

Case C-21/22**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:**

7 January 2022

Referring court:

Sąd Okręgowy w Opolu (Poland)

Date of the decision to refer:

10 December 2021

Applicant:

OP

Subject matter of the main proceedings

The subject matter of the case in the main proceedings is the examination of an appeal lodged by OP against the refusal by a notary acting as a deputy for another notary (zastępca notarialny) and practising in Poland, to perform a notarial act, namely to draw up, on behalf of a Ukrainian national, a notarial will which would contain a clause stipulating that the law applicable to all matters relating to the succession and modification of the legal order of succession would be Ukrainian law

Subject matter and legal basis of the request

The referring body submits two 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 relationship between that agreement and the regulation 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 the regulation by a national of the third country concerned.

Question referred for a preliminary ruling

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 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?

Provisions of European Union law relied on

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

Provisions of national law relied on

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), done at Kiev on 24 May 1993 (Dz.U. 1994 No 96, heading 465): Articles 36 and 37

Ustawa z dnia 4 lutego 2011 r. Prawo prywatne międzynarodowe (Law of 4 February 2011 on International Private Law) (Dz.U. 2011, No 80, heading 432): Article 66a

Ustawa z 14 lutego 1991 r. Prawo o notariacie (Law of 14 February 1991 on Notaries) (Dz. U. 1991 No 22, heading 91): Articles 81, 81a, 82, and 83

Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego (Law of 17 November 1964 establishing the Code of Civil Procedure) (Dz.U. 1964 No 43, heading 296) ('the Code of Criminal Procedure'): Article 366

Succinct presentation of the facts and procedure in the main proceedings

- 1 OP, who possesses only Ukrainian nationality and resides in Poland, is – together with her husband, under statutory community property rights – 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 zastępca notarialny refused to perform the notarial act in so far as it included the choice of Ukrainian law, on the ground that, in his opinion, the choice of Ukrainian law in the will would be contrary to the law, and more specifically to Article 81 of the Prawo o notariacie.
- 3 OP lodged an appeal with the zastępca notarialny, who, at the stage where the appeal was considered under the self-review procedure, attempted to initiate the relevant preliminary ruling proceedings, but, by order of 1 September 2021 in Case C-387/20, *OKR*, the question referred for a preliminary ruling was declared inadmissible by the by the Court of Justice of the European Union. The zastępca notarialny then dismissed the appeal.
- 4 OP lodged an appeal with the referring body. She requested that the refusal be annulled in its entirety and that a question be referred to the Court of Justice of the European Union for a preliminary ruling.

The essential arguments of the parties in the main proceedings

- 5 In the grounds of the refusal to perform the notarial act, the zastępca notarialny, first of all, drew attention to the scope *ratione personae* of the regulation. In this context, the notary referred to the ruling of the Sąd Okręgowy w Opolu (Regional Court in Opole, Poland) of 28 February 2020 – he considered to be binding on him – 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 that court, 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 applicable to succession, 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 jurisdiction.
- 6 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). Therefore, it is not possible to codify the rules on succession.

- 7 In her appeal, OP alleges that there has been an incorrect interpretation of Articles 22 and 75 of the regulation.
- 8 As regards the first sentence of 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 the regulation, any law specified by that regulation is to be applied whether or not it is the law of a Member State. [OP] 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.
- 9 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, OP 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 take precedence over Article 22 of the regulation, which governs this matter and allows a choice of law.
- 10 OP 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 the unity of the law applicable to the succession, the importance of which was emphasised by the Court of Justice of the European Union in its judgment in C-218/16, *Kubicka*.
- 11 In his response to the appeal, the zastępca notarialny maintained the position that the Polish-Ukrainian Agreement creates a separate regime for determining the law applicable to succession, which as a whole takes precedence over the regime arising from the regulation, including Article 22 thereof.
- 12 However, the zastępca notarialny also drew attention to the fact that the primacy of that agreement, also recognised in academic legal writings, which results in a split of applicable law (which is different with regard to movable property and

different with regard to immovable property), makes it significantly more for a large number of Ukrainian nationals residing in Poland to draw up a will. In view of the systemic importance of the issue under consideration in the present case, the *zastępca notarialny* supported OP's request for a question to be referred to the Court of Justice for a preliminary ruling.

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

- 13 As regards the first question, the referring court notes firstly that, in their observations in Case C-387/20, *OKR*, the Governments of Hungary and Poland and the European Commission agreed that Article 22 of the regulation allows a person who is not an EU citizen to choose, as the law governing all matters relating to succession, the law of a third country of which that person is a national at the time of making the choice or at the time of death. With reference to Article 366 of the Code of Civil Procedure, that court concludes that the above judgment of the Sąd Okręgowy w Opolu of 28 February 2020, interpreting the scope *ratione personae* of Article 22 of the regulation as being limited solely to nationals of Member States, and deemed by the *zastępca notarialny* to exclude the possibility of performing the requested notarial act, is not binding in the present case. However, the referring court considers it necessary to consolidate the position of the courts on the matter at issue and to that end refers the first question to the Court of Justice of the European Union for a preliminary ruling.
- 14 As regards the second question, the referring court refers firstly to the positions taken by the Governments of Hungary and Poland and the European Commission in their observations in Case C-387/20, *OKR*, which reveal differences in the interpretation of Article 75 of the regulation. The position of the Hungarian Government is that that regulation cannot effect the application of international conventions to which one or more Member States are party at the time that regulation was adopted and which concern matters covered by the provisions of the that regulation; in such circumstances, the applicable law must, in its view, be determined solely on the basis of the conflict-of-law rules of that agreement and where the bilateral agreement is 'silent' on choice of law, a third-country national residing in the Member State which is party to that agreement is not entitled to choose the rules on succession. The Commission also considered that, where a bilateral agreement concluded between a Member State and a third country determines the law applicable to the succession on basis of objective connecting factors, without allowing the parties to choose a different applicable law, choice of the law by a third-country bound by such an agreement was excluded. However, a different position was taken by the Polish Government, which expressed the view that in a case where a bilateral agreement between a Member State and a third country does not provide for a choice of law in matters relating to the succession, a third-country national residing in a Member State bound by that bilateral agreement may choose the law of that third country, even if the law of the country chosen does not provide for a choice of law in matters of succession.

- 15 Secondly, the referring court states that in Poland too there is no uniform position on the interpretation of Article 75 of the regulation. It notes that the position of Poland, as one of the parties to the abovementioned 1993 agreement, is that the omission of choice of law applicable to the succession was intended by the States party to this agreement. If it is to be regarded as an authentic interpretation by the entity which drew up and signed the above agreement, the issue remains of establishing whether the Ukrainian Government interprets those provisions of the 1993 agreement in a similar manner. At the same time, the referring court notes the signing on 29 May 2014 of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part. As is evident from Article 24(1) thereof, Ukraine and the European Union declared that they would develop judicial cooperation in civil and criminal matters and approximate Ukrainian legislation with European Union law.
- 16 With reference to Polish academic literature on the subject, the referring court notes that in relation to the interpretation of Article 66a of the Ustawa z dnia 4 lutego 2011 r. Prawo prywatne międzynarodowe some authors give precedence to the regulation over bilateral conventions concluded by Poland with Belarus, Russia and Ukraine. Another view is that the issues concerning the relationship between the regulation and conventions are resolved by the Succession Regulation itself, in the first sentence of Article 75(1) thereof, pursuant to which these issues were removed from the scope of that regulation.
- 17 Referring in turn to the origin of Article 75 of the regulation, the referring court recalls that in its original wording that provision was succinct and clear and in the event of a conflict of laws gave precedence to international agreements – subject to agreements between the Member States applying the regulation which cede to it – while referring to the then Article 307 TEC, which pointed to the need to eliminate any incompatibilities between the Treaty and agreements with third countries – a reference which the legislature ultimately abandoned.
- 18 In analysing the arguments in favour of the precedence of the regulation, the referring court raises several other issues: inter alia, potential discrimination against EU residents who are not nationals of an EU Member State and the archaic nature of the conflict-of-law rules contained in many international agreements. The referring court is also uncertain, in the light of the previous case-law of the Court of Justice of the European Union, whether the freedom to choose the applicable law must be regarded as a necessary pillar of judicial cooperation in civil matters.
- 19 Furthermore, the referring court expresses its concern that if the precedence of the regulation were to be denied, there is a risk that, as a result of the bilateral agreements concluded, the various Member States applying the regulation will – from a conflict-of-laws point of view – have a different perception of succession to the same testator/testatrix. Poland is bound by bilateral agreements containing conflict-of-law rules in succession cases, which do not provide for a choice of

law, 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). Germany has agreements of this kind with Turkey, Iran and the successor states of the USSR. Austria has such agreements with the successor states of the former Yugoslavia which are not Member States, Iran and Russia. A uniform resolution of the issue of the hierarchy of the legal rules in question would therefore appear to be important both from the point of view of the legal order of a number of Member States and the uniformity of the common system of conflict-of-law rules drawn up in connection with their unification, and also necessary in order to ensure uniformity of interpretation throughout the geographical territory in which the regulation applies.

WORKING DOCUMENT