ECJ, judgment of 10 February 2022, Case 522/20 – OE ./. VY, on the validity of the connecting factor „nationality“ in the Brussels IIbis Regulation (2201/2003) in light of Article 18 TFEU.

Today, in the case of OE ./. VY, C-522/20 (no Opinion was delivered in these proceedings), the ECJ decided on a fundamental point: whether nationality as a (supplemental) connecting factor for jurisdiction according to Article 3 lit. a indent 6 of the Brussels IIbis Regulation (2201/2003) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility is in conformity with the principal prohibition of discrimination against nationality in the primary law of the European Union (Art. 18 TFEU).

Article 18 TFEU reads: “Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. …”.

Art. 3 lit. a Brussels IIbis Regulation reads: “In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with with the courts of the Member State:”; indent 5 reads: “in whose territory the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or”, according to indent 6: “the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question …”.

The case emerged from a request in proceedings between OE and his wife, VY, concerning an application for dissolution of their marriage brought before the Austrian courts (paras. 9 et seq.):

“On 9 November 2011, OE, an Italian national, and VY, a German national, were

married in Dublin (Ireland). According to the information provided by the referring court, OE left the habitual residence the couple shared in Ireland in May 2018 and has lived in Austria since August 2019. On 28 February 2020, that is, after residing in Austria for more than six months, OE applied to the Bezirksgericht Döbling (District Court, Döbling, Austria) for the dissolution of his marriage with VY. OE submits that a national of a Member State other than the State of the forum is entitled to invoke the jurisdiction of the courts of that latter State under the sixth indent of Article 3(1)(a) of Regulation No 2201/2003, on the basis of observance of the principle of non-discrimination on grounds of nationality, after having resided in the territory of that latter State for only six months immediately before making the application for divorce, which is tantamount to disregarding the application of the fifth indent of that provision, which requires a period of residence of at least a year immediately before the application for divorce is made. By order of 20 April 2020, the Bezirksgericht Döbling (District Court, Döbling) dismissed OE's application, taking the view that it lacked jurisdiction to hear it. According to that court, the distinction made on the basis of nationality in the fifth and sixth indents of Article 3(1)(a) of Regulation No 2201/2003 is intended to prevent the applicant from forum shopping. By order of 29 June 2020, the Landesgericht für Zivilrechtssachen Wien (Regional Court for Civil Matters, Vienna, Austria), hearing the case on appeal, upheld the order of the Bezirksgericht Döbling (District Court, Döbling). OE brought an appeal on a point of law against that order before the referring court, the Oberster Gerichtshof (Supreme Court, Austria)."

The Court reiterated, inter alia, that (paras. 18 et seq.) the principle of non-discrimination and equal treatment require that comparable situations must not be treated differently and different situations must not be treated in the same way, "unless such treatment is objectively justified", further that the comparability of different situations must be assessed having regard to all the elements which characterise them, and thirdly that the (EU) legislature has a broad discretion in this respect. "Thus, only if a measure adopted in this field is manifestly inappropriate in relation to the objectives which the competent institutions are seeking to pursue can the lawfulness of such a measure be affected".

Against this background the Court held (paras 25 et seq.) that, first, Article 3 meets "the need for rules that address the specific requirements of conflicts

relating to the dissolution of matrimonial ties", secondly that while the first to fourth indents of Article 3(1)(a) of Regulation expressly refer to the habitual residence of the spouses and of the respondent as criteria, the fifth and sixth indents of Article 3(1)(a) permit the application of the jurisdiction rules of the *forum actoris*, and thirdly that "it is apparent from the Court's case-law that the rules on jurisdiction laid down in Article 3 of Regulation No 2201/2003, including those laid down in the fifth and sixth indents of paragraph 1(a) of that article, seek to ensure a balance between, on the one hand, the mobility of individuals within the European Union, in particular by protecting the rights of the spouse who, after the marriage has broken down, has left the Member State where the couple had their shared residence and, on the other hand, legal certainty, in particular that of the other spouse, by ensuring that there is a real link between the applicant and the Member State whose courts have jurisdiction to give a ruling on the dissolution of the matrimonial ties concerned (see, to that effect, judgments of 13 October 2016, *Mikolajczyk*, C-294/15, EU:C:2016:772, paragraphs 33, 49 and 50, and of 25 November 2021, *IB (Habitual residence of a spouse – Divorce)*, C-289/20, EU:C:2021:955, paragraphs 35, 44 and 56)." And the fact that typically there is such a real link if there is nationality sufficed to justify distinguishing between indent 5 and indent 6, all the more as this cannot be a surprise to the other spouse.

Therefore the Court came to the conclusion:

"The principle of non-discrimination on grounds of nationality, enshrined in Article 18 TFEU, must be interpreted as not precluding a situation in which the jurisdiction of the courts of the Member State in the territory of which the habitual residence of the applicant is located, as provided for in the sixth indent of Article 3(1)(a) 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, is subject to the applicant being resident for a minimum period immediately before making his or her application which is six months shorter than that provided for in the fifth indent of Article 3(1)(a) of that regulation on the ground that the person concerned is a national of that Member State."

The most important take away seems to be that PIL legislation using nationality as a supplemental connnecting factor is still in conformity with Article 18 TFEU

as long as it appears “not manifestly inappropriate” (para. 36). Therefore, and reconnecting to older case law (para. 39), legislation is still valid “with regard to a criterion based on the nationality of the person concerned, … although in borderline cases occasional problems must arise from the introduction of any general and abstract system of rules” so that “there are no grounds for taking exception to the fact that the EU legislature has resorted to categorisation, provided that it is not in essence discriminatory having regard to the objective which it pursues (see, by analogy, judgments of 16 October 1980, *Hochstrass* v *Court of Justice*, 147/79, EU:C:1980:238, paragraph 14, and of 15 April 2010, *Gualtieri* v *Commission*, C-485/08 P, EU:C:2010:188, paragraph 81).”