



## Reports of Cases

### JUDGMENT OF THE COURT (First Chamber)

16 July 2020\*

(Reference for a preliminary ruling — Regulation (EU) No 1259/2010 — Enhanced cooperation in the area of the law applicable to divorce and legal separation — Uniform rules — Article 10 — Application of the law of the forum)

In Case C-249/19,

REQUEST for a preliminary ruling under Article 267 TFEU from Tribunalul București (Regional Court, Bucharest, Romania), made by decision of 11 February 2019, received at the Court on 25 March 2019, in the proceedings

**JE**

v

**KF,**

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, R. Silva de Lapuerta (Rapporteur), Vice-President of the Court, L. Bay Larsen, C. Toader and N. Jääskinen, Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Romanian Government, initially by C.-R. Canțâr, E. Gane, O.-C. Ichim and L. Lițu, and subsequently by E. Gane, O.-C. Ichim and L. Lițu, acting as Agents,
- the German Government, by J. Möller, M. Hellmann and E. Lankenau, acting as Agents,
- the Portuguese Government, by L. Inez Fernandes, P. Barros da Costa, L. Medeiros and S. Duarte Afonso, acting as Agents,
- the European Commission, by M. Wilderspin and A. Biolan, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 March 2020,

\* Language of the case: Romanian.

gives the following

### Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 10 of Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (OJ 2010 L 343, p. 10).
- 2 The request has been made in proceedings between JE and KF concerning the determination of the law applicable to their divorce.

### Legal context

#### *European Union law*

##### *Regulation (EC) No 2201/2003*

- 3 Under Article 3(1)(b) of Council Regulation (EC) No 2201/2003 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) No 1347/2000 (OJ 2003 L 338, p. 1):

‘In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State:

...

- (b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the “domicile” of both spouses.’

##### *Regulation No 1259/2010*

- 4 Recitals 9, 21, 24, 26 and 29 of Regulation No 1259/2010 state:

‘(9) This regulation should create a clear, comprehensive legal framework in the area of the law applicable to divorce and legal separation in the participating Member States, provide citizens with appropriate outcomes in terms of legal certainty, predictability and flexibility, and prevent a situation from arising where one of the spouses applies for divorce before the other one does in order to ensure that the proceeding is governed by a given law which he or she considers more favourable to his or her own interests.

...

- (21) Where no applicable law is chosen, and with a view to guaranteeing legal certainty and predictability and preventing a situation from arising in which one of the spouses applies for divorce before the other one does in order to ensure that the proceeding is governed by a given law which he considers more favourable to his own interests, this regulation should introduce harmonised conflict-of-laws rules on the basis of a scale of successive connecting factors based on the existence of a close connection between the spouses and the law concerned. Such connecting factors should be chosen so as to ensure that proceedings relating to divorce or legal separation are governed by a law with which the spouses have a close connection.

...

- (24) In certain situations, such as where the applicable law makes no provision for divorce or where it does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the court seised should nevertheless apply. This, however, should be without prejudice to the public policy clause.

...

- (26) Where this regulation refers to the fact that the law of the participating Member State whose court is seised does not provide for divorce, this should be interpreted to mean that the law of this Member State does not have the institute of divorce. In such a case, the court should not be obliged to pronounce a divorce by virtue of this regulation.

...

- (29) ... the objectives of this regulation[ are] the enhancement of legal certainty, predictability and flexibility in international matrimonial proceedings and hence the facilitation of the free movement of persons within the Union ...'

- 5 Article 5 of that regulation, entitled 'Choice of applicable law by the parties', provides:

'1. The spouses may agree to designate the law applicable to divorce and legal separation provided that it is one of the following laws:

- (a) the law of the State where the spouses are habitually resident at the time the agreement is concluded; or
- (b) the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; or
- (c) the law of the State of nationality of either spouse at the time the agreement is concluded; or
- (d) the law of the forum.

2. Without prejudice to paragraph 3, an agreement designating the applicable law may be concluded and modified at any time, but at the latest at the time the court is seised.

3. If the law of the forum so provides, the spouses may also designate the law applicable before the court during the course of the proceeding. In that event, such choice shall be recorded in court in accordance with the law of the forum.'

- 6 Article 8 of that regulation, entitled 'Applicable law in the absence of a choice by the parties', provides:

'In the absence of a choice pursuant to Article 5, divorce and legal separation shall be subject to the law of the State:

- (a) where the spouses are habitually resident at the time the court is seised; or, failing that
- (b) where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seised, in so far as one of the spouses still resides in that State at the time the court is seised; or, failing that
- (c) of which both spouses are nationals at the time the court is seised; or, failing that

(d) where the court is seised.’

7 Article 10 of that regulation, entitled ‘Application of the law of the forum’, is worded as follows:

‘Where the law applicable pursuant to Article 5 or Article 8 makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the forum shall apply.’

8 Article 12 of Regulation No 1259/2010, headed ‘Public policy’, states:

‘Application of a provision of the law designated by virtue of this regulation may be refused only if such application is manifestly incompatible with the public policy of the forum.’

9 Under Article 13 of that regulation, entitled ‘Differences in national law’:

Nothing in this regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this regulation.’

### ***Romanian law***

10 Under Article 2600(2) and (3) of the Codul civil (Civil Code):

‘2. Where the foreign law thus determined does not permit divorce, or does so only in extremely limited circumstances, Romanian law shall apply where one of the spouses is, on the date of the divorce petition, a Romanian national or habitually resident in Romania.

3. The provisions in paragraph 2 shall also apply where the divorce is governed by the law chosen by the spouses.’

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

11 JE and KE, who are Romanian nationals, married in Iași (Romania) on 2 September 2001.

12 On 13 October 2016, JE applied for a divorce to the Judecătoria Iași (Court of First Instance, Iași, Romania).

13 By judgment of 31 May 2017, that court declined jurisdiction to hear that application in favour of the Judecătoria Sectorului 5 București (Court of First Instance of the Fifth District of Bucharest, Romania).

14 By a judgment of 20 February 2018, that court, on the basis of the nationality of both spouses referred to in Article 3(1)(b) of Regulation No 2201/2003, established that the Romanian courts had general jurisdiction to hear the application for divorce made by JE. Furthermore, on the basis of Article 8(a) of Regulation No 1259/2010, it designated Italian law as the law applicable to the dispute of which it was seised, on the ground that, on the date on which the application for divorce was filed, the habitual residence of the spouses was in Italy.

15 In that regard, that court held that, under Italian law, an application for divorce made in circumstances such as those of the main proceedings could be filed only if a legal separation of the spouses had previously been established or declared by a court and if at least three years had elapsed between the date of that separation and the date on which the application for divorce was filed with the court.

- 16 Given that the existence of a court decision establishing or pronouncing such a separation had not been proven and that Romanian law does not provide for legal separation proceedings, that court held that those proceedings had to be conducted before the Italian courts and that, consequently, any application to that effect made to the Romanian courts was inadmissible.
- 17 JE lodged an appeal against that judgment before the referring court, claiming, *inter alia*, that the court at first instance should have applied Article 2600(2) of the Civil Code, which constitutes the transposition into Romanian law of Article 10 of Regulation No 1259/2010.
- 18 In that regard, JE is of the opinion that, since Italian law is restrictive as regards the conditions required for divorce, Romanian law should apply to the application for divorce.
- 19 In JE's view, that solution also flows from the fact that the application of Italian law is manifestly incompatible with the public policy of the forum and that, consequently, that application must, in accordance with Article 12 of that regulation, be disapplied.
- 20 It is in those circumstances that the Tribunalul București (Regional Court, Bucharest) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the expression "the law applicable pursuant to Article 5 or Article 8 makes no provision for divorce" [in Article 10 of Regulation No 1259/2010,] to be interpreted (a) in a strict, literal manner, that it is to say only in respect of a situation where the foreign law applicable makes no provision for any form of divorce, or (b) more broadly, as also including a situation where the foreign law applicable permits divorce, but does so in extremely limited circumstances, involving an obligatory legal separation procedure prior to divorce, in respect of which the law of the forum contains no equivalent procedural provisions?'

### **Consideration of the question referred**

- 21 By its question, the referring court asks, in essence, whether Article 10 of Regulation No 1259/2010 must be interpreted as meaning that the words 'where the law applicable pursuant to Article 5 or Article 8 makes no provision for divorce' cover only situations in which the applicable foreign law does not provide for divorce in any form or whether they also include situations in which that law allows divorce, but makes it subject to conditions considered by the court seised to be more restrictive than those laid down by the law of the forum.
- 22 It is apparent from the order for reference that the law applicable to the dispute in the main proceedings is, in accordance with Article 8(a) of that regulation, Italian law and that, under that law, a divorce may be applied for only if, in particular, a legal separation has previously been established or declared by a court, whereas the law of the forum, namely Romanian law, neither lays down that condition nor contains procedural provisions relating to legal separation.
- 23 As a preliminary point, it must be noted that Article 10 of Regulation No 1259/2010 constitutes an exception to Articles 5 and 8 of that regulation and must, as a derogating provision, be interpreted strictly.
- 24 In accordance with Article 10 thereof, the law of the forum is to apply in two situations: first, where the law applicable pursuant to Articles 5 or 8 of that regulation does not provide for divorce and, second, where the applicable law does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex.

- 25 As regards the first situation referred to in Article 10 of that regulation, interpretation of which is requested by the referring court, it is clear from the wording of that provision that the law of the forum applies only where the applicable law ‘makes no provision for divorce’.
- 26 It in no way follows from the textual interpretation of that provision that the application of the law of the forum is also possible where the applicable foreign law provides for divorce, but makes it subject to conditions considered to be more restrictive than those laid down by the law of the forum. Similarly, recital 24 of Regulation No 1259/2010, which relates to Article 10 thereof, does not contain any indication to that effect.
- 27 That reading of Article 10 of Regulation No 1259/2010 is supported by a contextual and systematic interpretation of that provision.
- 28 In that regard, it should be noted that the words ‘does not provide for divorce’ are also used in Article 13 of that regulation, to which recital 26 thereof corresponds, according to which, where that regulation refers to the fact that the law of the participating Member State of which a court is seised does not provide for divorce, it should be interpreted as meaning that the law of that Member State ‘makes no provision for divorce’. Although recital 26 refers to the law of the Member State of which a court is seised, the fact remains that, in so far as that law concerns the meaning of the words ‘makes no provision for divorce’, the guidance which it provides in that regard is also relevant as regards Article 10 of Regulation No 1259/2010.
- 29 It must also be noted that legal separation, which is, moreover, expressly referred to in Article 10 of that regulation, falls, on the same basis as divorce, within the scope of that regulation and forms an integral part of its system and general scheme.
- 30 Moreover, from a teleological point of view, it is apparent from recitals 9, 21 and 29 of Regulation No 1259/2010 that that regulation seeks to create a clear and complete legal framework in the area of the law applicable to divorce and legal separation in the participating Member States, to ensure legal certainty, predictability and flexibility in international matrimonial proceedings and, accordingly, to facilitate the free movement of persons within the European Union and to prevent a situation in which one of the spouses applies for divorce before the other one does in order to ensure that the proceeding is governed by a law which he or she considers more favourable to his or her own interests.
- 31 Apart from the fact that it is contrary to the wording of Article 10 of Regulation No 1259/2010 and incompatible with the context and the scheme of which that provision forms part, an interpretation of that provision according to which the law of the forum applies where the applicable foreign law makes divorce subject to compliance with conditions considered to be more restrictive than those laid down by the law of the forum would also be inconsistent with the objectives pursued by that regulation.
- 32 As the Romanian Government submits, that interpretation would require a case-by-case examination of the conditions in which a divorce may be pronounced in accordance with the applicable law, under the provisions of that regulation, and a subjective assessment of the extent to which those conditions may be regarded as being more restrictive than those provided for by the law of the forum, which would in practice run counter to, or at least compromise, the achievement of the objectives of legal certainty and predictability pursued by that regulation.
- 33 Similarly, as the Portuguese Government has noted, that interpretation would frustrate the spouses’ autonomy of choice, provided for in Article 5 of Regulation No 1259/2010, and, in the absence of a choice by them of the law applicable to their divorce and legal separation, the application, in accordance with recital 21 and Article 8 of that regulation, of the law with which the spouses are closely connected.

- 34 Finally, such an interpretation could encourage a spouse applying for divorce to make his or her application to the court of a Member State whose law makes divorce subject to less restrictive conditions, which court has jurisdiction by virtue of the provisions of Regulation No 2201/2003.
- 35 As regards the dispute in the main proceedings, it is apparent from the order for reference that the law applicable under Article 8(a) of Regulation No 1259/2010, namely Italian law, does provide for divorce.
- 36 Consequently, Article 10 of that regulation is not applicable to the dispute and the fact that that law makes divorce subject to compliance with conditions considered to be more restrictive than those laid down by the law of the forum, such as prior legal separation, is irrelevant in that regard.
- 37 In accordance with settled case-law, in the procedure laid down in Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it (judgments of 23 March 2006, *FCE Bank*, C-210/04, EU:C:2006:196, paragraph 21; of 8 December 2011, *Banco Bilbao Vizcaya Argentaria*, C-157/10, EU:C:2011:813, paragraph 18; and of 25 July 2018, *Dyson*, C-632/16, EU:C:2018:599, paragraph 47).
- 38 In the present case, it is necessary, as the German Government and the European Commission have argued, to provide the referring court with guidance on the practical consequences of the interpretation of Article 10 of Regulation No 1259/2010 given in paragraphs 25 and 26 of the present judgment, since that court noted that, in the absence of provisions laying down a procedure for legal separation in Romanian law, the Romanian courts do not examine the substance of applications for legal separation and divorce proceedings which were not preceded by a legal separation established or declared in accordance with Italian law.
- 39 The referring court states that, in accordance with national case-law, in circumstances of fact such as those at issue in the main proceedings, those applications are dismissed, respectively, as inadmissible, on the ground that Romanian law does not provide for legal separation proceedings, and premature, on the ground that divorce is sought before the Romanian courts without a legal separation having first been established or declared by the Italian courts, or unfounded, on those two grounds taken together.
- 40 In so far as such a judicial practice has the effect of preventing a substantive examination of those claims, it deprives the uniform rules on the law applicable to divorce and legal separation laid down in Regulation No 1259/2010 of a large part of their substance and thus undermines their effectiveness.
- 41 It must be recalled that, in the present case, the general jurisdiction of the Romanian courts to hear JE's application for divorce has been established on the basis of Article 3(1)(b) of Regulation No 2201/2003.
- 42 Accordingly, even if, unlike Italian law, Romanian law does not contain procedural provisions on legal separation, the competent Romanian courts are required to rule on that application.
- 43 Thus, in a situation such as that at issue in the main proceedings, in which the court having jurisdiction considers that the foreign law applicable pursuant to the provisions of Regulation No 1259/2010 permits an application for divorce only if that divorce has been preceded by a legal separation of three years, whereas the law of the forum does not lay down any procedural rules in relation to legal separation, that court must nevertheless, since it cannot itself declare such a separation, determine whether the substantive conditions laid down in the applicable foreign law are satisfied and make that finding in the context of the divorce proceedings before it.

- 44 Having regard to all the foregoing considerations, the answer to the question referred is that Article 10 of Regulation No 1259/2010 must be interpreted as meaning that the expression ‘where the law applicable by virtue of Article 5 or Article 8 makes no provision for divorce’ applies only to situations in which the applicable foreign law makes no provision for divorce in any form.

### **Costs**

- 45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

**Article 10 of Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation must be interpreted as meaning that the expression ‘where the law applicable by virtue of Article 5 or Article 8 makes no provision for divorce’ applies only where the foreign law applicable makes no provision for divorce in any form.**

[Signatures]