# CJEU on the deceased's habitual residence

*Written by Vito Bumbaca, University of Geneva*

On 16 July the CJEU issued its preliminary ruling in case *E.E. & K.-D. E.* (CJEU, C-80/19, ECLI:EU:C:2020:569, not yet available in English). The case concerned, *inter alia*, the assessment of the deceased's habitual residence under the EU Succession Regulation No. 650/2012. Given the novelty of the ruling, which represents the very first CJEU assessment of the deceased's habitual residence under the EU Succession Regulation, we will focus on this particular aspect only.

**Facts:**

A Lithuanian mother and her son moved to Germany to live with the mother's husband. Prior to her death in Germany, she drew up a testament in Lithuania, naming her son as her sole heir. The mother owned an apartment in Lithuania and when she died (in Germany), her son approached a notary in Lithuania concerning the apartment and in order to obtain a Certificate of Succession. This notary refused both requests based on their interpretation of the EU Succession Regulation according to which the deceased's last habitual residence was in Germany at the time of death. The deceased's son appealed against such a decision; subsequently the proceedings reached the Lithuanian Supreme Court (Lietuvos Aukš?iausiasis Teismas), which decided to stay proceedings and ask the preliminary ruling of the CJEU. The CJEU found that a person can have only one habitual residence.

**Relevance:**

This is the first CJEU ruling on the determination of the deceased's habitual residence under the EU Succession Regulation.

It is welcomed to the extent that it provides a guiding assessment of the hierarchical order and practical implementation of recitals 23, 24 and 25. These are considered as explanatory rules for the determination of international competence and applicable law in matters of *EU 25* cross-border succession based on habitual residence as a primary connecting factor.

Specifically, the Court clarifies which key factors should be assessed in the determination of the deceased's habitual residence by virtue of the above-mentioned recitals and in line with the objectives followed by the EU Succession Regulation. Furthermore, it confirms that, when assessing the deceased's habitual residence at the time of death, a lengthy determination of the deceased's life circumstances preceding his/her death should be made. Lastly, it leaves unresolved the factual assessment of the manifestly closest connection criterion applicable on an exceptional basis.

**Brief analysis:**

According to the Court, the deceased cannot simultaneously have more than one habitual residence at the time of death (§ 41). This however does not exclude the possibility of acquiring an alternative and consecutive habitual residence at different points in time during the deceased's life. The Court indicated that by virtue of recital 23 the main element in determining the deceased's habitual residence is the stability of his/ her stay, and therefore of his/ her physical presence, at the time of death (§ 38). In the absence of stability, therefore on a subsidiary basis (§ 39), recital 24 advises national authorities, in some circumstances including notaries (§ 46), to refer to the deceased's nationality (personal factor) and/ or assets (economic factor). Finally, the criterion relating to the "manifestly closest connection" in relation to the determination of applicable law will have to be applied in a strict manner and not subsidiary to the complex determination of habitual residence, in accordance

with the principles of predictability and legal certainty as provided for by the EU Regulation (§ 37). The exceptional use of the "manifestly closest connection" criterion, however, is left to the judicial discretion of the first seised national courts (§ 45).

Ultimately, according to the Court's reasoning, which follows the Advocate General's Opinion of 26 March 2020 (§ 52), the element of stability relating to the deceased's physical presence at the time of death must be sought in the reasons (subjective element) and the conditions (objective element) of his/ her stay showing a close and stable link between the succession and the given State, in line with the objectives of the EU Succession Regulation (§ 37). The assessment of both objective and subjective elements, and generally of habitual residence, should consider the deceased's life circumstances at the time of death and the years preceding his/ her death (§ 23). Such a "lengthy" determination of the deceased's life assessment leaves the debate open as to its pertinence in an increasingly globalised society within which cross-border settlements regularly occur, in particular when involving expats holding multiple nationalities and various assets in different countries.

Lastly, the Court has made clear that the habitual residence assessment must be twofold in matters of competence and threefold in relation to applicable law. With regard to competence, according to the Advocate General, the Court first seised will have to look primarily at the duration and regularity of the deceased's settlement and subsidiarily at his/ her nationality and/ or assets. In relation to the deceased's settlement, the Advocate General clarified that duration (time factor) cannot be considered, in itself, a decisive element and that it should be accompanied by other relevant factors such as the deceased's family and social integration, or his/ her proximity to the State in question (Advocate General's Opinion, § 54). Furthermore, the Advocate

General confirmed that, in line with recital 24, the contexts typically falling under the subsidiary assessment of the deceased's nationality and/ or assets are: (i) the scenario involving expats; and (ii) that involving a "peripatetic" cross-border movement and life not allowing the establishing of stable connection (Advocate General's Opinion, § 55-57).

In relation to applicable law, the Court first seised should consider, as a last resort when none of the above elements can be traced, specific factors indicating a situation falling under "manifestly closest connection". According to the EU Succession Regulation, and confirmed by the Advocate General (§ 25 of the Opinion), a typical situation falling under "manifestly closest connection" is when the deceased moved to his/ her new habitual residence fairly recently before his/ her death. Nonetheless, the Court has not yet identified any specific elements for the determination of the exceptional "manifestly closest connection" criterion (§ 59).