



Reports of Cases

OPINION OF ADVOCATE GENERAL

BOT

delivered on 28 February 2019¹

Case C-658/17

WB

**with Przemysław Bac
as an intervenor**

(Request for a preliminary ruling from the Sąd Okręgowy w Gorzowie Wielkopolskim (Regional Court, Gorzów Wielkopolski, Poland))

(Reference for a preliminary ruling – Judicial cooperation in civil matters – Regulation (EU) No 650/2012 – Article 3(1)(g) and (i) – Definition of ‘decision’ and ‘authentic instrument’ in matters of succession – Article 3(2) – Definition of ‘court’ in matters of succession – Failure by the Member State concerned to notify of notaries as courts – Definition of ‘judicial functions’ – Legal classification of the Polish deed of certification of succession – Implementing Regulation (EU) No 1329/2014 – Form and attestation)

I. Introduction

1. This request for a preliminary ruling concerns the interpretation of Article 3(1)(g) and (i), Article 3(2), Article 39(2), Article 46(3)(b) and Article 79 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,² and the interpretation of Annexes 1 and 2 to Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014 establishing the Forms referred to in Regulation No 650/2012.³

2. The request has been made in proceedings brought by WB against a Polish notary who refused to issue her, for the purpose of recognition of a copy of the deed of certification of succession to the estate of her father, whose heir she was, with one of the attestations provided for by Regulation No 650/2012, confirming that that deed of certification is either a decision or an authentic instrument in matters of succession.

3. Under national law, the deed of certification of succession contains the list of heirs or legatees and useful information regarding the extent of their inheritance rights⁴ and, as such, is a key element in the settlement of the estate.

¹ Original language: French.

² OJ 2012 L 201, p. 107.

³ OJ 2014 L 359, p. 30.

⁴ See, with regard to the diversity of national deeds of certification of succession in the different Member States and their definition, the Opinion of Advocate General Szpunar in *Oberle* (C-20/17, EU:C:2018:89, points 23 to 25). In Article 62(3) of Regulation No 650/2012, relating to the European Certificate of Succession, the expression ‘internal documents used for similar purposes in the Member States’ is used.

4. This case affords the Court the opportunity to provide useful clarification on the scope of the concepts of ‘decision’ and ‘court’ within the meaning of Regulation No 650/2012, by deciding, in particular, whether a notary on whom national law confers the power to issue deeds of certification of succession exercises ‘judicial functions’.

5. At the end of my analysis, I shall propose that the Court reply to the Sąd Okręgowy w Gorzowie Wielkopolskim (Regional Court, Gorzów Wielkopolski, Poland) that the Polish notary, responsible for issuing a deed of certification of succession, does not exercise judicial functions. The instrument which he draws up is, in my view, an authentic instrument, the issue of a copy of which may be accompanied by the form referred to in Article 59(1) of Regulation 650/2012, which appears in Annex 2 to Implementing Regulation No 1329/2014, at the request of any person interested in using that instrument in another Member State.

II. Legal framework

A. EU law

1. Regulation No 650/2012

6. Recitals 7, 20 to 22, 62, 67, 69 and 76 of Regulation No 650/2012 state:

‘(7) The proper functioning of the internal market should be facilitated by removing the obstacles to the free movement of persons who currently face difficulties in asserting their rights in the context of a succession having cross-border implications. In the European area of justice, citizens must be able to organise their succession in advance. The rights of heirs and legatees, of other persons close to the deceased and of creditors of the succession must be effectively guaranteed.

...

(20) This Regulation should respect the different systems for dealing with matters of succession applied in the Member States. For the purposes of this Regulation, the term “court” should therefore be given a broad meaning so as to cover not only courts in the true sense of the word, exercising judicial functions, but also the notaries or registry offices in some Member States who or which, in certain matters of succession, exercise judicial functions like courts, and the notaries and legal professionals who, in some Member States, exercise judicial functions in a given succession by delegation of power by a court. All courts as defined in this Regulation should be bound by the rules of jurisdiction set out in this Regulation. Conversely, the term “court” should not cover non-judicial authorities of a Member State empowered under national law to deal with matters of succession, such as the notaries in most Member States where, as is usually the case, they are not exercising judicial functions.

(21) This Regulation should allow all notaries who have competence in matters of succession in the Member States to exercise such competence. Whether or not the notaries in a given Member State are bound by the rules of jurisdiction set out in this Regulation should depend on whether or not they are covered by the term “court” for the purposes of this Regulation.

(22) Acts issued by notaries in matters of succession in the Member States should circulate under this Regulation. When notaries exercise judicial functions they are bound by the rules of jurisdiction, and the decisions they give should circulate in accordance with the provisions on recognition, enforceability and enforcement of decisions. When notaries do not exercise judicial functions they are not bound by the rules of jurisdiction, and the authentic instruments they issue should circulate in accordance with the provisions on authentic instruments.

...

- (62) The “authenticity” of an authentic instrument should be an autonomous concept covering elements such as the genuineness of the instrument, the formal prerequisites of the instrument, the powers of the authority drawing up the instrument and the procedure under which the instrument is drawn up. It should also cover the factual elements recorded in the authentic instrument by the authority concerned, such as the fact that the parties indicated appeared before that authority on the date indicated and that they made the declarations indicated. A party wishing to challenge the authenticity of an authentic instrument should do so before the competent court in the Member State of origin of the authentic instrument under the law of that Member State.

...

- (67) In order for a succession with cross-border implications within the Union to be settled speedily, smoothly and efficiently, the heirs, legatees, executors of the will or administrators of the estate should be able to demonstrate easily their status and/or rights and powers in another Member State, for instance in a Member State in which succession property is located. To enable them to do so, this Regulation should provide for the creation of a uniform certificate, the European Certificate of Succession ..., to be issued for use in another Member State. In order to respect the principle of subsidiarity, the Certificate should not take the place of internal documents which may exist for similar purposes in the Member States.

...

- (69) The use of the [European] Certificate [of Succession] should not be mandatory. This means that persons entitled to apply for a Certificate should be under no obligation to do so but should be free to use the other instruments available under this Regulation (decisions, authentic instruments and court settlements). However, no authority or person presented with a Certificate issued in another Member State should be entitled to request that a decision, authentic instrument or court settlement be presented instead of the Certificate.

...

- (76) Equally, to facilitate the application of this Regulation and to allow for the use of modern communication technologies, standard forms should be prescribed for the attestations to be provided in connection with the application for a declaration of enforceability of a decision, authentic instrument or court settlement and for the application for a European Certificate of Succession, as well as for the Certificate itself.’

7. Under Article 3 of that regulation:

‘1. For the purposes of this Regulation:

...

- (g) “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;

...

(i) “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:

- (i) relates to the signature and the content of the authentic instrument; and
- (ii) has been established by a public authority or other authority empowered for that purpose by the Member State of origin.

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

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

The Member States shall notify the Commission of the other authorities and legal professionals referred to in the first subparagraph in accordance with Article 79.’

8. Chapter IV of the regulation, entitled ‘Recognition, enforceability and enforcement of decisions’, contains Article 39(1) and (2), which provides:

‘1. A decision given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. Any interested party who raises the recognition of a decision as the principal issue in a dispute may, in accordance with the procedure provided for in Articles 45 to 58, apply for that decision to be recognised.’

9. Under Article 43 of that regulation:

‘Decisions given in a Member State and enforceable in that State shall be enforceable in another Member State when, on the application of any interested party, they have been declared enforceable there in accordance with the procedure provided for in Articles 45 to 58.’

10. Article 46(3) of Regulation No 650/2012 provides:

‘The application [for a declaration of enforceability] shall be accompanied by the following documents:

- (a) a copy of the decision which satisfies the conditions necessary to establish its authenticity;
- (b) the attestation issued by the court or competent authority of the Member State of origin using the form established in accordance with the advisory procedure referred to in Article 81(2), without prejudice to Article 47.’

11. Article 59(1) of that regulation provides:

‘An authentic instrument established in a Member State shall have the same evidentiary effects in another Member State as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy (*ordre public*) in the Member State concerned.

A person wishing to use an authentic instrument in another Member State may ask the authority establishing the authentic instrument in the Member State of origin to fill in the form established in accordance with the advisory procedure referred to in Article 81(2) describing the evidentiary effects which the authentic instrument produces in the Member State of origin.’

12. Under Article 60(1) and (2) of that regulation:

‘1. An authentic instrument which is enforceable in the Member State of origin shall be declared enforceable in another Member State on the application of any interested party in accordance with the procedure provided for in Articles 45 to 58.

2. For the purposes of point (b) of Article 46(3), the authority which established the authentic instrument shall, on the application of any interested party, issue an attestation using the form established in accordance with the advisory procedure referred to in Article 81(2).’

13. Article 62 of that regulation provides:

‘1. This Regulation creates a European Certificate of Succession ... which shall be issued for use in another Member State and shall produce the effects listed in Article 69.

2. The use of the [European] Certificate [of Succession] shall not be mandatory.

3. The [European] Certificate [of Succession] shall not take the place of internal documents used for similar purposes in the Member States. However, once issued for use in another Member State, the Certificate shall also produce the effects listed in Article 69 in the Member State whose authorities issued it in accordance with this Chapter.’

14. Article 79(1) and (2) of Regulation No 650/2012 provides:

‘1. The Commission shall, on the basis of the notifications by the Member States, establish the list of the other authorities and legal professionals referred to in Article 3(2).

2. The Member States shall notify the Commission of any subsequent changes to the information contained in that list. The Commission shall amend the list accordingly.’

15. The Commission did not receive any notification from the Republic of Poland relating to the exercise of judicial functions by notaries.⁵

2. Implementing Regulation No 1329/2014

16. Article 1(1) and (2) of Implementing Regulation No 1329/2014 provides:

‘1. The form to be used for the attestation concerning a decision in a matter of succession referred to in Article 46(3)(b) of Regulation ... No 650/2012 shall be as set out in Annex 1 as Form I.

⁵ See point 62 of this Opinion.

2. The form to be used for the attestation concerning an authentic instrument in a matter of succession referred to in Articles 59(1) and 60(2) of Regulation ... No 650/2012 shall be as set out in Annex 2 as Form II.'

B. Polish law

1. The Notarial Code

17. The drawing up of deeds of certification of succession by Polish notaries is governed by Articles 95a to 95p of the Prawo o notariacie (Law introducing a notarial code)⁶ of 14 February 1991, as amended by the Law of 13 December 2013⁷ ('the Notarial Code').

18. Under Article 95b of the Notarial Code:

'Before drawing up a deed of certification of succession the notary shall make a record of succession with the involvement of all interested parties, having regard to Article 95ca.'

19. Article 95c(1) and (2) of the Notarial Code provides:

'1. When making a record of succession, the notary shall inform the parties taking part in the making of the record of their obligation to disclose all facts covered by the content of the record and their criminal liability in the event of making false statements.

2. The record of succession shall contain in particular:

(1) a unanimous request that a deed of certification of succession be drawn up, submitted by the parties taking part in the drafting of the record.

...'

20. Article 95ca(1) and (3) of the Notarial Code provides:

'1. At the request of an interested party and with his involvement, the notary shall draw up a draft record of succession.

...

3. An interested party may, in a declaration made before the notary who drew up the draft record of succession or other notary, confirm the information contained in the draft record of succession and indicate his agreement to the making of a record of succession in accordance with the draft thereof.'

21. Under Article 95e of the Notarial Code:

'1. After drawing up the record of succession, the notary shall draw up a deed of certification of succession where he has no doubts as to the jurisdiction of the national courts, the contents of applicable foreign law, the identity of the heir, the amount of the shares in the inheritance, and, where the testator has made a legacy by vindication, also as to the person to whom the testator made the bequest by vindication and the subject matter thereof.

⁶ Dz. U. No 22, position 91.

⁷ Dz. U. of 2014, position 164.

2. A notary may refuse to draw up a deed of certification of succession where:

- (1) a deed of certification of succession has already been drawn up previously or an order establishing succession has already been made previously in relation to the inheritance concerned;
- (2) during the drafting of the record of succession circumstances emerge which indicate that not all the parties who may be regarded as intestate or testate heirs or to whom legacies by vindication have been made were present when it was being drawn up, or wills which have not been opened or disclosed exist or have existed;

...

- (4) there is no national jurisdiction in the case. ^[8]

3. Where the estate is to pass to a municipality or to the Skarb Państwa [State Treasury, Poland] as an intestate heir, and the evidence furnished by an interested party is not sufficient for the drawing up of a deed of certification of succession, the notary may draw up a deed of certification of succession only after having summoned the heirs by an announcement made at the expense of the interested party. Articles 673 and 674 of the Kodeks postępowania cywilnego [Code of Civil Procedure] shall apply *mutatis mutandis*.

22. Under Article 95j of the Notarial Code:

‘A registered deed of certification of succession shall have the effects of a final order establishing succession.’

23. Article 95p of the Notarial Code provides:

‘Wherever reference is made to an order establishing succession in separate provisions, it must be understood as also meaning a registered deed of certification of succession. Where a law specifies the beginning or end of the period as the day on which the order establishing succession becomes final, it must be understood as also meaning the date on which the deed of certification of succession is registered.’

2. The Civil Code

24. Article 1025(2) of the Kodeks Cywilny (Civil Code) provides:

‘A person who has obtained an order establishing succession or a deed of certification of succession shall be presumed to be an heir.’

25. Under Article 1027 of the Civil Code:

‘An heir may prove his rights of succession in regard to third parties who do not claim rights to the estate by virtue of succession only by an order establishing succession or a registered deed of certification of succession.’

⁸ It is apparent from the discussions at the hearing that that expression, resulting from the translation of the words ‘*jurysdykcja krajowa*’, is generally used to refer to the criteria for international jurisdiction of a Polish court, which must be distinguished from domestic jurisdiction, ‘*właściwość*’.

26. Article 1028 of the Civil Code provides:

‘If the person who has obtained an order establishing succession or certification of succession, but is not an heir, transfers a right forming part of an inheritance to a third party, the person to whom the transfer is made shall acquire the right or be relieved of the obligation, save where he acts in bad faith.’

3. *The Code of Civil Procedure*

27. Article 669¹ of the Code of Civil Procedure provides:

‘1. The court having jurisdiction to rule on the succession shall annul a registered deed of certification of succession in the case where an order establishing succession already exists in respect of the same succession.

2. Where two or more deeds of certification of succession have been registered in respect of the same inheritance, the court having jurisdiction to rule on the succession shall annul, at the request of an interested party, all the deeds of certification of succession and shall make an order establishing succession.

3. Except in the cases referred to in paragraphs 1 and 2, a registered deed of certification of succession may not be annulled except in the cases provided for by law.’

28. Under Article 679 of that code:

‘1. Evidence that the person who has obtained an order establishing succession is not an heir or that his share in the inheritance is other than that declared may be taken only in proceedings to annul or vary the order establishing succession, in accordance with the provisions of this chapter. However, a person who is a party to proceedings for an order establishing succession may request variation of the order establishing succession only if the request is based on a ground on which he was unable to rely in those proceedings and if he submits the request for variation 1 year from the date on which the possibility of doing so became available to him at the latest.

2. An application for the institution of such proceedings may be submitted by any interested party.

3. Where evidence is taken showing that the inheritance has been acquired in part or in full by a person other than the person stated in a final order establishing succession, the court having jurisdiction to rule on the succession shall, by varying that order, give a decision on the succession in accordance with the actual legal situation.

4. The provisions of paragraphs 1 to 3 shall apply *mutatis mutandis* to a registered deed of certification of succession and a declaration of legacy by vindication.’

III. The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling

29. WB, the applicant, was one of the parties to the procedure to obtain a deed of certification of succession in respect of the estate of her father, a Polish national, who died on 6 August 2016 and whose last habitual residence was in Poland. That deed was drawn up on 21 October 2016 by a Polish notary, in accordance with Polish law.

30. As the deceased was a trader who carried on economic activity near the border between Germany and Poland, the applicant wished to know whether any capital was held by one or more German banks and, if so, the amount of that capital likely to be included in the estate.

31. To that end, on 7 June 2017 WB asked to be issued with a copy of the deed of certification of succession drawn up by the notary, affixed with an attestation confirming that that deed is a decision in a matter of succession within the meaning of Article 3(1)(g) of Regulation 650/2012, using the form set out in Annex 1 to Implementing Regulation No 1329/2014. In the alternative, in the event of a refusal to grant that request, the applicant asked to be issued with a copy affixed with Form II in Annex 2 to that regulation to be used for the attestation confirming that the deed is an authentic instrument in a matter of succession within the meaning of Article 3(1)(i) of Regulation No 650/2012.

32. By record of 7 June 2017, the notarial assistant refused to issue a copy of the deed of certification of succession affixed with one of the attestations requested. In support of that refusal, he stated, in a document of 12 June 2017, that that certificate was a ‘decision’ within the meaning of Article 3(1)(g) of Regulation No 650/2012 and that, in the absence of notification on the part of the Republic of Poland to the Commission, as required under Article 3(2) of that regulation, concerning notaries issuing deeds of certification of succession as exercising judicial functions, it was not possible for him to provide the certification using the form set out in Annex 1 to Implementing Regulation No 1329/2014. As regards the applicant’s request in the alternative, the notarial assistant stated that classification of the deed of certification of succession as a ‘decision’ precluded its classification as an ‘authentic instrument’, so that, although the conditions laid down in Article 3(1)(i) of Regulation No 650/2012 were satisfied, it was not possible to issue the corresponding attestation using the form set out in Annex 2 to Implementing Regulation No 1329/2014.

33. In support of her action brought before the Sąd Okręgowy w Gorzowie Wielkopolskim (Regional Court, Gorzów Wielkopolski), WB claimed that the deed of certification of succession met the requirements for classification as a ‘decision’ within the meaning of Article 3(1)(g) of Regulation No 650/2012.

34. WB claimed, first of all, that the deed of certification of succession has the same effect as a final order establishing succession which serves as proof of status as heir. She then stated that classification as an ‘authentic instrument’ exposes her to the risk of more grounds for non-recognition, while the existence of that instrument prevents her from subsequently obtaining an order establishing succession. Finally, she submitted that the failure of the Republic of Poland to inform the Commission that notaries drawing up deeds of certification of succession are legal professionals covered by the concept of ‘court’ within the meaning of the second subparagraph of Article 3(2) Regulation No 650/2012, read in conjunction with Article 79 of that regulation, does not alter the legal nature of those deeds.

35. The referring court considers that, in order to give a ruling on WB’s action, it must first obtain confirmation that the attestation corresponding to Annex 1 to Implementing Regulation No 1329/2014 may be issued for decisions which are not enforceable.

36. In support of this first question, the referring court states, in essence, that a reading of Article 46(3)(b) of Regulation No 650/2012, read in conjunction with Article 39(2) thereof, argues in favour of using the attestation for any decision, including those which are not enforceable or enforceable only in part. That solution is corroborated by point 5.1. of Form I in Annex 1 to Implementing Regulation No 1349/2014.

37. As regards the second question referred, the national court states that the concepts of ‘decision’ and ‘court’ within the meaning of Regulation No 650/2012 must be given a more precise definition. It considers, first, that Polish notaries who issue deeds of certification of succession exercise judicial functions within the meaning of recital 20 of Regulation No 650/2012, since that concept must, in the case of ‘establishing succession’, be interpreted autonomously in the context of that regulation. It states, in that regard, that verification of status of heir constitutes the essence of succession proceedings.

38. Secondly, the referring court is uncertain whether the term ‘decision’ in Article 3(1)(g) of Regulation No 650/2012 implies that it must be made by an authority competent to hear a case which is potentially contentious. It considers that this point is crucial in the light of the analysis made by the notarial assistant of his role and the effects of the certificate he draws up. In that regard, the referring court considers that it is the legal consequences of the procedure relating to certification of status as heir which should form the basis of the legal classification and not the question of whether the issuing authority is bound by the request of the parties to the procedure and whether that request must be made by mutual agreement.

39. As regards the third question referred, concerning the failure of Member States to give notification pursuant to Article 79 of Regulation No 650/2012, the referring court considers that the content of that provision does not enable a clear determination as to whether such notification gives rise to any rights or is purely indicative. It states that that classification should not depend on the decision of a Member State.

40. With regard to the fourth and fifth questions referred to the Court, the referring court states, in essence, that, if the deed of certification of succession drawn up by a Polish notary is not to be regarded as a ‘decision’, it is indisputable that it meets the requirements to be classified as an ‘authentic instrument’ within the meaning of Article 3(1)(i) of Regulation No 650/2012.

41. In those circumstances, the Sąd Okręgowy w Gorzowie Wielkopolskim (Regional Court, Gorzów Wielkopolski) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Must Article 46(3)(b) of Regulation No 650/2012, in conjunction with Article 39(2) thereof, be interpreted as meaning that the issuing of an attestation concerning a decision in a matter of succession, the model for which is set out in Annex 1 to Implementing Decision No 1329/2014, is permissible also in relation to decisions which declare the status of heir but are not enforceable (even in part)?
- (2) Must Article 3(1)(g) of Regulation No 650/2012 be interpreted as meaning that a deed of certification of succession drawn up by a notary in accordance with a non-contentious application by all the parties to the certification procedure, which produces the legal effects of a final court order establishing succession – such as a deed of certification of succession drawn up by a Polish notary – constitutes a decision within the meaning of that provision?

and consequently:

must the first sentence of Article 3(2) of Regulation No 650/2012 be interpreted as meaning that the notary drawing up that kind of deed of certification of succession must be regarded as a court within the meaning of that provision?

- (3) Must the second sentence of Article 3(2) of Regulation No 650/2012 be interpreted as meaning that notification effected by a Member State pursuant to Article 79 of the regulation has informational value and is not a condition for regarding a legal professional with competence in

matters of succession who exercises judicial functions as a court within the meaning of the first sentence of Article 3(2) of the regulation, where he satisfies the conditions laid down in that provision?

(4) In the event that the answer to Question 1, 2 or 3 is in the negative:

Must Article 3(1)(i) of Regulation No 650/2012 be interpreted as meaning that if a national procedural instrument certifying the status of heir, such as the Polish deed of certification of inheritance, is regarded as a decision within the meaning of Article 3(1)(g) of Regulation No 650/2012, it cannot be regarded as an authentic instrument?

(5) In the event that the answer to Question 4 is in the affirmative:

Must Article 3(1)(i) of Regulation No 650/2012 be interpreted as meaning that a deed of certification of succession drawn up by a notary in accordance with a non-contentious application by all the parties to the certification proceedings – such as a deed of certification of succession drawn up by a Polish notary – constitutes an authentic instrument within the meaning of that provision?

IV. My assessment

42. The dispute concerns the issue of one of the attestations provided for by Regulation No 650/2012 relating to either a decision or an authentic instrument in matters of succession.

43. It seems to me important to point out that the use of such attestations is envisaged either, as regards decisions, for the purposes of recognition or declaration of enforceability (Article 39(2), Article 43 and Article 46(3)(b) of that regulation) or, as regards authentic instruments, for use in another Member State (Article 59(1) of that regulation) or for the purposes of a declaration of enforceability in respect of those instruments (Article 60(2) of that regulation).

44. It is apparent from the circumstances of the case that WB's request for an attestation was made in order to obtain recognition in Germany of the proof of her status of heir constituted by the deed of certification of succession drawn up by a Polish notary.⁹

45. However, although it is provided in the second subparagraph of Article 59(1) of Regulation No 650/2012 that an attestation may be affixed to an authentic instrument for use in another Member State, that is not the case for decisions given in a Member State. Under Article 39(2) and Article 46(3)(b) of that regulation, it is only following a challenge that an attestation is required in support of an application for recognition, which may be made by any interested party, as the principal issue or as an incidental question.

46. In that regard, it may be noted that the referring court does not mention any refusal of recognition of WB on the part of the German banks in which her late father had opened accounts, warranting her request for an attestation, although she maintains, as her principal argument, that the deed of certification of succession may be classified as a 'decision' within the meaning of Regulation No 650/2012.

⁹ It should be noted that WB chose not to apply for the issue of a European Certificate of Succession which was designed specifically to meet the need for heirs to demonstrate easily their status or rights (see recital 67 of Regulation No 650/2012). As the Court pointed out in the judgment of 21 June 2018, *Oberle* (C-20/17, 'the judgment in *Oberle*', EU:C:2018:485, paragraph 47), the use of that certificate is not to be mandatory and it is not to take the place of internal documents. In his written observations lodged shortly after the judgment of 1 March 2018, *Mahnkopf* (C-558/16, EU:C:2018:138), the notarial assistant argued that that case illustrates the difficulties in interpreting the extent of the rights of heirs that must be overcome at times and which thus give priority to those internal documents.

47. Therefore, several observations may be made concerning the admissibility of the request for a preliminary ruling.

A. The admissibility of the request for a preliminary ruling

48. First, as the Court pointed out in the judgment in *Oberle*, Regulation No 650/2012 applies to successions with cross-border implications.¹⁰ It also held that national certificates fall within its scope.¹¹ Nonetheless, for the purpose of requesting an attestation in order to obtain recognition of a decision or to use an authentic instrument, it is not necessary to establish that the assets are located in another Member State. Indeed, that case illustrates the fact that it may be necessary to prove status as heir in order to verify the existence of assets in another Member State.¹²

49. Secondly, the request for the issue of an attestation is not subject to proof that an action seeking recognition of a decision has been initiated in another Member State.

50. Thirdly, as the referring court points out by its fourth question, the options of classifying the deed of certification of succession as an ‘authentic instrument’ or a ‘decision’ within the meaning of Regulation No 650/2012 are mutually exclusive.

51. In those circumstances, it seems to me that any doubts regarding the purely hypothetical nature of the questions and, therefore, their admissibility, can be dismissed.

B. Substance

52. In my view, it is appropriate to examine, at the outset, the second and third questions together since they invite the Court to clarify whether the deed of certification of succession, issued by a Polish notary, may be classified as a ‘decision’ given by a ‘court’ within the meaning of Regulation No 650/2012, and the outcome of the first question, as of the fourth and fifth questions, depends directly on that classification.

1. Concepts of ‘decision’ and ‘court’

53. It should be noted that ‘decision’ is defined in Article 3(1)(g) of Regulation No 650/2012 as 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.

54. Therefore, it should be pointed out that, unlike the decision of the officer of the court on costs which may have to be enforced in another Member State, referred to in that article,¹³ no clarification was given regarding certification of status as heir, although that constitutes the basis of proceedings relating to succession. It follows, contrary to what the referring court and the notarial assistant maintain, that there is no need to take into consideration the nature of the decision or its importance.

10 Paragraph 32 of the judgment in *Oberle*. See, especially, as regards the term ‘cross-border’, the wording of recitals 7 and 67, referred to in that paragraph.

11 Paragraph 30 of the judgment in *Oberle*.

12 In that regard, it again seems relevant to compare this with the European arrest warrant as I suggested in point 32 of my Opinion in *Zulfikarpašić* (C-484/15, EU:C:2016:654). Furthermore, before the judgment in *Oberle*, the debate concerning the scope of Regulation No 650/2012 could legitimately provide a basis for the fear that the effects of a national certificate would not be recognised.

13 The determination of costs by the officer of the court is classified as a ‘decision’ because ‘the registrar acts as an officer of the court which decided on the substance of the matter and, in the event of a challenge to the registrar’s decision, the court decides the issue’ (judgment of 2 June 1994, *Solo Kleinmotoren* (C-414/92, EU:C:1994:221, paragraph 16)).

55. Also, it should be remembered that the EU legislature laid down two criteria, one substantive, the other organic.

56. The examination of the first of those criteria poses no difficulty, since the Court held, in the judgment in *Oberle*, that national certificates fall within the scope of Regulation No 650/2012 owing to their subject matter.¹⁴

57. Consequently, it remains to examine the second criterion, laid down in Article 3(1)(g) of that regulation, namely that relating to the body giving the decision, that is a court.

58. The first subparagraph of Article 3(2) of that regulation states that ‘the term “court” means any judicial authority and all other authorities and legal professionals with competence in matters of succession which exercise judicial functions or act pursuant to a delegation of power by a judicial authority or act under the control of a judicial authority ...’.

59. That therefore covers not only the authorities whose legal position affords them a guarantee of independence from other state bodies, but also those which are subject to equivalent requirements because of the functions they perform or the intervention of the judicial authority.

60. It follows that the concepts of ‘decision’ and ‘judicial functions’ are closely linked, as is confirmed by recital 22 of Regulation No 650/2012. That recital states that ‘[w]hen notaries exercise judicial functions they are bound by the rules of jurisdiction,^[15] and *the decisions they give* should circulate in accordance with the provisions on recognition, enforceability and enforcement of decisions’,¹⁶ and then, so as to remove any ambiguity, that ‘[w]hen notaries do not exercise judicial functions they are not bound by the rules of jurisdiction, and *the authentic instruments they issue* should circulate in accordance with the provisions on authentic instruments’.¹⁷

61. Moreover, the second subparagraph of Article 3(2) of that regulation provides that the Member States are to notify the Commission of the non-judicial authorities which exercise judicial functions in the same way as courts.

62. In the present case, it should be pointed out that the Polish authorities did not indicate notaries as exercising judicial functions.¹⁸

63. Consequently, it is necessary to reply to the referring court’s queries on the consequences of that failure to notify, expressed in its third question, which will determine the need to take a view on the concept of ‘judicial functions’ to which the second question relates.

2. Consequences of the failure to notify as provided for in the second subparagraph of Article 3(2) of Regulation No 650/2012

64. The Court has not yet had occasion to rule on the question of the scope of the notifications made by Member States in accordance with the provisions of Regulation No 650/2012. However, a similar problem was examined in social security matters. It concerned in particular the interpretation of Article 9(1) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of

¹⁴ Paragraph 30 of the judgment in *Oberle*.

¹⁵ In that regard, see also recital 21.

¹⁶ Emphasis added.

¹⁷ Emphasis added.

¹⁸ The list per country of the other authorities and legal professionals considered to be courts, notified to the Commission, is available on the following webpage: https://e-justice.europa.eu/content_succession-380-en.do?clang=en. Moreover, the situation of [acting pursuant to] a delegation of powers by a judicial authority or under the control of a judicial authority is not addressed in this Opinion, as it has not been raised.

29 April 2004 on the coordination of social security systems,¹⁹ as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012,²⁰ which provides that the Member States are to notify the Commission of the declarations relating to national benefits and the lack of an insurance system, covered by various provisions of Regulation No 883/2004. It seems to me that the Court's case-law in the matter may be transposed to the declarations provided for in Regulation No 650/2012, in spite of the differences relating to the subject matter of the applicable instruments, since it identifies common criteria for analysis on grounds which cannot be dismissed.²¹

65. Thus, as regards the most recent decisions, it is apparent from the judgments of 3 March 2016, *Commission v Malta*,²² and of 30 May 2018, *Czerwiński*,²³ that the Court has held that the declarations of the Member States create a presumption that the national laws in a declaration fall within the material scope of Regulation No 883/2004 at issue and that, conversely, the fact that a Member State has failed to mention a national law pursuant to that regulation cannot, in itself, prove that that law does not fall within the scope of that regulation.²⁴ As long as the declarations made by a Member State are not amended or withdrawn, the other Member States must take them into account.²⁵

66. The Court added that, if there are doubts as to the correctness of the declarations made by a Member State, in particular with regard to the classification that State may have made,²⁶ 'a national court, seised of a dispute relating to a national law, can always be called upon to examine [that] classification ... in a case before it and, if necessary, to refer to the Court a question for a preliminary ruling on that issue'.²⁷

67. Furthermore, if the classification must be made by the national court concerned autonomously, the declaration made by the competent national authority is not binding on that court.²⁸ The same applies, in my view, in the absence of a declaration.

68. In the light of all of those considerations, I propose that the Court rule, in reply to the third question referred for a preliminary ruling, that the failure to notify, as provided for in the second subparagraph of Article 3(2) of Regulation No 650/2012, on the part of the Republic of Poland relating to the exercise by notaries of judicial functions is not definitive.

19 OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1.

20 OJ 2012 L 149, p. 4, 'Regulation No 883/2004'.

21 On the other hand, contrary to what is maintained by Wautelet, P., in Bonomi, A. and Wautelet, P., *Le droit européen des successions, Commentaire du règlement (UE) No 650/2012, du 4 juillet 2012*, 2nd edition, Bruylant, Brussels 2016, paragraph 71, footnote 89, p. 173, I do not think that a parallel may be drawn with the provisions of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1), as amended by Council Regulation (EC) No 603/2005 of 12 April 2005 (OJ 2005 L 100, p. 1, 'Regulation No 1346/2000'), or with the judgment of 21 January 2010, *MG Probud Gdynia* (C-444/07, EU:C:2010:24, paragraph 40). Annex A to Regulation No 1346/2000 contains the list of the proceedings to which that regulation applies, and forms an integral part of that regulation. The same is true of Article 4(7) of Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ 2004 L 143, p. 15), and Article 3 of 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 (OJ 2012 L 351, p. 1), from which the Court inferred that, since those articles relate specifically to the authorities that they mention or list, notaries in Croatia do not fall within those articles (see judgments of 9 March 2017, *Zulfikarpašić* (C-484/15, EU:C:2017:199, paragraph 34), and of 9 March 2017, *Pula Parking* (C-551/15, EU:C:2017:193, paragraph 46)).

22 C-12/14, EU:C:2016:135.

23 C-517/16, EU:C:2018:350.

24 See judgment of 30 May 2018, *Czerwiński* (C-517/16, EU:C:2018:350, paragraphs 31 and 32 and the case-law cited).

25 See judgment of 3 March 2016, *Commission v Malta* (C-12/14, EU:C:2016:135, paragraph 39).

26 See judgment of 30 May 2018, *Czerwiński* (C-517/16, EU:C:2018:350, paragraph 36 and the case-law cited).

27 Judgment of 30 May 2018, *Czerwiński* (C-517/16, EU:C:2018:350, paragraph 37 and the case-law cited).

28 See judgment of 30 May 2018, *Czerwiński* (C-517/16, EU:C:2018:350, paragraphs 38 and 39).

69. Consequently, it is appropriate to examine the referring court's second question, by which it asks, in essence, whether Regulation No 650/2012 must be interpreted as meaning that, in Poland, notaries acting within the framework of powers conferred on them by national law in the procedure for drawing up deeds of certification of succession exercise judicial functions.

3. Concept of 'judicial functions'

70. The Spanish and Hungarian Governments consider that the term 'court' used in Regulation No 650/2012 covers not only courts in the true sense, according to the expression used in recital 20 of that regulation, but also, in general, any authority where it exercises a function in equivalent circumstances, which, according to them, is the case in this instance, of the notary issuing a deed of certification of succession in accordance with Polish law. For its part, the Commission, like the Republic of Poland, takes a contrary view, having stated, at the hearing, with regard to the grounds for the judgment in *Oberle*, that, for non-judicial authorities, that term covers only contentious proceedings.

71. The concept of 'judicial functions' must, according to the Court's settled case-law, in the absence of an express reference to the law of the Member States for the purpose of determining its meaning and scope, be given an autonomous and uniform interpretation, which must take into account not only the wording of Article 3 of Regulation No 650/2012, but also the general scheme and purpose of that regulation.²⁹

(a) Wording

72. It is necessary, first, to point out the uniqueness of the concept of 'court' in Regulation No 650/2012. As is apparent from point 4.1., Article 2 of the explanatory memorandum of the Commission's proposal,³⁰ '[t]he concept of courts used in this Regulation is used in its broadest sense and includes other authorities where they exercise a function falling within the jurisdiction of the courts, in particular by means of delegation, including notaries and court clerks'.

73. Thus, unlike, for example, Regulations No 805/2004 and No 1215/2012, which contain no general provision in that regard,³¹ Regulation No 650/2012 states, in the first subparagraph of Article 3(2), that the term 'court'³² encompasses not only judicial authorities, but also all other authorities with competence in matters of succession which exercise judicial functions and satisfy certain conditions listed in that provision.³³

74. That condition relating to the functions exercised by non-judicial authorities is in line with the Court's settled case-law according to which, 'concerning notaries' functions ... there are fundamental differences between judicial and notarial functions'.³⁴

²⁹ See judgments of 9 March 2017, *Zulfikarpašić* (C-484/15, EU:C:2017:199, paragraph 32), and of 1 March 2018, *Mahnkopf* (C-558/16, EU:C:2018:138, paragraph 32).

³⁰ 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]. See also recital 20 of Regulation No 650/2012.

³¹ Compare with the judgments of 9 March 2017, *Zulfikarpašić* (C-484/15, EU:C:2017:199, paragraph 35), and of 9 March 2017, *Pula Parking* (C-551/15, EU:C:2017:193, paragraph 48). See also information concerning the different language versions in the Opinion of Advocate General Bobek in *Pula Parking* (C-551/15, EU:C:2016:825, points 68 and 71).

³² See, for a detailed account of the diversity of definitions of the concept of 'court', my Opinion in *Zulfikarpašić* (C-484/15, EU:C:2016:654, point 67 et seq.).

³³ See, in that regard, judgments of 9 March 2017, *Zulfikarpašić* (C-484/15, EU:C:2017:199, paragraph 35), and of 9 March 2017, *Pula Parking* (C-551/15, EU:C:2017:193, paragraph 48), and recital 20 of Regulation No 650/2012.

³⁴ Judgment of 9 March 2017, *Pula Parking* (C-551/15, EU:C:2017:193, paragraph 47 and the case-law cited).

75. The criteria for classifying the functions exercised are listed in the first subparagraph of Article 3(2) of Regulation No 650/2012, namely ‘such other authorities and legal professionals [must] offer guarantees with regard to impartiality and the right of all parties to be heard and ... their decisions under the law of the Member State in which they operate:

(a) [must be able to] be made the subject of an appeal to or review by a judicial authority; and

(b) [must] have a similar force and effect as a decision of a judicial authority on the same matter’.

(b) The general scheme of Regulation No 650/2012 and the objective pursued

76. The conditions set out in the first subparagraph of Article 3(2) of Regulation No 650/2012 ensure compliance with the principle of mutual trust in the administration of justice in the EU Member States, which underlies the application of the provisions of that regulation relating to the recognition and enforcement of decisions in another Member State, based on Regulation (EC) No 44/2001.³⁵

77. Those conditions form the basis for the difference in legal regime applicable to the circulation of ‘decisions’ and ‘instruments’ in the Member States, which was clarified, in particular, in Article 59 of Regulation No 650/2012.³⁶

78. Consequently, as well as the condition of impartiality, the functional criterion to be used is, in my view, that of the power, conferred on the competent authority, to decide a legal dispute³⁷ or to rule of its own motion on the basis of its assessment, which justifies compliance with fundamental procedural principles, including the principle of *audi alteram partem*, and the existence of remedies which guarantee the free circulation of judgments, in accordance with the settled case-law of the Court.³⁸ For those reasons, I consider that there is no need to derogate from that interpretation in matters of succession, which must apply to contentious or non-contentious decisions.³⁹

³⁵ Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1). See, with regard to the genesis of Regulation No 650/2012, the proposal for a regulation cited in footnote 30 of this Opinion, especially point 4.4 of the explanatory memorandum. See also recital 59 of Regulation No 650/2012: ‘In the light of its general objective, which is the mutual recognition of decisions given in the Member States in matters of succession, irrespective of whether such decisions were given in contentious or non-contentious proceedings, this Regulation should lay down rules relating to the recognition, enforceability and enforcement of decisions similar to those of other Union instruments in the area of judicial cooperation in civil matters.’ In that regard, see judgments of 9 March 2017, *Zulfikarpašić* (C-484/15, EU:C:2017:199, paragraphs 40 to 43), and of 9 March 2017, *Pula Parking* (C-551/15, EU:C:2017:193, paragraph 54).

³⁶ See, by comparison, the wording of Article 46 of Council Regulation (EC) 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 (OJ 2003 L 338, p. 1): ‘Documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also agreements between the parties that are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments.’

³⁷ Compare with the judgment of 2 April 2009, *Gambazzi* (C-394/07, EU:C:2009:219, paragraph 25). See also my Opinion in *BUAK Bauarbeiter-Urlaubs- u. Abfertigungskasse* (C-579/17, EU:C:2018:863, point 51).

³⁸ See judgment of 9 March 2017, *Zulfikarpašić* (C-484/15, EU:C:2017:199, paragraph 43).

³⁹ Compare with judgment of 15 November 2012, *Gothaer Allgemeine Versicherung and Others* (C-456/11, EU:C:2012:719, paragraphs 31 and 32). The Court pointed out, in essence, that a restrictive interpretation of the concept of judgment would give rise to a category of judicial decisions which other courts of the Member States would not be obliged to recognise and that the categorisation of the judgment must not be linked to that under the law of another Member State.

79. Therefore, as regards the non-judicial authorities referred to in Regulation No 650/2012, the only useful criterion is that of the exercise of a decision-making power.⁴⁰ In other words, the competence of the non-judicial authority in question must not depend only on the intention of the parties. In such a case, even if that authority should carry out checks, its role is to record the agreement of the parties and refer them to the judicial authority if there are difficulties.⁴¹

80. Acknowledging the agreed basis of the proceedings whose corollary is the absence of legal remedies means that it is necessary to rule out any discussion on the equivalence of the effects of the instrument issued to the effects of a decision given by a judicial authority within the meaning of Article 3(2), first subparagraph, (b) of Regulation No 650/2012, since the classification criteria laid down in the first subparagraph of Article 3(2) of that regulation are cumulative.

81. Therefore, I suggest an interpretation which may be compared with that stemming from the judgment in *Oberle*, given by the Court very recently. However, that interpretation requires certain clarifications with regard to terminology.

82. In that case, which related to the jurisdiction of a German court to issue a deed of certification of succession the scope of which was limited to that part of the estate located in Germany, the Court gave priority not to the nature or importance of the findings relating to the status as heir for the subsequent succession proceedings, but to the centralisation in a single Member State of the proceedings brought before a court, in the true sense, ‘irrespective of whether [the] proceedings are contentious or non-contentious’.⁴²

83. It held that ‘the rule of jurisdiction [international jurisdiction of the courts of the Member States in relation to proceedings involving measures concerning the succession as a whole⁴³] set out in Article 4 [of Regulation No 650/2012] also covers procedures not leading to the adoption of a judicial decision’.⁴⁴ The Court ruled in that way in the light of the objective pursued by Regulation No 650/2012, namely that of avoiding fragmentation of the succession.⁴⁵

84. I draw two conclusions from this. First, the Court has given priority to the organic criterion, the capacity of the competent authority which had issued the certificate of succession, and not the functional criterion relating to the nature of the proceedings, since it was a question of the court which would have jurisdiction in the event of a challenge in matters of succession.⁴⁶ It follows that the decisive criterion for the analysis of the functions of the non-judicial authority remains that of the exercise of a decision-making power irrespective of the nature of the proceedings, be they contentious or non-contentious.

40 Compare with judgments of 24 May 2011, *Commission v Austria* (C-53/08, EU:C:2011:338, paragraph 85), and of 1 February 2017, *Commission v Hungary* (C-392/15, EU:C:2017:73, paragraph 108 and the case-law cited).

41 See judgment of 2 June 1994, *Solo Kleinmotoren* (C-414/92, EU:C:1994:221, paragraph 18), my Opinion in *Gothaer Allgemeine Versicherung and Others* (C-456/11, EU:C:2012:554, point 38), and the Opinion of Advocate General Szpunar in *Oberle* (C-20/17, EU:C:2018:89, point 74 and the doctrinal comments cited). Compare with judgments of 24 May 2011, *Commission v Austria* (C-53/08, EU:C:2011:338, paragraph 103), and of 1 February 2017, *Commission v Hungary* (C-392/15, EU:C:2017:73, paragraph 116).

42 Paragraph 44 of the judgment in *Oberle*. In paragraph 38 of that judgment, the Court had pointed out that, according to ‘the order for reference ...[.] the procedure for issuing national certificates of succession is a non-contentious procedure and ... *decisions* relating to the issuing of such certificates contain only findings of fact, excluding any element likely to acquire the force of *res judicata*’ (emphasis added).

43 Expression taken from paragraph 44 of the judgment in *Oberle*.

44 Paragraph 42 of the judgment in *Oberle*.

45 See paragraph 56 of the judgment in *Oberle*.

46 Such a criterion may be compared with the condition in Article 42(2)(b)(i) of Regulation No 1215/2012 for the purposes of enforcement of a decision ordering a provisional measure. The certificate issued for that purpose by the court of origin must certify that that court has jurisdiction as to the substance of the matter.

85. Secondly, as the discussions at the hearing confirmed, care should be taken, owing to that duality of proceedings referred to in Regulation No 650/2012, as regards the conditions for using the expression ‘judicial functions’. In the judgment in *Oberle*, in paragraph 38, the Court chose that expression when contrasting it to national non-contentious proceedings. In paragraph 40 of that judgment, in the same context, the Court used the expression ‘the act of adopting a decision which is exclusively judicial’. Moreover, in paragraph 42 of the judgment, after having referred to declarations in relation to succession received by the courts, it held that ‘the rule of jurisdiction set out in Article 4 also covers procedures not leading to the adoption of a *judicial decision*’,⁴⁷ an expression generally understood as covering the existence of a dispute, in particular in the case of an examination of the admissibility of a request for a preliminary ruling.⁴⁸

86. I therefore suggest, in line with my previous explanations, that the expression ‘judicial functions’ applies both to contentious and non-contentious proceedings, provided that the latter do not depend only on the intention of the parties.

87. In any event, the scope of the judgment in *Oberle* must be limited to the question of the international jurisdiction of courts which it settled by giving its full importance to the major contribution of Regulation No 650/2012, that is, to put an end to the disparity between the grounds of jurisdiction in matters of succession. Although that decision must not be restricted to judicial authorities, its grounds do not, however, permit the conclusion that the Court intended to amend that concept of ‘judicial functions’ by extending it to instruments having the effect of recording a private expression of intent.

88. In other words, that judgment does not foreshadow a broader interpretation of the concept of ‘decision’ which may be correlated to that of the concept of ‘court’, that would be specific to matters of succession.

89. Consequently, it cannot be inferred from that judgment relating to non-contentious proceedings that any non-judicial authority which issues deeds of certification of succession, in the absence of a challenge, gives decisions as a court within the meaning of Article 3(1)(g) of Regulation No 650/2012.

90. Similarly, no argument to the effect that the Polish notarial assistant suggests can be drawn from the fact that the term ‘decision’ is used in Article 72 of Regulation No 650/2012 relating to the action which may be brought after a European Certificate of Succession has been issued, since that certificate is subject to an autonomous legal regime, as the Court held in the judgment in *Oberle*⁴⁹ and that term is used irrespective of the issuing authority referred to in Article 67 of that regulation, which must be read in conjunction with Article 64 thereof.

91. It is in the light of those explanations that it is now necessary to classify the functions exercised by the Polish notary when he draws up a deed of certification of succession.

4. Examination of the functions of the Polish notary in the light of the criteria identified

92. As is clear from my investigations, under Article 4 and Article 5(1) of the Notarial Code, notaries manage a single office⁵⁰ on their own account and exercise their main activity in exchange for remuneration on the basis of an agreement with the parties, within the limits of a scale.

⁴⁷ Emphasis added.

⁴⁸ See, for a reminder of the evolution of the Court’s case-law in favour of a broad interpretation, my Opinion in *BUAK Bauarbeiter-Urlaubs- u. Abfertigungskasse* (C-579/17, EU:C:2018:863, point 34).

⁴⁹ Paragraph 46 of that judgment.

⁵⁰ The Polish term is ‘*kancelaria*’.

93. With regard to notarial activities in matters of succession, it should be noted, at the outset, that, under Article 1027 of the Civil Code, the heir's rights of succession in regard to third parties who are not successors are proved by an order establishing succession or a deed of certification of succession. The referring court stated⁵¹ that that alternative had been established in 2009 for non-contentious successions.

94. Accordingly, the notary may be seised of the procedure for certification of status as heir only if all the interested parties agree⁵² or if there is no doubt⁵³ as to the jurisdiction of the national courts, the content of the applicable foreign law, the identity of the heir and the succession rights. He must refuse to draw up the deed of certification of succession, inter alia, if not all of the heirs were present when the record of succession was drawn up.⁵⁴ If two or more deeds of certification have been issued, the court having jurisdiction to rule on the succession is to annul them and make an order establishing succession.⁵⁵ Under Article 669¹(1) of the Code of Civil Procedure, where an order establishing succession has already been made, a registered deed of certification of succession is to be annulled. Moreover, although the deed of certification has the same effects as the order establishing succession,⁵⁶ it does not have the authority of *res judicata*⁵⁷ and cannot be subject to appeal. It may only be annulled, in particular in the cases referred to in Articles 669¹ and 679⁵⁸ of the Code of Civil Procedure.

95. It is clear from those provisions that the tasks entrusted to notaries in matters of succession are carried out on a consensual basis hinging on the prior existence of consent of the interested parties or an agreement between them and leave intact the court's prerogatives in the absence of agreement. Consequently, they cannot be regarded as participating, as such, directly and specifically in the exercise of judicial functions.

96. Moreover, as the Court has previously held in infringement proceedings,⁵⁹ that conclusion is not called into question by the fact that a notary is under an obligation to verify compliance with legal requirements, on which the notarial assistant relies, since he does not exercise any decision-making power apart from that of refusing to draw up the deed of certification of succession, or by the fact that the instrument drawn up has the same effects as those judgments.

51 Under point 3 'Provisions of national law' of the order for reference (p. 11 of the English-language translation).

52 Article 95c(2)(1) of the Notarial Code. The referring court states that the request for the issue of a notarial deed of certification may be made only by the heirs, who must be in agreement as regards its specific content (p. 11 of the translation of the order for reference, third and fourth paragraphs).

53 Article 95e(1) of the Notarial Code.

54 Article 95e(2)(2) of the Notarial Code.

55 Article 669¹ (2) of the Code of Civil Procedure.

56 Article 95j of the Notarial Code.

57 Articles 363 et seq. of the Code of Civil Procedure, according to the written observations of the Polish Government.

58 See, also, according to the doctrine cited by the Polish Government ('Komentarz do art. 95j Prawa o notariacie', in Szereda, A., *Czynności notarialne. Komentarz do art. 79-112 Prawa o notariacie*, Legalis, Varsovie, 2018), the following cases:

- a deed of certification of succession has been registered for the succession of the person declared dead or whose death has been established by a court order and that order declaring or establishing the death of the deceased has been annulled (Article 678 of the Code of Civil Procedure);
- following the final validation by the court of the annulment of the declaration of acceptance or refusal of the succession, an amendment is made with regard to the persons in respect of whom the deed of certification of succession has been registered (Article 690(2) of the Code of Civil Procedure).

59 Inter alia, judgments of 1 February 2017, *Commission v Hungary* (C-392/15, EU:C:2017:73, paragraphs 118 and 121 and the case-law cited), and of 15 March 2018, *Commission v Czech Republic* (C-575/16, not published, EU:C:2018:186, paragraphs 124 and 126). In the latter case, the Court stated in paragraph 90 of its judgment that 'that Member State claims, in the sixth place, that the notary, when he acts as a court commissioner, must be regarded as a "court" within the meaning of Regulation No 650/2012, since, in the Czech legal system, notaries exercise, for certain matters of succession, judicial functions in the same way as courts. The Czech Republic points out that as the notary, in his role as court commissioner, has the task of settling successions, he is bound by the rules established by that regulation, because he is exercising a judicial function. As such, the notary fulfils the conditions to be regarded as a "court" within the meaning of Article 267 TFEU and may, under that provision, seise the Court of a request for a preliminary ruling on the interpretation of that regulation. Accordingly, his activity should be regarded as connected with the exercise of official authority for the purposes of Regulation No 650/2012.'

97. In the light of all of those considerations, I propose that the Court reply to the second question of the referring court that the first subparagraph of Article 3(2) of Regulation No 650/2012 must be interpreted as meaning that the notary who draws up a deed of certification of succession at the non-contentious request of all the parties to the procedure conducted by the notary, in accordance with the provisions of the Polish law, is not covered by the concept of ‘court’ within the meaning of that regulation. Consequently, the Polish deed of certification of succession, drawn up by the notary, does not constitute a ‘decision’ within the meaning of Article 3(1)(g) of that regulation, to which must be affixed the attestation relating to a decision in a matter of succession corresponding to Form I in Annex 1 to Implementing Regulation No 1329/2014.

98. Consequently, there is no need to reply to the referring court’s first question, or to the fourth, which are now irrelevant. It therefore remains to examine the fifth and last question concerning the classification of the instrument at issue as an ‘authentic instrument’.

5. Classification of the deed of certification of succession as an ‘authentic instrument’

99. According to the definition given in Article 3(1)(i) of Regulation No 650/2012, classification as an ‘authentic instrument’ stems from the fact that the authenticity of the document relates to the signature and content of the authentic instrument and has been established by a public authority or any other authority empowered for that purpose by the Member State concerned.

100. That definition, which is based on that used by the Court in the judgment of 17 June 1999, *Unibank*,⁶⁰ by reference to the interpretation of Article 50⁶¹ of the Convention on jurisdiction and enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988,⁶² does not take up the requirement relating to the enforceability of the instrument.⁶³ It appears in the same terms, in Article 4(3)(a) of Regulation No 805/2004, in Article 2(1)(3)(a) of 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,⁶⁴ in Article 2(c) of Regulation No 1215/2012 and in Article 3(1)(c) of Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.⁶⁵

101. It is stated in recital 62 of Regulation No 650/2012 that the ‘authenticity’ of an authentic instrument should be regarded as an autonomous concept, defined as being the result of compliance with various prerequisites relating to formalities, to the appearance of the parties and to certification, connected with the powers exercised by the authority which draws them up.

102. As the Court held, prior to the entry into force of Regulation No 650/2012 and, in particular, Article 3(1)(i)(ii), for the application of Regulation No 44/2001, the first criterion to assess is that of ‘the involvement of a public authority or any other authority empowered for that purpose by the State of origin’.⁶⁶ In the same way as for decisions, the objective pursued is to facilitate the circulation of those instruments.⁶⁷

⁶⁰ C-260/97, EU:C:1999:312, paragraphs 16 and 17.

⁶¹ See, on this point, the Report by P. Jenard and G. Möller on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988 (OJ 1990 C 189, p. 57, paragraph 72).

⁶² OJ 1988 L 319, p. 9.

⁶³ See Wautelet, P., in Bonomi, A. and Wautelet, P., *op. cit.*, paragraph 60, p. 168.

⁶⁴ OJ 2009 L 7, p. 1.

⁶⁵ OJ 2016 L 183, p. 1.

⁶⁶ Judgment of 17 June 1999, *Unibank* (C-260/97, EU:C:1999:312, paragraph 15). See also paragraph 18 of that judgment.

⁶⁷ See Articles 59 and 60 of Regulation No 650/2012.

103. The second criterion to be examined, laid down in Article 3(1)(i)(i) of Regulation No 650/2012, concerns the role of the public authority. That authority must not only authenticate the signatures. It must also authenticate the content of the instrument, which means, in my view, that it must not be the result of mere declarations or expressions of intention and that, therefore, the liability of the competent authority may be incurred with regard to the particulars entered in the instrument.

104. Therefore, it is in the light of those requirements that the conditions of authenticity laid down by the Polish law must be examined.

105. In the present case, it is common ground, first, that, in the Polish legal system, notaries are empowered to draw up authentic instruments.

106. Secondly, when issuing the deed of certification of succession, the notary does not merely collect the non-contentious statements of the heirs. He also carries out checks which may lead to him refusing to draw up the deed of certification of succession.⁶⁸

107. Thirdly, that deed of certification of succession is registered and produces, according to Article 95j of the Notarial Code, the same effects as the final order establishing succession.

108. It follows that the conditions under which the Polish notary draws up a deed of certification of succession should lead to the classification of that deed as an authentic instrument within the meaning of Article 3(1)(i) of Regulation No 650/2012.

109. Therefore, I propose that the Court reply to the fifth question referred for a preliminary ruling that Article 3(1)(i) of that regulation must be interpreted as meaning that the deed of certification of succession drawn up by the Polish notary is an authentic instrument, a copy of which, when issued, may be affixed with the form referred to in Article 59(1) of that regulation, corresponding to that in Annex 2 to Implementing Regulation No 1329/2014.

V. Conclusion

110. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Sąd Okręgowy w Gorzowie Wielkopolskim (Regional Court, Gorzów Wielkopolski, Poland) as follows:

- (1) Failure to notify, as provided for in the second subparagraph of Article 3(2) 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, on the part of the Republic of Poland relating to the exercise by notaries of judicial functions is not definitive.
- (2) The first subparagraph of Article 3(2) of Regulation No 650/2012 must be interpreted as meaning that the notary who draws up a deed of certification of succession at the non-contentious request of all the parties to the procedure conducted by the notary, in accordance with the provisions of the Polish law, is not covered by the concept of ‘court’ within the meaning of that regulation. Consequently, the Polish deed of certification of succession, drawn up by the notary, does not constitute a ‘decision’ within the meaning of Article 3(1)(g) of that regulation to which must be affixed the attestation relating to a decision in a matter of succession corresponding to Form I in Annex 1 to Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014 establishing the Forms referred to in Regulation No 650/2012.

⁶⁸ See point 94 of this Opinion.

- (3) Article 3(1)(i) of Regulation No 650/2012 is to be interpreted as meaning that the deed of certification of succession drawn up by the Polish notary is an authentic instrument, a copy of which, when issued, may be affixed with the form referred to in Article 59(1) of that regulation, corresponding to that in Annex 2 to Implementing Regulation No 1329/2014.