

Case C-240/24**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:**

27 March 2024

Referring body:

Notary in Krapkowice Justyna Gawlica - Krapkowice (Poland)

Date of the decision to refer:

16 March 2024

Parties to the proceedings

N.T., O.T., S.T., BNP Paribas Fortis SA/NY

Subject-matter of the main proceedings

Proceedings to withdraw or modify a European Certificate of Succession started of the notary's own motion on account of the bank to which the certificate was presented challenging the effects of the European Certificate of Succession. Division of costs for those proceedings.

Subject matter and legal basis of the request

Entitlement of the notary to file a request for a preliminary ruling. Interpretation of Article 71(2) and Article 69(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 (OJ 2012 L 201, p. 107). Article 267 of the TFEU.

Question referred for a preliminary ruling

1. Must Article 71(2) of Regulation (EU) No 650/2012 of the European Parliament and of the Council be interpreted as meaning that in the current proceedings to withdraw or modify a European Certificate of Succession that has been issued, the non-judicial authority issuing the certificate of succession is

entitled to refer a question for a preliminary ruling pursuant to Article 267 of the TFEU?

and if the answer to that question is in the affirmative:

2. Does Article 71(2) of the above regulation allow for the costs of proceedings to withdraw or modify a European Certificate of Succession to be charged, based on national law, to a bank that was not a participant in the proceedings to issue this certificate, has not filed an application for its withdrawal or modification, but has questioned the legitimation effects of the certificate presented to it in such a way that has led to the issuing authority of its own motion starting proceedings to withdraw or modify the certificate, conducted with the participation of that bank?

and if the answer to that question is in the affirmative:

3. Must Article 69(2) of the above regulation be interpreted as meaning that the bank to which a valid certified copy of a European Certificate of Succession is presented is not entitled to challenge the status as heir of the person identified in the certificate?

Provisions of European Union law relied on

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), in particular Article 69(2) and Article 71(2). Article 267 of the TFEU.

Provisions of national law relied on

Ustawa z dnia 14 lutego 1991 r. Prawo o notariacie (Notarial Code of 14 February 1991)

Article 5(1). Notaries shall receive remuneration for their activities on the basis of an agreement with the parties, within the limits of a maximum notarial fee for a given activity.

Section 2 The remuneration referred to in Section 1 shall not include travel costs and other necessary expenses incurred by the notary in connection with notarial activities.

Section 3 The Minister for Justice [...] shall determine by means of a regulation the maximum notarial fees for the notarial activities referred to in Section 1, and the maximum amounts by which remuneration for notarial activities outside a notary's office may be increased, taking into account the value of the matter and the type of notarial activity, the degree of complexity, the

workload of the notary, the time allocated for completion of the activity and the social benefit guaranteeing appropriate access to notarial activities in civil law transactions [...].

Article 79 The notary shall carry out the following activities: [...]

1b) activities relating to a European Certificate of Succession.

Article 83(1). In case of a refusal to carry out a notarial activity, the party concerned may, within a week of notification of the grounds for this refusal, or if they have not requested notification of the grounds for the refusal within the prescribed period, within a week of the date of learning of the refusal, file a complaint to the district court competent for the registered address of the notary's office that has refused to carry out the notarial activity. The complaint shall be brought through that notary.

Article 89(1). The parties to a notarial activity shall be jointly responsible for the remuneration due to the notary.

Article 95t The notary shall confirm through notarial records the issue, rectification, modification or withdrawal of a European Certificate of Succession or suspension of its effects, as well as the refusal to carry out such activities. [...]

Article 95u(1). The notary shall, of his or her own motion, provide a copy of the report on the issue or refusal to issue a European Certificate of Succession together with information about the available route of appeal [...].

Article 95v If the basis for modification or withdrawal of the European Certificate of Succession set out in the [Regulation No 650/2012] is confirmed, the notary may modify or withdraw the certificate of his or her own motion.

Article 95w The notary, of his or her own motion, shall provide a copy of the report on the rectification, modification or withdrawal of the European Certificate of Succession or suspension of its effects, as well as refusal to carry out such activities, together with information about the available route of appeal. [...].

Article 95x(1). A complaint may be filed against a notary's activity to issue, rectify, modify or withdraw or to suspend the effects of a European Certificate of Succession. The provisions laid down in Article 83 shall apply *mutatis mutandis*.

Rozporządzenie Ministra Sprawiedliwości w sprawie maksymalnych stawek taksy notarialnej z dnia 28 czerwca 2004 r. (Regulation of the Minister for Justice on maximum notarial fees of 28 June 2004) (Dz.U. of 2020, item 1473)

Section 10a(2a). The maximum fee for activities involving a European Certificate of Succession, with the exception of the activities referred to in [...], is PLN 400.

Succinct presentation of the facts and procedure in the main proceedings

- 1 The testator, K.T., was a Polish and German citizen who settled in Belgium. She was unmarried with no children and her closest family were her parents and sister living in Poland. Shortly before her death, K.T. travelled to Poland, where she drew up a will before a Polish notary, in which she selected Polish law and indicated her sister as her sole heir. She died on 6 February 2023, still having her habitual residence in Belgium.
- 2 The succession property in Belgium included funds in a bank account held by BNP Paribas Fortis SA/NV ('the bank'). The heir applied to a Belgian notary for a Belgian deed of certification of succession. Due to the applicability of Polish law however, she was referred to the Polish authorities.
- 3 On 22 February 2023 at a notary's office in Krapkowice (Poland), the will was opened and read out. The testator's parents and sister, as the statutory heir, signed a choice-of-court agreement at that point in accordance with Article 5 of Regulation No 650/2012. As a result of the succession proceedings, the Polish notary ('the notary in Krapkowice') issued a deed of certification of succession identifying the testator's sister as her sole heir. One copy of this deed had an attestation confirming that that deed constitutes an authentic instrument in a matter of succession, which is an appendix to Commission Implementing Regulation No 1329/2014 establishing the forms referred to in Regulation No 650/2012 (OJ 2014 L 359, p. 30). In this attestation, the notary in Krapkowice described the effects of the issued deed of certification of succession and indicated its binding nature in legal relations.
- 4 The bank, however, requested that the heir submit a European Certificate of Succession ('ECS'). On 5 July 2023, the notary in Krapkowice issued an ECS indicating the testator's sister as the sole heir. The heir presented this to the bank, which then requested that she submit a certificate from the population register confirming that the testator did in fact have no children as well as a deed of certification of succession issued by a Belgian notary.
- 5 In August 2023, the heir reported this to the notary in Krapkowice, who on 18 September 2023 explained to the heir and the bank the legal status arising from signing the choice-of-court agreement and the issue of the ECS, refused to issue any confirmation of the accuracy of the issue of the ECS and also informed the bank of the possibility of filing a request for the withdrawal or modification of the ECS in accordance with Article 71(2) of Regulation No 650/2012. The notary indicated that the ECS would remain binding until such time of its withdrawal or modification.
- 6 At the same time, the notary in Krapkowice stated that if the legitimization effects of the issued ECS were still challenged, she would consider starting proceedings of her own motion to withdraw or amend the ECS. At the same time, she

emphasised that the start of such proceedings would generate procedural costs (notarial fee, delivery and translation costs).

- 7 On 3 November 2023, after receiving information from the heir that the bank was still challenging the legitimisation effects of the ECS, and given the bank's silence on the matter, the notary in Krapkowice started proceedings of her own motion to withdraw or modify the ECS with the participation of the heir, the testator's parents and the bank. She gave the participants in the proceedings a period of 6 weeks to provide the notary with any information and documents to certify the inaccuracy of the ECS. The effects of the issued ECS were not suspended.
- 8 The notary in Krapkowice informed the participants in the proceedings that the proceedings were started in connection with the bank's refusal to recognise the legitimisation effects of the ECS, which could mean that the bank might be in possession of information or documents not known to the body issuing the ECS and affecting the accuracy of the certificate; she also informed them that the result and course of the proceedings to withdraw or modify the ECS would involve the individual participants being charged for the costs of the proceedings, which would be done in the final report on the proceedings. None of the participants in the proceedings put forward any circumstances to attest to the inaccuracy of the issued ECS.

Succinct presentation of the reasoning in the request for a preliminary ruling

Practice of applying notarial fee provisions

- 9 Contractual arrangements concerning the notarial fee referred to in Article 5(1) of the Notarial Code do not apply for activities carried out by a notary when acting as the succession court, but apply to the area of activity of the notary in terms of drawing up agreements. First, the maximum notarial fee in succession proceedings is symbolic and does not depend on the value of the succession property. This category of case does not involve any arrangements between the parties concerning the notary's remuneration and the maximum rate based on the regulation is always used. Second, in this case the notary in Krapkowice started public legal proceedings, the result of which could potentially affect either the compensatory liability of the bank or criminal liability for giving a false statement by the parties to the original proceedings to issue the ECS. The nature of the case and the need to maintain a distance from the parties further rules out any arrangements concerning the amount of the notarial fee.
- 10 The notary in Krapkowice emphasises this point as previously in the opinion of the Advocate General Y. Bot of 17 May 2017 in case C-658/17, *WB* (point 92), inaccurate comments were made concerning the notarial fee due to the Polish notary for conducting proceedings to issue a deed of certification of succession.

Jurisdiction of the notary in national proceedings and grounds for competence to act in the question referred for a preliminary ruling.

- 11 The notary in Krapkowice states that she focuses on the competence of the Polish notary to lodge the question referred for a preliminary ruling in the context of proceedings to withdraw or modify an ECS. This issue should be differentiated from the classification of the Polish notary as a court when exercising other powers or in other regulatory contexts.
- 12 Pursuant to Article 71(2) of Regulation No 650/2012, the Polish legislature has placed a legal obligation on the notary, as the authority issuing the ECS, to modify or withdraw the issued ECS in the event of its inaccuracy, including of his or her own motion. Article 71(2) of Regulation No 650/2012 here envisages the performance - of the notary's own motion or on request - of the relevant procedure to investigate the accuracy of the certificate, in accordance with the wording 'where it has been established that the Certificate or individual elements thereof are not accurate'.
- 13 The subject matter of these proceedings is the accuracy of the content of the issued ECS as the basis for its modification or withdrawal, and thereby deprivation of the certificate's legitimisation effects in legal relations.
- 14 The question is raised as to whether when an assessment of the accuracy of an ECS is carried out by the notary as the issuing authority, the notary exercises a judicial function in the matter of withdrawing or modifying the ECS. Entrusting the power to withdraw or modify the ECS to a non-judicial issuing authority also requires contested matters to be settled both between the participants of the original proceedings to issue the ECS, for example in case of the subsequent disclosure of a will, and in relations with third parties in relation to whom the heir identified in the ECS starts to exercise his or her rights, and who may question the legal status reflected in the ECS, which was not contested at the stage of its issue.
- 15 Each issuing authority, including non-judicial authorities, must therefore be ready to settle such contested matters in cases to withdraw or modify an ECS. Without such settlements, a decision cannot be reached to withdraw or modify the ECS.
- 16 The notary in Krapkowice asserts that without access to the institutional infrastructure envisaged in EU law for authorities carrying out judicial functions, such as a preliminary ruling procedure, the notary will be unable to reliably carry out the functions of the issuing authority and ensure the accuracy of a previously issued ECS.
- 17 This state of affairs may have a negative impact on the acceptance of an ECS issued by non-judicial authorities in legal relations. To ensure the consistency of the certificate and its effects in all Member States, consistency of the issuing institution must also be maintained. If consistency of the issuing institution is not maintained due to the introduction of first (judicial) and second (non-judicial)

category authorities, this will also lead to the emergence of first and second category ECS in legal relations.

- 18 This difficulty is not resolved through judicial supervision entrusted to EU courts by the legislature. The jurisdiction of courts with which appeals against decisions of issuing authorities are lodged is therefore limited to checking the validity of the assessments of the issuing authority in terms of the accuracy of the ECS and does not extend to directly monitoring the accuracy of certificates and starting proceedings of its own motion in this regard.
- 19 In the context of the role of courts in ECS proceedings, the notary in Krapkowice asserts that most Member States have not decided to entrust the functions of the issuing authority solely to the courts. In Poland, where parties can choose between the courts and notaries as issuing authorities, the public shows a very clear preference for notaries. If Polish notaries had to send the parties back to the courts every time, since ECS issued by notaries would be treated as second category ECS in other Member States in the long term, this would be to the detriment of the parties' interests.
- 20 The conclusion that the issuing authority conducting the proceedings to withdraw or modify an ECS carries out judicial functions is also supported by the scheme of the regulation. In Article 66(5) of Regulation No 650/2012, the EU legislature declared it necessary to introduce a procedural pathway for opening a preparatory inquiry in other Member States. This relates to the fact that at the stage of issuing an ECS, the matter must not be challenged (Article 67(1), sentence 2(a) of Regulation No 650/2012). The authority issuing the ECS is therefore not appointed to settle matters being challenged and, in the opinion of the notary in Krapkowice, is not therefore the court authorised to refer to instruments for judicial cooperation in civil matters intended for the courts [Compare, however, the question referred for a preliminary ruling of Amtsgericht Lörrach, as the German issuing authority in the matter of the issue of an ECS, settled in case C-187/23, *Albausy*]. The situation changes, however, after the issue of the ECS in the phase of the proceedings to withdraw or modify the ECS, in which the issuing authority must also settle matters that are challenged. In Article 71 of the regulation, the legislature did not therefore repeat the provision similar to Article 66(5) of Regulation No 650/2012.
- 21 The notary in Krapkowice is of the opinion that in this case she carries out judicial functions to an extent that justifies the assumption that she is authorised to lodge the relevant question referred for a preliminary ruling for resolution in the matter of the withdrawal or modification of the ECS. However, on account of the outcomes of the proceedings in cases C-658/17, *WB* and C-387/20, *OKR*, she made the issue of competence to lodge a question referred for a preliminary ruling the subject of a separate question.

3. Significance of the subject-matter of the second and third questions for consideration of the case

- 22 The notary in Krapkowice started proceedings of her own motion with the intention of clarifying the grounds for withdrawing or modifying an ECS already being applied in legal relations. The persistent questioning by the bank of the legal effects of the ECS presented to it led the notary to assume that the bank has substantive grounds for challenging the accuracy of the ECS. On account of this, as well as the central role of the bank in clearing up doubts as to the actual situation, the bank was given the status of a participant in the proceedings.
- 23 National proceedings are in the final phase. The end of the proceedings will also involve the need to settle the costs thereof. These costs consist of the remuneration owing to the notary for the actions taken in the case, the costs of translations into Dutch of the letters sent in the course of the proceedings to the bank and delivery costs.
- 24 The statutory model of joint liability of the parties to notarial actions, formally only referring moreover to the notary's remuneration and not to other costs of the proceedings, is also in practice in the case of this remuneration the only starting point for the application of customary directives, which in the practice of legal relations have been developed for the settlement between parties of widely accepted notarial costs.
- 25 One of these directives is the incurring of the costs of the proceedings by the heir. However, this refers to costs of proceedings that are essential to obtain or confirm the status of heir, but not necessarily the costs of proceedings to withdraw or modify an ECS.
- 26 Another directive governing the division of the costs of proceedings is consideration of the extent of the contribution of a particular participant to the need to carry out a particular action or to the incurring of partial costs for said action. A qualified version of this directive is to charge parties for the costs caused by their negligent or clearly inappropriate actions.
- 27 In this case, at the end of the proceedings the notary in Krapkowice will have to decide on the distribution of the costs of the proceedings primarily between the heir to the will indicated in the ECS and the bank. Another possibility is to refrain from charging any costs to the parties on account of the circumstances of a particular case and as a result have those costs covered by the notary.
- 28 Here it is important to assess the grounds of the bank that led to the start of the proceedings to withdraw or modify the ECS. Both fundamental questions should undergo this assessment in view of the settlement of the costs of the proceedings.
- 29 In the second question, the notary in Krapkowice seeks to determine whether the regulation allows for the application of national law in terms of the costs of the proceedings and does not prevent these costs being charged to a person who was

not a participant in the original proceedings to issue the ECS, did not file the application for its withdrawal or modification but who was a participant in the proceedings to withdraw or modify the ECS due to questioning the legitimation effects of the certificate. This therefore becomes a question about the potential frameworks based on EU law for settling matters of costs in national law or for exercising the relevant competence under national law to divide the costs in such a way that deviates from the joint liability laid down by law.

- 30 If the answer to the second question is negative, this would rule out charging the bank for the costs of the proceedings. If the answer to the second question is in the affirmative, it would in turn be necessary to consider the extent to which the bank infringed the provisions of generally applicable legislation by refusing to recognise the legitimation effects of the ECS. The response to the third question at the end of the national proceedings will be key to settling the extent to which the bank is charged for the costs of the proceedings if the refusal to recognise the effects of the certificate was unauthorised on its part.

4. Legal considerations concerning the subject-matter of the second question referred for a preliminary ruling

- 31 The EU legislature left the issue of the costs of the proceedings outside the scope of Regulation No 650/2012 and it seems that it was assigned to be resolved by national law.
- 32 It therefore seems that while maintaining the general limitations arising from EU law, the method for settling the costs of the proceedings was left to the national legislature and the practice of applying national law by the issuing authorities. It therefore seems permissible, in accordance with national law, to charge each participant in the proceedings to withdraw or modify the ECS for the costs thereof.
- 33 The notary in Krapkowice classed the bank as a participant, assuming that the bank's persistent questioning of the legitimation effects of the ECS led to the creation for the bank of a legal interest in settling the matter of withdrawing or modifying the certificate. The result of this case will affect the eventual compensatory liability of the bank based on this questioning. Classing the bank as a participant also helps ensure the efficacy of the investigation proceedings into the grounds for withdrawal or modification, which in the current state of development of EU law would be hindered without guaranteed access by non-judicial issuing authorities to the institutional infrastructure, in the first instance Regulation No 2020/1784. The notary in Krapkowice ultimately asserts that the proceedings to withdraw or modify the ECS should be the fundamental method for studying the accuracy of the ECS. The conferral on the bank of the status of a party is seen as a matter to be ultimately settled in national proceedings and potentially verified through national complaint proceedings.

5. Legal considerations concerning the subject-matter of the third question referred for a preliminary ruling

- 34 The literature indicates two grounds on which private law entities could be justified in refusing to recognise the legitimisation effects of an ECS that is presented to them. The first is autonomy of will, the meaning of which in this context is especially emphasised in German literature. In this sense, private law entities should be authorised to assess whether the certified copy of an ECS presented to them indicates the attribute of heir to their satisfaction. These arguments are based, among other things, on the non-normative nature of recital 69, sentence 3 of Regulation No 650/2012 and the narrowing of the legal obligation to recognise the legitimisation effects of an ECS to Member State bodies.
- 35 The notary in Krapkowice questions the theory that the obligation to respect the legitimisation effects of the ECS was exclusively directed to Member State bodies. Article 69(1) of the regulation in the notary's opinion means that these effects must be respected in the legal areas of Member States, including by private law entities. In situations in which the EU legislature directs the provisions of the regulation only to Member States or their bodies, this is reflected in the content of the formulated provisions (see Article 4 of Regulation No 650/2012).
- 36 The notary in Krapkowice does not know whether this is the case in the Belgian banking sector but in the Member States, and in Poland in any case, there are entire service sectors in which economically strong entities systematically and repeatedly refuse financial benefits owing to individuals, including consumers. The notary in Krapkowice does not agree with calls for the debtor to be granted competence to assess whether a creditor, from the point of view of the debtor, has duly indicated his or her position as heir by presenting a copy of the ECS.
- 37 The second grounds on which the legitimisation effects of an ECS are relativised is the nature of the certificate itself, which should be the only refutable source of a presumption concerning the accuracy of the legal status awarded. Referring in this context to German academic writing, the notary in Krapkowice asserts that in this sense and in this case, the bank would be authorised to not comply with the content of the ECS and to refer the heir to court proceedings to obtain the payment in Belgium.
- 38 However, the notary in Krapkowice maintains that the ECS, which would be the only starting point for a preparatory inquiry into the status of the entity indicated in the certificate in individual Member States, would be an instrument with negligible efficacy. Regulation No 650/2012 envisages not only the principle of concentration of jurisdiction in a single Member State but also focuses within the same Member State of issue of the ECS the jurisdiction to carry out proceedings to withdraw or modify the ECS. As a result, the accuracy of the certificate cannot be assessed by bodies of other Member States, including the courts of Member States in which the certificate is used, which are bound by the content of the ECS. It is therefore a form of legal integration that goes beyond the traditional

obligation to recognise rulings. This concept of the ECS is also supported by the uniform structure of the ECS and its effects in all Member States, which would not be able to be maintained if the effects of the ECS could be verified in each Member State based on local rules of evidence.

- 39 The accuracy of the material and legal status reflected in the ECS should therefore only be assessed in the Member State of issue. In the Member State of use, on the other hand, the ECS releases the identified heir from the burden of proof in terms of his or her awarded status in a way that is binding for both the participants in legal relations and for any courts in which this aspect may be contested as a preliminary question. By refusing to recognise the legitimation effects of the ECS, the bank therefore seems to be infringing the rules of generally applicable legislation.

WORKING DOCUMENT