INSIGHT

The *E.E.* Decision Sheds Light on Notaries Acting as "Courts" and on a Few Other Notions Within the Context of the Succession Regulation

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Abstract: The preliminary questions of the Supreme Court of Lithuania in case *E.E.* (C-80/19) presented a unique opportunity to provide a more detailed and comprehensive interpretation of several provisions of the Succession Regulation. Responding to them, in its judgment of 16 July 2020 the CJEU discussed the understanding of the cross-border nature of the succession case, the concept of habitual residence, the notion of court and the status of notaries in this regard, the scope of jurisdictional rules, authentic instruments and, finally, the choice of court and applicable law. While some of the issues were already covered in the earlier case-law, this judgment brings more structure and clarity to the interpretation of the Succession Regulation, particularly with regard to the habitual residence of the deceased, status of notaries and their duties when issuing national succession certificates. This *Insight* gives a brief account of the legal and factual background of the case, discusses the main points of the CJEU judgment and follows the case back to the national level.

Keywords: Succession Regulation – habitual residence – term "court" – notaries as "courts" – jurisdictional competence – choice of law.

I. Preliminary remarks

The EU slogan "United in diversity" perfectly describes the co-existence of national legal systems in the EU as well as the EU approach when adopting instruments in the area of private international law. Even though based on mostly the same principles, the substantial and procedural laws of EU Member States diverge and the EU face considerable challenges when adopting common rules and setting the standards that would fit all. This is, *inter alia*, clearly reflected in the area of succession.

The Succession Regulation[1] is an instrument that was developed having in mind a variety of succession models existing in the Member States. Since in some of the States

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succession is dealt with through courts, and in others through notaries or other authorities, the Regulation seeks to take into account such national differences. In this regard, already in several cases, the Court of Justice of the European Union (CJEU) was called to elaborate how the provisions of the Succession Regulation apply to succession procedure settled by notaries.

This was exactly what happened in case *E.E.* (C-80/19)[2] originating from the preliminary reference made by the *Lietuvos Aukščiausiasis Teismas* (Supreme Court of Lithuania) where the CJEU was called to interpret several provisions of the Succession Regulation. The dispute has arisen in the context of the succession of a deceased Lithuanian national who lived in Germany. As her heir applied to a notary of Lithuania, the main legal consideration evolved around the concept of "court" and the extent to which notaries in succession cases have functions comparable to those of courts and thus are bound by jurisdictional rules of the Succession Regulation.

Déjà vu? Indeed, a couple of judgments of the CJEU were already delivered on the questions that to a certain extent overlap with the ones in the *E.E*. In *WB* (C-658/17),[3] the Polish court also sought clarification on the concept of "court" within the meaning of the Succession Regulation with the focus on notaries. The CJEU concluded that Polish notaries do not qualify as "courts" since they do not exercise "judicial functions". More precisely, the CJEU concluded that a notary who draws up a deed of a certificate of succession at the joint request of all the parties to the procedure conducted by the notary does not constitute a "court" within the meaning of art. 3(2) and, consequently, such a deed does not constitute a "decision" within the meaning of art. 3(1)(g). The case also dealt with the nature of the national certificates of succession rights and in this regard, the CJEU ruled such certificates constitute an "authentic instrument".[4]

One might also notice links with *Oberle* (C-20/17)[5] case where the question of competence of national authorities to issue certificates of succession was addressed. In that case, the Court ruled that art. 4 of the Succession Regulation must be interpreted as precluding legislation of a Member State "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,

[1] Regulation (EU) 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.

[2] Case C-80/19 *E.E.* ECLI:EU:C:2020:569.

[3] Case C-658/17 *WB* ECLI:EU:C:2019:444.

[4] For a more detailed analysis of the case see: M Wilderspin, 'The Notion of "Court" under the Succession Regulation' (29 June 2020) *Problemy Prawa Prywatnego Międzynarodowego* journals.us.edu.pl.

[5] Case C-20/17 *Oberle* ECLI:EU:C:2018:485.

where the assets of the estate are located in that Member State or the deceased was a national of that Member State".

Even if certain issues were already discussed by the Court, the *E.E.* judgment contributes to the development of the CJEU's jurisprudence as it goes further and brings light to several questions that were not yet covered. What is important, the Supreme Court of Lithuania raised questions whether the jurisdictional rules of the Succession Regulation should nevertheless be applied if the Lithuanian notaries would not qualify as "courts", and whether a notary would then be bound by the rules on jurisdiction of the Succession Regulation when he or she issues a national certificate of succession. Moreover, the CJEU was called to elaborate on the concept of "habitual residence" of the deceased as well as on the provision on the choice of court and applicable law.

II. The facts of the case and the reference for a preliminary ruling

In 2011, a Lithuanian woman married a German national. Since then and until she died in 2016, she lived in Germany with him and her under-aged son from previous relations (E.E., also a Lithuanian national). While living in Germany, she travelled back to Lithuania and drew up a will at a notary office in Kaunas (Lithuania). In her will, she designated her son E.E. as the heir to her entire estate (an apartment she owned in Lithuania).

After the death of his mother, E.E. contacted the notary office in Kaunas (Lithuania) requesting to initiate the succession procedure and to issue a certificate of succession rights. The notary refused claiming that, according to the Succession Regulation, the deceased had her habitual residence at the time of death in Germany and thus jurisdiction lies with German authorities. E.E. challenged the notary's refusal before the national court. The spouse of deceased expressed in clear terms that he has no interest in the succession and agreed to the jurisdiction of the Lithuanian courts.

The Kaunas district court ruled in favour of E.E. It ordered the notary to open the succession procedure, as the property was located in Lithuania, and to issue a certificate of rights of succession. The court stated that E.E.'s mother was a Lithuanian national and owned immovable property in Lithuania; moreover, she had preserved links with Lithuania, she drew up her will there. On appeal, the Kaunas regional court set aside the ruling of the court of the first instance. The appeal court considered that the court of the first instance had unreasonably relied on general principles. Then, E.E. lodged an appeal in cassation and the case reached the Supreme Court.

The Supreme Court of Lithuania stayed the proceedings and referred for a preliminary ruling six questions on the interpretation of the Succession Regulation.

First, the referring court asked to clarify whether, considering the factual circumstances of the case, the succession at stake is to be regarded as a "succession with cross-border implications" within the meaning of the Succession Regulation to which this Regulation must be applied.

Second, the Lithuanian court raised a question of whether Lithuanian notaries, considering their duties and powers, meet the definition of "court" under art. 3(2) of the Regulation.

Third, if Lithuanian notaries fall under the definition of "court", should certificates of succession rights issued by them be regarded as being decisions within the meaning of art. 3(1)(g) of the Succession Regulation and must jurisdiction for that reason be established for the purpose of issuing them.

Fourth, should this not be the case, the Supreme Court wanted to know whether Lithuanian notaries can issue national certificates of succession without following the rules of jurisdiction established in the Regulation and if these are deemed to be authentic instruments which have legal effects in other Member States.

Fifth, the referring court asked to confirm that the habitual place of residence of the deceased can be established in only one specific Member State.

And lastly, the Lithuanian Court posed certain questions relating to the choice of Lithuanian law and on the choice-of-court agreement by the parties concerned.

III. Main points of the CJEU judgment

III.1. Succession having cross-border implications

By its first question, the Lithuanian Supreme Court sought to clarify the meaning of the term "succession with cross-border implications". Such term is not used in the main text of the Regulation however, it can be found in the Preamble (Recitals 1, 7 and 67).

Knowing the factual circumstances of this case such a question seems to be rather artificial. However, it is less so if you are familiar with the national background: around 1 in 5 Lithuanian nationals live abroad, many of them keeping close links with Lithuania; once a problem arises (be it divorce or succession) often they return to Lithuania and refer to Lithuanian institutions to settle the issue. Courts and notaries are used to the pleas of Lithuanian expats who claim their links with the State and thus ask to deal with their case. In *E.E.* this tendency is clearly visible: the Lithuanian Supreme Court is reiterating the argument of the claimant that despite having her last habitual residence in Germany, the deceased had never broken her links with her country of origin, where she had drawn up a will and where almost all her estate was located.

Naturally, the CJEU found this question easy to answer. The factual circumstances of this case could serve as a model case-study to explain what is the "succession with cross-border implications". Therefore, the CJEU ruled that succession has cross-border implications where the habitual residence of the deceased and her major assets were located in different Member States (para. 45).

III.2. Habitual residence: "no, you cannot have two!"

A closely linked preliminary question was whether, for the purposes of the Succession Regulation, a person may have more than one habitual residence. Within the scheme of the Regulation, habitual residence is the general connecting factor for determining international jurisdiction and the applicable law, thus an answer to this question is very important.[6]

The CJEU did not take long to answer such a question and gave a clear and definite answer. Even though admitting that determining the deceased's habitual residence may prove complex, the Court ruled that the Succession Regulation is built on the concept of a single habitual residence of the deceased (para. 40). The Court noted, agreeing with the opinion of AG Campos Sánchez-Bordona, that arguments of predictability, legal certainty, prevention of contradictory outcomes and the fact that the applicable law is intended to govern the succession as a whole to prevent its fragmentation, support the proposition that there should be a single place of habitual residence (para. 41).

As for criteria for establishing the habitual residence of the deceased, the Court in *E.E.* set a certain standard that was not clearly established before (paras 36-39). In particular, the CJEU referred to the Recitals 23 and 24 of the Regulation's Preamble, suggesting the referring court to consider the criteria set therein (and in an order that such criteria are listed in the Recitals) to establish the habitual residence of the deceased. In such a way, a cascade of criteria for establishing habitual residence was set. Firstly, to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. Afterwards, the authority should verify where the centre of interests of the deceased person's family and his social life was. Only if this is still not enough to establish habitual residence, the secondary set of criteria – nationality and location of assets – should be taken into account.

III.3. Definition of the term "court": focus on notaries and their functions

Another set of the preliminary questions related to the understanding of "court" and implications linked thereto. In line with art. 3(2) of the Succession Regulation, the term "court" means any judicial authority, however, it also includes non-judicial authorities or

[6] On habitual residence in the context of succession cases, see M Atallah, 'The Last Habitual Residence of the Deceased as the Principal Connecting Factor in the Context of the Succession Regulation (650/2012)' (2015) Baltic Journal of European Studies 130.

legal professionals with competence in matters of succession, where they exercise judicial functions or act pursuant to a delegation of power by a judicial authority or act under the control of judicial authority, provided that they satisfy the conditions listed in that provision.[7] This definition, as confirmed by the cases before the CJEU, is not that clear in practice.

The critical point in this definition is that such non-judicial authorities or legal professionals should be exercising judicial functions. The term "exercise judicial functions" was already explained by the CJEU earlier, although in the different context. With regard to the Brussels I Regulation in civil and commercial matters, for example, the Court has ruled that the exercise of judicial functions means that the person concerned has the power to rule of his own motion on possible points of contention between the parties concerned.[8] In regard to making a reference for preliminary ruling under art. 234 EC, instead, for an authority to be regarded, in the light of the specific nature of its activities, as exercising a judicial function, it must be given the power to decide a legal dispute.[9] This is not the case where the powers of the professional concerned are entirely dependent on the will of the parties. Therefore, an authority must be regarded as exercising judicial functions where it may have jurisdiction to hear and determine disputes in matters of succession.[10]

Such requirements mean, that notaries in European States will rarely be seen as courts in the context of the Succession Regulation.[11] In *E.E.*, similar to *WB* (C-658/17) case, the CJEU found that a Lithuanian notary is not to be regarded as a "court" within the meaning of art. 3(2) of the Succession Regulation because it does not have the right to exercise judicial functions (para. 54). In particular, as summarized by the AG Campos Sánchez-Bordona, Lithuanian notary does not have the competence to adjudicate on the issues in dispute between the parties. He has no power to establish matters of fact that are not clear and obvious, or to rule on facts in dispute; where there are doubts about the

[7] In this context, it is worth reminding that in accordance with art. 79, each Member State is obliged to inform the European Commission about whether such an authority exists in their legal system and if that is the case, who that authority is. The European Commission compiles such information and makes it available on the European Judicial Network in civil and commercial matters. However, failure by a Member State to notify the Commission of the exercise of judicial functions by a certain authority (e.g. notaries), as required under art. 79, is not decisive for their classification as a "court" (*WB*, case C-658/17).

[8] Case C-414/92 *Solo Kleinmotoren* EU:C:1994:221 paras 17-18.

[9] Case C-344/09 *Bengtsson* EU:C:2011:174 para. 19 and the case-law cited.

[10] *WB* cit. para. 56.

[11] This does not mean, however, that notaries will never be seen as "courts". It is apparent from recital 20 of the Succession Regulation that the term "court" could encompass notaries where they exercise judicial functions in relation to certain matters of succession. At the same time, that same recital continues that the term "court" should not cover non-judicial authorities of a Member State empowered under national law to deal with matters of succession, such as the notaries in most Member States, where, as is usually the case, they do not exercise judicial functions.

content of the will, it is not for him to explain it and he cannot endorse an interpretation offered by one of the heirs or, in the event of disagreement between them, determine which understanding of the text reflects the actual intention of the deceased. In the event of any dispute or doubt, a Lithuanian notary must refrain from making any decisions, it being for the court to adjudicate in that regard (paras 81-82 of the AG opinion).

The CJEU thus concluded that a national certificate of succession rights by a Lithuanian notary does not involve the exercise of judicial functions (para. 54). The only exception is where the notary acted pursuant to a delegation of power by a judicial authority or under the control of such an authority (para. 55). The CJEU left it to the national court to ascertain whether this is the case.

III.4. Consequences of classifying the authority as "not court" under art. 3(2) of the Succession Regulation

Whether certain authority falls under the notion of "court" carries considerable importance – "courts" are bound by the jurisdictional rules of the Regulation, whereas "other authorities", such as notaries, are not, unless they are exercising judicial functions or act pursuant to a delegation of power by a judicial authority or under the control of such an authority (Recital 22, art. 3(2))[12].

If the Lithuanian notary is to be regarded as "court" (as noted, this was left for the national court to decide), he would be bound by jurisdictional rules of the Regulation and a certificate of succession issued by a notary would be regarded as a "decision" within the meaning of art. 3(1)(g) of the Regulation (para. 60). This would affect the circulation rules of the documents: "court" decisions circulate in accordance with the provisions on recognition, enforceability and enforcement of decisions (art. 39), while other documents circulate following the provisions on authentic instruments (art. 59).[13]

If on the opposite, the Lithuanian notary is not to be regarded as a court (which was highly likely when reading the CJEU judgment), he would not be bound by the rules of international jurisdiction laid down in the Regulation (arts 4-19), as clearly stated by Recital 22. This in practice means that a notary can issue a national succession certificate according to national jurisdiction rules, which may disregard the habitual residence of the deceased (para. 80). Such national succession certificate then

[12] The circulation rules of the documents issued by such institutions is also different: "court" decisions circulate in accordance with the provisions on recognition, enforceability and enforcement of decisions (art. 39), other documents circulate in accordance with the provisions on authentic instruments (art. 59). For the commentaries of these articles see AL Calvo Caravaca, A Daví and H-P Mansel (eds), *The European Succession Regulation, A Commentary* (Cambridge University Press 2016).

[13] On the evidentiary effects of succession authentic instruments, see P Beaumont, J Fitchen, J Holliday, *The evidentiary effects of authentic acts in the Member States of the European Union, in the context of successions*. Report for the European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, www.europarl.europa.eu.

constitutes an authentic instrument (again, this was left to the national court to verify, but the guidelines were set), and its evidentiary force has to be accepted in the other Member States under art. 59(1) of the Regulation.

III.5. Choice of law and choice of forum

By its last question, the Supreme Court of Lithuania sought to ascertain whether the deceased had opted for the law of her nationality, and the heirs for the jurisdiction of the Lithuanian courts. In principle, the Succession Regulation grants a certain degree of autonomy to the deceased and to the heirs to choose applicable law and court.[14] In particular, the deceased can choose the law of the State of his/her nationality (art. 22); and the heirs can opt for the courts of a Member State whose law had been chosen by the deceased (arts 5 and 7).

As regarding the applicable law, E.E.'s mother had not expressly chosen the law of her nationality. Her will only stated that it is governed by Lithuanian law. However, important here was the time frame: the deceased had drawn up the will in Lithuania before the entry into force of the Regulation. As she died after this date, the transitional provisions of art. 83 of the Regulation had to be applied.[15] The CJEU thus considered that the law under which that will was drawn up (Lithuanian law) was chosen as the law applicable to the succession (para. 94).

As regarding the choice of court, the question was if the potential heirs (E.E. and the deceased's husband) had chosen the jurisdiction of Lithuanian courts. According to the Succession Regulation they could have done so by signing a choice-of-court agreement (art. 5) or through express declarations in which they accepted the jurisdiction of the court seized (art. 7). In this case, no separate agreement was concluded, thus it had to be evaluated whether the conditions of art. 7 were fulfilled. Again, the CJEU left the question to be decided by the referring court.

[14] Initially, the European legislature did not plan to introduce the party autonomy and the possibility of choosing jurisdiction in succession matters. Later, this option was added to the text, but was kept very limited. See the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession ({SEC(2009) 410} {SEC (2009)411} COM/2009/0154 final - COD 2009/0157*. See also F Maultzsch, 'Party autonomy in European private international law: uniform principle or context-dependent instrument?' (2016) Journal of Private International Law 466.

[15] In line with art. 83(4), "if a disposition of property was made prior to 17 August 2015 in accordance with the law which the deceased could have chosen in accordance with this Regulation, that law shall be deemed to have been chosen as the law applicable to the succession".

IV. Case back in Lithuania

After the CJEU's judgment, the case bounced back to the Supreme Court of Lithuania. As a result, on 4 November 2020, the Supreme Court of Lithuania adopted the ruling No e3K-3-422-378/2020 which finalised the dispute.

Having the CJEU guidance at hand, the Supreme Court of Lithuania established that the deceased was habitually resident in Germany. It took into account the fact that she declared her emigration to Germany, married there, she and her minor son lived in Germany where she died, therefore, the length and regularity of stay as well the fact that family residence was there clearly suggested her habitual residence in that State. Accordingly, the case had to be classified as "succession with cross-border implications".

It then proceeded to analyse if Lithuanian notaries fall under the concept of "courts" within the meaning of the Succession Regulation. Having once again gone through the national law, the Supreme Court concluded that the issuance of a national certificate of the right of inheritance does not imply the exercising judicial functions in the Republic of Lithuania. The Court based its conclusion on the fact that notary just confirms the undisputable subjective rights, but it does not have an authority to resolve the possible disputes. Therefore, as expected, the Supreme Court of Lithuania ruled that a notary in Lithuania does not fall under the notion of "court" within the meaning of the Succession Regulation. As a result, it is competent to issue a national succession certificate without referring to the jurisdictional rules of the Regulation. Such jurisdictional rules would only come into play in the event of a dispute if the court's jurisdiction should be determined. Going a bit further than the present case, the Supreme Court suggested, that for the purpose of uniformity, the national legislator could enact a provision obliging Lithuanian notaries to follow the rules of jurisdiction established in the Succession Regulation in cases as *E.E.*, however, in their absence, notaries in Lithuania are only bound by the current national jurisdiction rules.[16]

[16] In accordance with art. 5.66 of the Civil Code of the Republic of Lithuania, heirs who have inherited by law or by will may request the notary of the place of origin of the estate to issue a certificate of succession. The main rule is that the last permanent residence of the deceased is considered to be the place of origin of the estate (art. 5.4 of the Civil Code). If the deceased did not live permanently in one place, the place of origin of the estate is established taking into account the most recent residence if it lasted more than 6 months, the centre of economic or personal interests of the deceased, location of property, place where spouse and children reside (art. 5.4(2)(2) of the Civil Code). In the present case, the Supreme Court stated as follows: "it was established that the testator's last habitual residence was in Germany, but the only heir named in the will applied for a national certificate of succession to the notary in Kaunas where the property is located. The panel notes that, in the circumstances described by the applicant, the notary could have decided that the testator lived in several States because, despite declaring her departure from Lithuania and spending more time in Germany, as all the property the deceased owned was located in Lithuania, she concluded her will here, Lithuania was identified as a place of residence in the application of the heir. Therefore, in accordance with art. 5.4(2)(2) of the Civil Code, the notary could have decided that Lithuania could be considered the place of origin of the estate, and he was competent to issue a national certificate of succession". The

The national court, following the reasoning of the CJEU, also confirmed that Lithuanian law should apply to the case (in accordance with art. 83(4) of the Regulation). It also stated that the parties have accepted the jurisdiction on Lithuanian courts – E.E by applying to Lithuanian court and his stepfather by issuing a respective statement (art. 7(c) of the Regulation.

The Supreme Court of Lithuania concluded that in cases as *E.E*., without taking into account the jurisdictional rules of the Regulation, the Lithuanian notary may issue national succession certificate that would have a power of an authentic instrument.

V. Concluding remarks

This case and the questions submitted for a preliminary ruling reflect common challenges of the domestic authorities when dealing with cross-border succession. Hopefully, at least part of questions typically appearing before such authorities will now be easier to answer having this CJEU judgment and its authoritative guidance. The formulation of preliminary questions submitted by the Lithuanian Supreme Court allowed the CJEU to provide a more extensive interpretation of the Succession Regulation and several issues relevant for many similar cases were dealt with.

An important contribution of this judgment is a clear answer that multiple habitual residences are not possible under the Succession Regulation. In this regard, it is interesting to note that some time before the *E.E*. decision, the Paris Court of Appeal in *IB v FA* (Case C-289/20)[17] requested to clarify the possibility of multiple habitual residences in relation to jurisdictional rules of the Regulation Brussels II bis.[18] The case is pending at the moment, however, it seems that academic speculations as regards the possibility to have more than one habitual residence in family matters and succession will finally be resolved with a clear answer of the CJEU.

Moreover, in *E.E.* the CJEU further developed the concept of "habitual residence" by referring to the criteria set in the Preamble of the Regulation. Not only the main criteria were identified in this way, but also hierarchy between the criteria was defined. This is likely to be a very useful explanation to national authorities dealing with succession.

It is the second case (the first being *WB*, C-658/17) where it was concluded that notaries do not exercise judicial functions for the purpose of the Succession Regulation.

Supreme Court added that "such an assessment of the situation in question would also be consistent with one of the objectives of Succession Regulation, which is to simplify the lives of heirs (Recital 32 of the Regulation 650/2012), by enabling them to obtain a national certificate of succession there where the property is located or where the heirs reside".

[17] Case C-289/20, request for a preliminary ruling from the *Cour d'appel de Paris* (France) lodged on 30 June 2020, *IB v FA* para. 34.

[18] Regulation (EC) 2201/2003 of the European Council of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) 1347/2000.

While this does not mean that such finding would be reached with respect to all notaries in EU Member States, it is likely that this judgment will be a reference point for notaries in States where regulation of notary duties are comparable to those in Lithuania or Poland. Another important point made by the CJEU is that notaries issuing national certificates of succession are not bound by the jurisdictional rules of the Regulation. They should follow national rules which (possibly) may differ from those set in the Regulation.