

**Case C-80/19**

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

**Date of receipt:**

4 February 2019

**Referring court:**

Lietuvos Aukščiausiasis Teismas (Lithuania)

**Date of the decision to refer:**

17 January 2019

**Appellant:**

E. E.

**Other parties to the proceedings in cassation:**

Kauno miesto 4-ojo notaro biuro notarė,

K.-D. E.

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**Subject matter of the action in the main proceedings**

The main proceedings concern the interpretation and application of the provisions of substantive law governing international succession and of the provisions of procedural law governing the establishment and recognition of preliminary facts.

**Subject matter and legal basis of the request for a preliminary ruling**

Interpretation and application of Regulation (EU) No 650/2012 of the European Parliament and of the Council; first paragraph, heading (b), and second paragraph of Article 267 TFEU.

**Questions referred**

1. Is a situation such as that in the case under examination – in which a Lithuanian national whose habitual place of residence on the day of her

death was possibly in another Member State, but who in any event had never severed her links with her homeland, and who, inter alia, had drawn up, prior to her death, a will in Lithuania and left all of her assets to her heir, a Lithuanian national, and at the time of the opening of the succession it was established that the entire estate comprised immovable property located solely in Lithuania, and a national of that other Member State surviving his spouse expressed in clear terms his intention to waive all claims to the estate of the deceased, did not take part in the court proceedings brought in Lithuania, and consented to the jurisdiction of the Lithuanian courts and the application of Lithuanian law – to be regarded as a succession with cross-border implications within the meaning of Regulation No 650/2012 and to which that regulation must be applied?

2. Is a Lithuanian notary who opens a succession case, issues a certificate of succession rights and carries out other actions necessary for the heir to assert his or her rights to be regarded as a ‘court’ within the meaning of Article 3(2) of Regulation No 650/2012, regard being had to the fact that, in their activities, notaries respect the principles of impartiality and independence, their decisions are binding upon themselves or judicial authorities and their actions may be the subject of judicial proceedings?

3. If the second question is answered in the affirmative, are certificates of succession rights issued by Lithuanian notaries to be regarded as being decisions within the meaning of Article 3(1)(g) of Regulation No 650/2012 and must jurisdiction for that reason be established for the purpose of issuing them?

4. If the second question is answered in the negative, should the provisions of Articles 4 and 59 of Regulation No 650/2012 (together or separately, but without limitation to those articles) be construed as meaning that Lithuanian notaries are entitled to issue certificates of succession rights without following general rules on jurisdiction and that such certificates will be held to be authentic instruments which also give rise to legal consequences in other Member States?

5. Must Article 4 of Regulation No 650/2012 (or other provisions thereof) be construed as meaning that the habitual place of residence of the deceased can be established in only one specific Member State?

6. Should the provisions of Articles 4, 5, 7 and 22 of Regulation No 650/2012 (together or separately, but without limitation to those articles) be construed and applied in such a way that, in the present case, in accordance with the facts as set out in the first question, it must be concluded that the parties concerned agreed that the courts in Lithuania should have jurisdiction and that Lithuanian law should be applied?

### **Provisions of EU law cited**

Recitals 7, 20, 21, 22, 23, 59 and 67 and Articles 2, 3, 4, 5, 7, 15, 22, 59 and 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 (OJ 2012 L 201, p. 107; ‘Regulation No 650/2012’).

### **Provisions of national law cited**

Article 5.2 of the Civil Code of the Republic of Lithuania (‘the Civil Code’) provides, inter alia, as follows:

*‘1. Succession shall arise by operation of law and by a will.’*

[...]

Article 5.4 of the Civil Code provides:

*‘1. The place of the opening of succession shall be regarded as the last place of domicile of the legator or testator (Article 2.12 of this Code).*

*2. In the event that the legator or testator had no permanent place of residence, the place of the opening of succession shall be considered to be:*

*(1) the place where the legator or testator lived for most of the time during the last six months prior to his death;*

*(2) if the legator or testator resided in several places, the place of the opening of succession shall be regarded as the place of the prevailing economic or personal interests of the legator or testator (place of location of property or its principal part, when the property is situated in several places; the place of residence of the spouse with whom the legator or testator maintained matrimonial relations during the last six months prior to his death, or the place of residence of the child who was residing together with the legator or testator).*

*3. Where it is impossible to determine the place of residence of the legator or testator in accordance with the circumstances indicated in Paragraphs 1 and 2 of this Article, the place of the opening of succession may be determined in accordance with the citizenship of the legator or testator, his registration, the place of registration of the vehicles belonging to him, and other circumstances.*

*4. In the event of dispute, the place of the opening of succession may be determined by the court at the request of the interested parties, taking into account all of the circumstances.’*

Article 5.28 of the Civil Code provides, inter alia, as follows:

*'1. Official wills are wills which are made in writing in two copies and attested by a notary or by an official of the Consulate of the Republic of Lithuania in the relevant State.*

[...]

*5. The fact of making an official will may not be disputed. ...'*

Article 5.66 of the Civil Code provides, inter alia, as follows:

*'1. The successors who inherit by operation of law or by a will shall be able to present an application to the notary for the place of the opening of succession for the issuance of the certificate of the right to the inheritance. ...'*

Article 1 of the Law of the Republic of Lithuania on the Institution of Notary provides:

*'The Institution of Notary shall comprise all notaries who, in accordance with this Law, are granted the right legally to establish the undisputed subjective rights of, and the legal facts relating to, natural and legal persons, and to ensure the protection of the legal interests of those persons and of the State.'*

Article 2 of the Law on the Institution of Notary states, inter alia, as follows:

*'A notary is a person authorised by the State to perform the functions set out in this Law to ensure that there are no unlawful transactions and documents in civil-law relations. The notary may also be a conciliation mediator in civil disputes.*

*Notaries shall be appointed and dismissed by the Minister for Justice of the Republic of Lithuania.'*

Article 12 of the Law on the Institution of Notary provides:

*'Notaries shall exercise their powers without having regard for the influence of institutions of State power and the administration, and shall be subject only to the law.'*

Article 26 of the Law on the Institution of Notary provides:

*'Notaries shall perform the following notarial acts:*

[...]

*(2) issue of certificates of the right of inheritance;*

[...]

*It shall be recognised that the facts listed in documents certified by a notary are established and require no proof so long as the documents (parts thereof) have not been not deemed invalid in accordance with any statutory procedure.'*

Article 40 of the Law on the Institution of Notary states, inter alia, as follows:

*'A notary must refuse to perform a notarial act if the performance of such a notarial act would be contrary to legislation or would fail to comply with legislative requirements.'*

Article 41 of the Law on the Institution of Notary provides, inter alia, as follows:

*'A concerned person who believes that the performance of a notarial act or the refusal to perform a notarial act is incorrect shall be entitled to challenge that matter before the court having jurisdiction for the place of the notary's office.'*

Article 444 of the Code of Civil Procedure of the Republic of Lithuania ('the Code of Civil Procedure') provides, inter alia, as follows:

*'1. A court shall establish facts giving rise to the opening, change or termination of personal or property rights of persons.*

*2. The court shall examine cases:*

*[...]*

*(8) concerning the acceptance of the estate and the establishment of the actual place of the opening of the succession;'*

Article 445 of the Code of Civil Procedure provides:

*'The court shall establish legally relevant facts only if the applicant is unable to obtain the documents required to confirm those facts in any other way or if lost documents cannot be reproduced.'*

Article 448 of the Code of Civil Procedure provides, inter alia, as follows:

*'2. A final court decision establishing a fact to be registered with a civil registrar or documented with other authorities shall provide grounds for registering or documenting that fact therewith but shall be deemed equivalent to documents issued by those authorities. ...'*

Article 511 of the Code of Civil Procedure provides, inter alia, as follows:

*'1. A notarial act performed or a refusal to perform a notarial act may be challenged in accordance with the procedure laid down in this Chapter.*

2. *An action may be brought before the district court having jurisdiction for the place of work of the notary (or of any other person entitled by law to perform notarial acts) whose actions may be the subject of appeal. ...*

Article 580 of the Code of Civil Procedure provides, inter alia, as follows:

[...]

2. *An application for initiating succession procedures shall be filed before the district court having jurisdiction for the place of the opening of the succession. ...*

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 In the main proceedings the mother E. E. (a Lithuanian national) of the appellant (E. E.) married K.-D. E. (a German national) and moved to live in Germany together with her son (the appellant).
- 2 Upon her return to Lithuania the appellant's mother E. E. drew up a will at the notary office in the town of Garliava, in the Municipality of the Region of Kaunas, and designated her son (the appellant) as the heir to her entire estate (an apartment in Kaunas).
- 3 On 17 July 2017 the appellant contacted the Kauno miesto 4-asis notaro biuras (notary office no 4 of the City of Kaunas) requesting that the succession procedure be initiated and that a certificate of succession rights be issued.
- 4 On 1 August 2017 the notary in notary office no 4 of the City of Kaunas decided to refuse to perform the notarial act. The notary's refusal to perform the notarial acts requested by the appellant was based on the habitual place of residence of the testatrix (Germany) within the meaning of Regulation No 650/2012. The appellant challenged the notary's refusal to perform the notarial act before the court of first instance.
- 5 On 29 January 2018 the Kauno apylinkės teismas (Kaunas district court) ruled in favour of the appellant's application, annulled the notary's decision of 1 August 2017 refusing to perform the notarial act and ordered the notary to open the succession procedure in accordance with the place where the property was registered and to issue a certificate of rights of succession to the estate of the deceased mother E. E. The court of first instance stated that, even though the appellant's mother had declared her departure to Germany, she was still a Lithuanian national and, on the day of her death, owned immovable property in Lithuania; she had not severed her links with Lithuania, and had visited the country and drawn up her will there.
- 6 On 26 April 2018 the Kauno apygardos teismas (Kaunas regional court) set aside the ruling of the court of first instance following an appeal lodged by the notary and turned down the appellant's application. The appellate court stated that, in a



case where the habitual place of residence of the deceased person is disputed, only a court can establish the legal fact as to the recognition of the habitual place of residence of the deceased in her State of origin, and that in the present case there was no information to indicate that the appellant had raised this matter before any court; the appellate court ruled that the court of first instance had, in annulling the notary's decision under challenge, unreasonably relied on general principles.

- 7 The appellant lodged an appeal in cassation against the judgment of the Kauno apygardos teismas (Kaunas regional court).

### **Brief summary of the grounds for the referral**

*Concerning the application of Regulation No 650/2012 to the dispute between the parties*

- 8 In the present case the need for the court of cassation to make a reference to the Court of Justice is justified by the fact that the content of certain provisions of EU law germane to the examination of the dispute between the parties is not entirely clear following application of the *acte clair* or *acte éclairé* doctrine.
- 9 It is first necessary in the present case to establish whether the dispute between the parties actually comes within the scope of Regulation No 650/2012 and only then should it be examined how, if need be, its relevant provisions ought to be applied.
- 10 Recitals 7 and 67 of Regulation No 650/2012 demonstrate that the regulation applies to situations involving cross-border succession. The purpose of that legislation is to facilitate the assertion of the subjective rights of heirs in the context of a succession having cross-border implications by creating better conditions for free movement of persons in that area and settling matters of succession speedily, smoothly and efficiently, for example by creating the European certificate of succession.
- 11 Reasonable doubts have arisen in the case under examination as to whether the application of Regulation No 650/2012 (particularly if it were to be found that, on the day on which the appellant's mother died, she was not habitually resident in Lithuania) would ensure the attainment of the objectives listed above rather than the opposite — the appellant's situation in asserting his subjective rights would be disproportionately and irrationally burdened because he would probably be forced to bring proceedings in Germany in order to acquire the estate.
- 12 The present Chamber finds that the facts established in the case under examination relating to the socioeconomic relationship of the appellant's mother with Lithuania suggest that the view ought to be taken that the main proceedings involve a situation of national succession rather than succession with cross-border implications. E. E. did not sever her close links with her homeland as she owned immovable property in Lithuania and maintained (cared for) it for more than five

years, even though at the same time she had established new marital (family) relations and resided in Germany.

- 13 The application of Regulation No 650/2012 may imply a situation in which the appellant, who is a Lithuanian national seeking to inherit a Lithuanian national's estate located in Lithuania that is not subject to claims from either national or foreign residents, would be treated as a 'foreign national' in respect of his home country because he would first need to go to another Member State (the appellant is currently living and studying in Lithuania) and apply to a court in that country requesting it to take a decision on the assertion of succession rights; later, upon returning to his homeland, he would have to obtain recognition of that decision.
- 14 The present Chamber takes the view that the drafting and application of Regulation No 650/2012 are particularly relevant to such cases of succession with cross-border implications in which a person from one Member State (the deceased) passes on property to heirs by operation of law or by will not only in the Member State of origin (or habitual residence) but also in another EU Member State, which means that all requirements relating to the estate must be decided on by means of undivided proceedings with a view, *inter alia*, to avoiding separate judicial decisions that are mutually incompatible.
- 15 The above situation has not occurred in the case under examination and the links of E. E. (the appellant's mother) with two States (Lithuania and Germany) should not, in the view of the present Chamber, alter the nature of the succession. The judgment of the Court of Justice of 21 June 2018 in *Oberle*, C-20/17 (EU:C:2018:485), also shows that succession with cross-border implications is associated with succession in several Member States.

*Concerning the concepts of 'court' and 'decision' within the meaning of Article 3 of Regulation No 650/2012*

- 16 The interpretation of the concepts of 'court' and 'decision' in accordance with the provisions of Article 3 of Regulation No 650/2012 is relevant to the case in question as well as to the case *WB* (C-658/17) currently under examination by the Court of Justice.
- 17 In accordance with Article 79 of Regulation No 650/2012, Lithuania, like Poland, has stated that, apart from the national courts, no other authorities or entities perform any functions of courts. Hence, in accordance with the decision of the Lithuanian authorities, Lithuanian notaries do not have any recognised status as courts within the meaning of Regulation No 650/2012.
- 18 The questions referred by a Polish national court show that that court possibly has doubts as to the legal effect of notifications by the Member States and their influence on deciding on the definition of the concept of a 'court' under Regulation No 650/2012. The court of cassation faces similar doubts because



notifications under Article 79 of Regulation No 650/2012 essentially publicise, but do not grant, rights.

- 19 In the case here under examination it should, inter alia, be noted that the contested decision of the notary was based on the provisions of Regulation No 650/2012 but that those provisions show that it is only courts that take decisions on the rules governing jurisdiction (Article 15 of Regulation No 650/2012).
- 20 On the other hand, the court of cassation believes that the notary was entitled to take a decision on jurisdiction because Article 4 of Regulation No 650/2012 lays down a general rule on the establishment of jurisdiction in respect of Member States, although Article 2 shows that that regulation does not affect the competence of national authorities. What needs to be established first is therefore general (international) jurisdiction followed by a decision on its exercise in respect of the relevant persons in accordance with the legislation of the Member State concerned.
- 21 It is not clear whether a notary's decisions on succession (if they are not considered to be court decisions) could be recognised as being authentic instruments. It is assumed that the procedure for the acceptance of authentic instruments should not be seen as being parallel to the procedure governing court decisions on succession. Furthermore, it is doubtful whether the provisions of Regulation No 650/2012 should be construed and applied in such a way that, depending on the territorial aspect of relations concerning succession (national or cross-border), decisions in one of those cases would be made by notaries while in the other case they would be made by conventional judicial authorities.
- 22 On the other hand, recitals 20 to 22 of Regulation No 650/2012 may give the opposite impression, namely that ordinary notaries who are not tasked with judicial functions should not be regarded as courts even though under national law they are authorised to examine matters of succession; this means that jurisdictional rules are not relevant and applicable to such notaries (who are not courts within the meaning of Regulation No 650/2012) and that they perform their functions in the form of authentic instruments rather than in that of judicial decisions. It is not clear whether in such a case not only jurisdictional rules but also other provisions of Regulation No 650/2012 would be irrelevant to notaries.
- 23 In Lithuania the commencement of succession proceedings and their essential elements are associated namely with actions performed by notaries, such as the opening of a succession case, the issuance of a certificate, and suchlike. Even though judicial authorities are generally associated with dispute resolution, according to the court of cassation, that does not *per se* mean that in legal relationships concerning succession Lithuanian notaries could not be regarded as courts for the purposes of Regulation No 650/2012.
- 24 In this context note should also be taken of the aforementioned judgment of the Court of Justice in *Oberle*, which states that the term 'to rule' does not have to be

linked with contentious proceedings and that the ruling does not need to have the effect of *res judicata*; the Court of Justice takes the view that this interpretation is also confirmed by recital 59. Paragraph 44 of the *Oberle* judgment notes that Article 4 of Regulation No 650/2012 determines the international jurisdiction of the courts of the Member States in relation to proceedings involving measures concerning the succession as a whole, such as, in particular, the issuing of national certificates of succession, irrespective of whether those proceedings are contentious or non-contentious.

- 25 It should be noted that notaries in the Republic of Lithuania have exclusive competence in matters of succession; although notaries do not perform their activities by exercising powers granted to them by a judicial authority, they ensure impartiality in respect of all parties to a notarial act and protect the rights and interests of all persons concerned, their actions may be challenged before a court, and a certificate of succession rights issued by a notary constitutes a ground for establishing and registering ownership; notaries certify rights of persons that are legally unchallengeable and legal facts but they do not resolve any disputes between the parties, this being a matter for courts; even though, in accordance with the law, a certificate of succession rights issued by a notary is not considered to be a decision having the force of *res judicata*, a court may not take a different decision on the same matter unless the decision is annulled; a certificate of succession rights issued is also binding on the notary himself, who cannot repeat the procedure until a court has annulled its results.
- 26 The court of cassation believes that the fact that a notary's decisions may be challenged before a (conventional) court does not of itself mean that a notary may never be regarded as 'court' according to Regulation No 650/2012. The refusal by a notary to issue a certificate of succession rights should be open to challenge before a court, which, following an independent interpretation and application of the law, may annul that decision (should the court come to opposite legal conclusions) and oblige the notary to perform the notarial acts requested by the person concerned. Even in that case the effect and value of the notary's decision for the rights and duties of the parties and its consequences for competent authorities of other countries in the event of succession with cross-border implications will not differ from the situation in which the notary immediately accedes to the applicant's request to carry out the corresponding actions.

*Concerning the jurisdiction of the Lithuanian courts and the law applicable in the case in question*

- 27 The present Chamber believes that in the present case the key legal issue relating to Regulation No 650/2012 (if it is at all applicable in the present case) concerns the competence (jurisdiction) of the Lithuanian authorities (courts or notaries) and the applicable law rather than the definition of a court. The sole fact that Lithuanian notaries are possibly not to be regarded as courts within the meaning of Regulation No 650/2012 should not affect the fact that the assertion of the rights of heirs in a situation of succession with cross-border implications should in

any event be safeguarded because, in the opinion of the present Chamber, either notaries should protect the interests of heirs by drawing up (accepting) authentic instruments or matters of succession should be handled by (conventional) courts.

- 28 It is not disputed that the main rule on the general jurisdiction of the courts of Member States is associated with the place of habitual residence on the day on which the person concerned dies. That said, the provisions of Regulation No 650/2012 do not make it entirely clear whether it is impossible to have situations in which, due to specific circumstances, the deceased had several habitual places of residence rather than merely one. In this respect, Regulation No 650/2012, *firstly*, sets out the circumstantial method for determining habitual residence rather than the formal one, that is to say, the habitual residence is established on the basis of various circumstances rather than on that of registration (recital 23); *secondly*, the nationality and the assets owned may be a decisive factor in establishing habitual residence (recital 23).
- 29 Even though the provisions of Regulation No 650/2012 make it appear that only one habitual place of residence is possible, although that position is not stated *expressis verbis*, there is in this context a need for greater clarity and explanations by the Court of Justice.
- 30 In the case under examination it is not entirely clear how much the establishment of jurisdiction and applicable law is affected by the fact that, *firstly*, the deceased had returned to Lithuania and drawn up her will with a Lithuanian notary, *secondly*, in the court proceedings concerning the extension of the deadline for accepting the succession and the appeal against the notary's decision the surviving spouse of the deceased, a German national, had consented, in clear terms, to the jurisdiction of the Lithuanian authorities and had expressed his intention to waive any claims to his spouse's assets, and *thirdly*, although informed about the proceedings, the surviving spouse declined to make an appearance and to take part in those proceedings.
- 31 The will of the appellant's mother does not actually set out in express terms her intention in relation to the application of Lithuanian law; however, the court of cassation believes that this emerges implicitly. Even if Germany were to be regarded as her habitual place of residence, it is common ground that the appellant's mother had returned to Lithuania and drawn up her will there in accordance with the legislation of her Member State of origin. It should also be noted that the provisions of the Regulation, inter alia its Article 22, were not yet applicable at the time when the will was drawn up (4 July 2013). The will in question is in any event effective and not open to challenge.