

CJEU on application of the law of the forum under Article 10 of the Rome III Regulation: Case C-249/19, JE

Back in February we reported on the Opinion presented by Advocate General Tanchev in case C-249/19, JE. Today the Court of Justice rendered its Judgment in which it confirms the interpretation provided in the Opinion.

As a reminder, the question referred to the Court of Justice originated in the proceedings pending before the Romanian courts dealing with a petition for divorce. The parties to these proceedings are Romanian nationals, habitually resident in Italy.

In these circumstances, under Article 8(a) of the Rome III Regulation, it is a priori Italian law that governs the grounds of divorce. According to 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.

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

Yet, seized of an appeal lodged by the applicant, the second instance court focused on Article 10 of the Regulation that states, inter alia, '[w]here the law applicable [...] makes no provision for divorce [...], the law of the forum shall apply'. That court referred a request for a preliminary ruling to the Court asking, in essence, whether Italian law could be disapplied under Article 10.

In his Opinion presented this February, AG Tanchev held that Article 10 of the Rome III Regulation calls for a strict interpretation. 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 recognize

the institution of divorce. Italian law should therefore be applied by the Romanian courts. Despite the lack of procedural rules in relation to legal separation, these courts have to verify whether the requirement relating to separation was met.

The Judgment is in line with the Opinion: it **confirms that a foreign law can be disapplied on the basis of Article 10 only when that law does not provide for any form of divorce.**

As discussed in the initial post, at points 64 to 66, **the Opinion seems to qualify the requirement provided for in the Italian law as a 'procedural condition'. That qualification does not appear explicitly in the Judgment.** At paragraph 43, the Judgment convincingly confines itself to stating that the substantive requirement at issue consists on a three years' separation of the spouses and that the lack of procedural rules in relation to legal separation cannot prevent the Romanian court from verifying whether that requirement is met.

Against this background, at paragraph 40, the Judgment makes a point in the context of effectiveness of the Rome III Regulation. **If the application of the requirement provided for in Italian law leads to the situation where the petitions for divorce are being rejected without their examination, the practical effectiveness of the uniform conflict of laws rules on divorce is undermined.** I deem the references to the effectiveness/effet utile to be highly interesting. See paragraph 20 of the Judgment in Bier for one of the earliest occurrences of such reference. The Judgment in JE is yet another example: it presents a noteworthy take on the interaction between effet utile and conflict of laws rules. It will be interesting to see whether and how that specific line of argument will be developed in the future.