

# Anonymised version

Translation

C-277/20 — 1

## Case C-277/20

### Request for a preliminary ruling

**Date lodged:**

24 June 2020

**Referring court:**

Oberster Gerichtshof (Austria)

**Date of the decision to refer:**

27 May 2020

**Applicant:**

UM

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The Oberster Gerichtshof (Supreme Court), [...] makes the following

Order

in the land registration proceedings brought by the applicant, UM, [...], Cologne, [...] further to the appeal on a point of law lodged by the applicant against the order of 16 January 2020 of the Landesgericht Klagenfurt (Regional Court, Klagenfurt), sitting as court of appeal, [...]

upholding the order of the Bezirksgericht Hermagor (District Court, Hermagor) of 12 November 2019:

**A.** The following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

1. Is Article 3(1)(b) of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, **[Or. 2]** 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 ('Regulation No 650/2012') to be interpreted as meaning that a contract of donation *mortis causa* entered into between two German

nationals habitually resident in Germany in respect of real estate located in Austria, granting the donee a right having the character of an obligation against the estate to registration of his title after the donor's death pursuant to that contract and the donor's death certificate, that is without the intervention of the probate court, is an agreement as to succession within the meaning of that provision?

2. If the answer to the above question is in the affirmative:

Is Article 83(2) of Regulation No 650/2012 to be interpreted as meaning that it also regulates the effect of a choice of applicable law made before 17 August 2015 for a contract of donation *mortis causa* that is to be qualified as an agreement as to succession within the meaning of Article 3(1)(b) of Regulation No 650/2012?

**B.** [...] [Stay of proceedings]

Grounds:

**I. Facts:**

It follows from the title deeds and the entries in the land register that: **[Or. 3]**

The German national ZL, who died in Cologne on 13 May 2018 [...] and was last habitually resident in Cologne, is recorded in the Austrian Land Register as the owner of real estate in Mauthen pursuant to a contract of sale dated 20 June 1975 and a transfer contract dated 22 July 1975. Probate proceedings are pending in the Amtsgericht Köln (Local Court, Cologne). His son, UM, who is also a German national habitually resident in Cologne, has brought proceedings there against the estate to have title to that real estate transferred back to him.

On 9 July 1975, ZL proposed the following contract in connection with that real estate to his son UM and his son's then wife XU, an Austrian national likewise resident in Cologne:

'First: by contract of sale dated 13 May and 20 June 1975, XU, [...], acquired a portion of real estate in [...], in the district of Kötschach, which has to be surveyed. A two-family house is to be erected on that land, to be used by XU and her family as their primary residence and financed by her father-in-law ZL. If XU transfers sole ownership of the aforesaid real estate to her husband UM and he in turn transfers the real estate to his father ZL, ZL proposes to enter into the following contract with XU and UM [...]:

a) ZL shall acquire ownership of the aforesaid real estate from UM, **[Or. 4]** together with everything, all rights and obligations, associated therewith, based on the state of the surveyed property. The real estate shall be transferred to ZL on the terms set out below.

- b) ZL undertakes to erect a two-family house on that real estate, to which he shall then have title, within ten years of signature of the contract. If that obligation is not discharged in his lifetime, it shall pass to his heirs. [...]
- c) ZL hereby transfers the aforesaid real estate *mortis causa* to XU and UM in equal shares, together with everything associated with the real estate at the time of his death, including the house erected on it, in keeping with the boundaries of the property as it stands at the time of transfer. Transfer shall occur on the death of ZL, but not before the house has been completed. Transfer is contingent upon the marriage between the two transferees not being dissolved at the time of the death of ZL and XU's surviving ZL. If that condition is not met, the transfer *mortis causa* shall be construed as having been made to UM alone, following which the right pursuant to the contract to be signed shall be heritable even before ZL's death.
- d) Inasmuch as a consideration for the transfer has not been agreed, ZL expressly declares that the real estate is to be transferred as a donation *mortis causa*. He waives the right to revoke this contract. [Or. 5]
- e) In partial consideration for the transfer, the transferees must grant XU's mother, Mrs [...], the right to live in the house erected [...].
- f) The legal relationships pursuant to the contracts signed shall be governed by Austrian law [...].
- g) ZL agrees not to sell or encumber the real estate owned by him without the consent of UM and XU, so that their rights pursuant to the contract of transfer *mortis causa* are secured. [...]
- h) ZL authorises the Land Registry to make the following entries under a new number in the Land Register for the District of Mauthen:
- aa) [...]
- bb) registration of title in equal parts further to a joint application by both transferees or registration of title to UM alone further to his application and subject to proof of satisfaction of the condition for transfer of the real estate to him alone pursuant to this contract and ZL's official death certificate.
- i) [...].

XU and UM accepted that proposal by notarised deed dated 22 July 1975. XU died on 5 November 2005, that is before ZL, at which point she and UM had already divorced. A house had not been [Or. 6] erected on the land in Mauthen.

## II. Arguments of the applicant and summary of the proceedings:

As the sole beneficiary under the contract of donation *mortis causa*, UM applied to the Austrian land registry court for registration of his title to the real estate in the land register. He submitted the proposed contract and declaration of acceptance dated 9 July/22 July 1975, death certificates for ZL and XU, a certificate of good standing from the tax authorities, the order of the District Court, Cologne, granting letters of administration, a copy of the valuation notice and an aerial photograph of the land.

The judicial administrator of the court of first instance dismissed the application for registration in the land register due to a lack of documentary proof of compliance with all the conditions of the proposed contract. He assumed that Austrian law applied.

The court of second instance upheld that decision. It found that the provisions of Regulation No 650/2012 were not applicable, as Austrian law was chosen in the proposed contract; that the applicant had to show satisfaction of the conditions precedent laid down in the contract in the form of a deed that could be entered in the land register; that the transfer based on the donation *mortis causa* was not to precede the completion of the house; and that satisfaction of that condition had not been proven. The court of second instance granted leave for an ordinary appeal on a point of law. [Or. 7]

The applicant lodged an appeal against that judgment in the Supreme Court, by which he is pursuing his application for registration of title.

The Supreme Administrative Court has decided to stay the proceedings on this appeal on a point of law and to refer questions of EU law to the Court of Justice of the European Union for a preliminary ruling that will enable judgment to be given.

## III. Provisions of EU law cited:

1. Article 1 of Regulation No 650/2012 states:

(1) *This Regulation shall apply to succession to the estates of deceased persons.*  
[...]

(2) *The following shall be excluded from the scope of this Regulation:*

[...]

*g) property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts, joint ownership with a right of survivorship, pension plans, insurance contracts and arrangements of a similar nature, without prejudice to point (i) of Article 23(2);*

[...]

*l) 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.*

2. Article 3 of Regulation No 650/2012 states:

*(1) For the purposes of this Regulation:*

*a) 'succession' means succession to the estate of a deceased person and covers all forms of transfer of assets, rights and [Or. 8] obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession;*

*b) 'agreement as to succession' means an agreement,*

*including an agreement resulting from mutual wills, which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement;*

*[...]*

*d) 'disposition of property upon death' means a will, a joint will or an agreement as to succession;*

*[...]*

3. Article 22 of Regulation No 650/2012 states with regard to the choice of applicable law:

*(1) A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death. A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.*

*(2) The choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition.*

*[...]*

4. Article 25 of Regulation No 650/2012 states with regard to agreements as to succession:

*(1) An agreement as to succession regarding the succession of one person shall be governed, as regards its admissibility, its substantive validity and its binding effects between the parties, including the conditions for its dissolution, by the law which, under this Regulation, [Or. 9] would have been applicable to the*

*succession of that person if he had died on the day on which the agreement was concluded.*

[...]

*(3) Notwithstanding paragraphs 1 and 2, the parties may choose as the law to govern their agreement as to succession, as regards its admissibility, its substantive validity and its binding effects between the parties, including the conditions for its dissolution, the law which the person or one of the persons whose estate is involved could have chosen in accordance with Article 22 on the conditions set out therein.*

5. The transitional provisions in Article 83 of Regulation No 650/2012 state:

*(1) This Regulation shall apply to the succession of persons who die on or after 17 August 2015.*

*(2) Where the deceased had chosen the law applicable to his succession prior to 17 August 2015, that choice shall be valid if it meets the conditions laid down in Chapter III or if it is valid in application of the rules of private international law which were in force, at the time the choice was made, in the State in which the deceased had his habitual residence or in any of the States whose nationality he possessed.*

*(3) A disposition of property upon death made prior to 17 August 2015 shall be admissible and valid in substantive terms and as regards form if it meets the conditions laid down in Chapter III or if it is admissible and valid in substantive terms and as regards form in application of the rules of private international law which were in force, at the time the disposition was made, in the State in which the deceased had his habitual residence or in [Or. 10] any of the States whose nationality he possessed or in the Member State of the authority dealing with the succession.*

*(4) If a disposition of property upon death 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. Provisions of national law cited:**

1. Paragraph 956 of the Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code, ‘the ABGB’), in the version applicable to this case prior to the entry into force of the 2015 Erbrechtsänderungsgesetz (Austrian Law Amending Inheritance Rights, Federal Law Gazette I 2015/87), provided as follows:

*A donation to be completed only after the donor’s death is valid as a legacy subject to compliance with the prescribed formalities. It can only be regarded as a*

*contract if it is accepted by the donee, the donor has expressly renounced the power to revoke it and a written deed of donation is handed to the donee.*

Paragraph 1(d) of the Notariatsaktsgesetz (Austrian Law on Notarised Acts, ‘the NotAktG’) states that a contract of donation without actual transfer must be recorded in a notarised act.

2. The relevant provisions of the Grundbuchgesetz (Austrian Law on the Land Register, ‘the GBG’) read as follows:

Paragraph 26:

*(1) Registrations and preliminary remarks can only be authorised based on a valid deed prepared in the prescribed form. [Or. 11]*

*(2) Deeds concerning the acquisition or variation of a right in rem must include a valid legal reason.*

3. The relevant provisions of the Rechtspflegergesetz (Austrian Law on Judicial Administrators, ‘the RPfIG’) read as follows:

Paragraph 2:

*A court officer may be appointed as a judicial administrator for one or more of the following fields of work:*

*[...]*

*3. Land register- and shipping register-related matters;*

*[...]*

Paragraph 16

*(1) [...]*

*(2) The following shall always remain the preserve of the judge:*

*[...]*

*6. Decisions in cases in which foreign law applies.*

## **V. Reasons for the questions referred:**

1.1 According to national case-law, the Austrian Land Register Court is required to verify the form and content of documents presented pursuant to Paragraph 26 of the GBG in order to substantiate a record in the land register. If a right is conferred under a contract conditionally and consent to the registration is granted only subject to that condition, documentary evidence of its satisfaction must also

be provided [...]. According to the RPflG, judicial administrators have the functional authority to conduct that verification. However, according to national case-law [...], where a provision of foreign law has to be taken into account, the reservation in favour of the judge under Paragraph 16(2), point 6, of the RPflG takes effect. If a judicial administrator [**Or. 12**] rather than the judge rules on such a case, the order and the proceedings culminating in it must be annulled and the judge must refer the case back to the court of first instance for a new decision. Any such procedural defect must be addressed, if not claimed in an appeal, of the court's own motion before the proceedings are closed with a final order [...].

1.2 The court must always explore and apply foreign law of its own motion if there is evidence in the file to suggest that such law may need to be applied [...]. The question of the validity of the choice of Austrian law made in the contract of donation *mortis causa* and the application of Regulation No 650/2012 to that type of contract are therefore preliminary questions to which the referring court requires an answer in order to know whether the judicial administrator in this case had the necessary functional authority.

2. National case-law on contracts for donations *mortis causa* under Paragraph 956 of the ABGB, in the version prior to the 2015 Law Amending Inheritance Rights, provided for the donor to retain enjoyment of the donated property up to his death [...]. In the case of real estate, the donee had to register title in order to acquire ownership and could apply to do so on the basis of the contract of donation bearing a declaration of conveyance and the death certificate, without the need for a separate order from the probate court. In order for a contract of donation *mortis causa* to be valid, the donation had to be accepted by the donee, the donor had to expressly waive its revocation and a [**Or. 13**] notarised deed had to be executed. The donation merely established a right having the character of an obligation to be performed only after the donor's death ([...] 'legacy solution'). According to national case-law, a clause in the contract for the donee's benefit prohibiting encumbrance and disposal replaced the express waiver of revocation. The documents presented to the land registry court in this case suggest that a contract of donation *mortis causa* for the applicant's benefit was executed in accordance with the criteria of Austrian law.

3.1 Regulation No 650/2012 in itself only regulates succession to the estate of a deceased person, not transactions *inter vivos*. However, a particular feature of a donation *mortis causa* under Austrian law is that it does not bring about a transfer of property *inter vivos* that would affect and encumber the donor in his lifetime, unless, which is not the case here, it is completed prior to the deceased's death. The property was transferred only after his death and affects the estate or the heirs. As the definitions in Article 3(1)(b) and (d) of Regulation No 650/2012 also list an agreement as to succession as an agreement which, with or without consideration, creates rights to the future estate as a disposition of property upon death, the referring court finds that the question as to whether a donation *mortis causa* is an example of such an agreement requires interpretation.

3.2 Most German commentaries take the view that a donation *mortis causa* that does not produce any [Or. 14] effects *in rem* during the donor's lifetime falls under inheritance law and thus within the substantive scope of Regulation No 650/2012 [...].

3.3 The referring court considers that there are stronger arguments for regarding a contract of donation *mortis causa* as an agreement as to succession within the meaning of Regulation No 650/2012, irrespective of whether or not partial payment was agreed. Even if, on the basis on the transaction *inter vivos*, the asset named therein is of itself to be transferred to the donee after the donor's death without any intervention by the probate court, it still belongs to the future estate within the meaning of Article 3(1)(b) of Regulation No 650/2012, even under the 'legacy solution' espoused under Austrian law. The referring court considers that it would be more in keeping with the need for a narrow interpretation of exemptions and the character of the specific exemptions named in Article 1(2)(g) of Regulation No 650/2012 to regard the disposition of part of an estate under a contract of donation *mortis causa* as being covered by the provisions of Regulation No 650/2012, especially where the donee's claim to transfer of ownership [Or. 15], like that of a legatee, arises only after the donor's death. It is the referring court's opinion that the exemption enacted in Article 1(2)(l) of Regulation No 650/2012 does not apply, as the question at issue concerns assessment of the contract under conflict-of-law rules, on which the assessment of the functional competence of the decision-making body depends, not registration law.

4. The lower courts applied Austrian substantive law based on the choice of law made by the parties to the contract. Regulation No 650/2012, which should apply here based on the time of death of the donor, includes transitional provisions governing a choice of law made prior to 17 August 2015, whereby that choice is valid if it meets the conditions laid down in Chapter III or if it is valid in application of the rules of private international law which were in force, at the time the choice was made, in the State in which the deceased had his habitual residence or in any of the States whose nationality he possessed. As the donor was already a German national at the time, remained so up to the time of his death and was resident in Germany both when the contract was executed and at the time of death, Article 83(2) of Regulation No 650/2012 suggests that the invalidity of the choice of law made in the contact of donation *mortis causa* depends on Austrian law. Article 83(2) of Regulation No 650/2012 does not refer expressly to an agreement as to succession, but it does refer to succession to the estates of deceased persons. Article 83(3) of Regulation No 650/2012 addresses the admissibility and substantive [Or. 16] and formal validity of a disposition of property upon death made prior to 17 August 2015, not the choice of law. Although the referring court considers that Article 83(2) of Regulation No 650/2012 should also apply to a choice of law made in an 'agreement as to succession', it does not consider that interpretation to be wholly unambiguous. However, if the choice of law is inadmissible even under the provisions of Chapter III of Regulation No 650/2012, it could only be valid where Article 83(2)

and (3) are applicable if it is valid under the provisions of German private international law, that is under German domestic law. However, the application of foreign conflict-of-law rules is also the preserve of the judge under the Austrian RPfG.

[...] [procedural law matters]

Supreme Court,

Vienna, 27 May 2020

[...]

[President's name, procedural law matters]

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