THE COURT OF JUSTICE OF THE EUROPEAN UNION'S INTERPRETATION OF REGULATION (EU) NO 650/2012

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Abstract

According to the European legislator, European citizens should be able to organise their succession in advance, especially in the context of a succession having cross-border implications. To this end the European Parliament and the Council of the European Union have adopted Regulation (EU) no. 650/2012 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, that applies to the successions of natural persons who died on or after 17 August 2015.

Since its enforcement, the Court of Justice of the European Union (CJEU) had the opportunity to interpret its provisions four times. In the Kubicka Case (C-218/16) the Court ruled on the refusal to recognise the material effects of legacies 'per vindicationem' in a Member State in which such legacies do not exist (the delimitation of the rules on succession and the rules on property). In the Mahnkopf Case (C-558/16), the Court ruled on the inclusion of an individual provision of German law in the scope of the law applicable to the succession (the delimitation of the rules on succession and the rules on matrimonial property regimes). In the Oberle Case (C-20/17) the Court ruled on the jurisdiction over procedures for issuing national certificates of succession. Last but not least, in the Brisch Case (C-102/18) the Court ruled on the nature of Form IV (Application for a European Certificate of Succession) as set out in Annex 4 of Commission Implementing Regulation (EU) No 1329/2014.

For a better understanding of Regulation (EU) no. 650/2012, this short overview presents, on the one hand, the premises situations which led to the CJEUs rulings mentioned above, and, on the other hand, some of the main arguments behind these decisions, without overlooking a case still pending before the Court of Justice of the European Union.

Keywords: *succession, Regulation (EU) 650/2012, scope, Court of Justice of the European Union (CJEU), preliminary rulings.*

Introduction

The European Parliament and the Council adopted on the 4th of July 2012 the Regulation (EU) no. 650/2012 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[1].

This legislative act applies throughout EU to the succession of natural persons who died on or after 17 August 2015, with the exception of the United Kingdom, Ireland and Denmark which didn't take part in its adoption and aren't bound by it or subject to its application.

Since its enforcement, the Court of Justice of the European Union (CJEU) had the opportunity to interpret its provisions four times: in the Kubicka Case (C-218/16), in the Mahnkopf Case (C-558/16), in the Oberle Case (C -20/17) and recently in the Brisch Case (C-102/18).

The interpretation of its provisions is all the more important as, on the one hand, the correct understanding of this Regulation allows citizens to organise their succession in advance, and on the other hand, the rights of heirs, legatees and of creditors of the succession can be effectively guaranteed only to the extent that its provisions are correctly applied in each given case.

That is why, in the following, we will present the four situations in which, till now, CJEU interpreted the provisions of Regulation (EU) no. 650/2012, without overlooking a case still pending before the Court of Justice of the European Union.

1. Kubicka Case (C-218/16)

In the first case, Ms. Kubicka, a Polish national married to a German national approached a notary practising in Poland in order to make her will. She wished to make a will containing a legacy 'by vindication' *(legatum per vindicationem)* that transfers the ownership of an object directly from the testator to the legatee, provided by Article 981[1] (1) of the Polish Civil Code, in favour of her husband, concerning her share of ownership from the jointly-owned immovable property situated in Germany.

The notary refused to draw up the will considering that such an act would be unlawful since such a legacy is contrary to German legislation and case-law relating to rights *in rem* and land registration, which must be taken into consideration under Article 1

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(2) (k) and (l) and Article 31 of Regulation (EU) no. 650/2012.

The German Civil Code (*Bürgerliches Gesetzbuch*) knows only the legacy 'by damnation' *(legatum per damnationem)*, provided by art. 2174, according to which a legacy creates a right for the legatee to demand delivery of the bequeathed object from the person charged and the legatee's claim arises at the time of the inheritance, so that the legatee is not *ab initio* the holder of a real right, as in the case of the legacy 'by vindication'. That's why, in Germany, a legatee may be entered in the land register only by means of a notarial instrument containing an agreement between the heirs and the legatee to transfer ownership of the immovable property.

In the end, the testator brought an appeal before the Regional Court, Gorzów Wielkopolski – Poland which decided to refer the following question: "Must Article 1(2)(k), Article 1(2)(1) and Article 31 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 be interpreted as permitting refusal to recognise the material effects of a legacy by vindication *(legatum per vindicationem)*, as provided for by [Polish] succession law, if that legacy concerns the right of ownership of immovable property located in a Member State the law of which does not provide for legacies having direct material effect?"[2]

Article 1(2)(k) and (l) provides that the nature of rights *in rem* and any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register are excluded from the scope of the regulation.

According to Article 31 on the adaptation of rights *in rem*, where a person invokes a right *in rem* to which he is entitled under the law applicable to the succession and the law of the Member State in which the right is invoked does not know the right *in rem* in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right *in rem* under the law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it.

However, as the Advocate General rightly pointed out[3], in the Kubicka Case the choice of a legacy 'by vindication' rather than a legacy 'by damnation' doesn't alter the content of the right to be exercised with regard to the asset, but it simply allows a right *in rem* to be transferred directly to the legatee, rather than being passed on indirectly by establishing a right *in personam* for the legatee. Therefore, as noted by the CJEU[4], both the legacy 'by vindication', provided for by Polish law and the legacy 'by damnation', provided for by German law, constitute methods of transfer of ownership of an asset, namely a right *in rem* that is recognised in both of the legal systems concerned. As such, the direct transfer of a property right by means of a legacy 'by vindication' concerns only the arrangement by which that right *in rem* is transferred at the time of the testator's death in accordance with the law governing succession.

The Court went on to state that Article 31 of Regulation no. 650/2012 doesn't concern the method of the transfer of rights *in rem*, but only the respect of the content of rights *in rem*, determined by the law governing the succession (*lex causae* – Polish law), and their reception in the legal order of the Member State in which they are invoked (*lex rei sitae* – German law). Therefore, since the right *in rem* transferred by the legacy 'by vindication' is the right of ownership, which is recognised in German law, there is no need for the adaptation provided for in Article 31.

It should be noted that in the present case, although, at the time of the death of the testator, the transfer of ownership will operate under Polish law, and the legatee, by virtue of the European certificate of succession, will be able to obtain the registration of the property over the inherited assets in the corresponding German register, according to recital (19) of Regulation (EU) no. 650/2012, the law of the Member State in which the register is held (the German law) will determine when the acquisition takes place[5].

2. Mahnkopf Case (C-558/16)

In the second case, Mr. Mahnkopf died on 29 August 2015, leaving behind as heirs a widow and a son. Until the time of his death, the deceased and his widow were subject to the German *statutory* separate property regime with equalisation of accrued gains, they had not entered into a marriage contract and the deceased made no dispositions upon death.

Since the deceased owned a half share in the ownership of a property in Sweden, his widow applied for a European Certificate of Succession in order to be used to record the transfer of ownership of the property in Sweden to the heirs of Mr. Mahnkopf. This application was rejected by the national court, which

[2] See CJEU, *Request for a preliminary ruling from the Regional Court of Gorzów Wielkopolski (Poland)*, lodged on 19 April 2016 – Aleksandra *Kubicka* (Case C-218/16), published in Official Journal of the European Union C 335 from 12 September 2016, p. 30.

[3] CJEU, *Opinion of Advocate General Yves Bot*, delivered on 17 May 2017, *Kubicka*, C-218/16, ECLI:EU:C:2017:387, paragraph 47.

[4] CJEU, *Judgement of 12 October 2017*, *Kubicka*, C-218/16, ECLI:EU:C:2017:755, published in the electronic Reports of Cases (Court Reports - general), paragraph 49.

[5] Recital (19): „The effects of the recording of a right in a register should also be excluded from the scope of this Regulation. […] Thus, where, for example, the acquisition of a right in immovable property requires a recording in a register under the law of the Member State in which the register is kept in order to ensure the *erga omnes* effect of registers or to protect legal transactions, *the moment of such acquisition should be governed by the law of that Member State*".

held that paragraph 1371(1) of the German Civil Code (*Bürgerliches Gesetzbuch* – BGB) concerns questions relating to matrimonial property regimes, which do not fall within the scope of Regulation no. 650/2012.

Consequently, the deceased's spouse challenged this judgment by an appeal lodged with the Higher Regional Court, Berlin – Germany, which decided to refer the following question: "Is Article 1(1) of the EU Succession Regulation 1 to be interpreted as meaning that the scope of the regulation ('succession') also covers provisions of national law which, like Paragraph 1371(1) of the German Bürgerliches Gesetzbuch (BGB, Civil Code), govern questions relating to matrimonial property regimes after the death of one spouse by increasing the share of the estate on intestacy of the other spouse? […]"[6].

Article 1931 from the BGB on the right of intestate succession of the spouse provides in paragraph (1) that the surviving spouse of the deceased as an heir on intestacy is entitled to one quarter of the inheritance together with relatives of the first degree, and paragraph (3) specifies that the provisions of Article 1371 of the same code are not affected. In the Mahnkopf case, according to this provision, the widow received one-fourth of the estate.

According to paragraph (1) of Article 1371 on the equalisation of accrued gains in the case of death, if the property regime is ended by the death of a spouse, the equalisation of the accrued gains is effected by the share of the inheritance on intestacy of the surviving spouse being increased by one quarter of the inheritance and it's irrelevant whether the spouses in the individual case have made accrued gains. This legislative solution allows the simplification of the liquidation of the matrimonial regime between the surviving spouse and the other heirs of the deceased, and it is not necessary to prove any potential patrimonial growth. So the widow's total was half the inheritance in accordance with the national rules on the legal devolution of the inheritance.

Since the German lawmaker solved a problem arising from the patrimonial aspects of matrimonial regimes by resorting to succession law[7], neither the case-law, nor does the doctrine offer a united view on this matter. Some authors include this norm in the field of law applicable to the matrimonial regime, even when the deceased's inheritance is governed by a foreign law[8], while according to other authors the rule is applicable only if the German law is applicable to both the matrimonial regime and the succession[9]. On the other hand, some authors qualify par. (1) of Article 1371 from the German Civil Code as succession rule[10].

The Court of Justice of the European Union concluded that paragraph 1371 (1) of the BGB concerns not the division of assets between spouses but the issue of the rights of the surviving spouse in relation to assets already counted as part of the estate. Accordingly, that provision doesn't appear to have as its main purpose the allocation of assets or liquidation of the matrimonial property regime, but rather determination of the size of the share of the estate to be allocated to the surviving spouse as against the other heirs. Therefore such a provision principally concerns the succession to the estate of the deceased spouse and not the matrimonial property regime. Consequently, a rule of national law such as that at issue relates to the matter of succession for the purposes of Regulation no. 650/2012[11].

This interpretation follows also from the principle that the law governing the succession should govern the succession as a whole, Article 23(2)(e) of Regulation no. 650/2012 providing that it governs "the transfer to the heirs and, as the case may be, to the legatees of the assets, rights and obligations forming part of the estate"[12].

However, the qualification of the norm made in the context of the application of EU law will not always lead to an identical result compared to the classification effected in the context of national conflict-of-law rules, considering that the German Federal Court of Justice decided that paragraph 1371 (1) of the BGB applies as a provision of law applicable to a matrimonial property regimes and, even if the law applicable to matrimonial property regimes is German law and the law applicable to the succession is the law of another State, the surviving spouse continues to be entitled to a share of the estate under paragraph (1) of article 1371 from the BGB[13].

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[6] See CJEU, *Request for a preliminary ruling from the Kammergericht Berlin (Germany)*, lodged on 3 November 2016 – Doris Margret Lisette *Mahnkopf* (Case C-558/16), published in Official Journal of the European Union C 30 from 31 January 2017, p. 20-21.

[7] This solution is considered by the dominant doctrine to be profoundly wrong – see Reinhard Zimmermann, *Intestate succession in Germany*, in K. G. C. Reid, M. J. de Waal, R. Zimmermann (eds.), „Comparative Succession Law. volume II: Intestate Succession" (New York : Oxford University Press, 2015), 213 and the authors mentioned in n. 310.

[8] See Dan Adrian Popescu, *Ghid de drept internațional privat în materia succesiunilor (Guide on international private law in successions matters)*, (Onești: Magic Print, 2014), 18, n. 37.

[9] Andrea Bonomi, *Le régime matrimonial et les conséquences patrimoniales des autres relations comparables au mariage*, in A. Bonomi, P. Wautelet, I. Pretelli, „Le droit européen des successions. Commentaire du Règlement (UE) n° 650/2012 du 4 juillet 2012", 2e édition (Bruxelles: Éditions Bruylant, 2016), 89, n. 30.

[10] See CJEU, *Opinion of Advocate General Maciej Szpunar*, delivered on 13 December 2017, *Mahnkopf*, C-558/16, ECLI:EU:C:2017:965, paragraph 31 and the authors mentioned in n. 6.

[11] CJEU, *Judgement of 1 March 2018, Mahnkopf*, C-558/16, ECLI:EU:C:2018:138, published in the electronic Reports of Cases (Court Reports - general), paragraph 40.

[12] *Idem*, paragraph 55.

[13] See CJEU, *Opinion of Advocate General Maciej Szpunar*, delivered on 13 December 2017, *Mahnkopf*, C-558/16, ECLI:EU:C:2017:965, paragraph 31 and the case-law mentioned in n. 5.

3. Oberle Case (C-20/17)

In the third case, Mr. A. Th. Oberle, a French citizen with his last usual residence in France, died on 28 February 2015. The constituent elements of the succession were located both in France and Germany. The deceased left behind two sons. A French court issued a national certificate of succession stating that the two brothers each inherit half of the estate.

Subsequently one of the heirs applied to the Local Court, Schöneberg, Berlin – Germany for the issuing of a national certificate of succession limited to the estate located in Germany[14]. That certificate was to state that the estate is inherited by the two brothers under French law. The court declared that it lacked jurisdiction to issue a national certificate of succession under Articles 4 and 15 of Regulation no. 650/2012 because the provisions of German law cannot determine international jurisdiction since the provisions of national law must yield to the provisions of Regulation no. 650/2012. In the court's view, the French courts, as the courts of the Member State where the deceased had his habitual residence at the time of death, and not the German courts, have jurisdiction to rule on the succession as a whole, including the application.

Consequently, an appeal was brought against that decision before the referring court which decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling: "Is Article 4 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 1 (Regulation No 650/2012) to be interpreted as meaning that it also determines exclusive international jurisdiction in respect of the granting, in the Member States, of national certificates of succession which have not been replaced by the European certificate of succession (see Article 62(3) of Regulation No 650/2012), with the result that divergent provisions adopted by national legislatures with regard to international jurisdiction in respect of the granting of national certificates of succession — such as Paragraph 105 of the Familiengesetzbuch (the Family Code) in Germany — are ineffective on the ground that they infringe higher-ranking European law?[15]

Article 4 of Regulation (EU) no. 650/2012 on general jurisdiction provides that the courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole.

So, the referring court asked for clarifications as to whether Article 4 defines 'exclusive jurisdiction' also over procedures for the issuing of national certificates of succession, or in other words whether Article 4 determines jurisdiction over procedures for issuing national certificates of succession, in the case of Member States where the judicial authorities can issue national heir certificates.

The Advocate General argued that even from an earlier stage of the legislative process it was assumed that the international jurisdiction of the authorities of the Member States over the issuing of national certificates of succession would be decided not by national law but by the uniform rules of jurisdiction contained in the regulation[16], and this view is confirmed by the literal, systematic and teleological interpretation, supported by the historical interpretation of Article 4 of Regulation (EU) No 650/2012.

The Court of Justice of the European Union embraced this point of view and decided that Article 4 of Regulation (EU) No 650/2012 […] must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which provides that, although the deceased did not, at the time of death, have his habitual residence in that Member State, the courts of that Member State are to retain jurisdiction to issue national certificates of succession, in the context of a succession with cross-border implications, where the assets of the estate are located in that Member State or the deceased was a national of that Member State"[17].

This interpretation upholds its previous judgment rendered in Kubicka case[18] according to which an interpretation of the rules of Regulation No 650/2012 which would lead to the fragmentation of the succession would be incompatible its objectives and one of those objectives is precisely to establish a uniform regime applicable to successions with cross-border implications, including the harmonising the rules relating to the international jurisdiction of the courts of the Member States in both contentious and non-contentious proceedings.

4. Brisch Case (C-102/18)

In the fourth case A German national with the last usual habitual residence in Cologne (Germany) died on 2 June 2017. The executor of the deceased's last will, pursuant to Article 65(1) of Regulation no. 650/2012, Mr. Brisch, applied to the Local Court in Cologne on 16 October 2017 on the basis of a notarised instrument

[14] For the view that the jurisdiction of the Member States courts to issue certificates of inheritance is determined by virtue of their national law, see Felix Odersky în U. Bergquist, D. Damascelli, R. Frimston, P. Lagarde, F. Odersky, B. Reinhartz, *Commentaire du règlement européen sur les successions* (Paris, Éditions Dalloz, 2015), 59.

[15] See CJEU, *Request for a preliminary ruling from the Kammergericht Berlin (Germany)*, lodged on 18 January 2017 – Vincent Pierre *Oberle* (Case C-20/17), published in Official Journal of the European Union C 112 from 10 April 2017, p. 19.

[16] CJEU, *Opinion of Advocate General Maciej Szpunar*, delivered on 22 February 2018, *Oberle*, C-20/17, ECLI:EU:C:2018:89, paragraph 118.

[17] CJEU, *Judgement of 21 June 2018, Oberle*, C-20/17, ECLI:EU:C:2018:485, not yet published (Court Reports - general).

[18] CJEU, *Judgement of 12 October 2017, Kubicka*, C-218/16, ECLI:EU:C:2017:755, published in the electronic Reports of Cases (Court Reports - general), paragraph 57.

of 11 October 2017 for a certificate in respect of the deceased's estate located in Italy, but did not use Form IV in Annex 4 to Implementing Regulation No 1329/2014 ('Form IV').

The Court requested the use of Form IV but Mr. Brisch refused to accede to that request and asserted that he was free - but not required - to use that form. Therefore, the court rejected the application for the certificate on the ground that Mr Brisch did not use Form IV and that therefore the application had not been lodged in the prescribed form. Consequently, Mr. Brisch brought an appeal before the Higher Regional Court on the ground that it follows both from Article 65(2) of Regulation no. 650/2012 and from Form IV itself that the use of the latter is optional.

The referring court decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling: "Is the use of the form as set out in Annex 4 as Form IV, established in accordance with the advisory procedure under Article 81(2) of the EU Succession Regulation, mandatory or merely optional for the purposes of an application for a European Certificate of Succession under Article 65(2) of the EU Succession Regulation, in accordance with Article 1(4) of the Implementing Regulation for the EU Succession Regulation?"[19].

According to Article 65 on the application for a certificate, for the purposes of submitting an application, the applicant *may use* the form established in accordance with the advisory procedure referred to in Article 81(2), and Article 1(4) from Regulation no. 1329/2014 states that the form *to be used* for the application for a European Certificate of Succession referred to in Article 65(2) of Regulation No 650/2012 shall be as set out in Annex 4 as Form IV.

The Court of Justice of the European Union considered that the wording of Article 65(2) of Regulation No 650/2012 is not ambiguous as regards the optional nature of the use of Form IV and Article 1(4) of Implementing Regulation No 1329/2014 and must be read in conjunction with Annex 4 to that regulation, to which it refers and which includes Form IV, since in the section 'Notice to the applicant', which heads Form IV, it is clearly specified that Form IV is optional. Therefore, it is clear from a literal interpretation of Article 65(2) of Regulation No 650/2012, read in conjunction with Annex 4 to Implementing Regulation No 1329/2014, that, for the purposes of an application for a certificate, the use of Form IV is optional[20].

This interpretation confirms the position of the doctrine that the regulation only suggests the use of the form but the applicant has all the interest in using it as it facilitates the mission of the authority responsible for issuing the European Certificate of Succession[21]. In addition, the claimant may also use a form provided for in the national law of the issuing authority where the Member State also has a national procedure for the issue of national succession certificates[22].

5. WB Case (C-658/17)

Besides the four judgments outlined above, there is a case still pending before the Court of Justice of the European Union. This fifth case provides the Court with the opportunity to offer useful guidance on the limits of the notions of "decision" and "court" within the meaning of Regulation no. 650/2012, establishing in particular whether a notary to whom national law confers jurisdiction to issue certificates of succession exercises "judicial functions"[23].

In the opinion of the Advocate General the notary who draws up a certificate of succession on the joint application of all the parties to the notarial procedure under the provisions of Polish law does not fall within the definition of "court of law" within the meaning of that regulation and, consequently, the Polish national certificate of succession drawn up by the notary does not constitute a "decision" within the meaning of Article 3 (1) (g) of Regulation (EU) No 650/2012, but it constitutes an "authentic instrument"[24].

The upcoming judgement of the Court of Justice of the European Union will be particularly relevant since it will also have an impact on the national certificates of inheritance issued by notaries in Romania, as they are part of the Latin type notarial system, together with their colleagues in Poland.

Instead of a Conclusion

This instrument in matters of succession, dealing, in particular, with the questions of conflict of laws, jurisdiction, mutual recognition and enforcement of decisions and a European Certificate of Succession, has a bright future ahead in supporting citizens to organise their succession in advance, and its clarifying interpretation by the Court of Justice of the European Union can only strengthen the freedom, security and justice in the European Union.

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[19] See CJEU, *Request for a preliminary ruling from the Oberlandesgericht Köln (Germany)*, lodged on 13 February 2018 – Klaus Manuel Maria *Brisch* (Case C-102/18), published in Official Journal of the European Union C 142 from 23 April 2018, p. 35.

[20] CJEU, *Judgement of 17 January 2019, Brisch*, C-102/18, ECLI:EU:C:2018:485, not yet published (Court Reports - general), paragraph 28.

[21] Patrick Wautelet in in A. Bonomi, P. Wautelet, I. Pretelli, *Le droit européen des successions. Commentaire du Règlement (UE) n° 650/2012 du 4 juillet 2012*, 2e édition (Bruxelles: Éditions Bruylant, 2016), 814.

[22] B. Reinhartz in U. Bergquist, D. Damascelli, R. Frimston, P. Lagarde, F. Odersky, B. Reinhartz, *Commentaire du règlement européen sur les successions* (Paris, Éditions Dalloz, 2015), 228.

[23] See CJEU, *Request for a preliminary ruling from the Sąd Okręgowy w Gorzowie Wielkopolskim (Poland)*, lodged on 24 November 2017 – WB (Case C-658/17), published in Official Journal of the European Union C 134 from 16 April 2018.

[24] CJEU, *Conclusions de l'avocat général M. Yves Bot*, présentées le 28 février 2019 (édition provisoire), Affaire C-658/17, WB, ECLI:EU:C:2019:166, paragraph 110.

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