OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 12 March 2009 [1]

I — Introduction

1. By this reference, the French Cour de cassation (Court of Cassation) has submitted to the Court questions on the interpretation of 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. [2]

2. The questions seek to ascertain whether a Hungarian or a French court has jurisdiction over a divorce decree where both spouses are habitually resident in France and have both Hungarian and French nationality.

3. They have arisen in the context of the recognition in France of a divorce decree given by a Hungarian court. The decree was issued before the entry into force of the Regulation and in relation to proceedings instituted before Hungary's accession to the European Union. In accordance with the relevant transitional provision, the application of Regulation No 2201/2003 in such a case depends on whether the courts of the State in which the decree was originally issued would have had jurisdiction under the Regulation.

II — Legal framework

4. Article 3(1) of Regulation No 2201/2003 ('General jurisdiction') provides:

'In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

1 — Original language: German.

2 — OJ 2003 L 338, p. 1, as amended by Council Regulation (EC) No 2116/2004 of 2 December 2004 (OJ 2004 L 367, p. 1) — also known as the Brussels IIa Regulation ('Regulation No 2201/2003' or 'the Regulation').

(a) in whose territory

— the spouses are habitually resident, or

— the spouses were last habitually resident, in so far as one of them still resides there, or

— the respondent is habitually resident, or

— in the event of a joint application, either of the spouses is habitually resident, or

— the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or

— the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there;

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses.'

5. Article 19(1) and (3) contains the following provisions concerning *lis pendens* in matrimonial matters in different Member States:

'1. Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

...

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.

…'

…

4. Where the recognition of a judgment is raised as an incidental question in a court of a Member State, that court may determine that issue.'

6. Article 21 governs the recognition of foreign judgments and reads in excerpt as follows:

'1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

…

3. Without prejudice to Section 4 of this Chapter, any interested party may, in accordance with the procedures provided for in Section 2 of this Chapter, apply for a decision that the judgment be or not be recognised.

7. Article 22 provides inter alia for the following grounds of non-recognition of a divorce decree:

'(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought;

(b) where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally;

…'

8. In accordance with Article 24, however, the jurisdiction of the court of the Member State of origin may not be reviewed. In particular, the test of public policy referred to in Article 22(a) may not be applied to the rules relating to jurisdiction set out in Articles 3 to 14.

9. Article 64(1), (3) and (4) contains the following transitional provisions:

'1. The provisions of this Regulation shall apply only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to agreements concluded between the parties after its date of application in accordance with Article 72.

…

3. Judgments given before the date of application of this Regulation in proceedings instituted after the entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings.

4. Judgments given before the date of application of this Regulation but after the date of entry into force of Regulation (EC) No 1347/2000 in proceedings instituted before the date of entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings and that jurisdiction was founded on rules which accorded with those provided for either in Chapter II of this Regulation or in Regulation (EC) No 1347/2000 or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.'

10. In accordance with Article 72, the Regulation entered into force on 1 August 2004 and has applied since 1 March 2005, with the

exception of Articles 67, 68, 69 and 70, which applied from 1 August 2004.

11. Regulation No 2201/2003 follows on, in terms of content, from the regulation which it replaced, Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses. [3] [4] The wording of Article 2 of Regulation No 1347/2000 corresponds to that of Article 3 of Regulation No 2201/2003. In accordance with Article 46, Regulation No 1347/2000 entered into force on 1 March 2001.

12. Regulation No 1347/2000 in turn drew extensively on the provisions of the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters of 28 May 1998 [5] (the 'Brussels II Convention'). As a result, the convention was not put into force. When it adopted Regulation No 1347/2000, the Council took note of the explanatory report on the convention drawn up by Professor Alegría Borrás (the 'Borrás Report'). [6] [7]

3 — OJ 2000 L 160, p. 19.
4 — See recital 6 in the preamble to Regulation No 1347/2000 and recital 3 in the preamble to Regulation No 2201/2003.
5 — OJ 1998 C 221, p. 2.
6 — OJ 1998 C 221, p. 27.
7 — See recital 6 in the preamble to Regulation No 1347/2000 and recital 3 in the preamble to Regulation No 2201/2003.

III — Facts and questions referred

13. Mr Iaszlo Hadadi and Ms Csilla Marta Mesko are Hungarian nationals. They were married in Hungary in 1979 and emigrated to France in 1980. In 1985, they also acquired French nationality. According to information provided by Ms Mesko, between 2000 and 2004, she was the victim of repeated acts of violence perpetrated by her husband. On 23 February 2002, Mr Hadadi instituted divorce proceedings before the Pest Regional Court (Hungary). Ms Mesko has stated that she did not learn of those proceedings until six months later. By final judgment of the Regional Court of 4 May 2004, the divorce was granted.

14. On 19 February 2003, Ms Mesko herself instituted proceedings for divorce on grounds of fault before the Juge aux affaires familiales (Family Court) of the Tribunal de grande instance de Meaux (Maux Regional Court, France). By order of 8 November 2005, the court declared her application inadmissible. Ms Mesko lodged an appeal against that order before the Cour d'appel de Paris (Paris Court of Appeal), which set aside the order of the court of first instance. The Cour d'appel based its decision on the fact that the divorce decree issued by the Hungarian court could not be recognised in France and that the divorce application made by Ms Mesko was therefore admissible.

15. Mr Hadadi lodged an appeal against that judgment before the Cour de cassation, which, by order of 16 April 2008, referred the following questions to the Court of Justice for a preliminary ruling under Articles 234 EC and 68 EC:

'(1) Is Article 3(1)(b) of Regulation (EC) No 2201/2003 to be interpreted as meaning that, in a situation where the spouses hold both the nationality of the State of the court seised and the nationality of another Member State of the European Union, the nationality of the State of the court seised must prevail?

(2) If the answer to Question 1 is in the negative, is that provision to be interpreted as referring, in a situation where the spouses each hold dual nationality of the same two Member States, to the more effective of the two nationalities?

(3) If the answer to Question 2 is in the negative, should it therefore be considered that that provision offers the spouses an additional option, allowing those spouses the choice of seising the courts of either of the two States of which they both hold the nationality?'

16. In the proceedings before the Court, observations have been submitted by Mr Hadadi, Ms Mesko, the French, Czech, German, Finnish, Polish and Slovak Governments and the Commission of the European Communities.

IV — Legal assessment

A — *Preliminary remark on the application of Regulation No 2201/2003 in accordance with the transitional provisions*

17. The subject-matter of the main proceedings is Ms Mesko's application for a divorce. The admissibility of her action in this context appears to be subject to the requirement that the marriage must not already have been dissolved by the judgment of a court of another Member State which the French courts must recognise. The recognition of the Hungarian divorce decree of 4 May 2004 therefore constitutes an incidental question in the context of examination of whether the divorce application made to the French courts is admissible.

18. In this regard, it must be noted at the outset that Article 21(1) of Regulation No 2201/2003 is based on the principle of

recognition. In accordance with Article 24 of that regulation, the lack of jurisdiction of the courts of the State where the judgment was originally delivered does not normally justify refusing recognition.

19. However, the divorce was applied for and granted in Hungary at a time when Regulation No 2201/2003 was not yet applicable. Recognition of the divorce decree on the basis of the Regulation is therefore conceivable only under the transitional provisions. To that extent, the referring court was right to take account of Article 64(4) of the Regulation, concerning judgments relating to divorce which

— were given before the date of application of Regulation No 2201/2003 but after the entry into force of Regulation No 1347/2000

— in proceedings instituted before the date of entry into force of Regulation No 1347/2000.

20. The relevant provisions of Regulation No 2201/2003 are, in accordance with Article 72, applicable from 1 March 2005. Regulation No 1347/2000 entered into force on 1 March 2001. For Hungary, however, the effective date is 1 May 2004 because, in accordance with Article 2 of the Act of Accession,[8] the rules of the *acquis communautaire* are binding and applicable in the new Member States only from that date. Mr Hadadi applied for a divorce in Hungary on 23 February 2002, that is to say, before the date of application of Regulation No 1347/2000. The divorce decree was then issued on 4 May 2004, in other words, after Regulation No 1347/2000 came into effect in Hungary and before Regulation No 2201/2003 was applicable.

21. It is true that Ms Mesko has stated that she had no knowledge of the proceedings until six months after they were instituted. She has not, however, submitted that Mr Hadadi failed to take the steps he was required to take to have service effected so that the court would not be deemed to have been seised at that time, in accordance with Article 16 of the Regulation. Moreover, it follows from the documents before the Court that she attended the proceedings before the Pest Regional Court.

22. Consequently, the proceedings were instituted and the decree issued within the periods referred to in Article 64(4) of the Regulation. In accordance with Regulation No 2201/2003, therefore, the decree must be recognised if rules of jurisdiction were applied

8 — Act concerning the Conditions of Accession to the European Union of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33).

which accord with those provided for either in Chapter II of that regulation or in Regulation No 1347/2000 or in a convention concluded between Hungary and France which was in force when the proceedings were instituted.

23. The rules on which the Pest Regional Court based its jurisdiction and the wording of those rules cannot be ascertained from the documents before the Court. In order to be able to say that the rules of jurisdiction applied accord with Article 3 of Regulation No 2201/2003, with the identically worded Article 2 of Regulation No 1347/2000 or with the applicable provisions of a convention, it need only be shown, however, that the Hungarian courts would also have had jurisdiction on the basis of those rules. No further comparison of the rules in question is necessary. For Article 64(4) is intended to ensure that the Regulation's provisions concerning recognition are applied extensively to the judgments of all courts which would also have had jurisdiction under the harmonised legislation or the rules laid down in a convention.

24. Whether this was the case, that is to say, whether the Pest Regional Court would also have had jurisdiction under Article 3(1)(b) of Regulation No 2201/2003, is the question which this reference is intended to help clarify.

B — *The questions referred*

25. Article 3(1)(b) of Regulation No 2201/2003 provides that, in matters relating to divorce, jurisdiction is to lie with the courts of the Member State of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the 'domicile' of both spouses. No special provision is made for cases where both spouses are dual nationals each with the same two nationalities. [9] The three questions referred contemplate a number of possibilities as to how jurisdiction under Article 3(1)(b) is to be determined in such cases.

26. If the answer to Question 2 is in the affirmative, priority would have to be given to the more effective nationality. The more effective nationality in this context would probably have to be regarded as that which, on the basis of additional criteria, such as habitual residence for example, establishes the closest link with the courts of one of the Member States whose nationalities the spouses hold. Only the court of the Member State of the more effective nationality would have jurisdiction under Article 3(1)(b). The Member State of the less effective nationality would be excluded as a ground of jurisdiction under that provision.

9 — See the Borrás Report, end of paragraph 33.

27. The alternative to this is the possibility, referred to in Question 3, that both common nationalities establish equal-ranking grounds of jurisdiction which the applicant is free to choose. The court first seised would therefore have jurisdiction. A court later seised in the other Member State would have to decline jurisdiction in accordance with Article 19(3) of the Regulation.

28. The Cour de cassation first raises the question whether, in the case of dual nationals, a national court must always give priority to the domestic nationality irrespective of whether it is the more effective.

1. Question 1

29. The answer to Question 1 must take into account the fact that the French courts are faced with an unusual situation in that, in applying Article 64(4) of Regulation No 2201/2003, they are required to adjudicate not on their own jurisdiction but on that of the courts of another Member State.

30. The normal course of events, on the other hand, is that each court seised examines only its own jurisdiction and, if appropriate, declines jurisdiction under Article 17 of the Regulation. If it considers itself to have jurisdiction and gives judgment in the matter, that judgment must be recognised in another Member State, subject to the grounds of non-recognition set out in Article 22 of the Regulation. Whether the court of the Member State of origin did indeed have jurisdiction may no longer be called into question in the Member State of recognition, in accordance with Article 24 of the Regulation.

31. That principle is also expressed in the rule on *lis pendens* contained in Article 19(1) of the Regulation. According to that rule, a court second seised in the same matrimonial proceedings must stay its proceedings until such time as the court first seised in another Member State establishes its jurisdiction. The court second seised cannot continue the proceedings pending before it because it considers the court first seised not to have jurisdiction. However, that rule is not directly applicable in this case because the proceedings were instituted before the date of application of the Regulation (Article 64(1) of Regulation No 2201/2003).

32. The question is, therefore, how a court in the State of recognition must proceed where, in accordance with Article 64(4), it must, exceptionally, examine whether the court of the State of origin would have had jurisdiction under Article 3(1)(b), and the spouses hold the nationality not only of the State of origin but also of the State of recognition.

33. The Cour d'appel clearly took the following view in this regard: the (common) nationality of both spouses within the meaning of Article 3(1)(b) must be determined exclusively in accordance with domestic law. Under French law, persons holding more than one nationality including French nationality must be treated exclusively as French nationals, without taking into account the fact that they also hold one or more other nationalities. Consequently, the Hungarian courts do not have jurisdiction under Article 3(1)(b) in respect of the divorce of Mr and Mrs Hadadi because — from the point of view of the French courts — they are French, not Hungarian.

34. I cannot endorse that view, however.

35. As the German and Polish Governments and the Commission state, for the purposes of applying Article 3(1)(b), the question of which nationality a person of dual nationality holds, or which of a number of nationalities must be taken into account, cannot be determined exclusively in accordance with national law. What is required in this context is, rather, an autonomous interpretation of the concept of nationality. An autonomous interpretation alone is capable of ensuring uniform application in all Member States of the provisions on jurisdiction in the Regulation. [10]

36. It is true that the Borrás Report states that the convention is silent on the consequences of dual nationality, so the judicial bodies of each State will apply their national rules within the framework of general Community rules on the matter. [11]

37. However, even if it is assumed that the above statement is correct in relation to the convention, it cannot be directly transposed to Regulation No 2201/2003. For, in the case of a convention between the Member States which is based on the EU Treaty, questions not expressly addressed are more likely to be answered by reference to national law than in the form of a European Community regulation. Where such a situation arises in the context of acts adopted by the Community, an autonomous interpretation based on the spirit and purpose of the provisions is to be preferred. Furthermore, the report itself states that national law must be observed within the framework of general Community rules.

10 — See to this effect, in relation to the Brussels Convention, Case C-125/92 *Mulox IBC* [1993] ECR I-4075, paragraph 11, and Case C-437/00 *Pugliese* [2003] ECR I-3573, paragraph 16.

11 — Borrás Report, end of paragraph 33.

38. Some of the parties to the proceedings have referred in this regard to the judgments in *Micheletti and Others* and *Garcia Avello*, [12] in which the Court considered the significance of the fundamental freedoms and the general prohibition on discrimination in cases of dual nationality. In this case, the question of the scope of the fundamental freedoms does not arise, however, as the Regulation already contains sufficient evidence that nationality is the connecting factor.

39. Thus, Article 3(1)(b) of the Regulation precludes persons with dual nationality from being treated exclusively as own nationals. The effect of such treatment would be to prevent those persons from relying on Article 3(1)(b) before a court of a Member State — in this case a French court — in order to establish the jurisdiction of the courts of another Member State — in this case Hungary — even though they hold the nationality of the State of the court seised.

40. Under Article 3(1)(b), however, the courts of that other Member State would have had to assume jurisdiction in respect of the divorce of two of its own nationals if — as is usually the case — they had had to examine their jurisdiction themselves. [13] If, exceptionally, a court in the State of recognition has to adjudicate on the jurisdiction of the court in the State in which the judgment was originally given, it must take into account the fact that the spouses also hold the nationality of the Member State of origin and the courts of the latter State would therefore also have to assume jurisdiction on the basis of nationality. This accords too with the principles of mutual trust and mutual recognition which underpin the Regulation.

41. That interpretation is not inconsistent with the Article 3 of the Hague Convention of 12 April 1930 on Certain Questions relating to the Conflict of Nationality Laws. [14] That provision codifies the customary law rule that a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses. However, in a situation such as that in this case, that rule means that sight must not be lost of the fact that another State whose nationality a person additionally holds also treats that person as one of its own nationals. [15]

12 — Case C-369/90 [1992] ECR I-4239, paragraph 10, and Case C-148/02 [2003] ECR I-11613, paragraph 28, respectively. See also, in connection with reliance on the nationality of a Member State, Case C-122/96 *Saldanha and MTS* [1997] ECR I-5325, paragraph 15; Case C-179/98 *Mesbah* [1999] ECR I-7955, paragraph 31 et seq.; Case C-192/99 *Kaur* [2001] ECR I-1237, paragraph 19; and Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraph 37).

13 — This at least is the case subject to the answer to Question 2 on the significance of effective nationality.

14 — League of Nations Treaty Series, Vol. 179, p. 89. The provision is worded as follows: 'Subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses.'

15 — See to this effect *Garcia Avello* (cited in footnote 12), paragraph 28.

42. Question 1 must therefore be answered as follows:

Where the court of a Member State has to examine whether, under Article 64(4) of Regulation No 2201/2003, the court of the Member State in which a judgment was originally given would have had jurisdiction under Article 3(1)(b) of that regulation, it may not regard spouses who both possess the nationality of the Member State of the court seised and of the Member State of origin as being exclusively of its own nationality. Rather, it must take into account the fact that the spouses also possess the nationality of the Member State of origin and that the courts of the latter State accordingly would have had jurisdiction in respect of the judgment.

2. Questions 2 and 3

43. Questions 2 and 3 are alternatives: in determining jurisdiction in respect of the divorce of persons possessing dual nationality, account is to be taken either of the more effective nationality alone, with the result that there is only one ground of jurisdiction based on nationality, or of both nationalities, with the consequence that jurisdiction may be established in both Member States on that basis. In order to assess the pros and cons of both possible solutions, the questions must therefore be considered together.

44. Ms Mesko and the Polish Government argue that account should be taken of the more effective nationality. In view of the fact that she has been resident in France for well over 20 years, Ms Mesko considers her French nationality to be the more effective. She submits that affording equal treatment to both nationalities would trigger a rush to the courts and opens the way for abuse in the form of 'forum shopping'.

45. The other parties to the proceedings counter that submission with the contention that Article 3(1)(b) has regard only to the common nationality of the spouses. Jurisdiction cannot be made dependent on the additional condition that this must be the more effective nationality. They also argue that, in any event, Article 3(1)(a) establishes other grounds of jurisdiction based on habitual residence which have equal ranking with the ground of jurisdiction of the common nationality of the spouses.

46. It must be noted first that Regulation No 2201/2003 governs only jurisdiction, not the conflict-of-law rules which determine the substantive law applicable to the divorce. The court with jurisdiction under Regulation No 2201/2003 must therefore determine the law applicable in accordance with domestic law. If the domestic conflict provisions give priority — as the Hungarian provisions clearly do — to the law of the court seised (*lex fori*), the determination of the forum may, however, involve an incidental question as to the law applicable.

47. The 'blindness to the conflict of laws (*négation des conflits de lois*)' for which the Regulation has been criticised in legal commentary [16] may therefore indeed encourage a rush to the courts by spouses. Instead of giving careful consideration to the institution of divorce proceedings, spouses in dispute may be tempted to rush into bringing proceedings before one of the competent courts in order to secure the advantages of the substantive divorce law applicable under the private international law rules of that forum. Under the rule of priority contained in Article 19, if two courts are seised, jurisdiction lies with the court first seised.

48. The Commission too is aware of the negative effects which thus result from the fact that the Regulation confines itself to laying down rules on jurisdiction. It has for that reason already proposed the introduction of common rules for determining the applicable law. [17]

49. However, the foregoing considerations relate only to the divorce itself, not to the consequences of divorce, such as, in particular, maintenance claims. The rules of jurisdiction applicable in this regard, contained in Article 5(2) of Regulation No 44/2001 [18] have just been replaced by a special regulation [19] which also refers to the Hague Protocol of 23 November 2007 on the Law applicable to Maintenance Obligations. Under Article 12 of Regulation No 2201/2003, jurisdiction in respect of rights of custody likewise does not automatically coincide with

16 — See Kohler, C., 'Status als Ware: Bemerkungen zur europäischen Verordnung über das internationale Verfahrensrecht für Ehescheidungen', in Mansel, P. (ed.), *Vergemeinschaftung des europäischen Kollisionsrechts*, 2001, pp. 41 and 42 (in French, Kohler, C., 'Libre circulation du divorce? Observations sur le règlement communautaire concernant les procédures en matière matrimoniale', in de Moura Ramos, R.M. et al. (eds), *Estudos em homenagem à Professora Doutora Isabel de Magalhães Collaço.* Vol. I, 2002, pp. 231 and 233).

17 — Commission proposal of 17 July 2006 for a Council regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (COM(2006) 399 final). See also the Green Paper of 14 March 2005 on applicable law and jurisdiction in divorce matters (COM(2005) 82 final). As it has not to date been possible to achieve unanimity on the 'Rome III' Regulation, consideration is now being given to the option of proceeding by way of enhanced cooperation (see the press release on the 2887th meeting of the Justice and Home Affairs Council of 24 and 25 July 2008, which can be downloaded from http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/08/205&format=PDF&aged=0&language=EN&guiLanguage=en). For a more detailed commentary on the proposal, see Kohler, C., 'Zur Gestaltung des europäischen Kollisionsrechts für Ehesachen: Der steinige Weg zu einheitlichen Regeln über das anwendbare Recht für Scheidung und Trennung', *Zeitschrift für das Gesamte Familienrecht (FamRZ)*, 2008, 1673.

18 — Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

19 — Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ 2009 L 7, p. 1).

jurisdiction in respect of the divorce. Finally, Community law contains no rules on the consequences of the divorce from the point of view of matrimonial property.

50. It is true that Ms Mesko formally objects to the jurisdiction of the Pest Regional Court. In reality, however, what she appears to consider most inappropriate is that Hungarian rather than French law was applied to the divorce. She proceeds on the assumption that her huband deliberately instituted divorce proceedings in Hungary in order to evade the consequences of a divorce on grounds of fault under French law, even though the couple now has hardly any connection with Hungary.

51. Against that background, it must be examined whether Article 3(1)(b) is to be interpreted as meaning that, in the case of persons having more than one nationality, jurisdiction is determined exclusively by the more effective common nationality.

52. The principle of the priority of the more effective nationality has long been recognised in international law, [20] where it affects the right of States to afford diplomatic protection. [21] In this regard, the more effective nationality is considered in particular to be that of the State in which the person is habitually resident. [22]

53. The extent to which the fundamental freedoms impose limits on the transposition of that concept [23] need not be examined here, as the Regulation itself precludes priority consideration being given to the more effective nationality. It must instead be ascertained whether the term nationality in Article 3(1)(b) can be interpreted as meaning that, in the case of persons having more than one nationality, account is to be taken only of the nationality of the Member State with which there is the closest real connection.

54. There is at first sight no support for such an interpretation in the wording of Article 3(1)(b). As the German Government rightly points out, the Regulation refers to nationality as the connecting factor at many other points

20 — See Article 5 of the Hague Convention of 12 April 1930 (cited in footnote 14), which reads:
'Within a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third State shall, of the nationalities which any such person possesses, recognise exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the country with which in the circumstances he appears to be in fact most closely connected.'

21 — See the International Court of Justice (ICJ) judgment of 6 April 1955 in *Nottebohm*, ICJ Reports 1955, p. 4, at p. 22 et seq.

22 — See Article 5 of the Hague Convention of 12 April 1930 (cited in footnote 14; article reproduced in footnote 20).

23 — See in this regard the case-law cited in footnote 12, from which some parties to the proceedings infer that taking into account the more effective nationality is contrary to the fundamental freedoms.

without merely meaning only an effective nationality. If the legislature had intended, by way of derogation, that account should be taken only of an effective nationality in Article 3(1)(b), one would have expected an express rule to that effect.

55. The wording alone is not decisive, however. Consideration must also be given to the spirit and purpose of the rules, their history and the context into which they fit.

56. According to recital 1 in its preamble, Regulation No 2201/2003 contributes towards creating an area of freedom, security and justice, in which the free movement of persons is ensured. From the point of view of the rules on matrimonial matters, it takes forward the objectives which underpinned Regulation No 1347/2000 and the Brussels II Convention. [24]

57. As the Borrás Report states, the forums of jurisdiction adopted in the Brussels II Convention are in line with the interests of the parties, involve flexible rules to deal with mobility and are intended to meet individuals' needs without sacrificing legal certainty. [25] The grounds adopted for establishing jurisdiction are objective, alternative and exclusive. [26]

58. Those objectives serve to enable persons who have exercised their freedom of movement to have a flexible choice of forum. It may thus be easier for those persons to seise the courts of the Member State in which they are habitually resident. It is equally conceivable, however, that they would rather seise the courts of their home State, of whose language they have a better command and with whose courts and legal systems they are more familiar. For that reason, Article 3(1)(a) and (b) of Regulation No 2201/2003 establishes several grounds of jurisdiction which, unlike some of the grounds of jurisdiction in the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 (Brussels Convention), were deliberately not allocated an order of precedence. [27]

59. If, in the case of persons of dual nationality, account were taken only of the more effective nationality in the context of Article 3(1)(b), this would lead to a restriction of choice. As habitual residence would be of fundamental importance in determining the more effective nationality, the forum of jurisdiction under Article 3(1)(a) and (b) would often be the same. In the case of persons of dual nationality, this would lead in practice to an order of precedence of the grounds of jurisdiction in subparagraphs (a) and (b), which is precisely what is not wanted.

24 — See recital 2 in the preamble to Regulation No 2201/2003.
25 — See the Borrás Report, paragraph 27.
26 — See the Borrás Report, paragraph 28.
27 — See the Borrás Report, paragraph 28.

Conversely, a couple with only one common nationality could still seise the courts in their home State even if they had long ceased to be habitually resident there and now had only limited real contact with that State.

60. The grounds of jurisdiction must ensure a real link with the State concerned, as recital 12 in the preamble to Regulation No 1347/2000 points out. [28] That link is formed either by habitual residence in the forum State or common nationality. However, the legislature, typically, proceeds on the premiss that nationality too entails a real link and thus establishes as a connecting factor a ground which is easy to manage and allows a competent court to be determined unequivocally.

61. More extensive qualitative grounds such as, for example, effective nationality were not adopted in Article 3(1)(b). Determining which nationality is effective would make the examination as to jurisdiction more onerous. It would also be at odds with the objective pursued by the Regulation of ensuring legal certainty in relation to jurisdiction.

62. Determining which nationality is more effective would entail considerable uncertainty not least because there is no definition of that vague concept. Furthermore, such an examination might require account to be taken of a number of factual circumstances which would not always lead to an unequivocal result. At worst, it could create a conflict of jurisdiction if two courts each considered the nationality of the other Member State to be the more effective. As regards such conflicts of jurisdiction, the Regulation contains no provision that would enable a court to refer a case with binding effect to the court of another Member State. [29]

63. That conclusion is not precluded by the fact that, in the case of the United Kingdom and Ireland, the relevant factor under Article 3(1)(b) is the 'domicile' of the spouses rather than their nationality. It is true that 'domicile' bears certain similarities to effective nationality. In particular, the relevant national provisions stipulate that a person can only have one 'domicile' at a time. [30] This special rule, which applies in two Member States and allows them to retain the

28 — The recital is worded as follows: 'The grounds of jurisdiction accepted in this Regulation are based on the rule that there must be a real link between the party concerned and the Member State exercising jurisdiction; the decision to include certain grounds corresponds to the fact that they exist in different national legal systems and are accepted by the other Member States.'

29 — See my Opinion of 29 January 2009 in Case C-523/07 *'A'* (case pending before the Court), points 76 and 80.

30 — See in this regard the comments of the United Kingdom and Ireland as reproduced in the Borrás Report (paragraph 34).

grounds traditionally applied for establishing jurisdiction, cannot, however, serve to support general conclusions for the interpretation of the concept of nationality.

64. Moreover, as the Slovak Government rightly points out, the concurrence of a common 'domicile' in one Member State and a common nationality of another Member State can give rise to the same problems as the concurrence of two nationalities. There is nothing in the Regulation to indicate that the common 'domicile' in such a case establishes the single ground of jurisdiction and that seising the courts of the common nationality would be precluded.

65. In summary, it can therefore be concluded that limiting the meaning of nationality in Article 3(1)(b) to the more effective nationality is not consistent with either the wording or the objectives of Regulation No 2201/2003. The system of jurisdiction in divorce proceedings provided for in the Regulation is not generally based on the idea of excluding multiple grounds of jurisdiction. Rather, it expressly provides for the coexistence of several equal-ranking grounds.

66. This necessarily entails a right of choice on the part of the applicant. The fact that a person possessing dual nationality can choose between the courts of two Member States which are competent exclusively on grounds of nationality is not contrary to the Regulation. The requirement in Article 3(1)(b) that both spouses must have the nationality of the court seised ensures that, when that provision is applied, both spouses have the same link to that forum and that it is not possible to seise a court the jurisdiction of which would be entirely unforeseeable or remote from the point of view of either of the spouses.

67. Nor does the choice available to the applicant lead to increased legal uncertainty. It follows from the principle of legal certainty that Community legislation must be certain and its application foreseeable by those subject to it. [31] On the interpretation put forward here, those requirements are taken into account by Article 3(1)(b), as jurisdiction on grounds of common nationality can be determined unequivocally. It is true that, in the case of persons holding more than one nationality, jurisdiction may lie with the

31 — See inter alia Case C-301/97 *Netherlands* v *Council* [2001] ECR I-8853, paragraph 43; Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 72; and Case C-288/07 *Isle of Wight Council and Others* [2008] ECR I-7203, paragraph 47.

courts of a number of Member States. However, should the courts of a number of Member States be seised for that reason, the conflict of jurisdiction is unequivocally resolved by Article 19.

68. As the situation in this case shows, adverse side effects such as the rush to the courts are not in fact such a significant problem from the point of view of jurisdiction per se. Even though Ms Mesko has lived for a long time in France and it is more expensive for her to take part in the proceedings in Hungary than it is for her to take part in proceedings before a court in her place of residence, the fact remains that her complaint is not directed primarily against the ground of jurisdiction as such. What she objects to is rather the application of Hungarian rather than French divorce law. This, however, is a direct consequence not of Regulation No 2201/2003 but of the Hungarian private international law rules. It would not be appropriate to make up for the lack of uniform conflict-of-law rules by an interpretation of the existing provisions on jurisdiction that was contrary to the objectives and scheme of those provisions.

69. Finally, seising a court having jurisdiction under Article 3(1)(b) likewise cannot be regarded as an abuse, as Ms Mesko's representative submitted at the hearing. It is indeed settled case-law that Community law cannot be relied on for improper or fraudulent ends. [32] However, an abuse can be found to exist only if, notwithstanding formal compliance with Community law requirements, reliance on the rules is contrary to their objectives. [33]

70. Seising the courts of a Member State the nationality of which is held by both spouses is not contrary to the objectives of Article 3(1)(b) even if — as submitted — jurisdiction was taken on the basis of the less effective nationality.

71. It must also be noted that, in the context of the rules governing jurisdiction, legal certainty plays a major role which requires that the application of Community law must be foreseeable by the persons concerned. [34] Consequently, the idea of abuse of law can only in exceptional circumstances at most lead to the seising of a court with jurisdiction under the applicable provisions being regarded as such an abuse.

32 — See Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, paragraph 51 et seq., and *Halifax and Others* (cited in footnote 31), paragraph. 68 and the case-law cited.

33 — See to this effect *Emsland-Stärke* (cited in footnote 32), paragraph 52, and *Halifax and Others* (cited in footnote 31), paragraph 74.

34 — See the case-law cited in footnote 31.

V — Conclusion

72. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Cour de cassation as follows:

(1) Where the court of a Member State has to examine whether, under Article 64(4) of 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, the court of the Member State in which a judgment was originally given would have had jurisdiction under Article 3(1)(b) of that regulation, it may not regard spouses who both possess the nationality of the Member State of the court seised and of the Member State of origin as being exclusively of its own nationality. Rather, it must take into account the fact that the spouses also possess the nationality of the Member State of origin and that the courts of the latter State accordingly would have had jurisdiction in respect of the judgment.

(2) For the purposes of determining jurisdiction under Article 3(1)(b) of Regulation No 2201/2003 in the case of spouses who hold more than one nationality, not only the more effective nationality is to be taken into account. The courts of all Member States whose nationality is held by both spouses have jurisdiction under that provision.