Project „CISUR – Enhancing Judicial Cooperation on the Implementation of the Succession Regulation in Croatia and Slovenia“/ *„CISUR – Jačanje pravosudne suradnje u primjeni Uredbe o nasljeđivanju u Hrvatskoj i Sloveniji“*

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RECOMMENDATIONS ON THE APPLICATION OF THE SUCCESSION REGULATION

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RECOMMENDATIONS ON THE APPLICATION OF THE SUCCESSION REGULATION

These Recommendations have been developed within the project called "CISUR – Enhancing Judicial Cooperation on the Implementation of the Succession Regulation in Croatia and Slovenia (hereinafter: the CISUR project) financed within the framework of the Justice Programme of the European Union (2014-2020). The CISUR project is aimed at contributing to the implementation of the Succession Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, the recognition and enforcement of decisions and the acceptance and enforcement of authentic instruments in matters of succession, and on the creation of a European Certificate of Succession (hereinafter: Succession Regulation No. 650/2012; Regulation) in Croatia and Slovenia but consequently also in other Member States of the European Union (hereinafter: EU). The Project is run by the Croatian Law Centre in partnership with the Ministry of Justice of the Republic of Croatia, the Croatian Chamber of Notaries, the Peace Institute (a civil society organisation from Slovenia) and the Chamber of Notaries of Slovenia and in association with the Supreme Court of the Republic of Croatia.

The Recommendations follow the structure of the research areas within the CISUR project, i.e. the structure of the Regulation, as well as of the results of the research and are divided in eight parts – 1) Scope, 2) Jurisdiction 3) Applicable Law, 4) Recognition and Enforcement of Decisions on Succession, 5) Acceptance and Enforcement of Authentic Instruments and Court Settlements in Matters of Succession, 6) European Certificate of Succession, 7) Cooperation and Exchange of Information, 8) Education.

I. SCOPE

1. In the Succession Regulation No. 650/2012, a very broad concept of the term succession is adopted. It applies to all civil law aspects of the transfer of succession upon death: all forms of the 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. By laying down the substantive scope of application, the Succession Regulation does not determine the concept of a "cross-border element" when dealing with succession matters in

terms of its application and particularly not which circumstances should be taken into consideration by the competent authority of a Member State.

A "cross-border element" in succession matters, when applying the Regulation, must be assessed by taking into account all the circumstances of a particular case (the testator, the assets constituting the estate...) and, above all, whether the assets constituting the estate are located in another Member State of the EU and/or in a third State. Indeed, the Regulation has adopted the principle of the unity of the estate according to which the applicable law, provided for in the Regulation, should govern the succession as a whole: all the assets making up the estate, regardless of the type of property and whether it is located in another Member State of the EU, or in a third State. The aim is to achieve legal security and avoid a fragmentation of the succession. In addition, the rules of the Regulation are drawn up to ensure that the authority conducting the proceedings in most situations applies its own body of law (*lex fori*).

2. Public law aspects are also excluded from the substantive area of the application of the Regulation: taxes, customs and administrative matters of a public-law nature. The national law (*lex fori*) of the Member State also determines the calculation and payment of taxes and other liabilities of a public-law nature, whether these be the taxes payable by the testator at the time of death or any type of succession-related tax to be paid off the estate or by the beneficiaries. The national law of the Member States also determines whether the transfer of the succession property to beneficiaries under this Regulation or the recording of changes in the corresponding registers may be made subject to the payment of taxes.

The results of the empirical research in Slovenia show that the policies connected with the taxation of succession decided by the authorities of other Member States on the basis of the Succession Regulation are very diverse. The participants in the research mentioned various cases where the recording in the land register, based on a European Certificate of Succession, was carried out without any prior decision made by a taxation body. There is a recommendation that in the Slovenian regulations the procedures should be provided to guarantee that prior to the implementation of decisions, or the issuance of a European Certificate of Succession, they are examined by the taxation authorities.

3. The Succession Regulation applies to succession only, but not to other areas of civil and family law. The issues of business capacity of natural persons (except for a special form of that

capacity within the area of the law of succession), and the existence of marriage or other family relationships which, under the applicable law, have comparable effects to marriage are excluded from the area of the application of the Regulation. If any of these issues should appear before a competent body of a Member State, particularly in relation to the first line of descent, it would be resolved according to the rules on a preliminary question under the conflict-of-laws-rules *lex fori* if such issues have not already been harmonised within the area of the EU:

- regarding the determination of the applicable law on divorce and legal separation see the Council Regulation (EU) No. 1259/2010 of 20 December 2010 on the implementation of enhanced cooperation in the area of the law applicable to divorce and legal separation, SL EU, L 343, 29/12/2010.

- regarding the applicable law and the business capacity of children, or the limitations on the representation of the holders of parental responsibilities, see the Council Regulation (EU) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility repealing Regulation (EC) No. 1347/2000, SL EU, L 338, 23/12/2003.

4. The Regulation also does not apply to questions relating to matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage. However, under the Regulation, the competent authority, when determining the estate and the respective inheritance shares, should take into account the termination of the matrimonial property regime or a similar property regime of the deceased. The questions related to matrimonial property, or the property regime of a relationship comparable to marriage, should also be dealt with as preliminary questions, following the adoption of the Council Regulation (EU) 2016/1103 of 24 June 2016 on the implementation of enhanced cooperation in the area of jurisdiction, applicable law and recognition and enforcement of decisions in the matters of matrimonial property regimes, SL EU, L 183, 08/07/2016, in accordance with the conflict-of-laws rules of the cited Regulation among the Member States taking part in enhanced cooperation.

According to the Regulation No. 2016/1103 on matrimonial property regimes, where proceedings in the matters of succession of a spouse are pending before the court of a Member State seized under Regulation (EU) No. 650/2012, the courts of that State should have

jurisdiction to rule on the matters of matrimonial property regimes arising in connection with that particular succession case. Therefore, in the matters of matrimonial property regimes, both the notaries in Croatia, and the courts in Slovenia (or in any other Member State having agreed to enhanced cooperation among the Member States of the EU), should take into account the matrimonial property regime and the right of the surviving spouse to a respective inheritance share in accordance with the Regulation. In their decisions on succession, they should increase the inheritance share of the surviving spouse for the part arising from the matrimonial property but, of course, under the condition that all the heirs agree to it.

5. The requirements for the recording in a register of a right in immovable or movable property are also excluded from the substantive scope of the Succession Regulation. The law of the Member State (*lex fori*) where the register is located is applicable to determine the competent authorities and any prerequisites and procedures of recording. The effects of the recording of a right in such a register – for instance, its declaratory or constitutive nature – are also excluded from the scope of the Regulation. Therefore, when rendering a decision on succession or/and on the issuance of a European Certificate of Succession, the requirements for the recording in the relevant register, arising from the law of the Member State where the register is kept, must also be taken into account.

The Succession Regulation does not affect the limited number (*numerus clausus*) of rights *in rem* known in the national law of some Member States of the EU. A Member State is not required to recognise a right *in rem* relating to property located in that Member State if the relevant right *in rem* is not known in its national law. Therefore, the Regulation provides for the adaptation of an unknown right *in rem* to the closest equivalent right *in rem* under the law of that other Member State to allow the beneficiaries to enjoy the rights which have been created or transferred to them by succession. If a right *in rem*, whose nature and content is unknown to the competent authority, appears in a case, in order to adapt this right *in rem* to the closest equivalent right *in rem*, the necessary data can be found at the European e-Justice portal (https://e-justice-europa.eu/content_adapting_rights_in_rem-486_hr.do).

6. The Succession Regulation applies in all Member States of EU, with the exception of Denmark, the United Kingdom and Ireland. Attention must be paid to the fact that the Regulation applies to the succession of persons who died on or after 17 August 2015. It

particularly provides for the choice of law applicable to succession and a disposition of property in the case of death carried out prior to 17 August 2015.

II. JURISDICTION

7. The Succession Regulation takes into account the fact that different authorities in individual Member States have different rules of jurisdiction when dealing with matters of succession. Therefore, the Regulation gives the term 'court' a very broad meaning: it covers not only the courts in the true sense of the word, but also notaries or registry offices, as well as all other authorities and legal professionals dealing with the matters of succession and exercising judicial functions, or acting pursuant to a delegation of power by a court, or acting under the control of a judicial authority. Such other authorities and legal professionals must guarantee impartiality and the right of all parties to be heard and their decisions under the law of the Member State where they operate: (a) may be subject to an appeal or a review by a judicial authority, and (b) have a similar force and effect as a decision of a judicial authority in the same matter.

With regard to the notaries, the Succession Regulation should allow all notaries, who are authorised to act in the matters of succession in the Member States, to exercise their powers. Whether or not the notaries in a given Member State are bound by the rules of jurisdiction set out in the Regulation should depend on whether or not they are covered by the term 'court' for the purposes of the Regulation. Where the notaries exercise judicial functions, they are bound by the rules of jurisdiction, and the decisions they give should, in legal transactions, be in accordance with the provisions on recognition, enforceability and enforcement of decisions. Where the 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 of the Regulation on the acceptance and enforceability of authentic instruments.

For the list of authorities and legal professionals considered to be 'courts' in individual Member States of the EU visit: https://e-justice.europa.eu/content_succession-380-hr.do?clang=hr.

8. Apart from the provision on general jurisdiction, the Regulation also the sets forth the provisions on the prorogation of jurisdiction, on subsidiary jurisdiction and on *forum necessitatis.* To prevent the rendering of incompatible decisions in different Member States, the

Regulation also provides for the moment when court proceedings are deemed to have been instituted, as well as their acting in the case of dual litispendence.

The provisions on jurisdiction contained in Chapter II of the Regulation, as well as the provision on litispendence, relate to both the question of the competent authority for succession proceedings with cross-border implications and to the issuance of national certificates on succession that have not been replaced by a European Certificate of Succession. It is also important to take into consideration the authorities competent for the issuance of the Certificate.

9. The Regulation also lays down which courts, in a Member State of the testator's habitual residence at the time of death, have general jurisdiction to rule on the succession as a whole. The court having jurisdiction under the Regulation rules in succession proceedings both regarding movable and immovable property of the deceased and, in principle, regardless of where the property is located (in another Member State or in a third State).

The connecting factor for the determination of general jurisdiction (as well as the applicable law to be applied to the succession as a whole) is the habitual residence of the deceased at the time of death which must ensure the existence of the real connection between an individual and the State where the proceedings are conducted. Habitual residence is a very vague legal term which leaves the courts with quite a lot of discretion when rendering their decisions. The authority ruling on succession, when determining the habitual residence of the deceased, should make an overall assessment of the life of the deceased, particularly during the years preceding his death, taking account of all relevant factual elements: the duration of his presence in a particular Member State, its regularity, as well as the conditions and reasons for his presence in the relevant Member State. When establishing the habitual residence of the deceased, various criteria should be taken into account, such as the family status, family connections, the duration and regularity of a person's presence in the relevant Member State, the employment (particularly the place where the work was usually done), the permanence of a housing location, the State where a person was paying taxes, the reasons for moving elsewhere, as well as other criteria clearly pointing to the facts of a person's life and stay in a particular Member State. The habitual residence thus determined should reveal a close and stable connection with the Member State concerned, taking also into account the specific aims of the Succession Regulation.

10. The Regulation rests on the idea that the authority ruling on succession applies its own law (*lex fori*). However, since the testator is entitled to choose the law of a Member State of his nationality as the law applicable to the entire succession, the Regulation, in such cases, provides for the mechanisms of adjustment and the issues of jurisdiction in the form of a choice-of-court agreement and a possibility that an authority of general (or subsidiary) jurisdiction refuses its jurisdiction for the reasons of purposefulness.

Such a choice-of-court agreement can be made after the opening of succession proceedings, as well as before, if the testator had chosen the applicable law. The agreement must be made in writing and the parties to which it relates must affix the date and their signatures on it. Any communication by electronic means that provides a durable record of the agreement is deemed equally valid. However, electronic communications must be made in a prescribed form in order to be considered as equally valid and they must contain an electronic signature. A simple exchange of e-mail messages will not suffice.

If the testator had chosen the applicable law to govern his succession, the court seized under the provision on general (or subsidiary) jurisdiction:

(a) at the request of one of the parties to the proceedings, **may** decline jurisdiction if "it considers that the courts of the Member State of the chosen law are better placed to rule on the succession, taking into account the practical circumstances of the succession, such as the habitual residence of the parties and the location of the assets." It is the discretion of the court which makes an adjustment to the circumstances of a particular case possible (the reasons of purposefulness);

(b) **declines** jurisdiction if the parties to the proceedings have agreed to confer jurisdiction on a court or the courts of the Member State of the chosen law (a choice-of-court agreement). It is then an obligatory decline of jurisdiction in favour of the courts of a Member State whose law the testator had chosen if the parties agreed on the choice of the court of that Member State.

Beside the choice-of-court agreement and the possibility that a court of general jurisdiction declines jurisdiction for the reasons of purposefulness, the court whose law the testator had chosen as applicable has jurisdiction to rule on the succession if:

(a) the parties to the proceedings have expressly accepted the jurisdiction of the court seized; or

(b) the parties to the proceedings who were not party to the choice-of-court agreement enter an appearance without contesting the jurisdiction of the court (tacit acceptance of the jurisdiction based on appearance).

11. The Regulation also provides for the subsidiary jurisdiction of the courts of the Member States in cases where the habitual residence of the deceased at the time of death is not located in a Member State but in a third State. The basis for the exercise of subsidiary jurisdiction are the assets constituting the estate that must be located in the relevant Member State.
The courts of a Member State in which assets of the estate are located will nevertheless have jurisdiction to rule on the succession as a whole:

(a) if the deceased had the nationality of that Member State at the time of death; or, failing that,
(b) the deceased had his previous habitual residence in that Member State, provided that, at the time the court is seized, a period of not more than five years has elapsed since that habitual residence changed.

The cited connections to exercise subsidiary jurisdiction are listed in a hierarchical order: priority is given to the courts of the Member State whose nationality the deceased had had at the time of death. Only if there is no such connection, the courts of the Member State of the previous habitual residence are taken into account. If the subsidiary jurisdiction of the courts of a Member State is established on the basis of these connections (the nationality or previous habitual residence in a Member State), it applies to the entire estate and not only the estate in the relevant Member State.

If the deceased was not a national of the relevant Member State and his previous habitual residence was not in that Member State but the assets of the estate are located in it, the subsidiary jurisdiction of the court of that Member State exists only in relation to the assets of the estate located in it.

12. It must be remembered that the Regulation also contains provisions on *forum necessitatis* to prevent denial of court protection. A court of a Member State may exceptionally rule on the succession closely connected with a third State. Within the framework of the Succession Regulation, this may exist if no court of a Member State under other provisions of the Regulation has jurisdiction, or if in a third State, with which the case is closely connected, it is

not possible to institute or to conduct the proceedings within reasonable time limits, or if the proceedings in a third State are not possible. It is particularly important to emphasise that jurisdiction based on *forum necessitatis* can be exercised only if the case has a sufficient connection with the Member State of the court seized. This would, for instance, be the case if the deceased had been the national or had had previous habitual residence in the relevant Member State. However, it would not be possible to exercise (not even) subsidiary jurisdiction in that Member State because there is no estate there. Indeed, *forum necessitatis* is used in exceptional cases: if the proceedings are absolutely impossible (natural disasters, epidemics, wars, armed conflicts), or if relative circumstances are involved where the proceedings cannot be instituted or conducted within a reasonable time frame.

13. One of the aims of the Regulation is to simplify the positions of heirs and legatees not living in the Member State where the proceedings are conducted. Any person is entitled under the law applicable to the succession (legacy) to make declarations, i.e. concerning the acceptance of the succession, a legacy or a reserved share, or waiver of the succession, a legacy or a reserved share, or concerning the limitation of the liability for the obligations arising from the estate before the courts of his or her habitual residence. The court must accept such declarations if, under the law of that Member State, they may be made before the court or before other authorities.

14. The jurisdiction of the courts of Member States is also laid down for the determination of provisional and protective measures according to *lex fori* even in the cases where, pursuant to the provisions of the Regulation, for rendering a decision on the merits of a case, the courts of another Member State have jurisdiction.

III. APPLICABLE LAW

15. The Succession Regulation prescribes a dual aspect of the principle of the unity of the estate: the application of a body of law regardless of the nature of the assets that are a component part of the estate and regardless of the location of the assets. At the same time, it also provides for the connection of the law governing the succession and the authority competent to decide on it. This unity established by the Regulation rests on the habitual residence of the deceased at the time of death. However, it must be emphasised that the court may decide, at the request of one of the parties, that it will not decide on one or several parts of the assets located in a third

State if it can be expected that its decision regarding that part of the assets will not be recognised and, if necessary, declared enforceable in a third State. It must be taken into account that the application of the cited rule on the limitation of the proceedings or exclusion of the assets located in a third State is connected with the prescribed presumption of impossibility of recognition and, if necessary, a declaration of enforceability of a decision rendered in accordance with the Regulation in the relevant third State. In addition, the principle of considering the entire estate in individual cases will not be able to be observed even if the law applicable to the succession, under the Regulation, is the law of a third State whose conflict-of-law rules, in the part of assets making up the estate, refer to the right of another State.

16. In accordance with the principle of the unity of the estate, the applicable law under the Regulation should govern a person's succession in its entirety. The Regulation provides for the issues for which the applicable law will be the one referred to in the Regulation. However, the list is not exhaustive and other legal questions, governed by the law determined in accordance with the Regulation, may also be taken into account.

The Regulation does not bring to the fore the laws of the Member States because any body of law, to which the rules of the Regulation refer, may apply, regardless of whether it is the law of one of the Member States or the law of a third State.

17. Just like with the determination of general jurisdiction, a general connector for the determination of the applicable law is the last habitual residence of the deceased. As already emphasised, the concept of habitual residence leaves a significant level of discretion to the authorities in individual cases. In practice, its determination may be quite complex.

18. The Succession Regulation prescribes a deviation from the application of a general rule for the determination of the applicable law. If it is clear from all the circumstances of the case that at the time of death, the deceased was "manifestly more closely connected" with the State not being the State whose law would be applicable under the general rule, and exceptionally, the law applicable for the succession is the law of that other State. The cited provision makes it possible for the authority to apply a foreign body of law the deceased had been more closely connected with, and at the same time, it does not question its jurisdiction connected with the last habitual residence of the deceased.

By prescribing a deviation from the general rule, the European legislator had in mind a situation where all the elements connected with the succession were in a particular State (the assets, the heirs and perhaps also the deceased had had the citizenship of that State), including the previous habitual residence and the last habitual residence starting very shortly before the testator's death. At the same time, there is a recommendation that this manifestly closest connection should not be resorted to every time when the determination of the habitual residence of the deceased at the time of death appears to be very complex.

19. The deceased may choose the law of the State whose national he had been at the time the choice was made, or at the time of his death, as being the law governing his entire succession (the choice of applicable law). A person with several citizenships may choose the law of any of the States whose national he had been at the time the choice was made, or at the time of death. The autonomy of the choice is thus limited to the law of the State whose national the deceased had been at the time the choice was made, or at the time of death.

The deceased must expressly specify the choice of law in a declaration made in the form of a disposition of assets in case of death. Or, the choice must clearly and undoubtedly arise from the provisions of such disposition of assets. The substantive validity of such an act is assessed in accordance with the law the deceased had chosen. Any change or withdrawal of the choice of law must meet the requirements regarding the form of the change or withdrawal of the disposition of assets in case of death.

The deceased may choose only a single body of law that will subsequently govern the overall succession and all the questions connected with it, including the information about the beneficiaries and the statutory heirs. The choice also excludes any possibility of the application of the law of a State where the deceased had his last habitual residence (a general rule). The principle of universal application also applies to the choice of law where the deceased, who is the national of a third State, may choose the law of that State.

The choice of law may lead to a separation of the questions of jurisdiction and the applicable law. Therefore, the Regulation provides for several mechanisms to be applied where the deceased had chosen the law of the Member State whose national he had been (see *supra ad* **10**). However, if the deceased had chosen the law of a third State, it would not be possible

to establish a connection between the chosen, applicable law and the jurisdiction, because the Regulation cannot have impact on the rules on the international jurisdiction of third States.

It is necessary to raise the awareness of EU citizens regarding the existence of the possibility to regulate the matters of succession in advance, among other things, also by choosing the applicable law.

20. To ensure the legal security of persons who want to plan their succession in advance, the Succession Regulation sets forth special rules regarding the admissibility and substantive validity of disposition of property in case of death. To facilitate the acceptance of the succession rights acquired on the basis of a succession agreement in Member States, the Regulation also prescribes which law should govern the admissibility of such agreements, their substantive validity and their binding effects on the parties, including the conditions for their dissolution. The admissibility and the acceptance of succession agreements are different in different Member States.

IV. RECOGNITION AND ENFORCEMENT OF DECISIONS ON SUCCESSION

21. The Succession Regulation provides for a simplified procedure of exequatur and makes a distinction between recognition and enforcement of decisions on succession. A decision on succession rendered in one Member State will be recognised in another Member State without the necessity of conducting any special proceedings.

In the Regulation, the term 'decision' means any decision in a matter of succession given by a court of a Member State, whatever the decision may be called, including a decision on the determination of costs or expenses by an officer of the court. First, it must be a decision rendered in relation to the (substantive) area of the application of the Regulation. Second, it must be a decision rendered by a 'court' of a Member State. The concept of a Member State covers all Member States of the European Union, excluding Denmark, the United Kingdom and Ireland. For more on the term 'court' used within the scope of the Regulation, see *supra ad* **7.**

22. A decision on succession will not be recognised if any of the grounds of non-recognition exist as laid down in the provisions of Article 40 of the Succession Regulation:

(a) if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State in which recognition is sought;

Although the concept of public policy, or the values it incorporates, are different from Member State to Member State, it must encompass the common basis of fundamental human rights and principles of the European law contained, among other documents, in the Charter of the Fundamental Rights of the European Union. However, it must also be mentioned that a review of decisions rendered in (another) Member State regarding its content is prohibited, even when its determination is substantially different from the one made under the law of the Member State of recognition or acceptance. The Court of the EU has expressly preserved the possibility of control of the boundaries of the application of the public policy mechanism by the Member States (although it may be questionable to what extent can the Court control the application of that mechanism).

(b) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so;

Taking particularly into consideration "default of appearance" of the defendant as a ground for non-recognition, it must be said that the grounds for non-recognition and the proceedings of declaring enforceability were conceived bearing in mind civil, contentious proceedings and forgetting that succession proceedings are non-contentious (in which, in most cases, several parties take part). Therefore, instead of using the term 'defendant', it would be better to use the term 'interested party'.

(c) if it is irreconcilable with a decision given in the proceedings between the same parties in the Member State in which recognition is sought;

The Succession Regulation contains the provisions on "irreconcilability of decisions" as a ground for non-recognition and they are inspired by the principle of *res iudicata.* The concept of "irreconcilable decisions" must be interpreted in the light of the case law of the EU Court meaning the decisions encompassing the legal consequences which exclude each other. Taking

into consideration Article 17 of the Regulation dealing with the principle of litispendence, or the duty of staying the proceedings *ex officio*, until the jurisdiction of the court of a Member State is established before which the proceedings were first instituted, there is very little possibility for the existence of two (irreconcilable) decisions of Member States involving the same parties. If this was nevertheless the case, under the Regulation, the decision on succession in the Member State of recognition takes precedence, regardless of whether this decision has been rendered earlier in relation to a decision of another Member State whose recognition was sought.

(d) if it is irreconcilable with an earlier decision given in another Member State, or in a third State in the proceedings involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought;

In this situation of "irreconcilability" of two decisions, a decision whose recognition is sought is irreconcilable with the previous decision rendered in another Member State (not the one where recognition is sought), or in a third State, involving the same case and the same parties. If that is the case, the Regulation provides for the principle according to which the previously rendered decision takes precedence, under the condition that it meets the prescribed requirements for recognition in the Member State where recognition is sought. Therefore, it is not necessary that the previous decision has (already) been recognised in the Member State where recognition is sought.

The court does not *ex officio* pay attention to these grounds for non-recognition of a decision on succession. Other grounds, such as the lack of jurisdiction of the court of the State of origin of the decision are not taken into account.

23. A decision rendered in a Member State and enforceable in that Member State, is also enforceable in another Member State when, at the request of one of the interested parties, it is declared enforceable. The Regulation contains the requirement of enforceability of a decision on succession but not of its finality. The proceedings of declaring the enforceability of a decision on succession are provided for by the law of the Member State of enforcement.

24. A copy of the decision fulfilling the conditions for the establishment of its authenticity, and a certification issued by the court or by the authority of a Member State of origin in the form

which is a component part of the Implementing Regulation No. 1329/2014, must be enclosed with the application for a declaration of enforceability of a decision on succession. Regarding the translation of these documents, it must be emphasised that (only) if the court or the competent authority so request, the translations of these documents must be enclosed. These translations must be done in a Member State by a qualified translator. The submission of a certified decision on succession in the European form is optional. If a certified decision on succession in the form that is a component part of the Implementing Regulation No. 1329/2014 has not been submitted, the competent court or authority may specify the date for its submission, or accept some other corresponding document or, if they opine to have received sufficient information, they may relieve the party from its submission.

25. A decision on succession is declared enforceable without delay and immediately upon the fulfilment of the formalities laid down in the Regulation. The first part of the proceedings is non-contradictory. In the proceedings of declaration of enforceability of a decision, the grounds for non-recognition are not examined and the party, against whom the enforcement is sought, is not authorised to enter any pleas or submissions in that phase of the proceedings. The applicant is immediately informed about the decision on the application for enforceability in compliance with the procedure prescribed under the law of the Member State of enforcement. A decision on enforceability is served on the party against whom enforcement is sought, together with the decision on succession unless it has already been served. At that stage, the proceedings for the declaration on enforceability become contradictory. After the parties have received a decision on the declaration of enforceability of the decision, they can both lodge an appeal against it. The appeal will be decided upon in accordance with the rules of contradictory proceedings.

V. ACCEPTANCE AND ENFORCEMENT OF PUBLIC INSTRUMENTS AND COURT SETTLEMENTS IN THE MATTERS OF SUCCESSION

26. A particular significance of the Succession Regulation lies in the equalisation of authentic instruments (the parties' agreements on the division of the estate, the wills and succession agreements, the declarations of acceptance, or waivers of the succession) drawn up in another Member State with authentic instruments of the Member State of acceptance.

The Regulation contains an autonomous definition of the concept of an authentic instrument: an "authentic instrument" means 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 that has been established by a public authority or other authority empowered for that purpose by the Member State of origin. The authenticity of an authentic instrument should not be confused with the substantive validity of an act being a legal transaction.

27. An authentic instrument drawn up in a Member State has the same evidentiary effects in another Member State as in the Member State of origin, or the closest possible effects under the condition that it is not manifestly in conflict with public policy of the Member State where the acceptance is sought. Under Croatian law, an instrument issued in the prescribed form by a state authority within the limits of its jurisdiction, and an instrument issued in the same form by a legal or natural person by carrying out its public powers entrusted to it by law or a regulation based on law (an authentic instrument), proves the authenticity of what it confirms or establishes. It is also possible to prove that in an authentic instrument, facts are wrongly established or that it has been improperly drawn up. The evidentiary effects of an authentic instrument, in accordance with the Regulation, also extend to other Member States. A person wanting to use an authentic instrument in another Member State, may request the issuing authority of the Member State of origin to fill in a form describing the evidentiary effects of the authentic instrument issued in the Member State of origin. This form is a component part of the Implementing Regulation No. 1329/2014.

When establishing the evidentiary effects of an authentic instrument in another Member State, their nature and scope in the Member State of origin must be taken into account. If in the law of the Member State of origin, an authentic instrument is prescribed an evidentiary effect it does not have under the law of the Member State of recognition, because of the fact that in the Regulation, there is an alternative reference to the "most comparable effect" the instrument may have, the authentic instrument cannot presumably be ascribed stronger evidentiary effect than that envisaged in the law of the Member State where its recognition is sought.

28. The authenticity of an authentic instrument may be challenged only before the courts of the Member State of origin and in accordance with its law. The concept of "authenticity" is an autonomous concept covering elements such as the genuineness of an instrument, formal

requirements for its existence, the powers of the authority having drawn up the authentic instrument and the procedure in which it has been drawn up. The concept should also encompass the factual elements registered in an authentic instrument by the competent authority, such as the fact that certain parties appeared before the authority on a specific date and made the declarations noted therein. An authentic instrument challenged in the Member State of origin does not possess any evidentiary effect in another Member State as long as the challenging proceedings are pending before the competent court.

29. Challenging the authenticity of an authentic instrument must be distinguished from challenging legal acts (such as agreements on the distribution of the estate, wills or agreements as to succession) or legal relationships (such as the determination of heirs, their respective shares or any other elements established under the law applicable to the succession) recorded in an authentic instrument. Legal acts or legal relationships recorded in an authentic instrument may be challenged before the courts having jurisdiction or before the authorities in accordance with the Regulation and the applicable law pursuant to Chapter III of the Regulation. An authentic instrument that is being challenged does not produce any evidentiary effects with regard to the matter that is being challenged (a legal act or relationship) in another Member State as long as the challenge proceedings are pending before the court.

30. The Regulation lays down the application of the system established for enforcement of decisions in the matters of succession to enforcement or declaration of enforceability of authentic instruments. There are some particularities in relation to the grounds challenging a decision on the declaration of enforceability of an authentic instrument according to which this is possible only if the enforcement of an authentic instrument is obviously in conflict with the public policy (*ordre public*) of the Member State of enforcement.

31. The Regulation also contains an autonomous definition of the concept "court settlement": a court settlement is a settlement in a matter of succession which has been approved by a court or concluded before a court in the course of proceedings. It also lays down the application of the system established for decisions on succession on the declaration of enforceability of court settlements in the matters of succession. There are some particularities in relation to the grounds for challenging a decision upon the motion for a declaration of enforceability of a court settlement according to which this is possible only if the enforcement of a court settlement is obviously in conflict with the public policy (*ordre public*) of the Member State of enforcement.

32. If in the application of the Succession Regulation, two incompatible authentic instruments are presented to the authority, it must be decided which authentic instrument, if any, takes precedence, considering all the circumstances of a particular case. If it is not clear from the relevant circumstances which authentic instrument, if any, must be given priority, the courts having jurisdiction under the Regulation, should decide, or, if this issue appeared as a preliminary question during the proceedings, the court before which these proceedings were instituted. In the case of incompatibility between an authentic instrument and a decision on succession, the grounds for non-recognition of decisions according to the Regulation must be taken into account. This should also be the case when a court settlement and a decision on succession are incompatible.

VI. EUROPEAN CERTIFICATE OF SUCCESSION

33. The creation of a European Certificate of Succession (ECS) is a qualitative step forward in the area of private international and procedural law. It can be used by heirs, legatees, executors of wills or administrators of the estate when, in another Member State, they must invoke their status or execute their rights as heirs or legatees, and/or their powers as executors of wills or administrators of the estate.

The European Certificates of Succession do not replace the internal documents used in the Member States for similar purposes. It must be particularly emphasised that the use of the Certificate is not mandatory. However, the authority presented with a Certificate issued in another Member State is not entitled to request that a decision on succession, an authentic instrument or a court settlement in the matters of succession be presented.

There may be some problematic cases where the contents of a decision on succession and of the Certificate are contradictory. Namely, the Regulation does not prescribe which of these two documents should be given priority, or that the Certificate should (possibly) take precedence in application. Possible contradictory contents must be carefully examined and, if necessary, the parties should be instructed to request a corresponding procedure to rectify a decision or a Certificate.

34. Under the Succession Regulation, European Certificates of Succession are issued by the courts or other authorities, or persons competent for the matters of succession (such as the notaries) in the Member States of issuance. Their jurisdiction is established in accordance with the provisions of Chapter II of the Regulation. A Member State is entitled to determine in its internal legislation which authorities are competent for the issuance of a Certificate. These are not necessarily the courts pursuant to the provisions of Article 3, para. 2 of the Regulation (see *supra ad* **7)**.

A European Certificate of Succession may be issued while the succession proceedings are still pending or after they have been completed.

35. The persons authorised to seek the issuance of a European Certificate of Succession are specified in the Regulation: heirs, legatees, executors of wills or administrators of the estate who, in another Member State, must invoke their status or execute their rights as heirs or legatees and/or their powers as executors of wills or administrators of the estate. There is still an open question whether estate creditors should also belong to the circle of persons authorised to seek the issuance of a certificate for the purpose of proving their position and exercising their rights. The collected data in the empirical research show that up to now, there has not been a single case, either in Croatia or Slovenia, where a creditor would require the issuance of a Certificate. Taking into consideration point 45 of the Preamble of the Regulation according to which the Regulation should not preclude creditors from taking such further steps as may be available under national law, where applicable, in accordance with the relevant instruments of the EU, to safeguard their rights, the circle of persons authorised to seek the issuance of Certificates should be widened to include also estate creditors (should they have such an interest).

36. The Regulation also provides for the content of the application for the issuance of a Certificate. When applying, the form which is a component part of the Implementing Regulation No. 1329/2014 may be used. Since the content of the application for the issuance of a Certificate, as well as the form to be filled in, are very complex, problems may arise in practice when they need to be filled in by the beneficiaries, as also shown by the data collected during the empirical research. Therefore, it is necessary, *pro futuro,* to think about the simplification of the form for the issuance of a Certificate.

37. The Succession Regulation prescribes the acting of the competent authority for the issuance of a European Certificate of Succession having received an application for its issuance, as well as its competences. The issuing authority takes all the necessary steps in terms of informing the beneficiaries of the application for a Certificate. If it is necessary for the establishment of the elements to be certified, it will hear any person involved, or any executor or administrator, and will make public announcements aimed at giving other possible beneficiaries an opportunity to invoke their rights. In the Croatian Act on the Implementation of the Regulation, it is set forth that information and public announcements of the parties are provided for by the provisions of the Succession Act regarding invitation by way of public announcements. The time limit for approaching the court or a notary is two months from the publication of the announcement in the Official Gazette. Such invitation and information given to the parties by a public announcement in the Official Gazette could be a problem in practice. The data collected during the empirical research also point to some open questions as to whether it is necessary to hold a hearing upon the application for the issuance of a Certificate and who should be summoned to the hearing.

The issuing authority, having received an application for the issuance of a Certificate, must check the data and the statements, as well as documents and other proofs submitted by the applicant. It may also invite the applicant to give any additional information it deems necessary. The issuing authority must also take all the necessary steps to inform all the beneficiaries about the application for the issuance of a Certificate in order to give other beneficiaries an opportunity to invoke their rights. If necessary (in order to establish the elements that must be confirmed), the issuing authority can also hear any interested party, the executor or the administrator of the estate.

38. The issuing authority issues a Certificate without delay and uses the form that is a component part of the Implementing Regulation No. 1329/2014. According to the legal practitioners participating in the empirical research, the form of the European Certificate of Succession is quite complex. In addition, it has become a common practice to issue Certificates by filling in the entire forms, although some of their parts, in some cases, are not relevant at all. In addition, Croatian authorities regularly require a translation of the Certificate and this usually boils down to a translation of the entire form although some of its parts are often not even filled in. In Slovenia, the experience with the translation of the form is similar. This approach

significantly increases the costs of the translation of the content of a Certificate (as a rule, both Croatian and Slovenian authorities insist on it).

The purpose of the Regulation and of the Certificate is to make it easier for the beneficiaries to exercise their rights. Therefore, additional thinking is required to make sure whether it is necessary to issue certificates by filling in the entire forms despite the fact that in many cases, some of their parts are not relevant. Even if such a Certificate, issued in another Member State, is presented, is it really necessary to insist on the translation of the entire form of the Certificate, or would it not be sufficient to translate only the parts that are filled in and relevant? Would it not be enough to translate only the content of the form that the competent authority has filled in their national language because the form itself is standardized and available in the languages of all Member States? In some border-areas, because of the knowledge of different languages, it may not even be necessary to translate the content of the Certificate.

39. A European Certificate of Succession is effective in all Member States and a special procedure for its acceptance is not necessary. In particular, no legalisation is required or any other formality aimed at the acceptance of the effects of a Certificate in other Member States. In addition, no control of the European Certificate of Succession is allowed from the aspect of public policy (*ordre public*), the jurisdiction of the issuing authority, its conformity with the provisions of the Regulation regarding its content in the Member State where it is used (the Member State of its "acceptance").

In the context of the effects of a Certificate, particularly worrying are the situations of the so-called defective certificates (this is what they are usually called in practice). These are the certificates issued in another Member State (primarily Germany) where it is noted that "the entire assets of the deceased" are being inherited. Particularly problematic is the fact that immovables are not described in the way required by *lex fori.* In the course of our empirical research, we were able to hear different opinions regarding the so-called defective certificates. According to some legal practitioners, such Certificates should be the basis for a corresponding entry in the land register if an immovable could be identified on the basis of an (additionally) submitted document (like an excerpt from the land register). According to others, it would be necessary – as a supplement to such a Certificate – to have a protocol made by a notary with a precise description of the immovable and with also some additional data. There were also those

who said that such protocols were necessary whenever a Certificate is presented "because it connects the Certificate with a corresponding entry."

Taking into consideration special aims of the Regulation and an intention to alleviate the position of beneficiaries and to avoid unnecessary costs, we should opt for an attitude according to which a Certificate is a (sufficient) basis for a corresponding entry in the land register if an immovable can be identified on the basis of (additionally) submitted documents (like, for example, excerpts from the land register). Therefore, we should not insist on a protocol made by a notary to affirm the facts. The issuing authority, in accordance with the Regulation, must pay attention to the requirements of the law of a Member State where a corresponding register is kept, including the necessary description of an immovable. The authorities of Member States should also be encouraged to act in accordance with the provisions of the Regulation.

40. The original of a European Certificate of Succession is kept by the issuing authority. The issuing authority also issues one or several certified copies of the Certificate for the applicant and any other person showing legal interest. The same authority also develops a list of persons who have received certified copies of the Certificate.

41. It must be emphasised that the certified copies of the European Certificates of Succession are valid for a limited period of six months, which must be marked on the certified copy by indicating the date its expiry. The Croatian Act on the Implementation of the Regulation expressly provides that the period of validity of six months starts running from the moment of issuance of a Certificate. In exceptional and justified cases, the issuing authority may exceptionally decide that the period of validity of a certified copy of a certificate must be longer. Once this period has expired, any person in the possession of a certified copy must, in order to be able to use the Certificate for indicated purposes, apply for an extension of its validity, or request a new certified copy to be issued by the issuing authority. Croatian legal practitioners participating in the research do not have any experience with the extension of the validity of a Certificate, or with the issuance of another copy if the validity of the previously issued Certificate has expired. They also do not have any knowledge of the costs of any of these two options since these costs are not specified in *lex fori*.

In exceptional and justified cases, a Certificate with a longer period of validity should be issued. In the future, Croatian regulations should either prescribe the extension of the validity, or the issuance of a new copy if the previous one has expired. The costs of both these options should also be specified.

The Slovenian Succession Act does not contain any special provisions on the validity of a Certificate or its certified copies. The participants in the research in Slovenia, particularly judges, have already come across cases where the validity had to be extended. The results of the research show that it is not quite clear what needs to be done when a party seeks extension. The competent authorities mostly opted for the issuance of a new Certificate. It would be useful to lay down, in the national regulations in Slovenia, how the authorities should act when the validity of certified copies must be extended, or when new certified copies must be issued.

42. The Regulation contains some provisions on rectification, modification or withdrawal of a European Certificate of Succession. The issuing authority, at the request of any person demonstrating a legitimate interest, or *ex officio*, rectifies a certificate in the event of an administrative mistake ("*clerical error"),* such as obvious typing errors (surnames of the parties, dates or identification numbers). In addition, the issuing authority, at the request of any person demonstrating a legitimate interest, or, if possible according to national law (*lex fori*), or of its own motion, modifies or withdraws a certificate where it is established that the certificate, or individual elements thereof are not accurate (e.g. if new heirs are found, or perhaps a will). If a Certificate is rectified, modified or withdrawn, the issuing authority must inform the persons who have received its certified copies, so as to avoid their unlawful use of such copies.

The Succession Regulation No. 650/2012 prescribes a temporary suspension of the effects of a European Certificate of Succession at the request of any person demonstrating a legitimate interest pending a modification or withdrawal of a Certificate. During the proceedings of challenging a decision on the application of the issuance of a European Certificate of Succession, or on rectification, modification or withdrawal of a Certificate following a legal remedy, the judicial authority, at the request of any person entitled to challenge a decision taken by the issuing authority, may temporarily suspend the effects of a Certificate.

The issuing authority or, as the case may be, the judicial authority, will without delay inform all persons to whom certified copies of a Certificate have been issued. During the temporary suspension of the effects of a Certificate, no further certified copies may be issued.

VII. COOPERATION AND EXCHANGE OF INFORMATION

43. It is necessary to enhance the cooperation and the exchange of information among legal practitioners, and in particular between the two partners in the project, Croatia and Slovenia. Some practitioners, taking part in the empirical research, have highlighted the examples of their successful cooperation with colleagues from other Member States.

It would be a good idea to establish a special register at the level of the EU where the time of the institution of succession proceedings would be registered, as well as the course of the proceedings, the application, the issuance of a European Certificate of Succession and all other circumstances related to a Certificate (its rectification, modification, withdrawal and temporary suspension of its effects). The authorities of the Member States entitled to act in accordance with the Succession Regulation would have access to such a register. Apart from a register at the EU level (and prior to its establishment), it would also be a good idea to organise similar registers in the two countries - partners in the CISUR project – Croatia and Slovenia.

VIII. EDUCATION

44. During the empirical research carried out within the CISUR project, we discovered what the participants, all of them legal practitioners in Croatia or Slovenia, think about the knowledge and education of those who must be familiar with the content and the application of the Succession Regulation. In their opinion, the level of the existing knowledge is very low. Citizens of both countries have also been insufficiently informed about the existence and the possibilities laid down in the Regulation.

Indeed, it is necessary to organise various appropriate forms of educational activities and training programmes not only for notaries, judges and practicing lawyers but also for other interested parties (lawyers working in banks, pension insurance institutions, and the like). In addition, corresponding materials should be developed to inform citizens about the possibilities

prescribed by the Regulation, particularly in connection with the disposition of assets in the case of death and the possibilities of choosing the applicable law.