

## Anonymised version

Translation

C-249/19-1

**Case C-249/19**

**Request for a preliminary ruling**

**Date lodged:**

25 March 2019

**Referring court:**

Tribunalul Bucureşti (Romania)

**Date of the decision to refer:**

11 February 2019

**Applicant at first instance and appellant:**

JE

**Defendant at first instance and respondent:**

KF

---

[omissis]

**TRIBUNALUL BUCUREȘTI - SECȚIA A IV-A CIVILĂ (Regional Court,  
Bucharest, Fourth Civil Section)**

[omissis]

**Public hearing of 11 February 2019**

[omissis]

The case relating to the appeal lodged by the appellant — applicant at first instance — JE [omissis] against the respondent — defendant at first instance — KF, concerning a divorce involving minor [children] has been registered.

[omissis]

**THE COURT,**

Ruling on the present case, finds as follows:

**I. Subject matter of the dispute. Relevant facts**

- 1 By an action brought by JE, registered at the Judecătoria Iași (Court of First Instance, Iași, Romania) [omissis] on 13 October 2016, the applicant at first instance filed **[OR. 1]** a petition for divorce in respect of the defendant KF, claiming that the parties' marriage should be dissolved, the applicant should return to using the name borne prior to the marriage, parental responsibility in respect of the minor child [omissis] should be exercised jointly, the minor child should reside with the mother in Italy, and the defendant should be required to pay maintenance and the costs of proceedings.
- 2 In the grounds for the application the applicant stated that the parties were married in Iași, Romania, on 2 September 2001, and that relationship produced the minor child [omissis], who was born in Verona, Italy, on 23 June 2005.
- 3 By civil judgment [of] [omissis] 31 May 2017, the Judecătoria Iași declined jurisdiction to hear the dispute in favour of the Judecătoria Sectorului 5 București (Court of First Instance, Fifth District of Bucharest, Romania), at which the case was registered on 9 August 2017.
- 4 At the hearing held on 21 November 2017, that court accepted the plea that the Romanian courts lack general jurisdiction over the heads of claim concerning parental responsibility and the requirement to pay maintenance for the minor child [omissis].
- 5 By civil judgment [of] [omissis] 20 February 2018, the Judecătoria Sectorului 5 București dismissed the action as unfounded, on the following grounds:
- 6 Since it was found that the parties' habitual residence on the date on which the court was seized of the divorce petition was in Italy (the parties having resided in Italy for a considerable time [omissis] and before the court in question was seized), the court established the direct applicability 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] and [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], which exclude the application of the Romanian rules of procedure concerning general jurisdiction and the provisions of the [Romanian] Civil Code on determination of the law applicable to divorce.
- 7 Having established the general jurisdiction of the Romanian courts with regard to divorce [Article 3(1)(b) of Regulation (EC) No 2201/2003], and the local

jurisdiction of the Judecătoria Sectorului 5, the court in question established that the law applicable to the dispute was Italian law, pursuant to Article 8(a) of Regulation (EU) No 1259/2010, since the parties were habitually resident in Italy. Thus, the court in question considered that the criteria laid down in Article 8(a) of Regulation No 1259/2010 are framed in a hierarchical manner in such a way that if the conditions of the first criterion are satisfied, the others are excluded, while at the same time observing that, according to recital 10 of Regulation No 1259/2010, the law determined by the conflict-of-laws rules of that regulation should apply to the grounds for divorce.

- 8 The court in question considers that dissolution of a marriage on grounds other than those provided for in Article 3 of Italian Law No 898 of 1 December 1970 [Legge 1 dicembre 1970, n.898 ‘Disciplina dei casi di scioglimento del matrimonio’ (Law No 898 laying down rules applicable in the event of dissolution of marriage)] can be applied for only where there has been a legal separation of the spouses, which must be established or ordered by a court, [OR. 2] and at least three years have passed between the legal separation and the time at which the court was seized of the divorce petition.
- 9 As has been stated, when analysing the application submitted by the applicant, the court in question considered that the grounds for divorce raised by the applicant are not available under Article 3 of Law No 898/1970, which lays down rules applicable in the event of dissolution of marriage, and that it had not been demonstrated that a decision had been made by a court pursuant to which the parties were legally separated. That court did not accept the argument that Italian law refers to the need for there to be a mere de facto separation, since the wording of Article 3(1)(2)(b) of Law No 898 of 1 December 1970 explicitly mentions separation approved or ordered by a court, which involves the conduct of legal proceedings.
- 10 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.
- 11 The applicant lodged an appeal against that judgment and the interlocutory decisions, claiming that the application as worded should be granted. In support of her appeal, the appellant pointed out that, from her point of view, the criteria provided for in Article 8 of Regulation No 1259/2010 are alternatives. She also claimed that she had clarified her application, requesting, in the first head of claim, court-ordered separation under substantive Italian law, with the consequent dissolution of the union and, in the alternative, divorce. The appellant further stated that the court of first instance should have applied Article 2600(2) of the Romanian Civil Code, under which, where foreign law thus determined makes no provision for divorce, or does so only in extremely limited circumstances, Romanian law is to apply where one of the spouses is, on the date of the petition for divorce, a Romanian national or habitually resident in Romania. Therefore, the appellant argues that since Italian law is restrictive as regards the conditions for

granting divorce, it is necessary to apply substantive Romanian law. However, the court of first instance did not rule on that application. The appellant also observes that, in so far as it is deemed that substantive Italian law is applicable, she considers that the decision of the court of first instance, which ruled that the request for legal separation is inadmissible, is unlawful, pointing out that the court found that, in the present case, substantive Italian law is applicable and provides for court-ordered separation within the meaning of Articles 150 and 151 and Article 191(2) of the Italian Civil Code, as amended by Law No 55/6 of May 2015 [legge 6 maggio 2015, n.55, Disposizioni in materia di scioglimento o di cessazione degli effetti civili del matrimonio nonché di comunione tra i coniugi (Law No 55 of 6 May 2015 laying down provisions on dissolution or cessation of the civil effects of a marriage or union between spouses)].

- 12 The appellant further stated that, in her opinion, in the light of the provisions of Italian law, the first sentence of Article 10 of Regulation No 1259/2010 is applicable in this case as Article 2600(2) of the Romanian Civil Code in fact constitutes the transposition into Romanian law of Article [OR. 3] 10 of Regulation No 1259/2010. The appellant also invoked Article 12 of Regulation No 1259/2010, claiming 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 normally applicable and to apply Romanian divorce law.

## **II. Provisions of national law applicable in the present case. Relevant national case-law**

- 13 Under Article 2557(3) of the Romanian Civil Code [which appears in] Title I, Book VII, [headed] ‘Provisions of international private law’, ‘*[t]he provisions of this Book shall be applicable in so far as the international conventions to which Romanian is party, the law of the European Union or the provisions of special laws do not provide otherwise*’.
- 14 As regards the relevant national case-law, it is the consistent practice of the Romanian courts to apply directly Regulation No 1259/2010 and the case-law of the Court of Justice of the European Union in interpreting Regulation (EC) No 1259/2010 in respect of factual circumstances such as those in the present case. Similarly, Romanian courts seized of an application for legal separation have considered that such an application is inadmissible as Romanian law makes no provision for such proceedings and where they have been directly seized of a divorce petition, without a legal separation being granted by the Italian courts beforehand, they have held that such an application is premature. The Romanian courts have not made a reference to the Court of Justice concerning the question at issue here and there is no request for a preliminary ruling currently pending before the Court of Justice concerning the interpretation of Article 10 of Regulation No 1259/2010 in respect of similar factual circumstances.

- 15 Under Article 2600(2) and (3) of the Romanian Civil Code, ‘(2) Where 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 set out in paragraph (2) shall also apply where the divorce is governed by the law chosen by the spouses’.
- 16 [omissis]

### III. Provisions of EU law deemed to be relevant in the present case

- 17 Under Article 8 of Regulation No 1259/2010, headed ‘Applicable law in the absence of a choice by the parties’, ‘*[i]n 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 seized; or, failing that (b) where the spouses were [OR. 4] last habitually resident, provided that the period of residence did not end more than 1 year before the court was seized, in so far as one of the spouses still resides in that State at the time the court is seized; or, failing that (c) of which both spouses are nationals at the time the court is seized; or, failing that (d) where the court is seized*’.
- 18 Under Article 10 of Regulation No 1259/2010, ‘[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’.
- 19 [Recitals] 24 to 26 of Regulation No 1259/2010 state as follows: ‘(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 seized should nevertheless apply. This, however, should be without prejudice to the public policy clause. (25) Considerations of public interest should allow courts in the Member States the opportunity in exceptional circumstances to disregard the application of a provision of foreign law in a given case where it would be manifestly contrary to the public policy of the forum. However, the courts should not be able to apply the public policy exception in order to disregard a provision of the law of another State when to do so would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which prohibits all forms of discrimination. (26) Where this Regulation refers to the fact that the law of the participating Member State whose court is seized 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. Where this Regulation refers to the fact that the law of the participating Member State whose court is seized does not deem the marriage in question valid for the purposes of divorce proceedings, this should be interpreted to mean, inter alia, that such a marriage does not exist in

the law of that Member State. In such a case, the court should not be obliged to pronounce a divorce or a legal separation by virtue of this Regulation'. [OR. 5.]

#### **IV. The reasons that have led the referring court to request a preliminary ruling**

##### **IV.1 The view of the parties on the question to be interpreted by the Court of Justice**

- 20 The appellant stated that it is not necessary to refer a question to the Court of Justice since there is clear concordance between Regulation No 1259/2010 and the Romanian Civil Code and therefore the court should take account of Article 2600(2) and (3) of the Romanian Civil Code, under which, where the applicable foreign law makes no provision for divorce, or permits it only in extremely limited circumstances, Romanian law is to apply where one of the spouses is, on the date of the divorce petition, a Romanian national or habitually resident in Romania. The applicant has also pointed out that it is possible to exclude certain provisions of foreign law if they are incompatible with public policy within the meaning of Article 12 of that regulation.

##### **IV.2 The question referred to the Court of Justice**

- 21 Identification of the issue of EU law. The issue of EU law in the present case concerns the interpretation of Article 10 of Regulation No 1259/2010, [omissis], in the sense that it is necessary to clarify whether the expression 'the law applicable pursuant to Article 5 or Article 8 makes no provision for divorce' is to be interpreted in a strict, literal manner, that it is to say only in respect of a situation where the applicable foreign law makes no provision for any form of divorce, or whether it is to be interpreted broadly as also including a situation where the applicable foreign law 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.
- 22 Need for a decision on the dispute (relevance of the issue of EU law identified). Depending on the interpretation of the expression 'the law applicable pursuant to Article 5 or Article 8 makes no provision for divorce', the referring court will make an assessment as regards the substantive law applicable to the dispute, that is to say Italian law, or the law of the forum, namely Romanian law.
- 23 [omissis] [OR. 6.]
- 24 [omissis] [recitals 24 and 26 of Regulation No 1259/2010 are reproduced again]

- 25 Depending on how the expression ‘makes no provision for divorce’ contained in Article 10 is interpreted, the following, different ways of approaching the issue emerge:
- 26 Thus, a strict interpretation will lead to the conclusion that substantive Italian law is applicable, which has led the national courts to hand down decisions in some cases refusing the petition on the ground that it is either inadmissible (where legal separation is applied for) or premature (where divorce is applied for without legal separation being formalised beforehand pursuant to Italian law), or indeed unfounded, as in the present case, where the considerations of the court of first instance referred both to the fact that the parties were not previously separated pursuant to a court order and the fact that such separation is inadmissible since no provision is made for a legal separation procedure under Romanian law. In other words, the procedural impediments arising from the absence of rules providing for a legal separation procedure under Romanian law have led to rulings on procedural matters without it being possible to make a substantive assessment of the petition.
- 27 A broad interpretation of that expression as meaning that it also includes a situation where applicable foreign law 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 provisions, results in the application of the law of the forum, namely Romanian law, since the spouses are Romanian nationals who were married in Romania.
- 28 Therefore, depending on the interpretation requested, it will be necessary to determine the substantive law applicable in the present case.
- 29 From the checks carried out, the referring court has been unable to identify in the case-law of the Court of Justice any case relating to the interpretation of Article 10 of Regulation No 1259/2010.

## **V. Conclusions. Procedural measures**

- 30 The Tribunalul considers that the ruling on the appeal turns on the interpretation of the abovementioned legal issue to be provided by the Court of Justice.
- 31 As regards the need to make a reference to the Court of Justice, in addition to the condition relating to the relevance of the question referred to the resolution of the legal issues raised in the case, the Tribunalul notes that the provision of EU law to which the question relates has not yet been [OR. 7] interpreted, and therefore that court is not absolved from its duty to refer a question for a preliminary ruling (see, to that effect, judgment of 27 March 1963, *Da Costa and Others*, 28/62 to 30/62, EU:C:1963:6).
- 32 The Tribunalul considers that the correct application of EU law in the present case is not so obvious as to leave no scope for any reasonable doubt such as to entitle it

to refrain from referring to the Court a question concerning the interpretation of EU law which has been raised before it (judgment in *Intermodal Transports*, C-495/03, EU:C:2005:552, paragraph 37 and the case-law cited) and to take upon itself the responsibility of resolving the matter (judgment in *Cilfit and Others*, 283/81, EU:C:1982:335, paragraph 16). Therefore, the doctrine of *acte clair* does not apply in the present case.

- 33 The judgment which will be given in the present case is final within the system of domestic appeals and therefore, under the third paragraph of Article 267 of the Treaty on the Functioning of the European Union, the Tribunalul must, in the circumstances set out above, make a reference to the Court of Justice for an interpretation of the EU law relevant to the proceedings.
- 34 [OMISSIS] [staying of proceedings is ordered]

**ON THOSE GROUNDS**  
**IN THE NAME OF THE LAW,**  
**ORDERS AS FOLLOWS:**

The following question shall be referred to the Court of Justice of the European Union for a preliminary ruling: On a proper construction of Article 10 of Regulation No 1259/2010, 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’, is the expression ‘the law applicable pursuant to Article 5 or Article 8 makes no provision for divorce’ 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, **[OR. 8 ]** involving an obligatory legal separation procedure prior to divorce, in respect of which the law of the forum contains no equivalent procedural provisions?

[omissis]

**[omissis]**

[omissis] [procedure and signatures]