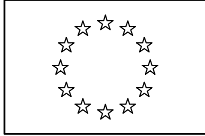

COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT

Commentary on the articles of the proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations

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This commentary relates to the Articles of the proposal for a Council Regulation adopted by the Commission on 15 December 2005 (COM (2005) 649 final).

Chapter I

Scope, subject-matter and definitions

Article 1. The Regulation applies to all maintenance responsibilities arising from family relationships (paragraph 1). Rather than listing the types of relationships thus covered, it has been felt preferable to refer to a generic concept of family maintenance obligations without seeking to impose either a broad or a restrictive vision of the concept of the family.

Paragraph 2 determines the geographical scope of the Regulation.

Article 2. Most of the definitions appear in other instruments (e.g. authentic instruments are defined in Article 4(3) of Parliament and Council Regulation (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims.[1]

Chapter II

Jurisdiction

This Chapter departs in a number of respects from Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters.[2]

Article 3. The rule of general jurisdiction applies wherever the defendant is habitually resident. This is the solution opted for in Council Regulation (EC) No 2201/2003 of 27 November 2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility.[3]

This Article adds an important detail at item d). To avoid all risk of controversy in the interpretation of “proceedings concerning the status of a person”, it is provided that a court having jurisdiction as regards parental responsibility under Regulation No 2201/2003 also has jurisdiction as regards maintenance if the maintenance application is ancillary to the proceedings relating to parental responsibility. This will help to encourage combined actions.

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[1] OJ L 143, 30.4.2004, p. 15.
[2] OJ L 12, 16.1.2001, p. 1.
[3] OJ L 338, 23.12.2003, p. 1-29.

Lastly, the Regulation abandons the concept of domicile and now refers only to habitual residence; this is the more appropriate concept in instruments applicable to family law.

Article 4. This provision broadly follows Article 23 of Regulation No 44/2001, but it makes two major innovations regarding prorogation of jurisdiction. First of all, the formal requirements are tightened up: only agreements concluded in writing will be accepted (paragraph 2).

Secondly, the scope of the clauses conferring jurisdiction is significantly restricted, since they are prohibited in disputes relating to a maintenance obligation towards a minor (paragraph 4). In such matters the "weaker party" must be given fuller protection.

Article 5. This follows Article 24 of Regulation No 44/2001.

Article 6. Instead of a renvoi to national laws, when no courts of any Member State have jurisdiction under the previous Articles, this provision establishes two subsidiary connecting factors: the common nationality of the creditor and the debtor, and the place of the last common habitual residence of the spouses, where this residence still existed at least one year before the institution of the proceedings.

Legal foreseeability is strengthened, and all situations in which a link with the European Community can legitimately be established are covered. This provision will apply only where the two parties – creditor and debtor – reside outside the European Union, did not conclude a choice-of-court agreement or did not appear voluntarily before a court in a Member State.

Articles 7, 8, 9 and 10. Regarding lis pendens, related actions, the seising of a court and provisional – including protective - measures, Articles 27, 28, 30 and 31 of Regulation No 44/2001 are broadly taken over here.

Article 11. This provision is partly inspired by Article 17 of Regulation No 2201/2003, but it takes account of the fact that there is no longer a renvoi to national law and that the international jurisdiction of a court of a Member State can now be based only on the Regulation.

Chapter III

Applicable law

Article 12. The purpose of this Chapter is to harmonise the conflict rules applicable to maintenance obligations and not to determine the law applicable to the establishment of the family relationship on which the maintenance obligations are based. The preconditions for the existence of a maintenance obligation are not covered. The law designated by the Regulation makes it possible to determine if the son has a maintenance obligation towards his father, but it does not regulate the establishment of the father/son relationship.

Article 13. The law of the country of the creditor's habitual residence remains predominant (paragraph 1), as in the Hague Convention of 2 October 1973 on the law applicable to maintenance obligations ("the Convention").

The lex fori ranks second (paragraph 2) in two situations. The first is where the law of the country of the creditor's habitual residence does not make it possible for the creditor to obtain

maintenance. The lex fori is thus applied as a replacement solution to protect the creditor (paragraph 2(a)).

The second situation (paragraph 2(b)) covers cases where the creditor is eligible for maintenance under the law of the country of his habitual residence but prefers to ask for the lex fori to apply. This possibility is available, however, only if the lex fori coincides with the law of the debtor's country of habitual residence. There is therefore no inequality between the parties: the creditor brings an action in the country of the debtor's habitual residence and asks for the law of that country to be applied. It could be, for instance, that the creditor, on linguistic grounds or for considerations of cost, might prefer the requested authority to apply its own internal law.

Rather than providing for the automatic application of the law of the common nationality of the parties on a cascade basis, in the event of "failure" of the other laws, paragraph 3 provides for derogating from the basic rules only if two conditions are both satisfied: it must be impossible under the laws designated by paragraphs 1 and 2 for the creditor to obtain maintenance from the debtor, and there must be another country with which the maintenance obligation has a close link. This could be the country of common nationality, but there might be other possibilities as well.

Article 14. Whatever the nature of the maintenance relationship, the parties can opt for the lex fori when commencing proceedings, provided the choice is explicit or at least unequivocal. The point is not, therefore, to choose the applicable law in advance for future disputes but to agree that the requested authority should apply its own law.

But stricter conditions as to substance and form apply for the creditor and debtor to agree in advance on the applicable law. Such agreements prior to any dispute are prohibited as regards maintenance obligations towards children and vulnerable adults. Moreover, the parties can agree to designate only certain laws with which their situation is connected. Lastly, agreements must be concluded in writing.

Article 15. This provision organises protection for the debtor against the application of the designated law when the maintenance relationship is not unanimously acknowledged as deserving priority. Such is the case, in particular, of maintenance relations between collateral relations or between in-laws, or of maintenance obligations owed by descendants towards relatives in the ascending line. As in Article 7 of the Convention, the debtor may oppose a claim by the creditor on the ground that there is no maintenance obligation under the law of their common nationality or, in the absence of a common nationality, under the law of the country in which the debtor is habitually resident.

Maintenance obligations between spouses and ex-spouses raise real difficulties in the Member States which want to prevent a duty of support being maintained artificially after the couple separate. Paragraph 2 protects the debtor by enabling him to plead that there is no maintenance obligation under the law of the country with which the marriage has the closest connection, i.e. the country which represented the principal centre of the spouses' interests when they were together.

Article 16. It reproduces Article 9 of the Convention but specifies that it applies only to the right of a public body to seek reimbursement, i.e. its capacity to act. Reimbursement as such will be subject to the law designated according to the other conflict rules in the Regulation (cf. Article 17(1)(e)).

Article 17. The non-exhaustive definition of the field covered by the law applicable to a maintenance obligation in paragraph 1 is inspired by the one in the Convention. It specifically mentions limitation periods to avoid certain difficulties of application at the enforcement stage.

Paragraph 2 takes over a provision of substantive law from Article 11 of the Convention, requiring the competent authorities of the Member States to take the needs of the creditor and the resources of the debtor into account in determining the amount of maintenance, whatever the contents of the applicable law designated by the conflict rule.

Article 18. The principle of the universality of the conflict rules is firmly established.

Article 19. Renvoi is prohibited (paragraph 1), except if the designated law is that of a non-member country whose rules of private international law designate the law of another country (paragraph 2). It does not appear appropriate in a maintenance dispute in a court of a Member State to apply the law of a non-member country which would not apply it in an identical situation. However, to simplify this "partial renvoi" technique, the lex fori is applied directly in such a case.

Article 20. The public policy exception is retained to exclude the designated law, but it is proposed that no use be made of it with regard to the laws of the Member States. The mechanisms protecting debtors against the claims of certain maintenance creditors (cf. Article 15) appear sufficient to neutralise the undesirable effects of the laws of certain Member States when they are applied in other Member States.

Article 21. The solution opted for by Article 19(1) of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations is taken over here for States with more than one legal system.[4]

Chapter IV

Common procedural rules

This Chapter enacts the common procedural rules to guarantee strict compliance with the requirements of adversary proceedings. These rules constitute the essential accessory to the removal of the exequatur procedure and will apply to all maintenance proceedings of whatever kind so that any decision given in a Member State may be eligible for the automatic recognition system.

Article 22. The methods of serving the document instituting proceedings are harmonised by taking over those provided for by Article 13 of Regulation No 805/2004, which make it possible to obtain proof of receipt of the document by the defendant (paragraph 1). At least one of these methods must be provided for by the national law of the Member States, which are asked to inform the Commission which methods are available (paragraph 3).

Paragraph 2 organises defence rights by requiring a minimum period which every defendant must enjoy from the day when he receives the document instituting proceedings.

[4] OJ C 27, 26.1.1998, p. 34 -53.

Article 23. The harmonisation effected by Article 22 will make it easier for the court to assess the admissibility of a case. The stay of proceedings provided for by Regulation No 2201/2003 (Article 18(1)) should therefore be very rare if the defendant failing to enter an appearance resides in a Member State since, by definition, this defendant will have been able to receive the document instituting proceedings in accordance with the common rules of Article 22. The court therefore has only a limited function when a defendant who fails to enter an appearance resides in a Member State: all it will have to do is check that the document was indeed served in compliance with the harmonised rules.

On the other hand, if a defendant who fails to enter an appearance resides in a non-member State (paragraphs 2 and 3), Article 18(1) and (3) of Regulation No 2201/2003 will have to be taken over.

Article 24. It may be that the rules of Article 22 are ineffectual, either because they do not produce the expected result (defendant untraceable), or because they are not applicable (defendant in a non-member State), or because of force majeure. In such cases, a decision can be taken, but the defendant will then have a right, in any Member State, to apply for review of the decision.

Since the defendant will have been informed of the decision and will have been able to act, he will enjoy a period to apply for review of this decision. Such a request suspends enforcement measures (cf. Article 33, item b).

Chapter V

Enforceability

Article 25. Intermediate measures are abolished for maintenance claims. Given the procedural guarantees imposed upstream, in all Member States, before the decision is given, downstream controls, when the decision circulates within the European judicial area, are no longer necessary.

Article 26. The full enforceability of a decision – already commonly provided for by the national laws of the Member States – is the general rule. This means that enforcement proceedings can be commenced even before the decision is final. A similar measure has already been taken by the Community legislature as regards rights of access (second subparagraph of Article 41(1) of Regulation No 2201/2003).

Chapter VI

Enforcement

Article 27. This Chapter derogates from the principle that enforcement proceedings are governed by the law of the enforcing Member State. It covers enforcement measures intended to apply in cross-border situations; this always means situations where a decision is taken in one Member State and enforced in another.

Article 28. The party applying for enforcement is exempted from producing a full translation of the decision. In place of a translation an extract from the decision using the standard form available in all the Community official languages is required.

Articles 29, 30 and 31. The formalities required in the enforcing Member State are simplified by observing the existing rules (Articles 50, 51 and 56 of Regulation No 44/2001) at the actual enforcement stage rather than at the declaration of enforceability stage, abolished by Article 25.

Article 32. The prohibition of any review as to substance in the Member State of enforcement is already provided for (e.g. Article 45(2) of Regulation No 44/2001). But paragraph 2 provides that the enforcement authorities may still limit the enforcement of the decision to the attachable part of the maintenance claim, without undermining the amount of the claim itself.

Article 33. Even if it makes no substantial modification, an enforcement authority which suspends enforcement of the original decision prevents the payment of maintenance and thus deprives it of its proper effect. Hence the need to limit the prerogatives of the enforcement authorities by giving an exhaustive list of the grounds on which the enforcement of a decision can be refused or suspended, in order to ensure the protection of a debtor whose situation changes or who applies for the review of the original decision.

Article 34. A monthly direct payment order is provided for. Some Member States already have measures with similar effects (seizure of bank accounts, seizure on wages/salaries), but this provision is important on two counts: it offers the certainty that this type of enforcement measure will be available everywhere in the European Union; and it offers a maintenance creditor the possibility of obtaining an order from the original court which will be enforceable in all the Member States.

The maintenance creditor will thus have access to local justice: if he takes action in the court for the place of his habitual residence, he will be able to apply to the same court for an automatic payment order, which can then be used in another Member State. The originating court will thus have jurisdiction to issue a directly enforceable order, even if enforcement actually takes place in another Member State.

Issuing a direct payment order assumes that the original decision is served on the debtor by one of the methods provided for by Article 22(2). It also assumes that the identity of the debtor's employer and/or bank account, to which the order is to be addressed, are known (paragraphs 4 and 5).

The debtor will not be always inactive; he will be able to apply for the review of the original court's decision if he is being informed of it for the first time, or to challenge the payments by applying for suspension of the enforcement measure as provided for by Article 33. To facilitate the debtor's information, he must be notified of the payment order, the original decision and an information note (paragraph 4(b)).

Article 35. The temporary freezing of a bank account may be obtained to guarantee the effectiveness of the enforcement measures. This rapid procedure – the debtor not being actively involved at the initial stage – allows the court hearing the case to prevent concealment of assets. It is a provisional safeguard measure which can be withdrawn at any time, either at the debtor's request (paragraph 5) or automatically when a decision is given on the substance (paragraph 6).

Article 36. The priority ranking given to maintenance claims makes it possible to ensure that, in the European Union, maintenance claims which meet essential requirements will always be paid by way of preference over the debtor's other debts.

Chapter VII

Authentic instruments and agreements

Articles 37 and 38. Authentic instruments and agreements between parties, when they are enforceable on the territory of a Member State, must be eligible mutatis mutandis for the same legal status as decisions, as is already the case in other fields (e.g. Article 46 of Regulation No 2201/2003). They must therefore be enforceable in any Member State as in the Member State of origin, without formality and without it being possible to challenge their recognition. They can, moreover, be subject to the same enforcement measures as decisions.

Chapter VIII

Cooperation

Articles 39 and 40. This Chapter is partly inspired by Regulation No 2001/2003 (Articles 53 to 58). The designation of central authorities and their general functions are subject to comparable rules.

Articles 41 and 42. The functions of the central authorities and their working methods are adapted to the specific requirements of the recovery of maintenance obligations. Thus maintenance creditors are given the possibility of being represented by a central authority in proceedings for a decision or for the actual recovery of amounts due (Article 41(2)). This aid will be free of charge if the maintenance creditor meets national requirements for eligibility for legal aid (Article 42(4)).

To simplify life for maintenance creditors, they will be able to apply to the court of the place of their habitual residence, which will assist them to ensure that action is taken on their cooperation requests (Article 42(1)).

Article 43. The central authorities will meet in the context of the European Judicial Network in civil and commercial matters.

Article 44. It is often very difficult to trace – or to retrace – the maintenance debtor. Locating him is essential for adversary proceedings and for identifying his assets. Member States must exchange information in order to achieve these objectives.

This positive obligation consists in providing the service that recovers maintenance obligations with all existing means. That is the point of paragraph 2: Member States do not have to create new records but make available those which exist. The creation of new records is, moreover, clearly prohibited (paragraph 3). The list in paragraph 2 is a minimum and non-exhaustive list; other authorities, and other types of information, can be added.

Article 45. Access to information is organised via central authorities. The maintenance creditor takes the initiative by referring the matter to “his” requesting authority via "his" court (the court for the place of his habitual residence). However, only the court is responsible for requesting and receiving information; the creditor does not have access to the debtor’s personal data, which is supplied exclusively to authorities specifically empowered to receive it.

The location of the debtor is the only item of information that can be exchanged at any time. Other information – on assets – can be sought only at a later date, when a decision, an

authentic instrument or an agreement between parties makes it possible to establish the maintenance creditor's status as such (paragraph 3).

Article 46. The information is transmitted to the court that made the initial request. The central authority is a channel of communication and cannot use the information itself; it must destroy it as soon as it has been transmitted (paragraph 1).

Only the court which receives information may use it and only to facilitate the recovery of maintenance claims (paragraph 2). Any other use is prohibited. The court may send this information, without disclosing it to the creditor, to the competent authorities in charge of the acts made possible by obtaining it.

The court alone is empowered to store the information, and only provided it is useful to the recovery of a maintenance claim and for no more than one year (paragraph 3).

Article 47. The debtor is entitled to know that data concerning him has been transmitted and how it was used. However, compliance with this information obligation, which is incumbent on the requested authority, must not undermine the effectiveness of recovery of the maintenance claim. Notifying the debtor can therefore be deferred, should a requesting authority want to be able to use the information it received without taking the risk that the debtor might block the proposed measures.

Chapter IX

General and final provisions

Article 48. The Regulation, an autonomous Community instrument for maintenance obligations, replaces Regulations Nos 44/2001 and 805/2004, which will no longer apply in this field (paragraph 1).

In addition, in view of the harmonisation of the rules on service of documents (Article 22), it is no longer necessary to apply Article 19 of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of the judicial and extrajudicial documents in civil and commercial matters[5] (paragraph 2).

The other provisions of Regulation (EC) No 1348/2000, and those of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, are not affected by this Regulation[6] (paragraph 3).

Article 49. The new Regulation prevails over the other instruments applicable in relations between Member States. It does not fully replace the applicable conventions, since its scope and content are not strictly identical, but it takes precedence over them and supplements them if necessary, in particular as regards cooperation.

Articles 50 and 51. These provisions concern the amendment of the annexes and committee procedures.

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[5] OJ L 160, 30.6.2000, p. 37.
[6] OJ L 174, 27.6.2001, p. 1.

Article 52. The Regulation will apply to proceedings instituted as from its entry into force (paragraph 1), but some of its provisions can be implemented before this date (paragraph 2). Such is the case of the conflict rules that the parties to an ongoing proceeding can decide to apply by mutual agreement. Likewise, enforcement measures can concern all decisions and authentic instruments which, in relation to existing instruments, have been endorsed for exequatur or, better still, are already exempted from this formality. Lastly, the provisions concerning cooperation, with the important rules on access to information will apply to pending proceedings.

Article 53. It sets the date of entry into force of the Regulation and its date of application.