



# RESEARCH NOTE

## FROM THE DIRECTORATE FOR RESEARCH AND DOCUMENTATION

Extrajudicial divorce: rules, procedures and cross-border  
recognition in Member States

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## SUMMARY

### INTRODUCTION

1. This research note deals with the issue of extrajudicial divorce. More specifically, the summary consists of two parts. First, (see Chapters I to III), it outlines the various conditions and procedures laid down for extrajudicial divorce in Member States where, based on research conducted into all national legal systems,<sup>1</sup> this type of divorce has so far been introduced, namely **Estonia, Greece, Spain, France, Italy, Latvia, Portugal, Romania** and **Slovenia**. In particular, this section of the summary covers the applicable substantive and formal conditions, the scope of review, conducted by the authority with jurisdiction, of agreements reached as part of an extrajudicial divorce, as well as the legal status of this type of divorce and the remedies available.
2. Secondly, (see Chapter IV), the summary gives a non-exhaustive overview of the methods of recognition adopted in the domestic law of all Member States<sup>2</sup> in relation to extrajudicial divorces and, more generally, to extrajudicial judgments or instruments originating in a foreign country.<sup>3</sup> Since only a minority of the Member States currently provide for one or more forms of extrajudicial divorce, the question arises as to whether and to what extent an extrajudicial divorce produces effects in the other Member States. The application in practice of the uniform recognition rules of the Brussels IIa Regulation to extrajudicial divorces granted in another Member State will be discussed periodically in this final section.
3. For the purposes of this note, the concept of 'extrajudicial divorce' refers to divorce agreements concluded by spouses without the involvement of a court but with the involvement of a public authority and/or professional, as well as to agreements concluded without such involvement (namely purely 'private' divorces by simple declaration of intent).
4. In the light of this definition, proceedings involving an authority forming part of the judicial system – such as a public prosecutor or court clerk – will also be taken into consideration, provided that such proceedings share the characteristics of extrajudicial proceedings in the respective national legal systems.
5. The concept of 'extrajudicial divorce' does not include divorce by mutual consent, divorce agreements approved by a court or mediation agreements settling disputes between spouses but which do not have the effect of dissolving a marriage.

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<sup>1</sup> The overview undertaken by the Directorate for Research and Documentation on the existence of extrajudicial divorce proceedings covered all national legal systems except Danish, Hungarian and Maltese law. **Denmark**, to which 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') does not apply, and was excluded from the study. **Hungarian** and **Maltese** law were excluded due to the lack of lawyers trained in Hungarian and Maltese law.

<sup>2</sup> Except **Denmark, Hungary** and **Malta**.

<sup>3</sup> In the last chapter, as in the rest of the summary, footnote references have been included only for legal systems for which there is no national contribution in this note.

## I. CONDITIONS REQUIRED FOR EXTRAJUDICIAL DIVORCE

6. The spouses' agreement to dissolve the marriage is a substantive condition in all nine legal systems examined. There are also a variety of approaches as regards the other requirements. Some national legal systems lay down additional conditions, such as a minimum duration of marriage (**Spanish** law), full legal capacity (**French, Spanish** and **Romanian** law), the absence of minor children (**Spanish, Italian** – as regards proceedings before a civil registrar – and **Slovenian** law), the existence of an agreement on what will happen to the family home or on the rental of the family home (**Portuguese** and **Slovenian** law), and the existence of an agreement on what will happen to any pets (**Portuguese** law). Furthermore, provision is made for certain cases which exclude recourse to extrajudicial divorce, including, for example, where one of the spouses' minor children requests to be heard by a court (**French** law).
7. As regards procedures for extrajudicial divorce, the written form is the most important requirement, to which some national legal systems have added other conditions, such as a period of reflection or mandatory legal advice. A very recent legislative innovation in **Greek** law allows spouses to divorce by means of a joint digital declaration.

### A. AGREEMENT OF THE SPOUSES AND OTHER CONDITIONS REQUIRED FOR EXTRAJUDICIAL DIVORCE

#### 1. AGREEMENT OF THE SPOUSES

8. The spouses' agreement to dissolve the marriage is the substantive condition at the heart of extrajudicial divorce proceedings.
9. Although this is not expressly provided for in all nine legal systems examined, the spouses' agreement is an essential condition for extrajudicial divorce. The agreement mainly relates to the intention to divorce, which must be expressed either jointly (**Estonian**,<sup>4</sup> **French, Greek, Latvian, Portuguese, Romanian** and **Spanish** law) or separately (**Italian** law, as part of the proceedings before the civil registrar). In addition, under some national laws, the mutual consent of both spouses covers not only the dissolution of the marriage, but also the personal or material effects of that dissolution, such as, respectively, the name that the spouses will have (**Estonian, French** and **Romanian** law) or the payment of maintenance to one of the spouses (**French, Portuguese** and **Spanish** law). Under **Greek** law, agreement subject to conditions or with the addition of time limits does not appear possible.
10. Furthermore, under **Estonian** law, the spouses have the option of entering into an agreement on the law applicable to the divorce (see paragraph 38).

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<sup>4</sup> **Estonian** law also allows, by way of exception, consent to divorce by one of the spouses to be submitted via separate instrument authenticated by a notary or consul if the spouse concerned is unable to appear in person for a valid reason.

a) THE PARTIES TO THE AGREEMENT

11. While in eight of the legal systems concerned it is exclusively the spouses who must consent to the extrajudicial divorce, under **Spanish** law, in cases where there are children of full age or emancipated minors, the children must also express their consent to the divorce.

b) CAPACITY OF THE SPOUSES

12. In order to express their agreement, the spouses must enjoy full legal capacity. This condition, which is expressly provided for in some of the legal systems examined (**French, Romanian and Spanish** law), appears to be implicit in the other legal systems concerned.
13. In **Greek** law, however, some scholars have advanced an interpretation of the provisions on legal capacity which militates in favour of proceeding with divorce including where spouses are placed under guardianship or partial guardianship after the marriage, with the spouses being assisted with the divorce by their guardian.

c) CONTENT OF THE AGREEMENT

14. In addition to the agreement on the dissolution of the marriage itself, a variety of approaches have been adopted by the various national legislatures regarding the subject matter of other agreements between the spouses required to obtain an extrajudicial divorce. In this respect, in **Portuguese** law, the civil code requires the spouses to agree on the payment of maintenance to the spouse in need, on what will happen to the family home, on what will happen to any pets and on the division of joint property (or, failing that, a request for the preparation of such an agreement) or, at the very least, in the event that the spouses choose not to divide such property, a precise list of joint property, indicating the value of each item of property. Agreement on the division of joint property is also required under **Latvian** law. Conversely, **Italian** law provides that, where an extrajudicial divorce is recorded by a civil registrar, the divorce agreement cannot contain agreements relating to assets that have the effect of transferring rights *in rem*.
15. For the sake of completeness, it should be noted that, in national legal systems which provide for the possibility of extrajudicial divorce, including in cases where there are minor children or children treated as such, the spouses' agreement must also cover aspects relating to the children, such as custody rights, arrangements for access rights and child maintenance, in so far as these aspects have not been settled, where appropriate, in court.<sup>5</sup>

2. OTHER CONDITIONS REQUIRED FOR EXTRAJUDICIAL DIVORCE

a) MINIMUM DURATION OF MARRIAGE

16. In **Spain**, extrajudicial divorce, whether recorded by a court clerk or by a notary, is permitted only if the divorce petition is submitted at least three months after the celebration of the marriage. This condition is not found in the other eight legal systems examined.

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<sup>5</sup> This possibility exists, for example, in **Portuguese** law. In the latter case, the certificate of the relevant court judgment must be submitted.



b) ABSENCE OF MINOR CHILDREN OR CHILDREN TREATED AS SUCH

17. In two national legal systems (**Spanish** and **Italian** law – in the case of the latter, only in relation to proceedings before the civil registrar), the absence of minor children or children treated as such is an essential requirement for extrajudicial divorce. In that regard, reference is made in particular to non-emancipated minor children (**Spanish** law) and to minor children common to both spouses (**Italian** law).
18. Children with impaired legal capacity (**Spanish** law), as well as incapacitated, severely disabled or economically dependent adult children (**Italian** law) are treated as minor children.
19. For the sake of completeness, it is important to clarify that, in legal systems which allow extrajudicial divorce where there are minor children or children treated as such, the existence of an agreement between the spouses on matters relating to those children (see paragraph 15) is not sufficient in itself; the interests of the children are also required to be taken into account. To meet this requirement, various approaches have been adopted, such as the mandatory taking of advice from lawyers whose role is, inter alia, to ensure that the interests of the children are taken into account, the obligation to inform minor children of their right to be heard by a court (**French** law), a statement in the divorce agreement to the effect that lawyers attempted to help the parties reconcile and informed them of the option of family mediation and of the importance for the child of spending adequate time with each parent, the requirement for authorisation from the prosecutor having jurisdiction (**Italian** and **Portuguese** law), and the establishment of a social investigation (**Romanian** law).
20. Under **Estonian** law, issues relating to children remain outside the scope of extrajudicial divorce and it is quite possible, for example, for spouses to divorce extrajudicially and to maintain joint custody of the children.

c) ABSENCE OF PREGNANCY

21. Under **Spanish** law, extrajudicial divorce is not possible if the wife is pregnant. This requirement must be satisfied on the date on which the extrajudicial divorce petition is lodged.

B. AGREEMENT FORMALITIES

1. WRITTEN FORM

22. It is a formal requirement in almost all of the national legal systems analysed that the divorce petition and/or declarations of the spouses and the divorce agreement be in written form.
23. As regards the divorce petition, it should be pointed out that, under **Estonian** law, the spouses' joint petition must bear a handwritten or electronic signature, whereas under **Greek** law, it is now open to spouses to use a joint digital declaration. Under **Portuguese** law, the petition must be signed by either the spouses or their lawyers. In addition to the requirement that it be in written form, under **Latvian** law, the petition must be in the form of a notarial instrument.
24. In **Italy**, the rules provide that the civil registrar must receive the declarations from the parties personally and separately, but do not, however, indicate whether the declarations are to be made orally or in writing. In that regard, it should be pointed out that both oral declarations

and declarations submitted in writing must be confirmed before the registrar, who will draw up the public instrument on the basis of these declarations. Taking into account the fact that the proceedings are conducted in the presence of the spouses, there are two possible scenarios: (i) the parties submit their declarations orally before the civil registrar, who draws up the divorce certificate; or (ii) the parties submit their declarations in writing and read aloud and confirm them when they appear before the civil registrar, who then draws up the divorce certificate.

25. The divorce agreement or the public instrument containing the agreement is always in written form. A number of clarifications can be made in relation to the approaches adopted in this regard in the various national legal systems. Under **Greek** law, the written agreement must be signed by the spouses and their lawyers or solely by their lawyers with a special power of attorney, whereas under **Estonian** law, both spouses must appear personally before the civil registrar on the specified date and sign a copy of the divorce certificate drawn up by the registrar. Under **Greek** law, the date of the spouses' written agreement is evidenced by a certificate of authenticity of their signature, which is not required when a joint digital declaration is lodged.
26. Under **French** law, the divorce agreement must be signed by hand or by electronic signature by the spouses and their lawyers meeting together for that purpose. In countersigning, the lawyers attest to their client's free and informed consent and the divorce agreement takes the form of a private legal instrument countersigned by the lawyer (*acte d'avocat*), with that countersignature serving as proof of the parties' writing and signature.

## 2. REFLECTION PERIOD

27. Some national legal systems provide that spouses must be granted a reflection period. The starting point for this period is the date on which the spouses lodge the petition for extrajudicial divorce or make their declarations in respect thereof. The period lasts between two weeks and three months. It is a minimum period of two weeks (**French** law), 30 days (**Italian, Latvian and Romanian** law) or a period of between one month and a maximum of three months (**Estonian** law). The *dies ad quem* is regulated differently in the various legal systems and can be, for example, the date on which the divorce agreement is signed (**French** law), the date of the second appearance before the authority concerned (**Italian and Romanian** law) or the date of the divorce (**Estonian and Latvian** law).
28. A period of at least ten days, which does not have the character of a reflection period, is also provided for in **Greek** law. This period, which must elapse between the date of the spouses' written agreement or joint digital declaration and the drawing up of the notarial instrument, has no effect on the dissolution of the marriage; it is only likely to entail the notary concerned being liable for disciplinary action in the event of non-compliance.

## 3. PERSONAL ATTENDANCE BY SPOUSES

29. As a general rule, personal attendance by the spouses is required before the authority concerned, with certain exceptions permitted where one of the spouses is unable to appear before the authority. These exceptions are sometimes accompanied by specific requirements – such as certification by a notary of a separate petition from a spouse who cannot appear in person at the registry office to lodge the joint petition (**Estonian** law) or representation by special power of attorney (**Romanian** law) – or are specifically permitted for

certain stages of the procedure (in **Romanian** law, only before the notary and only when the petition is lodged, but not at the second appearance, after the reflection period).

## II. EXTRAJUDICIAL DIVORCE PROCEEDINGS

### A. AUTHORITY WITH JURISDICTION TO HEAR APPLICATIONS FOR EXTRAJUDICIAL DIVORCE

30. Analysis of the legal systems referred to in this note has identified a variety of approaches as regards the authority before which extrajudicial divorce is recorded.
31. In this regard, in most of the national legal systems examined, that role lies with notaries,<sup>6</sup> while the possibility of applying to a different authority<sup>7</sup> is also provided for by way of an alternative in some national legal systems, subject to certain conditions. In legal systems where the spouses have a choice as to the authority to be seized, this choice is not in principle free,<sup>8</sup> however, but depends on the specific situation of the spouses.
32. Depending on the authority on which jurisdiction to grant extrajudicial divorce is conferred and depending on whether such jurisdiction is exclusive, two categories of national law can be identified: (i) national legal systems where jurisdiction lies exclusively or alternatively with notaries, and (ii) national legal systems where jurisdiction lies with other authorities.

#### 1. EXCLUSIVE OR ALTERNATIVE JURISDICTION OF THE NOTARY

33. In **French, Greek, Latvian** and **Slovenian** law, jurisdiction to hear extrajudicial divorce proceedings lies exclusively with the notary.
34. In this respect, it should be pointed out that in **France**, in view of the special role assigned to lawyers in extrajudicial divorce proceedings (see paragraph 44), neither the spouses nor their lawyers are in principle required to appear before the notary. However, according to notarial practice, the notary may summon them in certain cases, for example to confirm that they have not, in parallel, applied to the court for legal separation or divorce, this possibility remaining open until the divorce agreement is filed in the notary's minutes.
35. As regards the status of notaries, under **Latvian** law, in addition to being considered public officers, notaries belong to the judiciary and exercise their functions within the judicial district in which they are established.
36. It should also be pointed out that **Greek** law assigns a special role to the public prosecutor when the spouses have entered into a religious marriage. In this case, the law lays down the obligation to effect a 'spiritual' dissolution of the marriage. To this end, the *eisangeleas protodikon* (public prosecutor at the Court of First Instance, Greece) orders the ecclesiastical metropolis concerned to carry out a spiritual dissolution of the marriage, while at the same time sending it the extrajudicial notarial instrument of divorce. However, failure to effect the

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<sup>6</sup> **Estonian, French, Greek, Latvian, Romanian, Slovenian** and **Spanish** law.

<sup>7</sup> The possibility for spouses to apply to a court for divorce by mutual consent by way of alternative is beyond the scope of this note and is therefore not covered here. Note, however, that for all practical purposes, at least in some of the Member States providing for extrajudicial divorce, jurisdiction to hear cases involving divorce by mutual consent appears in principle to have been transferred to the extrajudicial authorities (under various conditions) such that (in specific cases) the spouses cannot apply to a court for divorce by mutual consent.

<sup>8</sup> With the exception of **Spanish** law (see paragraph 39).



spiritual dissolution of the marriage has no bearing on the effects produced by the notarial instrument itself.

37. In three Member States, provision is made for the jurisdiction of another authority as an alternative to that of notaries. These are **Estonia, Romania** and **Spain**. In **Estonia** and **Romania**, where recourse to a notary is provided for as an alternative to the civil registrar, the notary's jurisdiction goes beyond that of the civil registrar.
38. In this respect, in **Estonia**, a notary has jurisdiction to record extrajudicial divorces, including when the divorce has a foreign element (that is to say, foreign law is applicable to the divorce or the residence of one of the spouses is abroad) and when the spouses also wish to settle other divorce-related issues (such as custody and property matters). On the other hand, the civil registrar has jurisdiction only where there is no foreign element and provided that Estonian law is applicable to the divorce, which is the case when the spouses reside in Estonia or have concluded an agreement, pursuant to Regulation No 1259/2010, with a view to making that law applicable to the divorce.<sup>9</sup> In **Romania**, an extrajudicial divorce may be recorded before the civil registrar if there are no minor children, whereas a notary may record the divorce if there are such children.
39. In **Spain**, where notarial powers are provided for as an alternative to those of the registrar, the spouses are free to choose between these two public authorities. The two authorities have identical jurisdiction and the only difference is formal in nature, in that involvement of the registrar is free of charge, whereas involvement of a notary entails the payment of fees and related taxes.

## 2. COMPETENCE OF OTHER PUBLIC AUTHORITIES

40. In **Italy** and **Portugal**, competence to record an extrajudicial divorce lies not with the notary but with the civil registrar and, in **Italy**, provision is also made for the involvement of the public prosecutor.
41. First, as regards **Italy**, competence to record an extrajudicial divorce lies with the mayor, or his/her delegate -in his or her capacity as civil registrar – of the municipality in which one of the spouses resides or where the marriage certificate was registered and transcribed, provided that there are no minor children or incapacitated, severely disabled or economically dependent adult children. Furthermore, a special procedure for 'negotiation assisted by one or more lawyers' takes effect once authorisation has been obtained from the public prosecutor of the court with jurisdiction (that is to say, the court which would have had jurisdiction if judicial proceedings had been used). Note that under **Italian** law, jurisdiction to grant divorce in judicial proceedings is broader than for proceedings before the civil registrar. The prosecutor may authorise an assisted negotiation agreement even where there are minor children or incapacitated, severely disabled or economically dependent adult children, whereas this option is not available in the context of a divorce granted by the registrar.
42. Secondly, in **Portugal**, while extrajudicial divorce takes place before the civil registrar (*conservador do registo civil*), who is a public official, the public prosecutor also intervenes in proceedings where minor children are involved. If an agreement on the exercise of parental

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<sup>9</sup> 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).

responsibilities is submitted to the civil registrar, he or she forwards the case file to the prosecutor for examination to ascertain whether the agreement takes into account and safeguards the interests of the minor children. If the spouses do not agree with any amendments made by the public prosecutor, the case is referred to the court.

### 3. ROLE OF LAWYERS

43. In some legal systems, lawyers may be assigned a role in extrajudicial divorce proceedings, in particular to provide compulsory advice to the spouses.
44. In **France**, each spouse must receive legal advice to ensure that the divorce agreement is fair and that the interests of each of the parties and of their children are taken into account. In view of the importance of the role assigned to the lawyers and in order to prevent any risk of conflict of interest, the two lawyers chosen are not permitted to practise in the same organisation.
45. In **Greece**, each spouse must be advised or represented by a lawyer and the agreement to dissolve the marriage is signed either by the spouses and their lawyers or solely by their lawyers. In **Spain**, the involvement of lawyers is also mandatory under the civil code.
46. Under the assisted negotiation procedure provided for in **Italian** law, the spouses must be advised by one or more lawyers, who must certify the signatures of the spouses on the divorce agreement. Furthermore, where an agreement is concluded, it must state that the lawyers attempted to help the parties reconcile and informed them of the option of recourse to family mediation and of the importance for the child of spending adequate time with each parent. In addition, it is the lawyers who are required to send the divorce agreement to the civil registrar of the municipality where the marriage was registered and transcribed.

### B. SCOPE OF REVIEW CONDUCTED BY THE RELEVANT AUTHORITY

47. It should be noted at the outset that, although the intensity and legal status of the review conducted by the authority which grants the extrajudicial divorce are not the same in the nine legal systems analysed, a review is nevertheless conducted in all of those legal systems. The most extensive review seems to be that conducted, in **Portuguese** law, by the registrar, who, of the relevant authorities in the nine national legal systems examined, is the only authority with the power to ask the spouses to amend the relevant agreement(s) and, to that end, to order the necessary evidence to be produced. By contrast, under **Estonian** law, the registrar's powers of review appear limited to a purely formal intervention.
48. The intensity and legal status of the review carried out by the authorities of the relevant Member States range from minimal intervention which can be characterised as purely formal (**Estonian** law), to a review of the lawfulness of the conditions for divorce (which appears to be the dominant situation), culminating in a substantive review of the content of the divorce agreement (**Portuguese** law).

#### 1. PURELY FORMAL INTERVENTION OR SIMPLE REGISTRATION

49. No situation where a divorce agreement is merely registered has been identified in any of the Member States' national legal systems.

50. Under **Estonian** law, although national legislation provides that the civil registrar has substantive power of review and issues 'a decision', it would appear, however, that, in extrajudicial divorce matters, the registrar and the notary have only powers of formal review and that it is solely for the courts to examine the substantive issues. Consequently, this appears to be the least intensive standard of review of the nine legal systems concerned.

## 2. CHECKING THAT THE CONDITIONS ARE FULFILLED

51. The existence of a review of all the conditions required for extrajudicial divorce appears to be the rule in the vast majority of the legal systems concerned, although that review is not accompanied by the power to require the spouses to amend any of the agreements reached. This latter situation remains exceptional. In the context of an overall review of these conditions, the competent authority is required to verify, first, the veracity of the spouses' statements and the fact that their consent is not vitiated and, second, that all the other necessary conditions are satisfied. This examination must ensure, in particular, that the consent of the spouses is informed and that the weaker spouse is protected against the potentially harmful consequences of the divorce. If it does not at the same time conduct a substantive examination of the specific arrangements for divorce contained in the divorce agreement or, as the case may be, in the other ancillary agreements required, the authority concerned must at the very least review the completeness of those agreements.
52. The scope of the review appears relatively similar in six of the legal systems examined (**French, Greek, Latvian, Romanian, Slovenian** and **Spanish** law). Certain specific features of each of these legal systems merit a mention.
53. In this regard, under **Greek** law, notaries do not have the power to amend the content of a divorce agreement. Even if a notary considers that the agreement is not in the interests of the children concerned, he or she cannot require the spouses to amend the agreement in so far as it relates to those children. On the other hand, if the notary finds that certain conditions are not met, such as, for example, an agreement does not settle the issue of child maintenance, the notary must decline to validate the agreement and the spouses must, in principle, reconsider and amend the problematic aspects before resuming the proceedings before the notary.
54. The situation is very similar in **Spanish** law, where both the notary and the registrar carry out a two-fold review during extrajudicial divorce proceedings, namely a review of legality, in order to verify that all the conditions laid down by the legislation are satisfied (that is to say, the capacity of the spouses, the existence of mutual consent, the absence of minor or unemancipated dependent children, etc.), and a review of fairness, namely an examination of the content of the divorce agreement, to ensure that that agreement is not likely to be seriously prejudicial to the interests of either of the parties or of the adult children or emancipated minor children. This review must be limited to objective aspects while respecting the principles of minimum intervention and freedom of contract.
55. It is important to point out that, unlike **Portuguese** law, where the relevant authority has broader powers (see paragraphs 59 and 60), under **Spanish** law, if the notary or registrar considers that the divorce agreement is likely to seriously harm the interests of one of the parties or of the children involved, they cannot require that the agreement be amended. Their involvement is limited to notifying the parties of their decision and closing the extrajudicial proceedings without granting the divorce. The situation is very similar in **Romanian** law (see

paragraph 57) and **Slovenian** law (see paragraph 58), where the relevant authorities do not have the power to propose amendments to the content of spouses' agreements or to require them to remedy the absence of certain mandatory conditions. In such a case, their power is limited to refusing the extrajudicial divorce petition.

56. Under **French** law, it is the responsibility of the spouses' lawyers to attest to the spouses' free and informed consent. Although this is not expressly stated in the provisions of the civil code, the notary seems required to act as a 'flagrancy detector' to ensure that the agreement does not manifestly undermine public policy. If the notary makes such a finding in his or her capacity as a public officer, he or she may draw the lawyers' attention to the difficulty in question. Furthermore, it can be inferred from the provisions of the special laws on the notarial profession and notaries that a notary may refuse to draw up the documentation if a divorce agreement is in breach of public policy. Assessment of such a breach is nevertheless limited by the notary's powers of review in relation to the agreement. This possibility also exists in **Latvian** law, which provides that a notary may not draw up a notarial instrument prohibited by law or whose content is manifestly contrary to the provisions protecting public administration, societal morality or human dignity. The notary in **Latvia** also reviews the substantive conditions of the divorce. He or she checks whether the spouses' intention to divorce is genuine or whether, on the contrary, the divorce is forced, whether the marriage has already been dissolved and whether the parties understand the legal consequences resulting from the signing of their divorce petition and, where applicable, from their contract.
57. Under **Romanian** law, both the registrar and the notary check the formal and substantive conditions laid down by the legislation, in particular whether the consent of the spouses is free and unimpaired and whether the spouses have agreed on the surname to be used after the divorce, while only the notary also verifies that the spouses have agreed on aspects relating to minor children. If the spouses do not agree on any one of these elements, the divorce petition is refused and the spouses are encouraged to apply to the court having jurisdiction. Moreover, the mere existence of a spouses' agreement is not sufficient as regards matrimonial aspects relating to the exercise of parental authority and the establishment of the children's home after the divorce. For these two aspects, a social investigation is required and, where apparent from the conclusions of the investigation that the spouses' agreement is not in the interests of a minor child, the notary will refuse the divorce petition and encourage the spouses to apply to the court having jurisdiction.
58. Under **Slovenian** law, although the family code does not make any provision for legal review of a notarised agreement relating to extrajudicial divorce, this type of divorce is based on mutual consensus between the spouses and the relevant agreement is drawn up and approved by the notary. In this respect, the family code provides that an extrajudicial divorce may be granted by a notary where certain conditions are met, namely where spouses, who do not exercise parental responsibility, agree on the division of joint property, on which spouse will remain the tenant of the apartment where the spouses live and on maintenance for the spouse with no income who is unemployed through no fault of his or her own. Where those conditions are not satisfied, the notary must refuse to conclude an extrajudicial divorce agreement.

### 3. REVIEW OF THE CONTENT OF AGREEMENTS

59. **Portuguese** law appears to be the only law under which the relevant authority, namely the civil registrar, has genuine power to review the content of a divorce agreement, together with

the power to request its amendment and to follow up on any such amendment. While in other legal systems, the competent authority is responsible for checking the divorce agreement, particularly in terms of its completeness, to ensure that all the conditions laid down have been met and that the agreements between the spouses cover all the required aspects, under **Portuguese** law, the civil registrar not only checks that the legal conditions have been met but also examines the substance of agreements relating to joint property, the family home and the payment of maintenance to the spouse who needs it, and, where appropriate, the exercise of parental responsibility, inviting the spouses to amend them if these agreements do not protect the interests of one of them or of their children. In addition, the civil registrar may order the performance of certain acts and production of the necessary evidence. If the civil registrar considers, once the agreements submitted have been amended, that one or more of the agreements still does not adequately protect the interests of one of the spouses, approval (*homologação*) of the agreements is refused and the divorce proceedings are referred in their entirety to the court.

60. Furthermore, where there are minor children and an agreement on the exercise of parental responsibilities is submitted, the civil registrar will forward the file to the prosecutor for examination, to check whether the agreement takes into account and safeguards the interests of the minor children. If the spouses continue to apply for a divorce but do not agree with any amendments suggested by the public prosecutor, the case is referred to the court.
61. This situation is similar to that which exists under **Italian** law as part of the assisted negotiation procedure where there are minor children or children treated as such. In that Member State, the scope of the review differs according to whether the civil registrar or the public prosecutor is involved. In this respect, the civil registrar's powers of review are in line with those of other relevant authorities in most of the legal systems discussed above, in that the civil registrar must verify the parties' declarations to confirm the existence of the formal and substantive conditions for proceeding with the agreement, such as the absence of minor children and the truthfulness of the parties' declarations, whereas the scope of the review performed by the public prosecutor goes further where there are minor children or children treated as such. However, although the Italian prosecutor has the power to request that the agreement in question be amended through his or her observations, he or she does not have the power to follow this up, since the prosecutor is obliged to forward the file to the presiding judge of the court to which he or she is attached. Thus, if, after examining the agreement, the prosecutor considers that it does not meet the interests of the minor children or adult children who are incapacitated, severely disabled or economically dependent, the prosecutor will forward the file, together with his or her observations, to the presiding judge of the court so that a date for the parties' appearance can be set as soon as possible. It is important to clarify that appearance by the parties before the presiding judge of the court does not automatically entail the conversion of the extrajudicial proceedings into court proceedings. Spouses who do not agree with the prosecutor's observations may at this stage request that the proceedings be continued in court, but they may also choose to abide by the observations and amend the agreement, thereby allowing the assisted negotiation procedure to be brought to a successful conclusion. Two other solutions are possible in the event that the spouses do not abide by the prosecutor's observations, namely they may either abandon the assisted negotiation procedure or submit a new agreement in relation to which the prosecutor will be asked again to give an opinion.



### III. LEGAL STATUS OF EXTRAJUDICIAL DIVORCE AND REMEDIES

#### A. LEGAL STATUS

62. The specific legal status attributed to extrajudicial divorce is not always obvious. Only a minority of legal systems expressly address this aspect.
63. With regard to divorces recorded before the civil registrar, the legislative framework in **Portugal** and **Italy** expressly states that the public instrument issued by that authority produces the same effects as court decisions in this area. The same applies to divorce agreements authorised by the public prosecutor in **Italy** and those approved by a registrar in **Spain**. By contrast, in **Romania**, where, like the notarial procedure, the procedure before the registry office leads to a 'divorce certificate' being issued, there is no specific provision on the legal status of that certificate. Nor can a conclusion on its legal status be drawn from the legal literature, which has occasionally considered it to be an authentic instrument with probative force. Some special laws on identity documents refer alternatively to divorce certificates and divorce decisions, which may indicate a similarity as regards their effects.
64. With regard to the notarial procedure, with the exception of **Spain**, a notarial instrument relating to divorce is not treated as a court decision as regards its effects. However, the instrument appears to be characterised by the particular status enjoyed by notaries and the instruments issued by them in the Member States concerned. Thus, in **Latvia**, a notary is regarded as performing the duties of a public officer and a 'divorce certificate' issued by the notary is effective as a notarial instrument. In **Romania** and **Slovenia**, according to the general rules governing notaries, instruments drawn up by a public notary in accordance with those rules are official instruments. In **France**, a notarial instrument recording the filing of a divorce agreement in the minutes has the status of an authentic instrument, whereas it is the filing of the agreement which renders it enforceable. The situation appears less clear in **Greek** law: although the legislative framework requires the involvement of the authorities to dissolve a marriage, scholars contend that divorce is a matter of contract law and that the authority's involvement does not have the effect of creating or altering rights.
65. By contrast, in **Estonia**, it is the registration of divorce in the population register which constitutes the relevant public instrument in extrajudicial divorce matters and which serves as proof of the data registered. Furthermore, in **Spain** and **France**, in view of the public nature of civil status registers, the law specifies that a divorce takes produces its effects with regard to third parties from the date of its entry in those registers.

#### B. ENFORCEABILITY

66. Concerning the legal effects of extrajudicial divorces, in certain national legal systems (**Greek, Italian, Latvian, Romanian** and **Slovenian**) there seems to be, as regards enforceability, a difference between, on the one hand, instruments and agreements relating solely to the dissolution of the marriage and, on the other, those also relating to the consequences of that dissolution, such as the payment of maintenance, the division of property, and parental responsibility. Subject to various conditions laid down in the nine legal systems selected, divorce proceedings before the extrajudicial authority also include such aspects, beyond the mere dissolution of matrimonial ties (see paragraphs 9, 14 and 15).

67. Thus, in **Italy**, a divorce agreement recorded before the civil registrar or authorised by the public prosecutor constitutes an enforceable instrument in respect of the clauses relating to property. Similarly, in **Slovenia**, enforceability is conferred on agreements on the division of joint property and on maintenance agreements. In **Romania**, where there are minor children, it is the 'parental agreement' which is expressly enforceable. Similarly, in **Greece**, a notarial instrument may constitute an enforceable instrument only in respect of matters relating to parental responsibility and child maintenance. In **Latvia**, a notarial instrument recording a divorce is not considered to come within the category of enforceable notarial instruments. Although the spouses may be obliged to enter into an agreement on aspects concerning children and the division of property, the agreement does not necessarily have to take the form of a notarial instrument which could, by contrast, be enforceable. These examples therefore tend to limit enforceability to the consequences of the dissolution of matrimonial ties.
68. On the other hand, as regards extrajudicial divorce certificates in **France, Spain** and **Portugal**, the legislative framework appears to refer to their enforceability without further differentiation between certain aspects.

## C. REMEDIES

### 1. CONTESTING A DIVORCE AGREEMENT OR INSTRUMENT

69. The legal nature of extrajudicial divorce raises the question of whether an agreement between spouses or a public instrument of divorce can be subject to judicial review.
70. In **Italy** and **Portugal**, due to the fact that they are treated the same as decisions on divorce issued by the courts, the procedural remedies provided for such decisions can be used.
71. In other legal systems, a challenge to the divorce agreement or instrument can take different forms. In **France** and **Greece**, a legal challenge or, as the case may be, a declaration that the divorce agreement is void, is possible under ordinary contract law, for example on the basis of defects in consent. In **Slovenia**, a notarial instrument such as that relating to divorce may be subject to judicial review at the request of a contracting party if it infringes certain provisions of the law on notaries. Furthermore, in **Greece**, notwithstanding the existence of a notarial instrument settling matters relating to children, an appeal may be brought by one of the parents, by third parties, a prosecutor or a judge, since the court is not bound by an agreement between the parents that does not take into account the child's interests.

### 2. CHALLENGE TO THE REFUSAL OF AN EXTRAJUDICIAL DIVORCE PETITION OR TO ENTER IT IN AN OFFICIAL REGISTER

72. Other remedies may be available if an extrajudicial divorce petition is refused. This is the case in **Italy**, where refusal by the civil registrar to accept the spouses' declarations concerning the dissolution of the marriage may be challenged by the spouses before the courts.
73. By contrast, in **Spain**, a decision by a notary or registrar to terminate divorce proceedings in the case of an agreement that is detrimental to either of the parties or to the children involved cannot be appealed and the parties must apply to the court with jurisdiction in order to formalise their divorce. Similarly, in **Romania**, there is no right of appeal against refusal of an extrajudicial divorce petition, as in that case the spouses can apply for divorce through the

courts. However, the law does give spouses the right to apply to the courts for compensation for damage suffered as a result of the wrongful refusal of their petition.

74. More generally, in **Latvia**, the regulatory framework for notaries provides a remedy for challenging a notary's misconduct in the performance of his or her duties or in the event of refusal to perform those duties.
75. Finally, as regards entering a divorce in an official register, an administrative appeal may be brought in **Estonia** if a person considers that the registration is incorrect and the registry office refuses to correct it. Similarly, in **Slovenia**, refusal to enter an extrajudicial divorce in the civil register seems to be open to challenge before the administrative courts.

#### **IV. RECOGNITION OF EXTRAJUDICIAL DIVORCES GRANTED ABROAD**

76. Since only a minority of the Member States have so far introduced one or more forms of extrajudicial divorce, the question arises as to whether such a divorce has effect in the other Member States. By way of example, this question may arise where the validity of a divorce in another country arises as a preliminary issue in the event of remarriage or with regard to maintenance obligations or where an application is made to register such a divorce with a national office or in a national register.
77. With this in mind, the final chapter of this summary analyses the issue of recognition of extrajudicial divorce under the Brussels IIa Regulation in relation to divorces granted in Member States and, in the case of divorces granted in a non-member country, in relation to the rules on recognition under domestic law. This section applies to all Member States.<sup>10</sup>

##### **A. RECOGNITION OF AN EXTRAJUDICIAL DIVORCE GRANTED IN A MEMBER STATE**

###### **1. AUTOMATIC RECOGNITION PROCEDURE**

78. The Brussels IIa Regulation, applicable since 1 March 2005, lays down, inter alia, rules on the recognition of judgments given in matrimonial matters. With regard to the scope of application in this area, Article 1(1)(a) of the Brussels IIa Regulation states that it applies to divorce, legal separation and marriage annulment.
79. As set out in Article 21(1) of the Brussels IIa Regulation, which forms part of the first section of Chapter III, headed 'Recognition and enforcement', 'a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required'. Article 22 of the Brussels IIa Regulation, headed 'Grounds for non-recognition of judgments relating to divorce, legal separation or marriage annulment', sets out a total of four grounds for non-recognition. Furthermore, under Article 24 of the regulation, the jurisdiction of the court of the Member State of origin may not be subject to review and Article 26 provides that a judgment may not be reviewed as to its substance. Moreover, under Article 21(3) of the Brussels IIa Regulation, any interested party may, in accordance with the procedures laid down in Article 2 of the regulation, apply for a decision that the judgment be or not be recognised.

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<sup>10</sup> It is important to stress, however, that the research conducted on domestic law texts and national case-law has not made it possible to resolve the issue of recognition exhaustively for all Member States.

80. As regards the ‘judgments’ referred to in the rules on recognition in Articles 21 et seq. of the Brussels Ia Regulation, Article 2(4) of the regulation defines the concept of ‘judgment’ as ‘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’. The term ‘court’, defined in Article 2(1) of the regulation, refers to ‘all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1’.

## 2. APPLICATION OF THE RECOGNITION PROCEDURE TO EXTRAJUDICIAL DIVORCES

81. More specifically, as regards the applicability of the recognition rules of the Brussels Ia Regulation to extrajudicial divorces granted in a Member State, no specific practice or guidance from case-law was systematically identified in the legal systems referred to in this note. In **Ireland**<sup>11</sup> and **Bulgaria**,<sup>12</sup> specific examples taken from case-law seem to indicate that the regulation is considered applicable to certain extrajudicial divorces. Furthermore, in **Luxembourg**<sup>13</sup> and occasionally in **Romania**, information given to the public on administrative practice in relation to entry in the civil status records of divorces pronounced abroad refers to the prior requirement for a procedure for recognition or enforcement for the purposes of registration, solely for divorces pronounced by a court in a non-member country.
82. Among the Member States in which extrajudicial divorce is regulated, the **Latvian** legislature has laid down a specific provision, in accordance with Article 39 of the Brussels Ia Regulation, for the issuance of a certificate in relation to an extrajudicial divorce granted under **Latvian** law. Similarly, in **Italy**, a circular was published determining jurisdiction to issue such a certificate in cases of extrajudicial divorce provided for in Italian law. This approach appears to be based on the premiss that the regulation applies to extrajudicial divorce provided for in those legal systems.

## B. RECOGNITION OF EXTRAJUDICIAL DIVORCE GRANTED IN A NON-MEMBER COUNTRY

83. In some legal systems, the national rules on the recognition of foreign judgments expressly refer only to non-member countries<sup>14</sup> or make explicit reference to their subsidiarity in relation to EU regulations and, more specifically, to the Brussels Ia Regulation.<sup>15</sup> Indeed, with

<sup>11</sup> *Alves v An tArd-Chláraitheoir*, unwritten judgment of the Ard-Chúirt (High Court, **Ireland**) of 4 November 2010, No 2010/829 JR overturning the decision by an Irish authority to refuse to register the applicant’s marriage on the ground that her divorce in Portugal, granted by an administrative authority, rather than a court, could not be recognised in Ireland. In her appeal, the appellant relied on recognition under the Brussels Ia Regulation.

<sup>12</sup> *Administrativen sad Targovishte* (Administrative Court, Targovishte, **Bulgaria**) decision of 22 April 2021, administrative case No 89/21. In this judgment, which concerned the refusal by the Bulgarian civil registrar with jurisdiction to recognise a divorce registered before a Spanish notary, the court held that that divorce and the related application for recognition came within the scope of the Brussels Ia Regulation, and of Article 21 in particular.

<sup>13</sup> This is information under the heading ‘Having a legal separation or divorce obtained abroad (EU and non-EU) recorded in the civil registers’, available at <https://guichet.public.lu/en/citoyens/famille-education/vie-conjugale/separation-divorce/transcription-separation-divorce-etranger.html>.

<sup>14</sup> This is the case in **Romania**.

<sup>15</sup> In particular, in **Austria** (Paragraph 100 of the Bundesgesetz über das gerichtliche Verfahren in Rechtsangelegenheiten außer Streitsachen (Federal Law on non-contentious court proceedings) of 12 December 2003 (BGBl. I, 111/2003; ‘AußStrG’), in **Germany** (Paragraph 97 of the 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) of 17 December 2008 (BGBl. I, p. 2586; ‘FamFG’), in **Belgium** (Article 2 of the Loi portant le code de droit international privé (Law on the code of private international law) Moniteur belge of 16 July 2004, p. 57344; ‘code of private international law’), in **Estonia**, in **Finland** (Paragraph 125(1) of the Avioliittolaki (Law on Marriage) of 13 June 1929, as last amended by Law No 661 of 22 May 2015 (‘Law on Marriage’)) and in the **Netherlands** (Article 10:1 of the civil code).

the exception of **Denmark**, the Brussels Ila Regulation applies in all Member States with regard to judgments handed down by a court in a Member State (see paragraph 80).

84. Consequently, the national recognition rules will be analysed below with regard to their specific application to extrajudicial divorces or, more generally, to extrajudicial decisions or instruments originating in a non-member country. The examples from relevant case-law identified and cited below relate mainly to extrajudicial divorces granted in a non-member country.<sup>16</sup>
85. Two main mechanisms for the recognition of divorces granted abroad can be identified in domestic law, namely automatic recognition and recognition by means of prior procedure.

## 1. AUTOMATIC RECOGNITION

### a) OVERVIEW OF THE MEMBER STATES CONCERNED

86. Some legal systems expressly provide for recognition of a foreign divorce without prior procedure, unless there are grounds for non-recognition. In this sense, recognition is 'automatic' or by operation of law. This is the case in particular in **Austrian**,<sup>17</sup> **Belgian**,<sup>18</sup> **Bulgarian**,<sup>19</sup> **Finnish**,<sup>20</sup> **Greek**, **Irish**, **Italian**, **Lithuanian**<sup>21</sup> and **Polish**<sup>22</sup> law and, in part, in **Czech** and **Romanian** law, as well as in **Swedish**<sup>23</sup> law in the case of divorces granted in a Nordic country.
87. It is important to point out that, in **Czech** law and, apart from divorces granted in a Nordic country, in **Swedish** law, such recognition is limited to specific cases involving a connection with the foreign country, such as the spouses' nationality or residence.<sup>24</sup> **Romanian** law limits recognition by operation of law in a similar manner, in particular in relation to foreign judgments relating to the personal status of citizens of the state in which they were delivered. A connecting factor based on the spouses' domicile is also provided for in **Irish** law.<sup>25</sup>

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<sup>16</sup> Situations concerning the recognition, under national law, of an extrajudicial divorce granted in a Member State have been identified only in relation to divorces granted in **Denmark** (see footnote 30) albeit before the entry into force of the Brussels Ila Regulation.

<sup>17</sup> Paragraph 97 of the AußStrG.

<sup>18</sup> Article 22(1) of the code of private international law.

<sup>19</sup> Article 118(1) of the Kodeks za mezhdunarodnoto chastno pravo (code of private international law), published in DV No 42 of 17 May 2005 ('KMCP').

<sup>20</sup> Article 121 of the Law on Marriage.

<sup>21</sup> Article 809 (2) to (4) of the Lietuvos Respublikos civilinio proceso kodeksas No IX-743 (Lithuanian code of civil procedure) of 28 February 2002 (Žin., 2002, No 36-1340), as amended.

<sup>22</sup> Article 1145, Ustawa z 17 listopada 1964 roku Kodeks postępowania cywilnego (Law of 17 November 1964 establishing the code of civil procedure) (consolidated text of the Dziennik Ustaw 2021, item 1805, as amended; 'KPC').

<sup>23</sup> Paragraph 22 of the förordning (1931: 429) om vissa internationella rättsförhållanden rörande äktenskap, adoption och förmynderskap (Regulation on international legal relations concerning marriage, adoption and guardianship) concerning divorce judgments pronounced by a court or issued by an authority in Denmark, Finland, Iceland and Norway.

<sup>24</sup> As regards the **Czech Republic**, see Paragraph 52 of zákon č. 91/2012 Sb., o mezinárodním právu soukromém (Law No 91/2012 on private international law) of 25 January 2012 (částka 35/2012). As regards **Sweden**, see Chapter 3(7) of the lag (1904: 26 s. 1) om vissa internationella rättsförhållande rörande äktenskap och förmynderskap (Law on international legal relations concerning marriage and guardianship), SFS 2005, No 431.

<sup>25</sup> Article 5 of the Domicile and Recognition of Foreign Divorces Act 1986.



88. Although recourse to a judicial procedure for recognition is not in principle provided for in this approach,<sup>26</sup> in some legal systems an interested party nevertheless has the option of initiating judicial proceedings to obtain a declaration on the recognition or non-recognition of a foreign divorce.<sup>27</sup> The many grounds for non-recognition provided for in each legal system must be emphasised, however, and may entail verifying the jurisdiction of the authority in the state of origin.<sup>28</sup>

b) SCOPE OF AUTOMATIC RECOGNITION WITH REGARD TO EXTRAJUDICIAL DIVORCE

89. The application of automatic recognition to extrajudicial divorces granted in a non-member country can be clarified based on a number of factors arising from the case-law and from the legislation of the Member States referred to above.
90. First, in three Member States, examples from case-law indicate that the scope of the automatic recognition of divorces granted abroad is very broad. In **Austria** for example, the Supreme Court has ruled in favour of recognising divorces involving foreign authorities other than the courts, even if their only involvement was to register the divorce.<sup>29</sup> In **Poland**, in line with the broad interpretation in settled case-law of the concept of 'judgments by courts in foreign states',<sup>30</sup> the rules of recognition apply expressly, *mutatis mutandis*, to 'judgments by other authorities' in a foreign state, the sole criterion being that they must have been issued in a civil matter.<sup>31</sup> The case-law also allows the option of including declaratory instruments, such as the registration of divorce by a notary.<sup>32</sup> Similar examples can be found in **Lithuanian** case-law, where recognition of extrajudicial divorces granted abroad appears to encompass any judgment issued by foreign authorities having competence in matrimonial matters.<sup>33</sup>
91. Another example in the case-law concerning the scope of automatic recognition comes from the case-law in **Ireland**, even though the required threshold for state intervention is not explicitly specified. As regards the recognition of divorces 'granted' abroad, the High Court held that some element of judicial ruling or administrative intervention was required in the

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<sup>26</sup> See, for example, Lietuvos apeliacinis teismas (Court of Appeal, **Lithuania**), civilinė byla No e2T-76-943/2019, order of 2 September 2019, where the Court of Appeal refused to examine an application for recognition of a divorce certificate issued by an official in a district municipality in Japan for the reason that it was automatically recognised.

<sup>27</sup> See, for example, Paragraphs 98 and 99, AußStrG for **Austria**; Paragraph 122 of the Law on Marriage for **Finland**; Article 29 of the Family Law Act 1995 for **Ireland**.

<sup>28</sup> Examples include **Austrian** law (Paragraph 97, second paragraph, AußStrG), **Bulgarian** law (Article 117, KMCP), **Finnish** law (Paragraph 121, second paragraph of the Law on Marriage) and **Greek** law.

<sup>29</sup> Oberster Gerichtshof (Supreme Court, **Austria**), orders of 31 August 2006, 6 Ob 189/06x, [ECLI: AT: OGH0002: 2006: 0060OB00189.06X.0831.000](#), and of 27 November 2019, 6 Ob 115/19h, [ECLI: AT: OGH0002:2019:0060OB00115.19H.1127.000](#).

<sup>30</sup> See in particular Sąd Najwyższy (Supreme Court, **Poland**), orders of 2 September 1975 (I CR 559/75) and of 20 September 1983 (II CR 278/83), recognising a divorce issued, respectively, by the head of a province in Norway and a Danish district authority.

<sup>31</sup> Article 1149<sup>1</sup>, KPC.

<sup>32</sup> Sąd Apelacyjny w Katowicach (Court of Appeal, Katowice, **Poland**), order of 20 August 2009 (I ACa 410/09), finding that such registration of a divorce could be recognised but rejecting an application for recognition of a 'talaq' divorce registered by a notary in Egypt as a 'judgment' within the meaning of the KPC as the wife was unable to respond to her spouse's unilateral act. Scholars are critical of this possibility of recognising declaratory instruments.

<sup>33</sup> Lietuvos apeliacinis teismas (Court of Appeal of **Lithuania**), civilinė byla No. 2T-215/2010, order of 8 November 2010 (judgment of the legal department of the county governor in Norway), civilinė byla No. 2T-212/2011, order of 27 June 2011 (decision of a Japanese municipality) and civilinė byla No. 2T-256/2011, order of 10 October 2011 (judgment of the Icelandic national police commissioner).

country where the divorce occurred in order for a divorce to meet the condition of being 'granted' in proceedings for divorce.<sup>34</sup>

92. Secondly, elements determining the application of automatic recognition to extrajudicial divorces can be found in the legislation. In **Romania**, for example, the term 'foreign judgments' used in the rules of recognition in the code of civil procedure broadly refers to 'contentious or non-contentious jurisdictional acts of the courts, notaries or any authority with jurisdiction of a state that is not a member of the European Union'. Furthermore, in **Finland**, following the latest amendment to the Law on Marriage containing the rules of recognition in this area, the current version of these provisions replaced any reference to 'order' with 'judgment'.<sup>35</sup>
93. In **Belgium**, on the other hand, the scope of automatic recognition appears to lead to certain requirements for the foreign authority. The concept of 'judgment' in the context of the recognition of foreign judgments is defined as 'any judgment given by an authority having jurisdiction'.<sup>36</sup> This definition would seem to include other public authorities as well, but the reliance on having 'jurisdiction' seems to presuppose that judgments issued by the authorities in question are binding.
94. Finally, in **Italian** law, there is no legal definition of judgments by extrajudicial authorities and the mechanism of automatic recognition does not apply to them.

## 2. RECOGNITION BY PRIOR PROCEDURE

### a) OVERVIEW OF THE MEMBER STATES CONCERNED

95. In a second group of legal systems, the relevant rules provide that a foreign judgment must first, under domestic law, be subject to a judicial or administrative recognition procedure. This is the case for foreign judgments on the dissolution of marriage in **German**,<sup>37</sup> **Dutch**<sup>38</sup> and, to some extent, **Czech**<sup>39</sup> and **Swedish**<sup>40</sup> law. A prior recognition procedure for foreign judgments in general is also provided for in **Cypriot**,<sup>41</sup> **Latvian**, **Portuguese**, **Romanian**, **Slovak**<sup>42</sup> and **Spanish** law. Various conditions may be examined in the context of that

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<sup>34</sup> Ard-Chúirt (High Court, **Ireland**) judgment of 24 January 2015, [MY v AA \(2017\) IEHC 227](#), paragraph 93, on the recognition of a 'talaq' type divorce in Libya under Article 5 of the domicile and recognition of foreign divorces Act 1986.

<sup>35</sup> See Sections 121 and 122 of the Law on Marriage.

<sup>36</sup> Article 22(3), first subparagraph of the code of private international law.

<sup>37</sup> Paragraph 107, first subparagraph of the FamFG provides, in certain cases, for a formal procedure before the *Land* department of justice.

<sup>38</sup> Article 10:57 of the civil code.

<sup>39</sup> Paragraph 16(2) and Paragraph 51 of Law No 91/2012 on private international law, where at least one of the spouses is of Czech nationality or, if the conditions for automatic recognition (see paragraph 87) are not met, where the spouses are of Czech nationality.

<sup>40</sup> If neither spouse is a citizen of the foreign country, the law on international legal relations concerning marriage and guardianship provides for a judicial recognition procedure to allow the remarriage of a spouse in Sweden.

<sup>41</sup> See the 2000 law on judgments of foreign courts, which applies where the defendant or, in the absence of such a party, the claimant, resides in Cyprus.

<sup>42</sup> See, in particular, Paragraphs 63 to 65 of Law No 97/1963 on private and procedural international law.

procedure by the authority in charge, possibly including an examination of the substance of the judgment.<sup>43</sup>

b) SCOPE OF THE PRIOR RECOGNITION PROCEDURE WITH REGARD TO EXTRAJUDICIAL DIVORCE

96. With regard specifically to the recognition of extrajudicial divorce, a number of clarifications need to be made about the scope of the recognition procedures provided for in the Member States referred to above.
97. First, it should be noted that, as with the automatic recognition of divorces, (see paragraph 90), it is clear from the case-law of three Member States that the prior procedure provided for in national law applies to divorces involving a foreign authority other than a court, even if the divorce was simply registered by that authority or recorded without any substantive review by it. This is the case in **Germany**, where the Federal Court of Justice has ruled in favour of a broad interpretation of the concept of 'judgment' to determine acts that can be recognised, in the sense of including all divorces involving a foreign authority other than a court.<sup>44</sup> Similarly, in the **Czech Republic**, as regards recognition by prior procedure, the case-law includes divorces that have merely been registered.<sup>45</sup> In **Portugal**, a number of recent judgments relate to the recognition of extrajudicial divorce provided for in Brazilian law and recorded by a notary without any substantive review. In this context, most case-law has favoured including, within the concept of 'judgment', instruments recognised administratively by the legal system in which they were issued as being instruments producing legal effects.
98. Secondly, it may be that the recognition rules themselves already refer to judgments by various foreign authorities other than the courts, without relying on a certain degree of required state intervention. Thus, in **Cyprus**, reference is made to judgments given by an 'organ of a foreign country' with which the Republic of Cyprus has concluded or is bound by a convention on the mutual recognition and enforcement of court judgments and arbitration awards.<sup>46</sup> It should be noted that Cyprus is a contracting party to the Hague Convention,<sup>47</sup> which covers not only the recognition of divorces obtained following legal proceedings, but also, in particular, administrative divorces.<sup>48</sup> In **Croatia**, the rule of recognition applicable to foreign court judgments also expressly applies to instruments issued by other authorities,

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<sup>43</sup> For example, in the **Czech Republic**, the court responsible for the recognition procedure verifies, in certain cases, that the factual basis of the judgment has been determined, in substance, in accordance with national procedural rules (see Paragraph 51(3) of Law No 91/2012 on private international law).

<sup>44</sup> *Bundesgerichtshof* (Federal Court of Justice, Germany), order of 28 November 2018, XII ZB 217/17, [ECLI:DE:BGH:2018:281118BXIIZB217.17.0](https://ecli.europa.eu/DE/BGH:2018:281118BXIIZB217.17.0).

<sup>45</sup> *Nejvyšší soud* (Supreme Court, **Czech Republic**), decrees of 28 February 2017, No 28 NCU 4/2017, ECLI:CZ:NS:2017:28.NCU.4.2017.1 (registration by a Thai registry office), of 26 September 2018, No 28 NCU 30/2018, ECLI:CZ:NS:2018:28.NCU.30.2018.1 (registration by the Bureau of the Chinese Ministry of Civil Affairs), of 10 December 2019, No 28 NCU 97/2019, ECLI:CZ:NS:2019:28.NCU.97.2019.1 (judgment by a Japanese mayor), and of 19 August 2021, No 20 NCU 66/2021, ECLI:CZ:NS:2021:20.NCU.66.2021.1 (judgment by the registry office of the Ministry of Interior in Egypt).

<sup>46</sup> Article 3 of the *O peri apofaseon allodapon dikastirion (anagnorisi, eggrafi kai ektelesi dynami symvaseos) nomos tou 2000* (Law of 2000 on judgments by foreign courts (recognition, registration and enforcement based on a convention)) of 21 July 2000 [E.E., Annex I (I), No 3420].

<sup>47</sup> Convention on the recognition of divorces and civil separations, concluded in The Hague on 1 June 1970.

<sup>48</sup> See Bellet, P. and Goldman, B., Explanatory Report to the Convention on the recognition of divorces and legal separations, Imprimerie Nationale, The Hague, 1970 (<https://assets.hcch.net/docs/00a94277-a3cd-4802-a89c-9d9933d835a1.pdf>), paragraphs 6 and 12. According to Article 1 of the Convention, the Convention 'shall apply to the recognition in one Contracting State of divorces and legal separations obtained in another Contracting State which follow judicial or other proceedings officially recognised in that State and which are legally effective there'.

which are therefore also recognised as ‘judgments’. <sup>49</sup> In **Czech** law, the scope of the general rules on the recognition of foreign judgments also covers judgments given by the ‘authorities of a foreign State’ on rights and obligations which, in view of their private-law nature, are decided by courts in the Czech Republic, as well as notarial instruments and other foreign public instruments in this area. <sup>50</sup> In **Slovakia**, reference is also made to judgments by ‘authorities in a foreign state’ in relation to family matters in particular, where in Slovakia such cases are dealt with by the courts. <sup>51</sup> More specifically, in **Slovenia**, the national rules on enforcement procedures also refer to public instruments issued by a foreign administrative body and treat enforceable notarial instruments drawn up abroad in the same way as an amicable settlement concluded before a court.

99. Thirdly, in a final group of Member States, the concept of ‘judgment’ used in the recognition rules seems to be based on the procedure before the foreign authority or on the function of the foreign authority. Thus, in **Spanish** law, the concept refers to ‘any judicial authority or any authority with powers similar to those of the judicial authorities of a state’ and the case-law includes in particular divorce decrees issued by administrative authorities, such as a governor or municipal authorities. In the **Netherlands**, dissolution of a marriage in a non-member country by judgment of a court or other authority having jurisdiction is recognised if it was obtained ‘after due process’ (*na een behoorlijke rechtspleging*). <sup>52</sup> Otherwise, the other party must have accepted that judgment unequivocally. <sup>53</sup> Lastly, in a stricter sense, the recognition rules in **Latvia** mainly relate to judgments delivered by a foreign court ‘ruling on the merits of a dispute’ and court rulings approving arrangements with creditors. By contrast, a judgment by a ‘foreign authority having jurisdiction’ is included only if it is enforceable and if its recognition and enforcement are provided for by EU law or an international agreement.

### 3. ‘RECOGNITION’ FOR THE PURPOSES OF ENTRY IN A CIVIL STATUS REGISTER

100. Lastly, an extrajudicial divorce granted abroad may serve as the basis for updating civil status in an official register outside the procedural recognition mechanisms described above.
101. This is the case in **Belgium** for authentic foreign instruments, subject to examination. <sup>54</sup> In particular, an extrajudicial divorce granted abroad may be classified as authentic and be ‘recognised’ as such by any authority to which that instrument is submitted, but the authority must in particular verify the validity of the instrument under the applicable law and its authenticity under the law of the state of origin. <sup>55</sup> Although in practical terms this results in the ‘recognition’ of a divorce in the form of an entry in the register, examination under conflict of laws rules introduces a methodological difference in relation to the mechanism for

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<sup>49</sup> Article 66(1) and (3) of zakon o međunarodnom privatnom pravu (Law on private international law) of 4 October 2017 (Narodne novine, No 101/17).

<sup>50</sup> Paragraph 14 of Law No 91/2012 on private international law.

<sup>51</sup> Paragraph 63 of zákon č. 97/1963 Zb., o medzinárodnom práve súkromnoa procesnom (Law No 97/1963 on private and procedural international law).

<sup>52</sup> Article 10:57(1) of the civil code. See the decree of the *Gerechthof Amsterdam* (Court of Appeal, Amsterdam, **Netherlands**) of 30 May 2017, [ECLI:NL:GHAMS:2017:2026](#), paragraphs 4.3 to 4.5, on the non-recognition of a divorce in Pakistan without notification of the other party and, therefore, in breach of the adversarial principle, that principle being interpreted, in particular, in light of the case-law of the European Court of Human Rights.

<sup>53</sup> Article 10:57(2) of the civil code.

<sup>54</sup> Article 31(1) of the code of private international law.

<sup>55</sup> Article 27(1) of the code of private international law.

recognising foreign court judgments, which precludes a review on the merits.<sup>56</sup> In the same vein, in **Spain** and **Portugal**, foreign public documents that cannot be classified as court judgments can produce effects by means of entry in the public registers subject to certain conditions, such as compliance with the requirements laid down by the law of the country of origin or with international public policy under domestic law.

102. Similarly, in **Estonia**, foreign instruments that are neither judgments nor other enforceable instruments within the meaning of domestic law may serve as a basis for amending civil-status data. The registry office may thus exercise its discretion and amend the civil status records on foot of a request or as part of its official obligations.

## CONCLUSION

103. Extrajudicial divorce proceedings currently found in the national laws of a minority of the Member States reflect a relatively recent development in the relevant legislation aimed at simplifying and accelerating divorce proceedings, while at the same time relieving the courts of a large number of divorce-related disputes.
104. Despite certain specific features identified in the various legal systems, it is important to point out that extrajudicial divorce proceedings remain essentially similar. In legal systems where such proceedings are brought, divorce is by no means a purely private matter precluding any intervention by a public authority. On the contrary, review by such an authority is a *sine qua non* for extrajudicial divorce, although the scope of such review varies from one Member State to another. The preferred authority with competence to record such a divorce is the notary, followed by the civil registrar, although in certain cases other authorities may also be involved. The guiding principle for the involvement of these authorities seems, in most cases, to involve checking agreements between the spouses for completeness, including checking all conditions laid down, with enhanced review in cases involving minor children or children treated as such.
105. As regards the legal status attributed to extrajudicial divorce, it follows from a comparative analysis of the legal systems selected that this aspect has not always been expressly regulated. Several approaches have thus been identified which incorporate the divorce agreement or instrument into the traditional typology of legal instruments, such as court judgments, authentic instruments or private agreements.
106. In addition, there are different approaches when it comes to the possibility of a judicial review or a challenge in relation to a divorce agreement or public instrument. These may include the procedural remedies available for court judgments, challenges to agreements under ordinary law or review of the instrument under special laws. Furthermore, a challenge to the refusal of a divorce petition may be expressly excluded or permitted.
107. Finally, as regards the cross-border recognition of divorces granted by authorities other than a court, no specific practice or guidance in the case-law on the application of the Brussels IIa Regulation to extrajudicial divorces in a Member State was identified systemically in the Member States.

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<sup>56</sup> See Article 25(2) of the code of private international law.



108. On the other hand, analysis of the rules on recognition in domestic law has shown that there are certain nuances as to the nature of the instruments that may be recognised. However, national case-law and/or legislation in a considerable number of Member States point to the conclusion that extrajudicial divorces involving an authority and, more generally, instruments issued by an extrajudicial authority can be recognised, irrespective of the recognition mechanism chosen (whether automatic or via prior procedure).

[...]