

**Case C-646/20**

**Summary of the reference for a preliminary ruling pursuant to Article 98(1)  
of the Rules of Procedure of the Court of Justice**

**Date lodged:**

1 December 2020

**Referring court:**

Bundesgerichtshof (Germany)

**Date of the decision to refer:**

28 October 2020

**Appellant in the appeal on a point of law:**

Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht

**Respondent to the appeal on a point of law:**

TB

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**Subject matter of the main proceedings**

Regulation (EC) No 2201/2003 (Brussels IIa Regulation) – Concept of ‘judgment’  
– Private divorce – Recognition in another Member State

**Subject matter and legal basis of the reference**

Interpretation of EU law, Article 267 TFEU

**Questions referred for a preliminary ruling**

1. Is the dissolution of a marriage on the basis of Article 12 of Decreto Legge (Italian Decree-Law) No 132 of 12 September 2014 (‘DL No 132/2014’) a divorce within the meaning of the Brussels IIa Regulation?
2. If Question 1 is answered in the negative: Is the dissolution of a marriage on the basis of Article 12 of DL No 132/2014 to be treated in accordance with the

rule in Article 46 of the Brussels IIa Regulation on authentic instruments and agreements?

### **Provisions of EU law cited**

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; Brussels IIa Regulation), in particular Article 1(1)(a), Article 2, point 4, Article 21(1) and Article 46

### **Provisions of national law cited**

Personenstandsgesetz (Law on Civil Status; ‘the PStG’), in particular Paragraph 16(1), first sentence, point 3

Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (Law on proceedings in family matters and in matters of non-contentious jurisdiction; ‘the FamFG’), in particular Paragraph 97(1), second sentence, and Paragraph 107(1), first sentence

Decreto Legge (Italian Decree-Law) No 132 of 12 September 2014 (‘DL No 132/2014’), converted into Law No 162 of 10 November 2014, in particular Article 12

### **Brief summary of the facts and proceedings**

- 1 TB has German and Italian nationality; her husband has Italian nationality only. They were married in Berlin (Germany) on 20 September 2013 and their marriage was recorded in the register of marriages.
- 2 On 30 March 2017, they visited the Ufficio di Stato Civile (Civil Register Office) in Parma (Italy) and stated that they had no underage children or adult children who are seriously disabled, in need of care or economically dependent, that they did not wish to enter into any asset transfer agreements and that they opted for separation by mutual consent. They confirmed that statement on 11 May 2017 in person at the register office. On 15 February 2018, they returned, referred to their statements made on 30 March 2017 and stated that they wished to dissolve their marriage, in respect of which no proceedings were pending. After they had confirmed these statements to the Parma Register Office on 26 April 2018, the register office sent TB on 2 July 2018 a certificate in accordance with Article 39 of Regulation No 2201/2003, confirming the divorce with effect from 15 February 2018.
- 3 TB asked the appropriate register office in Berlin to have the divorce recorded in the German register of marriages. However, the register office raised doubts as to

whether the document first needed to be recognised under Paragraph 107 of the FamFG, and referred the matter to the Amtsgericht (Local Court) for a ruling. The Local Court instructed the register office by order of 1 July 2019 that the private out-of-court divorce granted on 15 February 2018 first had to be recognised by the competent authority under the first sentence of Paragraph 107(1) of the FamFG before an entry could be made in the register of marriages.

- 4 TB's appeal of 1 July 2019 against that order of the Local Court was upheld. The Kammergericht (Higher Regional Court, Berlin) varied the order of the Local Court and instructed the register office not to make the entry in the register of marriages contingent upon prior recognition by the competent authority of the divorce granted in Italy.
- 5 The Senatsverwaltung für Inneres und Sport (Ministry for the Interior and Sports, Berlin), the competent authority which supervises the register offices, lodged an appeal on a point of law with the Bundesgerichtshof (Federal Court of Justice, Germany), by which it sought to have the order of the Local Court restored.

#### **Brief summary of the grounds for the reference**

- 6 The proceedings concern the question of whether the private divorce granted in Italy further to concurring statements by the spouses before the civil registrar can be recorded in the German register of marriages without any additional recognition procedure.
- 7 Under German law, the register of marriages must be supplemented and corrected by follow-on entries and notes, inter alia if the marriage ends in divorce (Paragraph 16(1), first sentence, point 3, of the PStG). That may also be done on the basis of a final judgment given abroad. A divorce granted abroad is recognised only if the competent authority finds that the requirements for recognition have been fulfilled (Paragraph 107 of the FamFG).
- 8 However, no recognition procedure is required if judgment within the meaning of Article 21(1) of the Brussels IIa Regulation has been given (Paragraph 97(1), second sentence, of the FamFG). In that case, it is recognised in Germany without any special procedure being required. Production of the certificate referred to in Article 39 of the Brussels IIa Regulation then suffices for entry in the register of marriages.
- 9 According to the referring court, the legal situation is as follows in Italy: under Decreto Legge (Italian Decree-Law) No 132 of 12 September 2014 ('DL No 132/2014'), converted into Law No 162 of 10 November 2014, spouses no longer need to petition the court for divorce and may opt for divorce by way of a simple agreement.
- 10 Subject to specific requirements detailed in the law, spouses may either agree to divorce in the presence of their lawyers (Article 6 of DL No 132/2014) or, as in

the present case, they may enter into a divorce agreement under Article 12(1) of DL No 132/2014, which entered into force on 12 December 2014, before the mayor with territorial jurisdiction, acting as supreme civil registrar, even without the assistance of a lawyer, provided (as regulated in Article 12(2) of DL No 132/2014) they have no underage children or adult children who have no legal capacity or are seriously disabled or economically dependent. The civil registrar takes receipt of the spouses' personal statements, which cannot include any asset transfers, and asks them to return before him or her no earlier than 30 days after receipt of the statements to confirm the agreement (Article 12(3) of DL No 132/2014). In the period between submission of the statements and confirmation of the agreement, the civil registrar is able to verify the veracity of the spouses' statements (e.g. that they do not have any dependent children) and the spouses have the opportunity to reflect on their decision and, if they wish, to change it. If they confirm the agreement, it applies in lieu of a judicial decision.

- 11 The question that arises is whether divorce by consensual statements by the spouses before the civil registrar under Italian law falls within the scope of the Brussels IIa Regulation. If that question is answered in the negative, the appeal on a point of law by the registry supervisory authority would be well founded and the divorce in Italy would have to be recognised by the competent authority before being entered in the German register of marriages.
- 12 Commentaries disagree on the answer to this question, but the referring court is inclined to answer the question in the negative, as there is no constitutive assistance by a court. The answer to the question depends on how the concept of 'judgment' used in the Brussels IIa Regulation is to be understood.
- 13 According to Article 2, point 4, of the Brussels IIa Regulation, 'judgment' within the meaning of the regulation means a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision. According to Article 2, point 1, of the Brussels IIa Regulation, the term 'court' covers all the authorities in the Member States with jurisdiction in the matters falling within the scope of the regulation. Although that implies that the involvement of a State authority is required in order to assume that judgment has been given, it is not possible to draw compelling conclusions as to what type of involvement is required. However, the wording 'judgment ... pronounced by' suggests constitutive assistance by the State authority in connection with the divorce, rather than simply assistance with the registration procedure.
- 14 The Court of Justice has to date only indirectly addressed the question of whether private divorces fall within the scope of the Brussels IIa Regulation (see judgment of 20 December 2017, *Sahyouni*, C-372/16, EU:C:2017:988).
- 15 The subject matter of those proceedings was whether the divorce brought about by the unilateral statement of one spouse before a religious court in Syria fell within

the substantive scope 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; Rome III Regulation). The Court found that this type of private divorce is not a 'divorce' within the meaning of Article 1(1) of the Rome III Regulation. It held that, although it is true that private divorces are not explicitly excluded from the scope of the Rome III Regulation, the references made to the involvement of a 'court' and to the existence of a 'proceeding' show that the regulation covers exclusively divorces pronounced either by a national court or by, or under the supervision of, a public authority (judgment of 20 December 2017, *Sahyouni*, C-372/16, EU:C:2017:988, paragraph 39) and that the substantive scope of the Rome III Regulation and of the Brussels IIa Regulation should be consistent with each other so that the definition of the term 'divorce' should correspond in both regulations.

- 16 The Court found that the objective of the Rome III Regulation is to establish enhanced cooperation between the participating Member States in the area of the law applicable to divorce and legal separation (judgment of 20 December 2017, *Sahyouni*, C-372/16, EU:C:2017:988, paragraph 44); that, at the time of the adoption of that regulation, in the legal systems of the Member States participating in such enhanced cooperation, public bodies alone were able to adopt legally valid decisions in that sphere and it should therefore be assumed that the EU legislature had in mind only situations in which divorce is pronounced by a national court or by, or under the supervision of, another public authority (judgment of 20 December 2017, *Sahyouni*, C-372/16, EU:C:2017:988, paragraph 45); that, while it is true that a number of Member States have, since the adoption of the Rome III Regulation, introduced the possibility for divorces to be pronounced without the involvement of a State authority, the inclusion of private divorces within the scope of the Rome III Regulation would require arrangements coming under the competence of the EU legislature alone; and that, in the light of the definition of the concept of 'divorce' in the Brussels IIa Regulation, it is clear from the objectives pursued by the Rome III Regulation that the latter regulation covers solely divorces pronounced either by a national court or by, or under the supervision of, a public authority (judgment of 20 December 2017, *Sahyouni*, C-372/16, EU:C:2017:988, paragraph 48).
- 17 While with that judgment the Court interprets the concept of 'divorce' in the Rome III Regulation, 'divorce' within the meaning of Article 2, point 4, of the Brussels IIa Regulation can only be assumed if the divorce was pronounced by a national court or by, or under the supervision of, a public authority. However, the intensity and legal quality of that supervision cannot be inferred from that judgment.
- 18 Only constitutive assistance by a State body guarantees protection for the 'weaker' spouse against disadvantages in connection with the divorce, as only then can the court or the authority prevent the divorce by dismissing the act of State assistance. In the opinion of the referring court, the same must necessarily apply for the purposes of the Brussels IIa Regulation, as Article 21(1) thereof is

based on the consideration that a divorce pronounced in a Member State can be expected to provide that guarantee (see also recital 21 of the Brussels IIa Regulation).

- 19 In any event, these considerations suggest that the divorce granted by the Italian register office in accordance with Article 12 of DL No 132/2014 is a private divorce falling outside the scope of the Brussels IIa Regulation, as the Italian civil registrar clearly has no powers of verification that fulfil these requirements.
- 20 That assessment is corroborated by the fact that, in adopting the Brussels IIa Regulation, the EU legislature had no cause to include contractual forms of divorce, such as those provided for in Italy, as they were not provided for at that time in the laws of the Member States. It cannot therefore be assumed that divorce without any constitutive act of State assistance, under a procedure introduced well after the Brussels IIa Regulation was adopted, is covered by the statutory objective pursued by Article 21(1) of the Brussels IIa Regulation of recognising a judgment without any special procedure.
- 21 Furthermore, by Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (OJ 2019 L 178, p. 1; Brussels IIb Regulation), the EU legislature has since enacted an explicit rule for such circumstances for the period from 1 August 2022. According to Article 65(1) of the Brussels IIb Regulation, authentic instruments and agreements on, inter alia, divorce which have binding legal effect in the Member State of origin must be recognised in other Member States without any special procedure being required.
- 22 It follows from recital 14 of the Brussels IIb Regulation that the EU legislature considers that a decision must be preceded by approval by a court or authority following an examination of the substance. By the recast version of the Regulation, it now wishes to include procedures in which authorities are otherwise involved, for example by assisting solely with the registration procedure. It may be inferred from this that, even in the opinion of the EU legislature, the Brussels IIa Regulation is not intended to cover such procedures and, therefore, does not apply to the divorce before the Italian register office.
- 23 As regards the second question, the referring court is of the opinion that the divorce obtained on the basis of Article 12 of DL No 132/2014 cannot be recognised under Article 46 of the Brussels IIa Regulation either. Contrary to Article 65(1) of the Brussels IIb Regulation, that provision does not mention divorce; it refers solely to enforceable authentic instruments and agreements. However, it cannot cover divorce in the absence of any such enforceable instrument or agreement in that regard.

- 24 As it is not possible to deduce the correct interpretation unequivocally from the Brussels IIa Regulation or from the case-law of the Court to date, read in combination, the two questions have been referred to the Court.

WORKING DOCUMENT