



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-372/16
Soha Sahyouni v Raja Mamisch

According to Advocate General Saugmandsgaard Øe, private divorces do not come within the scope of the 'Rome III' Regulation

In any event, that regulation on the law applicable to divorce does not allow such a divorce to be recognised as valid where the applicable foreign law is discriminatory

Mr Raja Mamisch and Mrs Soha Sahyouni, who hold both Syrian and German citizenship, currently reside in Germany.

In 2013, since Mr Mamisch expressed his desire to get divorced, his representative pronounced the required formula before a religious court in Syria, which granted the divorce. The divorce was 'private' in so far as it is based not on a constitutive decision of a court or other public authority, but on a declaration of intent of the spouses, in this case unilateral and followed by a merely declarative act of a foreign authority. Subsequently, Mrs Sahyouni signed a declaration acknowledging that she had received all the payments which, according to religious law, were due to her under the marriage contract and on the basis of the unilateral divorce instigated by her husband and she thereby released her husband from all obligations to her.

Mr Mamisch then applied to have the divorce recognised in Germany. That application was granted by the President of the Oberlandesgericht München (Higher Regional Court, Munich), holding, in particular, that the 'Rome III' Regulation on the law applicable to divorce¹ covers that type of application and that, under that regulation, the divorce at issue was governed by Syrian law.

Mrs Sahyouni contested that recognition of the divorce before the Oberlandesgericht München, which referred to the Court of Justice several questions relating to the interpretation of the 'Rome III' Regulation.

In his Opinion of today, Advocate General Henrik Saugmandsgaard Øe notes first of all that the 'Rome III' Regulation lays down the rules governing conflicts of applicable laws in matters of divorce in the participating Member States,² without governing the recognition of decisions on divorce which have already been made. Nevertheless, that regulation applies indirectly in the present case, and its interpretation is therefore useful, in so far as German law refers to it in order to determine the law applicable to judicial proceedings concerning the recognition of private divorces declared abroad.

However, **the Advocate General considers, contrary to what the German legislature assumed, that the 'Rome III' Regulation does not cover divorces which are declared without a constitutive decision of a court or other public authority, such as a divorce resulting from the unilateral declaration of a spouse which is registered by a religious court.** He reaches that conclusion, in particular, in view of the preparatory works of that regulation and taking into account the fact that the EU legislature intended the scope of application of the latter to be

¹ 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).

² Given that the 'Rome III' Regulation implements enhanced cooperation, it is, to date, applicable only in Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia.

consistent with that of the Brussels IIa Regulation on jurisdiction, recognition and enforcement of judgments in matrimonial matters.³

In the event that the Court holds that private divorces are covered by the 'Rome III' Regulation, the Advocate General sets out his opinion on the interpretation of Article 10 of that regulation, a provision according to which a court of a participating Member State must apply its own national law where the foreign law which is in principle applicable provides that access to divorce depends on the sex of the spouse. In that regard, the Advocate General notes that, according to the Oberlandesgericht München, Syrian law does not grant the wife the same conditions of access to divorce as those available to the husband.

The Advocate General considers, first of all, that the question whether access to divorce provided for by the foreign law is discriminatory must be assessed in the abstract, and not specifically in the light of the circumstances of the case. Therefore, it suffices that the applicable foreign law be discriminatory by virtue of its content for it to be disapplied. The EU legislature considered that the discrimination at issue, namely that based on the sex of the spouse, is so serious as to warrant unqualified rejection, without the possibility of exception on a case-by-case basis, of the entirety of the law which should have been applied in the absence of such discrimination.

Next, the Advocate General examines whether the fact that the spouse discriminated against possibly consented to the divorce allows the national court not to disapply the foreign law despite its discriminatory nature, and therefore to apply that law.

According to the Advocate General, that question should be answered in the negative. The rule set out in Article 10 of the 'Rome III' Regulation, which is based on compliance with values considered to be fundamental, is mandatory in nature and therefore, as a result of the intention of the EU legislature, does not fall within the sphere in which the persons at issue can freely waive the protection of their rights.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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³ 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).