INSIGHT

Reshaping the Boundaries Between 'Decision' and Party Autonomy. The CJEU on the Extrajudicial Italian Divorce

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Abstract: This contribution focuses on the definition of "decision" in divorce matters for the purpose of Brussels IIa and IIb Regulations. Shaping the concepts of "decision" and "court" in EU family matters has become controversial since when extrajudicial divorces have spread around Europe since the early 21st century. In 2022 the CJEU, in dealing with a divorce agreement drawn up by the Italian civil registrar and confirmed by the spouses before that registrar in accordance with the conditions laid down by the national legislation, came to the conclusion that it constitutes a "decision". This contribution critically examines the *Senatsverwaltungs* judgment of the Court of Justice of the European Union by exploring the arguments it uses, the conclusion it reaches and the implications it carries. In particular, it analyses the "examination of the substance of the agreement" as criterion to feature the concept of "decision" by comparing it with the CJEU's precedents and argues that, if properly understood, this should lead to deny the divorce agreement drawn up by the Italian civil registrar to be a decision. Finally, it makes a plea for an alternative view of the boundaries of "decision" and "authentic instrument and agreement" in cases falling under the sphere of application of Brussels IIb regulation.

Keywords: divorce in front of a civil registrar in Italy – recognition- Brussels IIa regulation – Brussels IIb regulation – decision – authentic instruments and agreements.

I. *Senatsverwaltung* as a step forward in the definition of decision in divorce matters after *Sahyouni*

Since the early 21st century many European systems have dejudicialized divorce matters by introducing different types of proceedings involving either professionals or administrative authorities or both.[1] This trend not only has changed the relevance traditionally

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[1] A Dutta, D Schwab, D Henrich, P Gottwald and M Lohnig (eds), *Scheidung ohne Gericht. Neue Entwicklungen im europäischen Scheidungsrecht* (Gieseking Verlag 2017). An updated overview is available at www.europa.eu.

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played by spousal status in national family laws; it has also challenged the concepts of "court" and "decision" in EU private international family law and even the rationale behind the general aim of judicial cooperation in civil matters as a keystone of mutual recognition of judgments (art. 81 TFEU). It is not surprising that the dejudicialization trend in these matters has been defined as a "burning point" of Private International Law.[2]

The first occasion the EU Court of Justice (thereinafter: CJEU) had to deal with a non-judicial dissolution of a marriage was the famous *Sahyouni* case, regarding a husband's unilateral repudiation in front of a Syrian religious authority, where a question of applicable law regarding the interpretation of Regulation no. 1259/2010 (Rome III) was at stake.[3] Then a divorce in front of an Italian civil officer gave the Court the opportunity to take a further step in giving an autonomous and uniform interpretation of the terms "court" and "decision" set out by article 2 (1) and (4) of the Brussels IIa Regulation (n. 2201/2003).[4] Soon after, a notarial divorce issued in Spain was a further occasion for the *Kammergericht* Berlin to raise a similar question for a preliminary ruling in 2022.[5] The proceeding was, finally, cancelled in December 2022.[6]

The present proceeding concerned a couple previously married before the *Standesamt Mitte* of Berlin and composed of, respectively, a dual German/Italian national and an Italian national. After the former spouse applied to the Civil Registry officer of Berlin Mitte for the divorce to be entered in the Berlin registry of marriages, the question arose as to whether Paragraph 107(1) of the *FamG* applied, with the consequent need for the divorce to be first recognized by the regional competent judicial authority (in this case, the *Senatsverwaltung für Justiz, Verbraucherschutz und Antidiskriminierung*, namely the Ministry of Justice, Consumer Protection and Fight against Discrimination of Berlin). The Civil Registry Officer asked the competent *Amtsgericht* (German local Court), which gave a positive answer by order of 1 July 2019. However, the Berlin Ministry of Justice rejected the application sued by the spouse having both German and Italian nationality, arguing that the agreement in front of the civil officer was not a "decision" and, therefore, did not require recognition. At the same time, the *Kammergericht* Berlin (Higher Regional Court of Berlin) upheld the action brought by the same spouse against the *Amtsgericht*'s order of 1 July 2019[7] and, thus, prohibited the Civil Registry Office of Berlin-Mitte from making the registration in the register of marriages in Italy conditional upon prior recog-

[2] P Mankowski, 'Anerkennung einer standesamtlichen Scheidung aus Italien' (2020) Beck-Rechtsprechung 6463.

[3] Case C-372/16 *Soha Sahyouni v Raja Mamisch* ECLI: ECLI:EU:C:2017:988.

[4] Case C-646/20 *Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht v. TB* ECLI:EU:C:2022:879.

[5] Kammergericht Berlin judgment of 28 April 2022.

[6] Case C-304/22 PM v Senatsverwaltung für Justiz, Vielfalt und Antidiskriminierung.

[7] Kammergericht Berlin judgment of 30 March 2020. See the comment by A Dutta (2020) Zeitschrift für das gesamte Familienrecht 1215.

nition by the Berlin Ministry of Justice. Therefore, the authority responsible for monitoring civil status brought an appeal against that decision before the *Bundesgerichtshof* (Federal Court of Justice, Germany), which asked for the Court of Justice's preliminary ruling on whether the dissolution of a marriage on the basis of article 12 of the Decree-Law (hereinafter: D. L.) No 132/2014 is a divorce within the meaning of the Brussels IIa Regulation and, if not, whether it has to be treated in accordance with the rule in article 46 of the Brussels IIa Regulation on authentic instruments and agreements.[8]

Taking its distance from the referring *Zivilsenat des Bundesgerichtshofs* of 28 October 2020, the CJEU embraced a broad reading of the aforementioned article 2(4) by stating that it must be interpreted as meaning that a divorce agreement drawn up by the Italian civil registrar and confirmed by the spouses before that registrar in accordance with the conditions laid down by the national legislation constitutes a "decision". As a further consequence, that divorce shall fall within the sphere of application of article 21 ("Recognition of a judgment") instead of article 46 ("Authentic instruments and agreements") of the same regulation. Even more importantly, instead of confining its statement to the sphere of application of the Brussels IIa Regulation, the CJEU further reasoned that art. 30 ("Recognition of a decision") of the subsequent Brussels IIb Regulation (no. 1111/2019) must be interpreted accordingly.

Considering that the CJEU itself, in the previous *Sahyouni* case, emphasized the need for a consistent definition of the term "divorce" within both fields of jurisdiction and applicable law,[9] it is reasonable to assume that the understanding of the concept of "decision" stated in the *Senatsverwaltung* judgment applies to Rome III Regulation as well.

The latest judgment, however, goes beyond the previous *Sahyouni* case, where the court designed the scope of Rome III Regulation as including any situation "in which divorce is pronounced by a national court or by, or under the supervision of, another public authority" and, consequently, easily excluded a mere "private unilateral declaration of intent" from its sphere of application. In that case, no further detail was added regarding the nature of the authority involved and the kind of control it operates over the divorce, leaving unanswered whether a divorce in front of the civil registrar - like the one provided for by Italian law – falls under the scope of EU regulations.

This judgment is remarkable and, at the same time, open to criticism, for three main reasons: firstly, the arguments it uses; secondly, the conclusion it reaches; thirdly, the implications it carries.

[8] Bundesgerichtshof (BGH) judgment of 28 October 2020, no 187. See the comments by C Meyer (2020) Zeitschrift für das gesamte Familienrecht 119; E Bargelli (2021) Zeitschrift für das gesamte Familienrecht 214; D Turoni 'Il divorzio italiano davanti al sindaco e la sua circolazione nello spazio UE' (2021) Giurisprudenza italiana 594.

[9] *Sahyouni* cit. para 47.

II. The reasoning of the CJEU and its doubtful application to the Italian divorce in front of the mayor

The core argument supporting the CJEU's conclusion is that, for the purpose of article 2(4) of Brussels IIa Regulation, a "decision" presupposes retaining the "control over the grant of the divorce", which means examining "the conditions of the divorce in the light of national law and the actual existence and validity of the spouses' consent to divorce".

From this major premise, the Court of Justice came to the minor premise that the Italian civil officer, in receiving the spousal's joint declaration, did perform such examination of the substance and, consequently, drew the conclusion that the divorce agreement is a "decision".

Such a minor premise, however, is not convincing.

As a matter of fact, the Italian mayor, who acts as a civil officer according to art. 1 of the Decree of the President of the Republic no. 396/2000, receives the spouses' application form and checks their identity and the legal requirements to dissolve their marriage according to the procedure provided for by art. 12 D. L. no. 132/2014, namely, the minimal length of their legal separation and the absence of minor or non-self sufficient/handicapped children. The spouses are then summoned before the mayor not earlier than thirty days from their first appearance to confirm their willingness to divorce.[10] The divorce is then finalised without any legal advice or assistance being required in any step of the proceeding.

This means that the mayor is not expected to issue any act of approval or *nihil obstat*, being merely entitled to draft the divorce agreement according to the parties' application and register it. In particular, the mayor does not examine "…the actual existence and validity of the spouses' consent to divorce", as there is no room for the spouses to be asked or heard or their actual capability of discernment and the absence of vices of consent to be checked.

The hearing of the spouses is not envisaged in the assisted negotiated divorce either. This is the alternative extrajudicial proceeding consisting of an agreement reached through the assistance of two lawyers and forwarded to the Public Prosecutor (art. 6 D. L. no. 132/2014), required to at least check the regularity and validity of the agreement and issue an act of *nihil obstat.*[11]

Conversely, whenever spouses opt for the judicial consensual proceeding according to art. 4 Law no. 898/1970 (the so-called Divorce law), which requires the assistance of at least one lawyer, the President of the Tribunal must summon them to try to reconcile

[10] For further details and critical remaks E Bargelli, 'L'accordo dei coniugi nella negoziazione assistita e nel divorzio municipale: il divorzio per mutuo dissenso fa il suo ingresso nell'ordinamento' in G Ferrando M Fortino and F Ruscello (eds), *Trattato di diritto di famiglia* (Giuffre 2018) 269 ff.

[11] For an updated description of the assisted negotiation proceeding see: M Calogero 'Negoziazione assistita familiare' in *I Tematici IV – Famiglia* (Giuffré 2022) 921 ff.; E Al Mureden, Separazione dei coniugi, in *I Tematici IV – Famiglia* (Giuffré 2022) 1294 f.

them and, on this occasion, actually checks and tests their will. This provision is now repealed by Legislative Decree No 149 of 10 October 2022, which entered into force on 28 February 2023, and replaced by art. 473-bis.51 of the civil procedural code (hereinafter CPC). The parties are currently required to appear before the judge, who, after hearing them and acknowledged their wish to get divorced, submits the case to the court's decision. However, the parties may ask for replacing the hearing by filing written notes. Although the Tribunal, in the practice, does not examine the substance of the maintenance agreement,[12] it is aware of the spouses' economic conditions, as these must file their income tax declarations with the court (see the former art. 4 subs. 6, and 5 subs. 9 Divorce law and, now, art. 473-bis.48 subs. 2 CPC).

Against this background, as the German Supreme Court correctly pointed out in its judgment, the Italian mayor does not perform any examination of the substance of the agreement, since its control is restricted to the legal requirements to get divorced.

This feature of the divorce in front of the mayor raises concern whenever it includes maintenance clauses. Indeed, although art. 12 D.L. no. 132/2014 keeps silence on this specific issue, the *Consiglio di Stato* (the Italian supreme administrative court) lastly (and unconvincingly)[13] stated that such clauses are eligible to be incorporated in the divorce agreement sealed in front of the mayor.[14] Nevertheless, as emphasized above, the civil officer neither is aware of the spouses' income tax declarations, nor checks the validity or the fairness of any clause and, in addition, no legal assistance is envisaged. Against this background, affirming that the agreement is subject to an examination of the substance - as the Court of Justice does - is far from being true and even misleading for the State of destination.

Obviously the recognition of the maintenance agreement, where present, is subject to the applicable Regulation no. 9/2008 (Maintenance Regulation). There is little doubt that, as enclosed in a document drafted by a public officer as the mayor is, this agreement would fall under the definition of "*atto pubblico*" (authentic instrument) according to art. 2714 of the Italian Civil Code.[15] As enforceable under national law pursuant to art. 474 CPC, this agreement should be qualified as authentic instrument even for the purpose of art. 48 of the cited Regulation.

[12] See below section V and fn 32.

[13] For critical remarks see E Bargelli, 'Divorzio privato e autonomia preventiva' (2021) Rivista di diritto civile 253; in favour see A Lupoi, 'Separazione e divorzio' (2016) Rivista trimestrale di diritto e procedura civile 286.

[14] Italian Supreme Administrative Court judgment of 26 October 2016, n. 4478 (2016) Foro italiano III, 636. The Court confirmed the validity of the ministerial circular No 6/15, which allowed maintenance clauses to be incorporated in the divorce agreement in front of the mayor, except for one-off (*una tantum*) maintenance agreements. Conversely the previous circular (No 19/14) had interpreted art. 12 in a quite restrictive way, prohibiting any maintenance clause.

[15] As emphasized by C Silvestri, 'La circolazione nello spazio giudiziario europeo degli accordi di negoziazione assistita in materia di separazione dei coniugi e cessazione degli effetti civili del matrimonio' (2016) Rivista trimestrale di diritto e procedura civile 1287 ff.

This means that, as a consequence of the CJEU's doctrine, the same divorce agreement would result to be a sort of two-faced Janus, being defined as "decision" for the scope of Regulations Brussels IIa and Brussels IIb and "authentic instrument" for the purpose of the Maintenance Regulation.

To conclude, the CJEU's doctrine, if properly applied, should lead to the conclusion that the divorce drafted by the Italian mayor is not a decision.

The qualification of this kind of divorce as decision might have been reached by reasoning that, for the purpose of Regulation Brussels IIa, the intervention of the competent public authority is constitutive as necessary for producing the dissolution of the marriage.[16] Indeed, this different approach would have been more convincing.

Alternatively, the divorce agreement drafted by the mayor as civil registrar might have been qualified as authentic instrument for the purpose of art. 46 of Brussels IIa Regulation ("Documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also agreements between the parties that are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments"). In fact, as pointed out above, it unquestionably falls under the heading "*atto pubblico*" being an agreement drafted by a public officer.[17]

III. The wide definition of 'decision' and its implications for Brussels IIa and Brussels IIb regulations

Assuming that, conversely, a kind of control like the one made by the Italian civil registrar is enough to qualify the divorce agreement as a "decision" – as the CJEU argues –, a further consequence is that the majority of non-judicial divorces around Europe will be defined in the same way.

Indeed, the requirements needed for an act to qualify as a decision according to the EUCJ's solution of the Italian case seem to be met in any extrajudicial divorce.

On the one hand, the administrative authorities competent in divorce matters in some European jurisdictions perform such minimum control over the agreement and, sometimes, even overcome the step designed by the Court of Justice by truly examining its substance (like in the case of Portuguese law)[18]. On the other hand, there are several

[16] See A Dutta, T Helms, 'Neue Entwicklungen im Scheidungsrecht als Herausforderung für das Internationale Privatrecht' in A Dutta, D Schwab, D Henrich, P Gottwald and M Lohnig (eds), *Scheidung ohne Gericht*, cit. 243 f.

[17] This is the solution endorsed by E D'Alessandro, 'La negoziazione assistita in materia di separazione e divorzio' (2015) Giurisprudenza italiana 1282 ff.; C Silvestri, 'La circolazione nello spazio giudiziario europeo degli accordi di negoziazione assistita in materia di separazione dei coniugi e cessazione degli effetti civili del matrimonio' cit. 1287 ff.; D Turroni, 'Il divorzio italiano di fronte al sindaco' (2021) Giurisprudenza italiana 596.

[18] See articles 1776 and 1778 of the Portuguese Civil Code, whose procedure is modelled on the consensual judicial procedure, providing for the refusal of approval by the civil registrar if the agreement does

notarial divorces allowed around Europe, drafted by legal professionals checking the legal capacity of the spouses as well as the legal requirements for the dissolution of their marriage, in addition to being responsible for the validity of the agreement.[19] For instance, this seems to be the case of the Spanish notarial divorce, whose pending case was understandably removed from the CJEU's agenda.[20]

This quite extensive interpretation of the term "decision" is not in itself unconvincing, as a functional and extensive approach to the concepts of "court" and "decision" was indeed endorsed by scholars pending the application of the Brussels IIa regulation.[21] An example of this trend is given by the reasoning followed by the cited *Kammergericht* Berlin in its judgment.[22]

This doctrine is based on the functional equivalence of judgments and non-judicial divorces, being supported by the argument routed in the constitutive involvement (*konstitutive Mitwirkung*) of the public authority in the dissolution of the marriage: an argument which has an internal coherence as based on the observation that the mere parties' mutual wishes are not enough to dissolve their marriage.

The argument in favour of the recognition of non-judicial divorces as "decisions" has a practical importance in the context of Regulation No. 2201/2003 before its recast because of the restrictive formulation of art. 46, which required the enforceability in one Member State as a condition for the authentic instruments and agreements to be recognised and declared enforceable under the same conditions as judgments. For practical grounds, acts which would better fit the box "authentic instruments and agreements" could be reasonably held as "decisions" for the purpose of art. 21 of Brussels IIb Regulation, notwithstanding the counterargument that the competent non-judicial authorities were usually not required to check jurisdiction's rules.[23]

Conversely one might wonder whether such extensive application of the term "decision" is reasonable where cases subject to Regulation No. 1111/2019 are involved. In fact, in filling the gap of the previous legislation, Brussels IIb Regulation provides for an *ad hoc* regime of recognition of authentic instruments and agreements "which have binding legal effects in the Member State of origin" (see articles 64 ff.). In the context of the new Regulation, extending the concept of "decision" considerably means minimising the

not adequately protect the interests of one of the spouses, with the subsequent referral of the case to the district's Tribunal.

[19] See art. 87 *codigo civil* – Law 2 July 2015, n. 15. An extrajdicial alternative is given by the agreement before the court clerk (art. 87, cit.). For an overview, G Cerdeira Bravo de Mansilla (ed), *Separaciones y divorcios ante notarios*, (Reus 2016).

[20] See *supra* fn 5.

[21] A Dutta T Helms, ‚Neue Entwicklungen im Scheidungsrecht' cit.

[22] KG Berlin judgment of 30 March 2020 cit.

[23] E D'Alessandro, 'The impact of private divorces on EU Private International Law', in J Scherpe and E Bargelli (eds), *The Interaction between Family Law, Succession Law and Private International Law. Adapting to Change* (Intersentia 2019) 69.

scope of "authentic instruments and agreements" unnecessarily and, as a consequence, undermining the dividing line between their slightly different regimes.

IV. The examination of the substance of the agreement in context and the need for different concepts of 'decision' in Brussels IIa and Brussels IIb regulations

Notwithstanding the emphasis put on the need for a uniform and autonomous interpretation of the term "decision", the examination of the substance as a dividing line between "decisions" and "authentic instruments and agreements" is a quite new criterion in the CJEU's case law.

Indeed, the precedent invoked by the same Court of Justice – the rather remote Solo Kleinmotoren of 1994[24]- denied a judicial settlement before a tribunal of a Member State to be qualified as a "decision" and, in doing so, accepted the traditional restrictive definition of this term ("in order to qualify as a "decision" within the meaning of the Convention, the act must emanate from a court belonging to a Contracting State and ruling with its own powers on matters in dispute between the parties").

A restrictive concept of "decision" as judicial act is currently followed in the field of application of art. 267 TFEU, wherever the Court of Justice is required to identify the "court or tribunal" entitled to request a preliminary ruling concerning the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union (art. 267 TFEU)[25].

Conversely, the present judgment seems rather in line with the approach which aimed to consider the functional equivalence of judicial and non-judicial activities. This general attitude, however, takes different shapes in the CJEU's case law.

For instance, in the Schlömp case of 2017,[26] in dealing with a *lis pendens* issue arising from a Swiss mandatory mediation proceeding falling under the Lugano Convention of 2007, the Court of Justice came to the conclusion that: "the term 'court' includes any authorities designated by a State bound by that convention as having jurisdiction in the matters falling within its scope…Thus… the wording… takes a functional approach according to which an authority is classified as a court based on the functions it carries out rather than by its formal classification under national law".

The functional approach takes a different meaning in succession matters, as, according to art. 3.2 of the Succession regulation (n. 650/2012), "court" may be any authority or even legal professional with competence in matters of succession which exercises judicial functions or acts pursuant to a delegation of power by a judicial authority or acts under

[24] Case C-414/92 *Solo Kleinmotoren* ECLI:EU:C:1994:221.
[25] Case C-387/20 *OKR (Renvoi préjudiciel d'un clerc de notaire)* ECLI:EU:C:2021:751.
[26] Case C-467/16 *Brigitte Schlömp v. Landratsamt Schäbisch Hall* ECLI:EU:C:2017:993

the control of a judicial authority, provided that certain requirements are met (impartiality, right of all the parties to be heard). In applying this provision, the Court of Justice emphasised the need for the "court" to possess the power to decide a legal dispute: something which does not take place where "the powers of the professional concerned are entirely dependent on the will of the parties". As a consequence, this qualification was denied to both a Polish[27] and a Lithuanian notary.[28]

If compared with the trend in succession matters, the doctrine affirmed by the CJEU in *Senatsverwaltung* seems to follow a slightly different path in indirectly defining the concept of "court", as it requires neither the possession of jurisdiction nor the power to decide a legal dispute and rather focuses on the kind of control put in place by the competent national authority (or professional).

Indeed, the rationale of this judgment seems to be that of harmonizing Brussels IIa and IIb by backtracking the rule stated by Recital 14 of Brussels IIb Regulation, which gives the term "court" a broad meaning "so as to also cover administrative authorities, or other authorities, such as notaries, who or which exercise jurisdiction in certain matrimonial matters or matters of parental responsibility".[29] By generalizing the criteria introduced by the recast to reshape and update the scope of Brussels IIa Regulation, the CJEU gives it a retroactive effect and lets it cover cases falling under the sphere of application of the older regulation.

To support this view the Court of Justice starts by recalling the aim of the autonomous and uniform interpretation of EU terms and concepts by resorting to the wording of article 2.4 and the general objectives of judicial cooperation in civil matters pursued by art. 81 TFEU. The decisive argument, however, seems to be that of the legislator's intention made clear by the Commission's hearing, according to which, in adopting the Brussels IIb Regulation, "the EU legislature would not be seeking to innovate and introduce new rules, being merely aimed to 'clarify' on the one hand, the scope of the rule already laid down in article 46 of the Brussels IIa Regulation and, on the other hand, the criterion for distinguishing the concept of 'judgment' from those of 'authentic instrument' and 'agreement between the parties'".[30]

Instead, a decisive weight should be given to the historical circumstances where the Brussels IIa Regulation was enacted, a time when dejudicialized divorces were almost non-existent in Europe and the EU recognition rules were based on judgments *stricto sensu*. Brussels IIb was precisely aimed to fill a gap. Following this argument, the cases subject to the previous regulation should be treated differently from those falling under the newer without contradicting the principle of autonomous interpretation of EU law.

[27] Case C-658/17 *WB* ECLI:EU:C:2019:444.
[28] Case C-80/19 *E.E.* ECLI:EU:C:2020:569.
[29] See above, section II.
[30] *Senatsverwaltung* cit. n. 61.

V. A plea for an alternative view of the boundaries of 'decision' and 'authentic instrument and agreement'.

While the scope of the older regulation should diverge from that of the newer, the CJEU's reasoning seems to be unconvincing even within the sphere of application of the Brussels IIb Regulation.

Although the examination of the substance is expressly mentioned by Recital 14 as distinctive feature of a "decision" as opposed to authentic instruments and agreements, this criterion should be understood differently.

To begin with, the examination of the substance should properly apply to cases where the authority retains a discretionary power in examining divorce matters and may refuse to approve a certain clause or the agreement as a whole. This usually happens if the interests of the children or the economically weaker spouse are not satisfactorily met by the parties' will.

For instance, this kind of control is expressly given to the Italian Public Prosecutor if the divorce agreement is drafted as a result of a negotiation assisted by two lawyers and, nevertheless, is contrary to the best interest of the minor or non-self-sufficient children involved (art. 6 subs. 2 D.L. n. 132/2014). Because of the exercise of this power – which, by the way, is restricted to children matters –, the Public Prosecutor may deny its authorization and send back the case to the President of the Tribunal. Conversely, where no minor or non-self-sufficient children are present, the Public Prosecutor's approval is focused on the formal requirements of the agreement and no substantial examination is at stake.

Building on this more stringent and appropriate concept of "examination of the substance", it would be reasonable to conclude that in the former situation the divorce is a decision, whereas in the latter it is not.[31]

However, again, the "examination of the substance" in divorce matters is quite an evanescent and elusive criterion even at the national level. If one takes it seriously, even the judicial authority, when dealing with consensual separation and divorce, should not be considered a "court", except for children matters. According to the Italian Court of Cassation, for instance, as far as maintenance clauses are concerned, the Tribunal's control is held to be merely external, with the consequent that the parties, in addition to being entitled to appeal the judgment pursuant to art. 5 subs. 5 of the Divorce Law, may avail themselves of contractual remedies in case of incapacity or vices of consent.[32]

Given the difficulty of capturing the exact meaning of the term "substantial examination", this should be given a sense which would allow it to work properly in both EU and national law. Having in mind the essence of the judicial function at national level, the "substantial examination" may be viewed as referring to situations where the authority,

[31] C Honorati and S Bernasconi, 'L'efficacia cross-border degli accordi stragiudiziali in materia familiare tra i regolamenti Bruxelles II-bis e Bruxelles II-ter' (2020) Freedom Security & Justice: European Legal Studies 22 ff., 38 ff.

[32] See fn 33.

whichever it is, has the power to assess and qualify the facts at stake and, consequently, to issue an act which remains separate from the parties' mutual consent.

A sign of separation between the authority's act and the agreement is the possibility of challenging the former by means of appeal, which remain distinct from contractual remedies. This distinction is inherently blurred in case of a divorce judgment based on the parties' mutual will (former art. 4 Divorce law, now replaced by art. 473-bis.51 CPC). Given its hybrid nature, the Italian Court of Cassation is currently keen to allow the parties to avail themselves of contractual remedies as far as patrimonial relationships between spouses are concerned.[33] Nevertheless, this "decision" can be appealed according to art. 5 subs. 5 Divorce Law, although under very limited circumstances given its consensual basis.[34]

Conversely, there should be no decision where divorce agreements may be challenged only by contractual remedies. This is the case of divorce agreements drafted by the mayor according to Art. 12 D.L. n. 134/2014 or those negotiated by lawyers and endorsed by the Public Prosecutors, regardless of whether children are involved (art. 6 D.L. n. 134/2014). As a matter of fact, no means of appeal are allowed against the Public Prosecutor's denial of *nihil obstat*, as the spouses will be left with the option to make recourse to the judicial (consensual or contentious) separation or divorce proceeding.[35] This will eventually happen even if the Public Prosecutor's approval is denied and the President of the Tribunal, to which the agreement is forwarded according to art. 6 subs. 2 D. L. n. 132/2014, subsequently confirms its negative conclusion.

Thus, agreements concerning marriage dissolution and parental responsibility, as capable of means of appeal, would circulate as "decisions", whereas the remaining consensual divorces and parental dispositions, which are challengeable only by the contractual remedies awarded by national law, would be recognized as authentic instruments and agreements.

To conclude, one can only make a plea for the concept of "decision" to be reshaped in future divorce cases by complementing EU and national law.

[33] According to the prevailing opinion in case law, contractual remedies would be applicable to maintenance clauses in divorce agreements. This trend was confirmed by Italian Court of Cassation Grand Chamber judgment of 29 July 2021, n. 21761 (2021) Diritto di Famiglia e delle Persone I, 1590; Italian Court of Cassation judgment of 21 April 2015 n. 8096 cit. Critical G Petrelli, 'Patologie negoziali e stabilità del giudicato nel divorzio su domanda congiunta' (2022) Rivista del Notariato 313 ff.

[34] According to a widespread opinion, these means of appeal would be limited (Italian Court of cassation judgment of 21 April 2015 n. 8096), as, in this situation, there would be no losing party (Italian Court of cassation judgment of 20 August 2014 n.18066).

[35] See, for instance, A Carratta, 'Le nuove procedure negoziate e stragiudiziali in materia matrimoniale' (2015) Giurisprudenza italiana 1287 ff; F Danovi, 'Il P.M. nella procedura di negoziazione assistita, Il P.M. nella procedura di negoziazione assistita. I rapporti con il presidente del tribunale' (2017) Famiglia e diritto 78.