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NON-JUDICIAL DIVORCES AND THE BRUSSELS II BIS REGULATION: TO APPLY OR NOT APPLY?

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Abstract. This paper aims to analyse the international consequences of private divorces, which are available in several European countries. Particular attention is drawn to the amendments suggested by the Lithuanian legislator, which intend to transfer certain functions of the courts to notaries. In particular, Lithuanian notaries would have competence in the dissolution of marriage provided there is mutual consent between spouses. The authors discuss how private divorces are regulated in different countries, whether the amendments suggested by the Lithuanian legislator would introduce a "private divorce" into Lithuanian law, and what the implications of private divorce are in private international law. In particular, the scope of application of the Brussels II bis Regulation is addressed. As yet, there is no consensus as to whether the Regulation applies to private divorces. However, the analysis in this paper shows that it would be beneficial to include such divorces in the above-mentioned Regulation. This would ensure a greater legal certainty for international couples.

Keywords: private international law, notaries, jurisdiction, recognition, private divorce

Introduction

The caseload of courts around Europe varies significantly (European Commission, 2020). According to the EU Justice Scoreboard, since 2012 caseload has decreased in the majority of EU member states, and has remained stable for several years (European Commission, 2020). Lately, in several EU member states, a trend in releasing indisputable cases from courts – by, for instance, introducing non-judicial divorces – can be observed (Kramme, 2021).

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Some initiatives to relinquish non-judicial functions have also been taken in Lithuania. One of these suggestions is to hand over divorces to notaries by mutual consent. It is worth mentioning here that Lithuanian courts are some one of the busiest in the entire European Union in terms of the number of civil cases received (European Commission, 2020). Lithuanian courts rank third by number of civil cases received in courts of the first instance, surpassed only by Belgium and Romania. This is partly due to the peculiarities of national legal regulation, which requires cases to go to court even in the absence of a dispute. For instance, in a case of divorce by mutual consent, the role of the court is essentially limited to confirming the agreement between spouses. In 2020, 15,709 family relationship cases were heard in the district courts of Lithuania, of which 7,488 were cases of divorce by the mutual consent of both spouses. Thus, approximately half of all family cases examined by the district courts in 2020 consisted of simple indisputable family cases. Such excessive litigation results in the loss of time and financial costs for both the people and the state. This excess also does not contribute to the efficient functioning of the judiciary.

However, removing divorces from the court can have an additional, not necessarily expected results – namely the international recognition of non-judicial divorces. Within the EU, the latter is regulated by the Brussels II bis Regulation (2003), which will be replaced by the Brussels II ter Regulation (2019) in 2022. It is unclear whether, for instance, notaries can apply the Brussels II bis Regulation's jurisdictional rules, or whether non-judicial divorce will be recognized according to the rules of the Regulation. Neither the Brussels II bis Regulation nor the case-law of the Court of Justice of the European Union (hereinafter – CJEU) give a clear answer to this question. The literature on the topic is similarly limited. The issues of private divorce in private international law have been addressed in some recent studies. Kramme (2021) discusses this issue in light of the Brussels II ter Regulation, while Dutta (2019) addresses the applicable law issues of private divorce. Some general comments regarding non-judicial divorces can be found in Magnus and Mankowski (2017), and several works discuss the 2017 case of Soha Sahyouni v. Raja Mamisch (Sellens & Zimmer, 2016, 2018; Gössl, 2017).

This paper aims to contribute to the ongoing discussion of whether private divorces fall within the scope of the Brussels II bis Regulation. To this end, a brief comparative analysis of private divorces in particular states will be provided. This will allow for the identification of different types of private divorces, which can be important in determining whether the Brussels II bis Regulation applies. The analysis of the application of the above-mentioned Regulation will comprise the following interconnected questions: whether non-judicial divorce falls within the scope of application of the Regulation; whether a notary can be considered a "court"; and if or how non-judicial divorce can be recognized according to the Brussels II bis Regulation. The issues at stake raise theoretical questions on both the limits of the application of the Brussels II bis Regulation, and the practical problems within member states (Lazić, 2018b).

1. Private divorces in national law – one name, different faces

Divorce laws are becoming increasingly liberal across Europe (Ryznar & Devaux, 2018). National legislators are removing judicial authorities from the process of divorce because of the long duration of court proceedings even in simple cases (Kramme, 2021). For instance, in Lithuania, the idea of releasing the courts from uncharacteristic functions was prompted by the need to address the issue of balancing the workloads of district and regional courts. According to the calculations of the Lithuanian Ministry of Justice (Explanatory note on Draft Law, 2020), the exemption of district courts from some currently-heard cases, as proposed by amendments to the law, would reduce the workload of district courts in civil cases by almost 10%, as well as simplify the resolution of many family issues.

In the subject literature, a private divorce is characterized as a divorce without the involvement of the judicial authorities (Kramme, 2021). Private divorces vary in particular countries; however, the common feature is the involvement of a public authority in the divorce process. Therefore, it is important to distinguish them from informal religious divorces among Muslims, which do not involve public authorities and do not have binding effects (Scherpe & Bargelli, 2021).

So far, several European countries have introduced private divorce in their legal systems, including Estonia, France, Italy, Latvia, Slovenia, Spain, Portugal, and Romania. A brief comparative analysis of how the issues surrounding private divorce are regulated in these countries can be beneficial for the consideration of the implications of private international law, as the application of a European legal instrument can depend on the national legal peculiarities of member states. For instance, under Regulation 650/2012 (2012), EU member states shall inform the European Commission of the type of authority which has competence in succession cases. Some member states include notaries among these authorities. Moreover, in the case of E.E. (2020), the CJEU left the national court to decide whether, according to national law, the state's notaries act pursuant to a delegation of power by a judicial authority, or act under the control of a judicial authority. Against this background, the differences between national laws can be crucial in terms of the application of EU regulations.

Latvia (Lazić, 2018b), Estonia (Family Law Act, 2009), Slovenia (Kraljić, 2020), France (Scherpe & Bargelli, 2021), Spain (Cerdeira, 2016), and Romania (Explanatory note on draft laws, 2020) allow notarial divorce provided there is the mutual consent of the spouses. In Latvia (Lazić, 2018b), France (Scherpe & Bargelli, 2021), Romania (Explanatory note on draft laws, 2020), and Estonia (Family Law Act, 2009), it does not matter whether spouses have or do not have minor children or common property. However, in cases where spouses have minor children, Latvian and Romanian laws require an additional agreement regarding custody of the child, access rights, and child maintenance (Lazić, 2018b; Explanatory note on Draft Law, 2020). Spain (Scherpe & Bargelli, 2021) and Slovenia (Kraljić, 2020), however, allow a notarial divorce only in the absence of common minor children.

Slightly different procedures are provided by Italian and Portuguese legislators. In Italy (Scherpe & Bargelli, 2021) and Portugal (Civil Code), marriage can be dissolved at a civil registry office. However, if the spouses have minor children, their divorce agreement is additionally checked by the public prosecutor's office as to whether the children are duly protected (Scherpe & Bargelli, 2021; Civil Code, 1966).

The Lithuanian legislator, in its proposed amendments, suggests an amendment to Article 3.51 of the Civil Code of the Republic of Lithuania, which would provide for the possibility of divorce by notarial procedure if there is the mutual consent of the spouses and if the spouses have not managed a joint household for more than one year, do not live a married life, and do not have minor children. The legislator also proposes to provide for the possibility for both spouses to apply to a notary with a joint application for the confirmation of legal separation if the spouses do not have minor children. It is noteworthy that the Lithuanian notarial system belongs to the group of Latin notary systems. Notaries are non-judicial authorities acting in non-contentious cases, and in the case of a dispute or any doubts they must refrain from making decisions. Only the courts can adjudicate in case of a dispute.

It can be stated that these amendments would introduce so called "private divorce". However, a notary would be still involved in the process, and thus the agreement of the spouses would be controlled in terms of its lawfulness. In fact, the Lithuanian legislator seems to be following the general European trend of the liberalization of divorce law.

Another important issue is whether in case of mutual consent spouses can choose between a judicial and a non-judicial divorce. The majority of countries – for instance, France (Scherpe & Bargelli, 2021), Estonia (Family Law Act, 2009), Latvia (Civil Law, 1937), and Portugal (Civil Code, 1966) – do not provide alternatives in this regard; in other words, if spouses achieve mutual consent, they cannot have a judicial divorce. However, some countries – Spain, for instance – allow spouses to choose a judicial divorce as an alternative to a non-judicial divorce (Scherpe & Bargelli, 2021).

Finally, in terms of further analysis, it is important to point out the potential consequences of private divorce. In all of the countries discussed, the final effect of the decision, agreement, or the notarial deed will be the dissolution of marriage. In fact, the final result will not be different from that of a judicial divorce (Scherpe & Bargelli, 2021). It is noteworthy that the laws presented are not discriminatory for either of the spouses – they require their consent regarding the divorce and its consequences. Moreover, often such a non-judicial divorce is possible provided the

spouses do not have minor children. If they do, additional protective measures, as controlled by the prosecutor's office, are in place.

2. Non-judicial divorce in light of the Brussels II bis Regulation

2.1. Non-judicial divorce and the scope of application of the Brussels II bis Regulation

The legislative initiatives discussed above would have implications not only on national cases, but also on cases with an international element. From the standpoint of international cases, there are two questions that have to be addressed: jurisdiction; and the recognition of the judgment, or other authentic documents. Within the European Union, these questions are currently regulated by the Brussels II bis Regulation (2003) (hereinafter referred to as the Regulation). This Regulation applies in matters of divorce, legal separation, and parental responsibility. Article 2 of the Regulation defines the "court" as "all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1 and the "judge" as "the judge or an official having powers equivalent to those of a judge in the matters falling within the scope of the Regulation". Finally, the regulation defines the "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".

Until now, divorces and legal separations in Lithuania were within the competence of the courts, and the notions presented by the Regulation were, therefore, not considered problematic. This can change due to the transfer of some court functions to other institutions. In cases of divorces and separations based on the mutual consent of spouses, these functions would be transferred to notaries. Therefore, it is important to answer the questions of: whether "divorce" by a notary can be understood as "divorce" in the meaning of Article 1 of the Regulation; whether a notary can be considered a "court" or a "judge"; and whether the notary's conclusions can be considered a "judgment" within the meaning of Article 2 of the Regulation.

In other words, it needs to be discussed whether Lithuanian notaries would be able to apply the Regulation in order to determine jurisdiction, and whether their decisions could be recognized on the grounds provided by the Regulation. So far, the CJEU has not had the opportunity to address all of these questions. It was recently approached with a question regarding the notion of divorce in case of non-judiciary proceedings for the first time – fifteen years after the Regulation came into force. On 1 December 2020, the Bundesgerichtshof (Germany) lodged a request for a preliminary ruling asking whether a non-judicial marriage dissolution on the basis of Article 12 of Decreto Legge (Italian Decree-Law) No. 132 of 12 September 2014 (DL No. 132/2014) is a divorce within the meaning of the Brussels II a Regulation (CJEU, C-646/20, 2020). The main question in the case concerned the recognition of non-judicial Italian divorce in Germany. Neither the opinion of the Attorney General nor the ruling of the CJEU have been provided thus far. However, on several occasions the CJEU has had the opportunity to elaborate on the notions of "court" and "divorce" within the meaning of the EU regulations related to jurisdiction and recognition of judgement in civil matters. The legal doctrine has also addressed the issues mentioned earlier.

Perhaps the most well-known example of this is the case of Soha Sahyouni v. Raja Mamisch (2017). Although this case concerned the scope of application of the Rome III Regulation (2010), the CJEU referred explicitly to Article 1(1) and Article 2(4) of the Brussels II bis Regulation. The Court pointed out that different understandings of "divorce" in both regulations would lead to divergence in the scope of their application, which would be inconsistent. The Court reiterated the opinion of the Advocate General, stating that at the time of the adoption of the Regulation divorces were pronounced by the courts or by, or under the supervision of, another public authority (Soha Sahyouni v. Raja Mamisch, 2017, para. 45). Both the Court and the Advocate General agreed that private unilateral declaration of the intent to divorce pronounced before a religious court cannot be considered divorce under the Rome III Regulation. Moreover, the inclusion of private divorces into the scope of application of the Regulation would require legislative steps within the competence of the EU. In light of the Soha Sahyouni v. Raja

Mamisch case, it remains unclear whether notarial divorce would fall under the notion of divorce in the Rome III and Brussels II bis regulations.

Legal doctrine is also not unanimous in this regard. The Regulation covers both judicial and non-judicial proceedings concerning divorce (Magnus & Mankowski, 2017, p. 54). However, non-judicial proceedings include mainly administrative proceedings (Magnus & Mankowski, 2017, p. 54), which was also confirmed by the CJEU in the Soha Sahyouni v. Raja Mamisch case. As was pointed out earlier, non-judicial divorce is being introduced in different EU member states as a faster alternative to a judicial divorce. For instance, notary divorce is available in Spain (Cerdeira Bravo de Mansilla, 2016), Latvia, and Romania (European Commission for the Efficiency of Justice…, 2019). In her report, A. Borrás (Council of the European Union, 1998) confirms that the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (1998) also applies to non-judicial divorces, provided there is consent between spouses regarding all of the relevant matters – such as maintenance, property, and custody.

Considering notarial divorce within the scope of the Brussels II bis Regulation would allow for the maintenance of uniformity and legal certainty in determining jurisdiction in international divorce cases within the EU. This has been confirmed by the explicit mention of notaries in the preamble to the Brussels II ter Regulation (2019), where it is explained that notaries can be considered public authorities even when they are exercising a liberal profession. Therefore, the new regulation leaves no doubt in this regard. However, it still remains unclear what the CJEU will say in the case lodged by the German court (CJEU, C-646/20, 2020).

Kramme (2021) claims that it can be expected that the CJEU will reiterate the position it expressed in the Soha Sahyouni v. Raja Mamisch case – that private divorce falls outside the scope of the Brussels II bis Regulation. The author recalls CJEU considerations regarding the need for an aligned understanding of the term "divorce" in the Brussels II bis and Rome III regulations. Dutta (2019) is less strict in this regard, noting that from the standpoint of private international law it is difficult to protect the idea of the separation of private and judicial divorces, particularly when unilateral or mutual intent is a prerequisite for divorce in both cases. He claims that the boundaries between judicial and non-judicial divorces are drawn formalistically (Dutta, 2019). The opinions of both authors are in favor of the recognition of private divorce as falling within the scope of the Brussels II bis Regulation.

It is noteworthy that in the case of Soha Sahyouni v. Raja Mamisch the CJEU did not differentiate between types of private divorces. Such differentiation could bring greater clarity to the position of the CJEU regarding private divorces that are different from the one in the Soha Sahyouni v. Raja Mamisch case. In light of the report prepared by Borrás (Council of the European Union, 1998), it seems that notarial divorce can still be considered as falling within the scope of the Brussels II bis Regulation. It seems that the CJEU could, in its forthcoming judgement regarding the notion of "divorce", still take a different point of view from the one it occupied earlier in the Soha Sahyouni v. Raja Mamisch case. According to the CJEU, the terms used in the Rome III and Brussels II bis Regulations have to be explained in a uniform way. It can be expected that the CJEU will also wish to maintain the uniform interpretation of the terms used in the Rome III Regulation and the new Brussels II ter Regulation. The latter accepts notarial divorces. Therefore, the CJEU could go further than in the Soha Sahyouni v. Raja Mamisch case, and explain more thoroughly what it means in stating that the divorce was pronounced by the court or by, or under the supervision of, another public authority.

Therefore, it cannot be dismissed that the CJEU might conclude that under some circumstances private divorce will fall within the scope of application of the Brussels II bis Regulation. This would allow for continuity to be maintained between the two regulations – Brussels II bis and Brussels II ter.

2.2. Will Lithuanian notaries be considered "courts"?

Potential doubts regarding non-judicial divorce can come about due to several circumstances. The CJEU has already had possibilities to approach the question of the definition of "court" within the meaning of private international law (Eco Swiss China Time Ltd v. Benetton International NV, 1999). In its recent E.E. judgment (2020), the CJEU decided on whether a "notary who opens a succession case, issues a certificate of succession rights and carries out other actions necessary for the heir to assert his or her rights [is] to be regarded as a "court" within the meaning of Article 3(2) of Regulation No 650/2012". The CJEU held that Lithuanian notaries are not courts within the meaning of Article 3(2) of Regulation 650/2012 (2012), unless they act pursuant to a delegation of power by a judicial authority or act under the control of a judicial authority. The latter was left for the national court to examine. Subsequently, the Lithuanian Supreme Court found that Lithuanian notaries are neither courts nor do they either act pursuant to a delegation of power by a judicial authority or act under the control of a judicial authority (Lithuanian Supreme Court, 2020). The main reason for this was the fact that notaries cannot solve disputes between parties. These judgments can also be relevant when considering notarial divorces.

Neither Regulation 650/2012 nor the Brussels II bis Regulation distinguishes between cases solved by the consent of the parties and cases without such consent. However, the definitions of "court" in the Brussels II bis and Succession regulations are not identical, thus considerations as to whether a notary can be considered a "judge" or a "court" within the meaning of each of these regulations may also differ. Within the meaning of the Brussels II bis Regulation, a notary can still be considered to constitute "another public authority", as mentioned by the CJEU in the Soha Sahyouni v. Raja Mamisch case. However, the Brussels II ter Regulation (2019) does not leave any doubt. Although the wording of Article 1(2)(a) of the new regulation is almost the same as in the Brussels I bis Regulation, paragraph 14 of the Preamble to the Brussels II ter Regulation mentions notaries expressis verbis as authorities that can be considered a "court" under this regulation. These changes could be important for future interpretation of the new regulation.

2.3. Cross-border recognition of notarial divorces.

The transfer of some divorces to notaries would also have implications on the recognition of these divorces abroad. The Brussels II bis Regulation distinguishes the recognition of judgments and the recognition of authentic documents; however, it provides the same rules of recognition and enforcement for both . The new Brussels II ter Regulation introduces changes in this regard – notably, it no longer mentions "judgments". Instead, it distinguishes "decisions", "authentic instruments", and "agreements", and provides separate rules for their recognition and enforcement. Therefore, it is important to consider which of these rules would apply to Lithuanian notarial divorces.

Article 26(1) of the Lithuanian Law on Notaries provides a non-exhaustive list of cases where the notarial deed is available. For the moment, a notary can provide a notarial deed confirming different legal transactions. Whilst this law does not name these transactions, it does provide strict formal requirements for the notarial deed. From the standpoint of private international law, the most important question is how to qualify the deed of a Lithuanian notary confirming the divorce: is it an "authentic instrument", a "decision", or an "agreement"? This will depend on the actual content of notarial reform in Lithuania, and the delimitation of notarial functions from those of the court. Presently, it seems that the function of a notary will not differ from the function of a court in regard to divorce by mutual consent; neither interfere with the content of the spouses' agreement, provided it is lawful.

Some guidance is provided in the preamble to the Brussels II ter regulation. In point 14 of the preamble, the legislator tries to make a delineation between "decisions" and "other agreements". An agreement approved by a court after an examination of the substance according to the national law is considered a "decision". Other legally binding agreements following the formal intervention of the public authority should be recognized as "authentic documents" and "agreements". Agreements that do not fit either classification can still circulate, provided they are registered by a public authority. In case of the proposed amendments in Lithuania, most probably a notarial deed

can be considered an "authentic document" within the meaning of the Brussels II ter regulation. In the subject literature, an "authentic document" has been described as "a public document by which an agent of the state in question formally and authoritatively records declarations made by the parties so as to constitute those declarations as legal obligations" (Fitchen, 2011, p. 33). It seems that this definition quite precisely describes the function of a notary within a notarial divorce: the notary does not interfere in the content of the spouses' agreement, provided it is lawful. The function of the notary is limited to confirmation of the parties' mutual declarations and obligations.

Since the adoption of the Brussels II Convention, however, it is clear that a lawful dissolution of marriage or declaration of legal separation must be recognized in the entirety of Europe. The very fact that the marriage has been dissolved should be recognized automatically, and should also happen under the Brussels II ter Regulation.
The situation is more complicated in light of the Brussels II bis Regulation. In fact, the recognition of notarial divorce will mainly depend on whether such a divorce falls within the scope of the Regulation or not. Therefore, the CJEU judgement in case C-646/20 will be crucial in this regard. Under the present legal framework, the member states face difficulties in understanding whether a private divorce can be recognized according to the rules of the Brussels II bis Regulation (Lazić, 2018a).

Considering the fact that a growing number of EU member states are beginning to allow non-judicial divorces, the CJEU's answer will have great meaning for EU citizens obtaining such a divorce in another member state (Kramme, 2021). The decision of the CJEU would have very important practical implications for international couples. It could be even claimed that the interpretation of the Court would affect the possibility of EU citizens to fully enjoy the freedoms enshrined in the EU treaties. The Brussels II bis Regulation is imperative for the courts of the member states. It is not difficult to imagine a situation where, according to the Brussels II bis Regulation, jurisdiction belongs only to member state X. In that member state, divorce by mutual consent is possible, however only in the form of non-judicial divorce. If such a divorce would not be recognized in other EU member states, the legal certainty and the value of the Brussels II bis Regulation in international divorce cases would be undermined.

Conclusions

Private divorce, available in several European countries, allows spouses who have attained mutual consent to avoid entering a judicial procedure. However, it still requires the participation of the public authority. In many instances – such as in Spain, Latvia and France – this takes the form of a notary, who confirms the spouses' agreement. However, a civil registry or a public prosecutor's office can also be involved – as in Italy and Portugal, for example. Although the non-judicial divorce procedure differs from the judicial one, the consequences of both are similar: the ending of the personal bond between spouses; the distribution of their property; and a decision on the custody and maintenance of children. The latter applies only in cases where non-judicial divorce is available for spouses who have minor children.

The Lithuanian legislator seeks to follow the European trend and to introduce private divorce into its legal system. The Draft Law foresees amendments that could significantly reduce the workload of courts. It would also make divorce proceedings faster and easier in cases that do not involve any disputes. It also seems that these amendments follow the recent European trend of making divorces more accessible.

Private divorces have significant implications in private international law. There is currently a case pending before the CJEU that addresses the recognition of private divorce. Whilst the CJEU has already approached private religious divorce, the private divorces discussed in this paper – unlike informal religious divorces – have a binding effect. Moreover, their effect does not differ from the court's decision in similar situations – namely in cases of uncontested divorce.

Neither the literature nor the case-law provides unambiguous support for excluding private divorces from the Brussels II bis Regulation. In the Soha Sahyouni v. Raja Mamisch case, the CJEU mentions "other public authority" – thus, notaries can be considered as such.

Finally, the Brussels II ter Regulation explicitly mentions notaries among the public authorities eligible to pronounce a divorce. Therefore, legal certainty and continuity between the Brussels II bis Regulation and the Brussels II ter Regulation would benefit from "court" and "other public authorities" having the same meaning in both regulations.

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