

CJEU on the (in)admissibility of the request for a preliminary ruling on the Succession Regulation lodged by a notary in the case OKR, C-387/20

In its judgments delivered in the cases WB, C-658/17 and E.E., C-80/19, the Court of Justice already addressed the question whether a notary dealing with succession-related matters is a “court” for the purposes of the Succession Regulation. In these cases, however, the requests for a preliminary ruling originated from the proceedings pending before the national courts.

By contrast, in the case OKR, C-387/20, the request for a preliminary ruling is brought before the Court by a Polish notary [or, to be more specific, by a notarial clerk/assistant (fr. “clerc de notarie”, pl. “zastępca notarialny”), yet this nuance does not seem to affect the outcome of the case at hand].

The case itself concerns a Ukrainian national living in Poland who is the joint owner of an estate situated in that Member State. A Polish notary is requested 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. The notary refuses to perform the notarial act on the ground that the choice of Ukrainian law in the will would be unlawful.

The refusal to perform the notarial act in question is challenged by an appeal brought by the interested party: under Polish law, such appeal is lodged through the refusing notary who may still perform the notarial act, if he or she deems the appeal justified. In the request for a preliminary ruling it is argued that within this framework the notary acts as an authority of first instance.

On its merits, the request for a preliminary ruling revolves around the choice of law under Article 22 of the Succession Regulation and a bilateral agreement with Third State that takes precedence over the Regulation and does not explicitly

provide for choice of law in matters of succession.

However, as noted by Carlos Santaló Goris in his outline of the request for a preliminary ruling, the case provokes a no less intriguing question whether a Polish notary faced with an appeal is a “court” within a meaning of Article 267 TFEU and as such can submit a preliminary reference to the Court.

That question is addressed by the Court in its order delivered early this September. It receives a negative answer and, as a consequence, the request for a preliminary ruling lodged by a notary is considered to be inadmissible.

Even a cursory reading of the order reveals that, for the Court, a notary faced with an appeal against his or her refusal is not deciding a legal dispute and is not delivering a decision of judicial nature: he or she only confirms the refusal to perform a notarial act or performs the notarial act accordingly to the initial request of the interested party. Therefore, according to the Court, the notary is not engaged in exercise of a judicial function (paragraphs 25 and 28).

Those findings lead the Court to the conclusions that, “for the purposes of the present reference for a preliminary ruling”, a notary (scil. a notarial clerk/assistant) cannot be classified as a “court” within the meaning of Article 267 TFEU (paragraph 34).

It is noteworthy that in this order the Court makes it clear that the notion of “court” in the meaning of Article 3(2) of the Succession Regulation is broader in scope than the notion of “court” in the sense of Article 267 TFEU (paragraph 31).

The order is available here (no English version yet).