Case C-387/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

12 August 2020

Referring body:

Justyna Gawlica, Notary in Krapkowice – Krapkowice (Poland)

Date of the decision to refer:

3 August 2020

Party to the main proceedings:

OKR

Subject matter of the proceedings before the referring body *

The subject matter of the case in the main proceedings is the examination of an appeal brought against the refusal by a notary in Poland to perform a notarial act, namely to draw up, on behalf of a Ukrainian national, a notarial will which would contain a choice-of-law clause in favour of Ukrainian law and modify the legal order of succession provided for in Ukrainian law.

Subject matter and legal basis of the request

The referring body submits two questions, the second of which includes a number of partial questions. The first question seeks a determination as to whether Article 22 of Regulation No 650/2012, which entitles a testator/testatrix to choose the law of his or her native country as the law by which all matters relating to succession are to be governed, also applies to third-country nationals. The second question concerns the determination – in the case where a bilateral agreement is in force between a Member State and a third country, which agreement does not govern the choice of law but indicates the applicable law – of the mutual

* Translator's note: in this case, the referring body is not a court or tribunal. See the justification concerning admissibility in paragraphs 15 to 25 of the original text and in paragraphs 10 to 13 of the present summary.

relationship between that agreement and Regulation No 650/2012 and the effect of that hierarchy of norms on the admissibility of a choice of law made pursuant to Article 22, in conjunction with Article 75, of Regulation No 650/2012 by a national of the third country concerned.

Questions referred

1. Must Article 22 [of Regulation No 650/2012] be interpreted as meaning that a person who is not a citizen of the European Union is also entitled to choose the law of his or her native country as the law governing all matters relating to succession?

2. Must Article 75, in conjunction with Article 22, of Regulation No 650/2012 be interpreted as meaning that, in the case where a bilateral agreement between a Member State and a third country does not govern the choice of law applicable to a case involving succession but indicates the law applicable to that case involving succession, a national of that third country residing in a Member State bound by that bilateral agreement may make a choice of law?

and in particular:

- must a bilateral agreement with a third country expressly exclude the choice of a specific law and not merely govern the *lex successionis* using objective connecting factors in order for its provisions to take precedence over Article 22 of Regulation No 650/2012?

- is the freedom to choose the law governing succession and to make the applicable law uniform by making a choice of law – at least to the extent determined by the EU legislature in Article 22 of Regulation No 650/2012 – one of the principles underlying judicial cooperation in civil and commercial matters in the European Union, which may not be infringed even where bilateral agreements with third countries apply which take precedence over Regulation No 650/2012?

Applicable provisions of EU law

TFEU: Article 81(2)(c)

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: recital 38; Articles 22 and 75

Applicable provisions of national law

Konstytucja Rzeczypospolitej Polskiej (Constitution of the Republic of Poland) of 2 April 1997: Articles 45(1) and 176(1)

Umowa polsko-ukraińska z dnia 24 maja 1993 r. o pomocy prawnej i stosunkach prawnych w sprawach cywilnych i karnych (Polish-Ukrainian Agreement of 24 May 1993 on Legal Assistance and Legal Relations in Civil and Criminal Matters): Article 37

Ustawa z 14 lutego 1991 r. Prawo o notariacie (Law of 14 February 1991 on Notaries): Articles 81, 82 and 83

Succinct presentation of the facts and procedure

1 OKR, a Ukrainian national living in Poland, is the joint owner of a dwelling located in Poland. She requested a notary in Poland to draw up a notarial will which would contain a choice-of-law clause opting for Ukrainian law and modify the legal order of succession on the basis of that law.

2 On 10 July 2020, the notary refused to perform the notarial act on the ground that, in her opinion, the choice of Ukrainian law in the will would be unlawful.

3 OKR lodged an appeal with the referring body.

Essential arguments of the parties in the main proceedings

4 In the grounds of the refusal to perform the notarial act, the notary, first of all, draws attention to the scope *ratione personae* of Regulation No 650/2012. In this context, the notary refers to the ruling of the Sąd Okręgowy w Opolu (Regional Court in Opole, Poland) of 28 February 2020, which, when examining an appeal in a factually similar case, found that Article 22 of the regulation allows only nationals of Member States of the European Union to choose the law of the State by which all matters relating to succession are to be governed. In the view of the notary, another indication excluding the application of the regulation to third-country nationals is contained in the first sentence of recital 38, which refers to the right of EU citizens to choose the law, and also in Article 81(2)(c) TFEU, which constitutes the basis for the adoption of the regulation and according to which the regulation is a measure designed to ensure the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction.

5 Secondly, the notary draws attention to the precedence which provisions of bilateral agreements concluded by Member States with third countries take over the regulation pursuant to Article 75 of the regulation. The Polish-Ukrainian Bilateral Agreement of 24 May 1993 on Legal Assistance and Legal Relations in Civil and Criminal Matters does not provide for the possibility to choose the law

applicable to succession matters. Article 37 of the Polish-Ukrainian Agreement governs the law applicable to succession matters in such a manner that the law applicable to the succession of the applicant's movable property is Ukrainian law as the law of the country of her nationality (paragraph 1), while the law applicable to the succession of immovable property is the law of the State Party in which that property is located (paragraph 2). Thus, it is not possible for individuals to choose the applicable law.

6 In her appeal of 28 July 2020, OKR alleges that there has been an incorrect interpretation of Articles 22 and 75 of the regulation.

7 As regards Article 22 of the regulation, the applicant referred to the wording of that provision, according to which 'a person' [in Polish 'każdy', meaning 'any person'] may choose the law of the State of which he or she is a national as the law governing his or her succession. She also draws attention to the fact that Article 22 of the regulation features in Chapter III thereof, which contains generally applicable conflict-of-law rules. According to Article 20 of Regulation No 650/2012, any law specified by that regulation is to be applied whether or not it is the law of a Member State. OKR takes the view that this also applies to the law specified by way of a choice of law made pursuant to Article 22 of the regulation.

8 As regards Article 75 of the regulation, which states that the regulation 'shall not affect' the application of conventions between Member States and third countries, OKR considers that the parallel application of the regulation and the agreement does not mean that the Polish authorities must apply the conflict-of-law rules arising from the agreement in a Polish-Ukrainian succession case in which they determine the law applicable on the basis of objective connecting factors. Since Article 37 of the Polish-Ukrainian Agreement does not address the question of the choice of the law applicable to succession, in these circumstances it cannot, she submits, take precedence over Article 22 of Regulation No 650/2012, which governs this matter.

9 OKR also points out that the refusal to draw up a will in Poland containing a choice-of-law clause electing Ukrainian law is all the more unjustified as such a will could be drawn up in any other Member State (not being bound by the agreement in question with Ukraine) and that this leads to a fragmentation of the succession, which is contrary to the principle of uniformity of the *lex successionis*.

Brief summary of the grounds for the request

Justification of admissibility

10 First of all, the referring body, namely the notary, presents arguments to justify the admissibility of a request for a preliminary ruling made by a notary in Poland. The referring body stresses that a Polish notary's competence to refer a question for a preliminary ruling within a strictly defined context, namely the hearing of an

appeal at first instance against a refusal to perform a notarial act, must be carefully distinguished from classifying a Polish notary as a court or tribunal in the context of his or her other areas of competence or in other regulatory contexts relating to EU law.

11 The referring body then goes on to describe in detail the procedure governing appeals against a refusal to perform a notarial act, discussing the 2015 amendment to the Law on Notaries which arose from the resolution adopted by an extended panel of seven judges of the Sąd Najwyższy (Supreme Court, Poland) of 7 December 2010. In the case of an appeal lodged against a refusal to perform a notarial act, the body hearing the case at first instance is the notary. With respect to appeals against the refusal to perform a notarial act, the court of second instance is the regional court (Sąd Okręgowy). On the other hand, a notary who has refused to perform a notarial act is not a party to appeal proceedings at first instance; instead, he or she conducts a review of the lawfulness of the refusal in his or her capacity as the authority exercising public tasks relating to legal protection. The notary examining the appeal must follow the procedures applicable to so-called inter-institutional proceedings, which are analogous to those which govern general civil proceedings. The notary's position and the scope of his or her actions arising from Article 83(1) of the Law on Notaries are analogous to those of a court of first instance which issued a judgment that is subject to appeal pursuant to the Kodeks Postępowania Cywilnego (Code of Civil Procedure). Proceedings conducted by a notary are – with respect to judicial proceedings pending as a result of an appeal being lodged against the refusal to perform a notarial act – equivalent to first-instance proceedings, and the notary's ruling on the refusal to perform a notarial act is equivalent to a first-instance ruling. This interpretation and its compatibility with Article 176(1) of the Constitution of the Republic of Poland was also confirmed by the Trybunał Konstytucyjny (Constitutional Court, Poland) in its judgment of 13 January 2015. According to that judgment, a notary is treated as a public official, and entrusting him or her with the resolution of a case meets the standards set by the constitutional principle of procedural justice.

12 As regards the position of the Polish notary in the proceedings in question as developed in the case-law and its relationship to the various criteria applicable to a 'court or tribunal' within the meaning of Article 267 TFEU, the referring body stresses that the notary is an impartial entity independent of the parties asking him or her to perform a notarial act. The legal protection provided by the notary is of a mandatory nature in the sense that a party wishing or obliged to perform an action in notarised form has no influence over the notary's obligatory review of the lawfulness of the substance of the action in question. This review is carried out *ex officio* on the same statutory basis by every notary (absolute obligation) and with respect to every notarial act (preventive jurisdiction). A notary may not, even at the express request of a party, solely instruct the party that the envisaged action is defective and let the party perform that action at the party's own risk (judgments of the Supreme Court of 7 November 1997 and 5 February 2004). Where an appeal is lodged against the refusal to perform a notarial act, the judicial phase of

the notary's preventive jurisdiction begins. At this stage, the party is no longer entitled to choose the notary who will handle the case, and a regional court may hear the case only after the appeal has been examined by the notary. In these circumstances, the notary is bound both by the principle of the primacy of EU law and by the case-law of the courts which supervise notarial activities at second instance.

13 The referring body takes the view that a notary is able effectively to carry out his or her task of review at first instance only if, in a case where the outcome depends on the interpretation of EU law, he or she is also given the power to submit a request for a preliminary ruling. Under Polish law, a party has the right to effective review of its case also at the stage when the party's appeal is examined by a notary. In order to obtain the interpretation of EU law necessary for a ruling on the appeal that has been lodged, it appears necessary for the notary to refer a question for a preliminary ruling.

Grounds for the questions

14 As regards the first question, the referring body refers to the arguments put forward by OKR. OKR's appeal cannot be allowed owing to the presence in the Polish legal system of the aforementioned ruling of the Regional Court in Opole of 28 February 2020.

15 As regards the second question, the referring body takes the view that, before interpreting the provisions of the Polish-Ukrainian Agreement, the extent to which the provisions of bilateral agreements take precedence over Regulation No 650/2012 must be determined. The rationale underlying Article 75 of Regulation No 650/2012 is that the Member States' Treaty obligations towards third countries must be respected. Therefore, the relevant interpretation of Article 75 of the regulation should be uniform in all the Member States. The question therefore arises as to whether, under the regulation, the choice of law is precluded only by the provision of the bilateral agreement which governs the choice of law differently from the regulation, or already by a provision which determines the *lex successionis* in any manner.

16 It might be concluded that only a bilateral agreement which expressly excludes the choice of law of succession in general or in a given case – due to the different manner in which the admissibility of such a choice is regulated – takes precedence over Article 22 of the regulation. In the case at issue, the notary originally adopted, on the basis of Polish and German jurisprudential teaching, a fundamentally different interpretation, according to which the conflict-of-law rules of the bilateral agreement constitute an autonomous regime under which the applicable law can be comprehensively established. A less conservative approach would be that Article 75 of the regulation does not require the Member States' authorities to 'enforce overzealously' the application of provisions of bilateral agreements; it merely requires that preference be given to bilateral agreement provisions where these actively address the matter in question in a manner

different from the regulation. Bilateral agreements, which are considered anachronistic today, rarely use this technique of indicating the applicable law. In this respect, the regulatory regime of the regulation would apply to the greatest extent possible and only in individual cases could it be replaced by the provisions of a bilateral agreement with a third country to the extent that its provisions could not be reconciled with the regulation.

17 In this context, the notary refers to Article 25 of Regulation No 593/2008, Article 28 of Regulation No 864/2007, Article 69 of Regulation No 4/2009 and, above all, the case-law of the Court of Justice relating to Article 71(1) of Regulation No 44/2001, in particular the relationship between the jurisdiction rules of that regulation and the rules of the Convention on the Contract for the International Carriage of Goods by Road (CMR), with particular reference to the judgment of 4 September 2014 in Case C-157/13, in which the Court of Justice held that the application of the rules of international conventions which take precedence over the regulation 'cannot compromise the principles which underlie judicial cooperation in civil and commercial matters in the European Union such as the principles […] of the free movement of judgments in civil and commercial matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants' (paragraph 38). In the notary's view, the question also arises as to whether the freedom to choose the applicable law and the freedom to make the applicable law uniform by choosing the applicable law – at least to the fairly narrow extent permitted by the EU legislature under Article 22 of Regulation No 650/2012 – are overriding considerations which affect the interpretation of the extent to which international agreements take precedence over the rules underlying EU regulations, including the rule of legal certainty.

18 The notary points out in passing that Poland has bilateral agreements – which do not provide for a choice of law and which do contain conflict-of-law rules in succession cases – with four third countries the nationals of which are relatively numerous in Poland: namely, with Ukraine, Belarus, Russia and Vietnam (but also with the successor states of the former Yugoslavia that are not Member States, as well as with Cuba, Libya, North Korea and Mongolia). The purpose of this observation is to highlight the importance of the questions referred for uniform practice (not merely in Poland) and the scale of the phenomenon associated with the parallel application of the regulation and of bilateral agreements between Member States and third countries.