Opinion of Advocate General Tanchev in the case C-249/19, JE: Application of the law of the forum under Article 10 of the Rome III Regulation

In his **Opinion** delivered today, Advocate General Tanchev presents his take on Article 10 of the Regulation No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (commonly referred to as Rome III Regulation), under which '[w]here 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'.

More specifically, the Opinion deals with the question lodged before the Court of Justice by a Romanian court, concerning the interpretation of the expression 'the law applicable pursuant to Article 5 or Article 8 [the Rome III Regulation] makes no provision for divorce'.

By its question, the referring court is, in essence, asking whether Article 10 of the Rome III Regulation must be interpreted in a strict sense, meaning that the recourse to the law of the forum can be made only where the foreign law designed as applicable does not recognize any form of divorce, or more broadly – the law of the forum should be applied when the foreign law designed as applicable under the Regulation permits a 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 provision'.

Even though the requests for a preliminary ruling concerning Article 10 of the Regulation were already presented in the cases **C-281/15, Sahyouni** and **C-372/16, Sahyouni II** (yet, in a different context, relating to the second limb of Article 10 – discrimination through lack of equal access to divorce), ultimately this provision has not been yet interpreted by the Court of Justice. Therefore, alongside the Opinion of AG Saugmandsgaard Øe delivered in the case **C-372/16, Sahyouni II**, which also addresses this provision, Opinion of AG Tanchev is certainly worthy of attention. While the very question referred to the Court did not seem to pose a particular difficulty, these are the supplementary considerations on the consequences of the proposed interpretation of Article 10 that certainly make this Opinion an interesting read.

Legal and factual context

Seized of a petition for divorce, the first instance court established the jurisdiction of the Romanian courts under Article 3(1)(b) of the Brussels II Regulation due to the common nationality of both spouses.

Since the parties seemingly had not chosen the law applicable to divorce and had been habitually resident in Italy, the first instance court considered that, pursuant to Article 8(a) of the Rome III Regulation, it is the Italian law that governs the grounds of divorce.

Yet, this court observed that, according to the Italian law, the dissolution of marriage can be pronounced only where there had been a legal separation of the spouses and at least three years have passed between this separation and the time at which the court have been seized by the applicant. It seems that in this regard the first instance court referred itself to Article 3(2)(b)of the Law No 898 of 1 December 1970 (Disciplina dei casi di scioglimento del matrimonio), mentioned in the Opinion presented by AG Bot in case **C-386/17, Liberato** (for multiple linguistic versions of this provision see point 20 of this Opinion).

However, the first instance court considered that since no provision is made for legal separation proceedings under Romanian law, those proceedings must be conducted before the Italian courts and therefore any application to that effect made before the Romanian courts is inadmissible.

The applicant lodged an appeal against the decision of the first instance court. In those circumstances, the second instance court presents its request for a preliminary ruling.

Opinion of Advocate General

According to the Opinion of AG Tanchev, it is manifest that Article 10 of the Rome III Regulation calls for a **strict interpretation in the sense that the expression 'where the law applicable pursuant to Article 5 or Article 8 makes no provision for divorce' relates only to situations in which the applicable foreign law does not recognise the institution of divorce** (see, most notably, point 19 of the Opinion). In order to reach this conclusion, the Opinion delves into literal, systemic, historical and teleological interpretation of the provision in question.

At point 37, the Opinion indicates that '[the] Italian law, as the applicable law, does not prohibit divorce; it merely subjects it to certain requirements, which is within its competence regarding its substantive family law'. Therefore, in the present case, there is no room for Article 10 of the Rome III Regulation to apply.

Yet, as mentioned in the introduction, the analysis does not stop here. At points 59 et seq. **the Opinion addresses the consequences of the advocated interpretation of Article 10.**

At points 62 and 63 the Opinion argues in following terms that the national courts seized of a petition for divorce **could have recourse to 'adaptation'** (see also point 68) :

62. First of all, pursuant to Section 1 of Chapter II of [the Brussels II bis Regulation], where the court of a Member State is seized of an application for divorce, it cannot decline jurisdiction (contrary to a court seized in the area of parental responsibility, which has discretion to address the courts of another Member State, under Article 15 of that regulation) and it is obliged to rule on that application for divorce.

63. I agree with the view of the German Government that the Member States participating in the enhanced cooperation implemented by [the Rome III Regulation] must ensure that both divorce and legal separation may be granted by their courts. Therefore, instead of considering that legal separation must first be established or ordered before the Italian courts, the Romanian courts should, to my mind, allow for such a procedure and apply, by analogy, national procedural rules relating to divorces or even adapt foreign (Italian) procedural rules relating to legal separation (in conjunction with Romanian national rules). Otherwise, the provisions of [the Rome III Regulation] would be partially ineffective.

Against this background, at points 65 and 66 the Opinion refers to the solution proposed by the Commission and favoured also by Advocate General:

65. By way of a concrete solution in the present case, the Commission proposed that the court seized apply the substantive conditions foreseen by the applicable law and forgo the application of any procedural conditions foreseen by that law, in circumstances where the procedural law of the forum does not allow for those procedural conditions to be met. Therefore, if, in a particular case, the substantive conditions for a legal separation order are fulfilled, the forum court may remedy the fact that that court itself cannot grant such an order by waiving that foreign procedural condition.

66. I concur. In my view, such a solution would be balanced and would correspond to the implicit intention of the Union legislature. First, it would not unduly encourage forum shopping, because it would require the substantive conditions of the applicable law to be fulfilled. The applicant would not be able to avoid those conditions by seizing another court under the very generous rules of [the Brussels II Regulation] and by asking for his or her own law to be applied (parties can avoid those conditions quite easily if they agree on the choice of the law of the forum).

On a side note...

It is although distant from the context of the present request for a preliminary ruling but nonetheless interesting to notice some points that may be inspirational in others contexts and in relation to the issues not covered by this request:

*• At point 69, while expressing itself in favour of 'adaptation', the Opinion states 'while [the Rome III Regulation] does not provide specifically for such an adaptation, neither does it expressly prohibit it'. In this regard, the Opinion draws inspiration from the Succession Regulation and from the twin Regulations Nos 2016/1103 and 2016/1104. It is yet to be seen **whether these considerations herald the recognition of adaptation as a general (and non-codified) instrument of EU private international law** and, therefore, such 'adaptation' could occur also in relation to, i.e., the Rome I and II Regulations.*

*• It is worth mentioning that it can be argued that, at points 62 and 63, the Opinion acknowledges the existence of a **link between, on the one hand, the obligation to exercise jurisdiction established under the Brussels II Regulation and, on the other hand, a substantive effect that should be (at least potentially) achievable under the law designed as applicable under Rome III Regulation**. It states 'pursuant to [the Brussels II Regulation], where the court of a Member State is seized of an application for divorce, it cannot decline jurisdiction […] and it is obliged to rule on that application for divorce […]'. Then '[the Member States bound by the Rome III Regulation] must ensure that both divorce and legal separation may be granted by their courts'. If anything, it will be interesting to follow the discussion on the implications of such interpretation of these Regulations.*

• Before delving into the consequences of the proposed interpretation of Article 10 of the Rome III Regulation, at points 59 to 61, the Opinion clarifies that the considerations relating to that issue are necessary 'in order to provide the national court with an appropriate [and useful] answer for the purpose of the application of [EU] law in the dispute before it'.Even though these considerations do not seem vital to answer the preliminary question (what makes them even more worthy of attention – if this is the case, they do not have to be necessarily addressed in the upcoming judgment), they may also be relevant in this as well as in other contexts for a very specific reason.

Before the first instance court, the applicant seeking divorce invoked Article 12 of the Rome III Regulation. The applicant claimed that the application of Italian law is manifestly incompatible with the public policy of the forum, thus making it necessary to exclude the application of the foreign law (point 15 of the Opinion).

If Article 10 of the Rome III Regulation must be considered lex specialis that overrides Article 12, the fact that the former provision is not relevant in the present case could make space for the latter to apply. One could wonder – as the appellant seemingly did – whether a requirement provided for in by a foreign law could be disapplied as contravening the public policy of the forum. The Opinion seems to provide some guidance relating to that issue. In fact, it addresses the public policy exception, yet in a different context.

At point 63, the Opinion provides that 'the Member States participating in the enhanced cooperation implemented by [the Rome III Regulation] must ensure that both divorce and legal separation may be granted by their courts'. At point 64 it argues that 'the referring court cannot refuse to rule on the application in the main proceedings on the basis of Article 12 of the above regulation (which is reserved for exceptional cases) on the ground that its national law does not provide for legal separation or for procedural rules for legal separation'.

Leaving aside the question whether it could be inferred from the lack of procedural scheme to pronounce legal separation that granting a divorce without the separation itself being pronounced is (or could be) contrary to the public policy of the forum (this is, of course, a distinct issue relating to the law of the forum and to the limits of the concept of public policy under the Rome III Regulation), the Opinion seems to recognize the aforementioned lex specialis relation. However, it also seeks to prevent the excessive reliance on the public policy exception with reference to a simple maladjustment of the law of the forum.

*• It seems that the doubts of the referring court result from the fact that the Italian law imposes a requirement that cannot be fulfilled under the Romanian law.Indeed, on the one hand, according to the **information** provided by the database managed by European Judicial Network, '[i]n Romanian law there is no concept of 'legal separation' but only of 'de facto separation' and the judicial division of property. This is a situation that must be proven before the court. In the event of the de facto separation having lasted for at least two years, this is a reason for judicially issuing a divorce.'On the other hand, the Italian law requires a judicial separation to be declared by a judgment that has acquired the force of law or a consensual separation that has been judicially confirmed (Article 3(2)(b)of the Law No 898 of 1 December 1970 read in the light of Article 150 of the Italian Civil Code).*

• At point 64, the Opinion seems to take the view that the requirement provided for in the Italian law according to which a separation has to be declared by a judgment or judicially confirmed is a 'procedural condition'. It will be interesting to see the evolution of case law and literature as to the classification of similar requirements in different contexts than that of Article 3(2)(b)of the Law No 898 of 1 December 1970 read in the light of Article 150 of the Italian Civil Code.The question remains open whether such other requirements are also of procedural nature (or, alternatively, even though it might ultimately boil down to the question of terminology: of formal nature or of substantive nature, yet they can be fulfilled only via the procedural framework of the State that imposes them and of the other States that provide for a judicially-pronounced separation, if one takes into account the recognition of a judgment on separation within the divorce proceedings) and, if they are truly of procedural nature, do they fall within the scope of the law designed as applicable under the Rome III Regulation.