Opinion by AG Maciej Szpunar of 14 July 2022 in C- 354/21 – R.J.R., Intervener Registru centras, on the interpretation of the European Succession Regulation: "Extended substitution" in light of mutual trust?

The deceased, living in Germany, leaving as her sole heir her son, who also lives in Germany, owned immovable property in Germany and Lithuania. Her son obtained a European Certificate of Succession from the German authorities, naming him as the sole heir of the deceased's entire estate. He presented the certificate to the Lithuanian authorities and applied for the immovable property to be recorded in the Real Property Register. They refused to do so on the grounds that the certificate was incomplete, as the European Certificate of Succession submitted did not contain the information required under the Lithuanian Law on the Real Property Register to identify the immovable property by documents to be submitted, in that it did not list the property inherited by the applicant. The heir sought legal redress against this rejection with the Lithuanian courts. Against this background the referring court asked:

Must point (l) of Article 1(2) and Article 69(5) [of Regulation No 650/2012] be interpreted as not precluding legal rules of the Member State in which the immovable property is situated under which the rights of ownership can be recorded in the Real Property Register on the basis of a European Certificate of Succession only in the case where all of the details necessary for registration are set out in that European Certificate of Succession?

AG Szpunar first of all referred to the overall objective of the ESR as spelled out in recital 7 to facilitate the proper functioning of the internal market by removing the obstacles to the free movement of persons who want to assert their rights

arising from a cross-border succession (para. 39). In doing so, the Regulation does not harmonise substantive law but has opted for harmonising private international law, choice of law in particular (para. 40) but also provides for the European Certificate of Inheritance, subject to an autonomous legal regime, established by the provisions of Chapter VI (Art. 62 et seq.) of the Regulation.

Article 68 lists the information required in a European Certificate of Succession "to the extent required for the purpose for which it is issued" and this includes "the share for each heir and, *if applicable*, the list of rights and/or assets for any given heir" (italic emphasis added).

Under a succession law like the German that does not provide for succession other than universal succession it is clear that the estate as a whole, rather than particular assets, is transferred as a totality. AG Szpunar concludes: "That being so, it is not necessary to include an inventory of the estate in the European Certificate of Succession, inasmuch as the situation referred to in point (l) of Article 68 of Regulation No 650/2012 by the phrase 'if applicable', the need for a list of assets for any given heir, does not arise" (para. 55). Thus, the phrase "if applicable" is not to be understood solely as a reflection of the wishes of the person applying for a European Certificate of Succession (para. 57). Even though the applicant is required to inform the authority issuing the certificate of its purpose, it is for that authority to decide, based on that information, whether or not an asset should be specified. The Commission Implementing Regulation No 1329/2014 (point 9 of Annex IV to Form V) does not have a bearing on this decision as it can only implement but not modify the Regulation (para. 73).

However, where the situation does not depend upon a national right of succession governed by the principle of universal succession and where the purpose of the certificate can only be achieved by indicating the share of the inheritance for the person in question, "it is most likely that the asset in question should be specified" (para 62). And even if there is no need to list assets (such as under German law), "it should be noted in that regard that, if a European Certificate of Succession is to produce its full effects, a degree of cooperation and mutual trust between the national authorities is required. That may imply that the issuing authority is required, in a spirit of sincere cooperation with the authorities of other Member States, to take account of the requirements of the law governing the register of another Member State, especially if that authority holds relevant information and elements" (para. 65).

Of course, Point (l) of Article 1(2) of the ESR states that "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" is excluded from the scope of the regulation. By its judgment in *Kubicka*, AG Spzunar explained, "the Court found that points (k) and (l) of Article 1(2) and Article 31 of that regulation must be interpreted as precluding refusal, by an authority of a Member State, to recognise the material effects of a legacy 'by vindication', provided for by the law governing succession chosen by the testator in accordance with Article 22(1) of that regulation, where that refusal is based on the ground that the legacy concerns the right of ownership of immovable property located in that Member State, whose law does not provide for legacies with direct material effect when succession takes place. As a consequence of that judgment in *Kubicka*, the German law disputed in the main proceedings was not applied to the transfer of ownership. However, it did not concern real property registration rules. The national property law of a Member State may therefore impose additional procedural requirements, but only inasmuch as any such additional requirements do not concern the status attested by the European Certificate of Succession." (paras. 77 et seq).

As Advocate General Bot noted in his Opinion in *Kubicka*, in practice, other documents or information may be required in addition to the European Certificate of Succession where, for example, the information in the certificate is not specific enough to identify the asset the ownership of which must be registered as having been transferred. In the present case, however, AG Szpunar rightly observed, "the Lithuanian authorities have all the information needed for the purpose of making an entry in the Real Property Register: they are able to identify the person to whom the asset in question belongs or belonged and to ascertain, from the European Certificate of Succession, the status of heir of the applicant in the main proceedings". Thus "the *effet utile* of the European Certificate of Succession would be undermined if Lithuanian property law were able to impose additional requirements on the applicant" (para. 81).

In other words, even though the contents of a European Certificate of Succession, due to the underlying *lex successsionis*, may not exactly represent what is required for documentation by the *lex registrii* of the requested Member State, the overarching principle of the EU's efforts for integration, namely mutual trust, and, more concretely, the effet utile of the ESR create the obligation of the

requested Member State to substitute required documents under its *lex registrii* as much as functionally possible – a methodical tool that may perhaps be abstractly framed as "extended substitution" and may well develop to a powerful concept for the European Succession Certificate.

Be that as it may, limited to the constellation in question, AG Szpunar concluded:

"Point (l) of Article 1(2), point (l) of Article 68 and Article 69(5) of 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 preclude the application of provisions of national law pursuant to which an immovable property acquired by a sole heir pursuant to a right of succession governed by the principle of universal succession can only be recorded in the Real Property Register of the Member State in whose territory that asset is located on the basis of a European Certificate of Succession if all the data required under the national law of that Member State to identify the immovable property are included in the certificate."

The full text of the Opinion is here.