regulated by Chapter VI of the Regulation, and the model form is established by Annex 5 of the Implementing Regulation. Its use is not mandatory, and it does not substitute national documents used for similar purposes. It has evidentiary effects, with particular regard to the elements listed in Article 63 of the Succession Regulation, which are: the status of heir or legatee and their respective shares of the estate or the attribution in their favour of specific assets; the powers as executors of wills or administrators of the estate.

5. Heirs, legatees, executors or administrators are entitled to request the ECS. For this purpose, according to Article 65(2), the applicant may use the form established by Annex 4 of the Implementing Regulation, including all the relevant information within his/her knowledge. The long list of relevant information is provided for by Article 65(3), which makes the related model a length form with 7 pages, 5 annexes and the possibility to attach further documents. The sole appearance of this model risks making it not easily manageable by and attempting to a private party.

6. The application must be submitted to the Courts having jurisdiction under Article 4, Article 7, Article 10 or Article 11 of the Succession Regulation (Article 64(1)). These are the Courts of the State of the last habitual residence of the deceased; or those law was chosen as applicable to the succession, insofar as the interested parties agree; or having subsidiary or *necessitatis* jurisdiction[11]. Actually, only two provisions within the chapter on jurisdiction are excluded, Articles 8 and 9. The former is strictly not a rule on jurisdiction, establishing the closing of proceedings in certain events[12], therefore not being suitable for vesting an authority with competence to issue a certificate subject to request[13].

7. The sole excluded jurisdiction is therefore that based on appearance[14]. This limitation can be subject to critics, since it risks jeopardising the right to fair trial of the parties in proceedings filed pur-

[11] This article does not aim at analysing the rules on international jurisdiction of the Succession Regulation. Therefore, we refer to distinguished contributions for further considerations: P. Lagarde, "Les principes de base du nouveau règlement européen sur les successions", *Revue critique de droit international privé*, 2012, p. 723; S. Álvarez González, I. Rodríguez-Uría Suárez (Coord.), *Estudios sobre ley aplicable a la sucesión mortis causa*, Santiago de Compostela, Universidad Santiago de Compostela, 2013; A. Bonomi, "Il regolamento europeo sulle successioni", *Rivista di diritto internazionale privato e processuale*, 2013, pp. 311 ff.; A. Leandro, "La giurisdizione nel regolamento dell'Unione europea sulle successioni *mortis causa*", en P. Franzina/A. Leandro (a cura di), *Il diritto internazionale privato europeo delle successioni* mortis causa, Milano, Giuffré, 2013, pp. 59 ff.; A. Davì, A. Zanobetti, *Il nuovo diritto internazionale privato europeo delle successioni*, Torino, Giappichelli, 2014, pp. 195-218; F. Oderski, "Chapter II: Jurisdiction", en U. Bergquist et al. (eds.), *EU Regulation on Succession and Wills. Commentary*, Köln, Otto Scmidt, 2015, pp. 64-119; A. Bonomi, P. Wautelet (sous la dir.), *op. cit.*; A.L. Calvo Caravaca, A. Daví y H.-P. Mansel (eds.), *The EU Succession Regulation. A Commentary*, Cambridge University Press, 2016; A. Dutta, "Erbrechtverordnung", in *Münchener Kommentar BGB*, Band 10, Auflage 6, 2016; J. Carrascosa González, *El Reglamento Sucesorio Europeo de 4 d julio 2012. Análisis crítico*, Murcia, Rapid Centro, 2019.

[12] A. Dutta, *op. cit.*, p. 1489; F. Marongiu Buonaiuti, "Article 8: Closing of Own-Motion Proceedings in the Event of a Choice of Law", en A.L. Calvo Caravaca, A. Daví y H.-P. Mansel (eds.), *op. cit.*, p. 178.

[13] A. Dutta, *op. cit.*, p. 1621.

[14] B. Kresse, "Article 64: Competence to Issue a Certificate", en A.L. Calvo Caravaca, A. Daví y H.-P. Mansel (eds.), *op. cit.*, p. 708; P. Wautelet, "Article 64", en A. Bonomi, P. Wautelet (sous la dir.), *op. cit.*, p. 808.

suant to Article 7(1)(b) or (c), if one interested party appears without raising any exception[15]. The absurd output is the lack of jurisdiction to issue the ECS, notwithstanding the competence to hear the claim[16]. Furthermore, this conclusion seems to contradict recital 70 of the Succession Regulation, which does not distinguish among the various grounds of jurisdiction for the issue of an ECS. In order to avoid such denial of justice, some scholars suggest accepting jurisdiction for the issue of the ECS[17]. The establishment of the competence is surrounded by many conditions[18], that prevent from any abusive or elusive intent of one or more parties interested in the succession.

8. Article 64 defines the issuing Authority. This is a court as determined in Article 3(2)[19] or another authority which has competence to deal with succession matters according to national law. The definition is very broad, including not only authorities exercising judicial competences, but any other authority or professional performing any function according to national succession law, in that comprehending notaries[20], where such figures exist in the Member State concerned. Furthermore, the characterization of authorities and legal professionals as Courts shall not be confined to those contained in the lists arranged by the Member States pursuant to Article 79 of the Succession Regulation. In the *WB* judgment the CJEU made it clear that this information has a purely "indicative value" (para. 48)[21], because the definition of "Court" is that established by Article 3(2), and not by these lists. The proper functioning of the Succession Regulation risks being jeopardised, if each Member State could determine the notion of judicial authority for the purposes of the Regulation itself, including authorities and professionals that do not exercise judicial functions, or, on the opposite, excluding those performing these functions. It follows that the applicant shall pay due attention to the competence and the powers of the authorities and the legal professionals within a Member State, before applying for an ECS, it not being enough to refer only to the lists communicated by the Member State[22].

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[15] A. Dutta, *op. cit.*, p. 1621.

[16] *Contra*: I. Antón Juárez, "La prueba de la condición de heredero en el derecho europeo de sucesiones: el certificado sucesorio europeo", *Cuadernos de Derecho Transnacional*, 2018, 2, p. 192, because the application for the ECS does not need the appeareance of other parties. However, this interpretation implies a choice of court power in favour of the applicant, which does not seem to be consistent with the general principles on party autonomy of the Succession Regulation and in particular with Article 7, requiring the agreement of all the interested parties. Furthermore, the Court deciding on the dispute would not have jurisdiction to issue the ECS.

[17] A. Dutta, *op. cit.*, p. 1621.

[18] M. Álvarez Torné, "La regulación de la competencia internacional en el reglamento de la UE en materia sucesoria: un nuevo escenario frente al sistema español de dipr", en J.J. Forner Delaygua et al. (Coord.), *Entre Bruselas y la Haya.* Liber Amicorum *Alegría Borrás*, Madrid, Barcellona, Buenos Aires, São Paulo, Marcial Pons, 2013, p. 113; M. Álvarez Torné, *La autoridad competente en materia de sucesiones internacionales. El nuovo regolamento de la UE*, Madrid, Barcelona, Buenos Aires, São Paulo, Marcial Pons, 2013, PP. 159 FF.; A. Leandro, *op. cit.*, pp. 59 ff.; F. Oderski, *op. cit.*, p. 85; A. Dutta, *op. cit.*, p. 1494; A. Bonomi, "Article 9", en A. Bonomi, P. Wautelet (sous la dir.), *op. cit.*, p. 226; A.L. Calvo Caravaca/J. Carrascosa González, *Derecho Internacional privado*, vol. II, Granada, Comares, 2018, p. 603; C. Grieco, *Il ruolo dell'autonomia della volontà nel diritto internazionale privato delle successioni transfrontaliere*, Milano, Giuffrè, 2019, p. 271; I. Queirolo, "*Drafting* normativo e competenza giurisdizionale nel regolamento (UE) n. 650/2012 in materia di successioni *mortis causa*", *Rivista di diritto internazionale privato e processuale*, 2018, p. 890.

[19] R. Frimston, "Article 3: Definitions", en U. Bergquist et al. (eds.), *op. cit.*, p. 57; A. Dutta, *op. cit.*, pp. 1464 ff.; P. Wautelet, "Article 3", en A. Bonomi, P. Wautelet (sous la dir.), *op. cit.*, pp. 170 ff.; M. Weller, "Article 3: Definitions", en A.L. Calvo Caravaca, A. Davì y H.-P. Mansel (eds.), *op. cit.*, p. 123; J. Carrascosa González, *op. cit.*, pp. 119 ff.

[20] P. Wautelet, "Article 3", *op. cit.*, p. 171; J. Carrascosa González, *op. cit.*, p. 673.

[21] According to P. Wautelet, *op. cit.*, p. 173, it is a "*systéme déclaratif*".

[22] We may wonder about the consequences of a situation opposed to that incurred in the *WB* case, i.e. the inclusion in the list of an authority or of a legal professional which does not exercise judicial functions. The issue does not arise if the applicant requests an ECS, since the authority might still be competent on succession matters according to national law, and Article 64(1)(b) might be applicable. Instead, if a dispute arises, the Member State's fault might be meaningful, because the claim is lodged with an authority without jurisdiction to hear a dispute. Still, its inclusion in the list might create a legitimate expectation to private parties on its correctness. Notwithstanding the lack of jurisdiction of the seized authority – that must somehow dismiss the case – the party might suffer a damage from the Member State's mistake and should therefore be entitled to a damages action for infringement of Article 3(2) of the Succession Regulation, the State not having respected the definition therefor provided. This perspective seems theoretically right, but hard to be realised: the technical legal assistance usually needed in successions' disputes should prevent from lodging a claim with an authority not exercising judicial functions.

9. These rules on jurisdiction and these definitions apply with regard to national certificates, too. This was spelled out in the *Oberle* case[23]. The CJEU focuses on the broad material scope of application of the Succession Regulation, in order to conclude that the rules on jurisdiction apply to all proceedings related to the succession as a whole, irrespective of their contentious or non-contentious nature. As a consequence, the competence to issue national certificates is coincident with the jurisdiction to deliver an ECS. This solution might come to a surprise, since the Succession Regulation does not impinge on national documents, nor provides for rules on coordination between the ECS and (one or more) national certificates[24]. Nevertheless, it affects the jurisdiction to issue a national document.

10. The ECS produces effects in all Member States and shall be presumed to demonstrate the elements established therein according to the law applicable to the succession. The jurisdictional authority shall keep the original and issue certified copied, with the duration of six months, exceptionally subject to extension, or to be issued again. The ECS can be rectified, modified or withdrawn, the latter if its elements are not accurate. Article 72 establishes a common rule on judicial redress, which is allowed against any decision taken after the application for the issue of an ECS, or in case of rectification, modification or withdrawal, or, finally, against a decision suspending the effects of the ECS due to a request of modification or withdrawal. During the proceedings, the effects of the ECS might be suspended, too.

III. The facts of the case

11. The facts at stake are very typical for testing the proper functioning of the Succession Regulation and of the ECS. A German national, habitually resident in Germany, had properties located in Germany, Italy and Switzerland. By will, the *de cuius* appointed an Italian clerical congregation as heir and Mr Brisch as executor. Pursuant to Article 65(1), Mr Brisch applied to the German Court for an ECS, without using the standard form in the Implementing Regulation. The Court requested as a supplement the filled form IV in Annex 4. The executor did not accede to the request, were the use of the form not mandatory. Therefore, the Court rejected the request to issue the ECS.

12. On appeal, the executor stressed the optional nature of Form IV in Annex 4 of the Implementing Regulation, due to the literal interpretation of Article 65(2) of the Succession Regulation and the different formulation of Annex 5 to the Implementing Regulation on the ECS's model. The Appeal Court dismissed the claim and referred the case for a preliminary ruling.

13. The referring Court raises doubts on the optional or mandatory use of Form IV in Annex 4. According to it, the latter interpretation seems due to the wording of Article 1(4) of the Implemen-

[23] The case is a classic example where the ECS might have expressed strong usefulness. The deceased person was a French national with the last habitual residence in France and assets in France and Germany. The heirs were his two sons, one of which obtained a French certificate stating the sons' status as heirs and afterwards requesting a German certificate, declaring their rights as heirs on the deceased's properties in Germany. The German authority refused the issue of the national certificate, since it had infringed Article 4 of the Succession Regulation. Had the heir(s) applied for an ECS, this document had effects both in France and in Germany, thus allowing the final definition of the succession and of the patrimonial arrangement.

[24] This omission and its consequences are strongly debated: A. Fötschl, "The Relationship of the European Certificate of Succession to National Certificates", *European Review of Private Law*, 2010, p. 1262; E. Jacoby, "Acte de notoriété ou certificat successoral européen? Du nouveau pour le notaire français chargé du règlement d'une succession internationale", *Juris-Classeur*, 2012, n. 25, p. 65; J. Kleinschmidt, "Optionales Erbrecht: Das Europäische Nachlasszeugnis als Herausforderung an das Kollisionsrecht", *Max Planck Private Law Research Paper No. 13/20*, p. 27; J. F. Sagaut, "Le certificat successoral européen", en E. Fongaro (sous la dir.), *Droit patrimonial européen de la famille*, Paris, LexisNexis, 2013, p. 62; M. Buschbaum, "Rechtslagenanerkennung aufgrund öffentlicher Urkunden?", en N. Witzleb et al. (hrgs.), *Festschrift für Dieter Martiny zum 70. Geburtstag*, Tübingen, Mohr, 2014, p. 267; K. W. Lange, "Das Europäisches Nachlasszeugnis", en A. Dutta, S. Herrler (hrgs.), *Die Europäische Erbrechtsverordnung*, München, Beck, 2014, p. 175; A. Dutta, *op. cit.*, p. 1612; B. Reinhartz, "Article 62: Creation of a European Certificate of Succession", en U. Bergquist et al. (eds.), *op. cit.*, p. 249; B. Krebe, "Article 62: Creation of a European Certificate of Succession", en A.L. Calvo Caravaca, A. Daví y H.-P. Mansel (eds.), *op. cit.*, p. 681; P. Wautelet, "Article 62", *op. cit.*, pp. 785 ff.; E. Goossens, "A Model for the Use of the European Certificate of Succession for Property Registration", *European Review of Private Law*, 2017, p. 523; I. Antón Juárez, *op. cit.*, p. 186.

ting Regulation, which might constitute a *lex specialis* in relation to Article 65(2) of the Succession Regulation. After the Commission's exercise of powers pursuant to Article 80 and Article 81(2) of the Succession Regulation, the use of the Form shall be mandatory. The former interpretation seems based on Article 65(2) of the Succession Regulation and on the section of Form IV entitled 'Notice to the applicant', where the model is expressly characterised as non-mandatory.

IV. The legal grounds of the decision

14. The CJEU decides without the previous opinion of the Advocate General, thus holding that the case raises no new point of law, pursuant to Article 20(5) of the CJEU's Statute. This statement might surprise, since this is the first preliminary question on the nature of the forms prepared in connection with an EU Regulation on civil judicial cooperation. This notwithstanding, the opportunity to renounce to the opinion of the Advocate General is most probably justified by the idea that the case does not raise *highly difficult* points of law, as confirmed by the large use of the literal interpretation to give the ruling.

15. The CJEU focuses on seven points, four of which based on the literal interpretation of the relevant provisions. Firstly, the Court recalls the need to offer an autonomous interpretation of EU Law rules, lacking any express reference to national law[25]. Secondly, the CJUE rests on the literal formulation of Article 65(2) of the Succession Regulation, that employs the word "may" with reference to the use of the Form. Thirdly, para 3 states a duty for the applicant to provide for a set of information, but does not oblige to use the Form. The interpretation of Article 65 of the Succession Regulation does not raise any doubt as for the optional nature of the Form.

16. Then the CJEU considers the literal formulation of Article 1(4) of the Implementing Regulation, from which a duty may be derived. Nevertheless, according to the CJEU, the rule must be interpreted in conjunction with Annex 4, which makes it clear its optional nature in the preliminary notice. This means that the module to be used is Form IV to the extent that the applicant wishes to use a module for his/her application.

17. A further argumentation involves a historical interpretation based on the Commission's Proposal[26] that originated in the Succession Regulation. In the former document, proposed Article 38 clearly linked the application to the use of the standard form. The different black letter formulation of current Article 65(2) of the Succession Regulation means that the EU legislator departed from the original proposal in that perspective.

18. The optional use of the Form is further confirmed by the contextual interpretation. Indeed, Article 67(1) lays down an obligation to use Form V as the standard model for the ECS. The different literal formulation of this provision and of Article 65(2) means that the latter shall have another meaning, i.e. establishing no duties. Furthermore, Annexes from 1 to 3 and 5 of the Implementing Regulation do not refer to any optional use of the Form provided for therein.

19. Confirming the optional use of the Form, the CJEU delves into the consequences: this conclusion does not jeopardise the principle of mutual recognition in cross-border cases. Indeed, the model aims at helping the gathering of the necessary information for the issue of the ECS, but the mutual re-

[25] The autonomous interpretation shall be considered a standard and consolidated approach of the CJEU: P. Bertoli, *Corte di giustizia, integrazione comunitaria e diritto internazionale privato e processuale*, Milano, Giuffrè, 2005; S. Bariatti, "Qualificazione e interpretazione nel diritto internazionale privato comunitario: prime riflessioni", *Rivista di diritto internazionale privato e processuale*, 2006, pp. 361 ff.

[26] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (COM(2009) 154 final), 14 October 2009.

cognition of judgments does not depend on its use. Indeed, before granting the ECS the issuing authority must ascertain the information, that is not given for granted for the sole use of the standardized models.

V. Consequences of the reasoning of the CJEU

20. The solution offered by the CJEU does not generate any doubt as for its consistency. Scholars had already stressed the optional use of Form IV, even after the adoption of the Implementing Regulation and the dubious formulation of its Article 1(4)[27]. Indeed, Article 65(2) prevails over the latter provision. Still, scholars point on the utility of the Form that facilitates the request, so that the applicant can be sure to supply all relevant information.

21. Due to the clear formulation of Article 65 of the Succession Regulation, the CJEU could limit itself to the literal interpretation, without even comparing different linguistic versions. Nevertheless, this clarification raises two more questions, one theoretical, one relevant from the practical perspective, too.

22. Since the ruling is grounded on Article 65 and on the preliminary notice in the Form, Article 1(4) of the Implementing Regulation appears to be the sole provision raising serious doubts on the nature of the Form. Its formulation seems therefore unfortunate insofar as it employs the words "to be used" and "shall". This lack of accuracy can be overcome only by a combined interpretation with the notice of the form. Therefore, we may wonder about the consequences that might have derived from the lack of this notice. Apparently, it would have been harder to state that Article 1(4) of the Implementing Regulation does not lay down an obligation pursuant to the sole literal interpretation[28]. Since, on the contrary, Article 65 is clear in stating its optional nature, as stressed by the CJEU, a doubt on the invalidity of Article 1(4) of the Implementing Regulation might have arisen.

23. Part of the scholars submits that national law is applicable both for the aspects not regulated by the Succession and Implementing Regulations[29], and for applications not making use of the Form[30]. However, the CJEU stated that Form IV must be used in the event of application through a standard model. This statement seems to reduce the role of national law in the procedure for the issue of an ECS, since the request shall have two forms only: that established in Form IV or a free application. National forms do not seem to be allowed. Consequently, national law is applicable only to those parts of the procedure not made uniform by the two Regulations, as, for example, the language, the number of copies and the certification/legalisation of the application.

VI. Some concluding remarks: The different legal value of the forms and models established by EU Regulations within the civil judicial cooperation

24. Every EU Regulation on international jurisdiction and the recognition and enforcement of decisions establishes uniform standard models. Most of them shall be issued by a public authority, it being judicial or non-judicial, seating in the Member State of origin, or in the Member State of destination, in order to facilitate the cross-borders effects of a national decision or to strengthen the cooperation between Member States.

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[27] C.F. Nordmeier, "Art. 65 EuErbVo", en R. Hüsstege, P.H. Mansel (hrgs.), *NomosKommentar, BGB*, *Rom-Verordnungen*, vol. VI, Baden Baden, Nomos, 2015, para. 6; B. Reinhartz, *op. cit.*, p. 257; A. Dutta, *op. cit.*, p. 1625; B. Kresse, "Article 65: Application for a Certificate", en A.L. Calvo Caravaca, A. Davì y H.-P. Mansel (eds.), *op. cit.*, p. 717; P. Wautelet, "Article 65", en A. Bonomi, P. Wautelet (sous la dir.), *op. cit.*, p. 814; I. Antón Juárez, *op. cit.*, p. 182; *contra*: K. W. Lange, "Das Europäisches Nachlasszeugnis", en A. Dutta, S. Herrler (hrgs.), *Die Europäische Erbrechtsverordnung*, München, Beck, 2014, p. 163.

[28] For example, the Spanish version uses the term "deberá", thus apparently establishing an obligation.

[29] B. Krebe, "Article 65: Application for a Certificate", *cit.*, p. 717; P. Wautelet, "Article 65", *op. cit.*, p. 814; I. Antón Juárez, *op. cit.,* p. 182.

[30] A. Dutta, *op. cit.*, p. 1625; P. Wautelet, "Article 65", *op. cit.*, p. 814.

25. Only a few models are dedicated to private parties. These are: Form IV, main topic of the present paper; Annex 2 of the Commission Implementing Regulation 2017/1105, establishing the forms referred to in Regulation 2015/848[31], entitled "Lodgement of claims"; Annex 3 of the same Implementing Regulation, entitled "Objection with regard to group coordination proceedings"; Annex 4 of the same Regulation, entitled "Request for access to information"; Annex 1, Claim Form, of Regulation (EC) No 861/2007 on a European Small Claims Procedure[32], as amended[33]; Annexes 1 and 6 of Regulation (EC) No 1896/2006 on the a European order for payment procedure[34].

26. These models can be divided in two groups, those showing a notice making it clear that their use is optional (the second and the third Forms mentioned above) and those not having such notice (the remaining). For the former, the legal consequences are the same as those described for Annex 4 of the Implementing Regulation, for the same reasons put forward in the *Brisch* case. For the latter, the relevant provisions in the two regulations use mandatory words, as "shall", thus differing from Article 65(2) of the Succession Regulation. The use of these Forms should therefore be mandatory. Annex 4 of Regulation 2017/1105 can be considered as an exception, since it can be filled and submitted online.

27. The difference between the two groups of Forms depends on their functions. The former aims at facilitating the exercise of a right or the protection of individual interest. Therefore, the EU make forms available so that any request can be complete and well-organised, for the sake of clarity and expeditious results. The latter includes Forms to be used to introduce judicial proceedings based on written evidence, where oral hearing is only potential. These models are integral parts of these proceedings and can therefore be formalised and their use made compulsory.

28. The complained formalism with the ECS is at least partly reduced. The mandatory use of the other form (first group) risked being disproportionate. EU Regulations aim at a cooperation in order to grant the principle of mutual recognition pursuant to mutual trust. In this perspective, national authorities are the first responsible to let these principles being applied. The use of standard forms can help in understanding the work and the outputs of foreign authorities, so that judgments, decisions and to some extent documents can circulate among Member States. The same duty cannot be laid down to private parties, which are the beneficiaries of the area of freedom, security and justice. In that perspective, individuals might be required to use official forms for official acts, as the introduction of a claim, but the same is not true when the issue is the care of private interests. In these cases, the EU refrains from any obligation and makes Forms available in order to facilitate the applicant, to the extent that he/she finds them useful.

[31] Commission Implementing Regulation (EU) 2017/1105 of 12 June 2017 establishing the forms referred to in Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings [2017] OJ L160/1.

[32] Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L 199/1.

[33] Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure [2015] OJ L341/1.

[34] Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure [2006] OJ L399/1.