



COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL

calling on the Council to provide for measures relating to maintenance obligations taken under Article 65 of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty

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1. LEGISLATIVE AND INSTITUTIONAL CONTEXT

1.1. Community legislation applicable to maintenance obligations

Maintenance obligations are an integral part of the scope of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the “Brussels I Regulation”).¹ That Regulation lays down rules governing conflicts of jurisdiction, including a special rule on maintenance obligations in Article 5(2). These are followed by rules on the recognition and enforcement of judgments, covering among other things judgments given in the Member States concerning maintenance obligations. Incidentally, Article 57(2) of the Brussels I Regulation specifically mentions “*Arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them*”, which are to be regarded as authentic instruments.

Maintenance obligations are also within the scope of European Parliament and Council Regulation (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims (the “EEO Regulation”).² This Regulation secures the free movement in all Member States of judgments certified as European Enforcement Orders. Judgments in maintenance matters are covered by this Regulation, which, like the Brussels I Regulation, expressly mentions arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them, which are to be regarded as authentic instruments (Article 4(3)(b)).

Maintenance obligations are excluded, on the other hand, from Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (the “new Brussels II Regulation”).³ The exclusion is expressly provided for by Article 1(3)(e) and recital 11.

¹ OJ L 12, 16.1.2001.

² OJ L 143, 30.4.2004.

³ OJ L 338, 23.12.2003.

1.2. Draft reform of Community legislation on maintenance obligations

1.2.1. Brief presentation of the proposal for a Regulation laid before the Council

In accordance with the conclusions of the European Council meetings in Tampere (15 and 16 October 1999) and Brussels (4 and 5 November 2004), the Commission presented to the Council a proposal for a Regulation implementing the mutual recognition programme, the objective being to remove the outstanding barriers to the recovery of maintenance in the European Union. The aim of the future Regulation is to create a legal environment matching the legitimate expectations of maintenance creditors. It must enable them to obtain an enforcement order easily, quickly and, wherever possible, free of charge which can enjoy unimpeded freedom of movement in the European law-enforcement area and achieve the practical result that sums due are properly paid.

This new legal environment calls for action consisting of more than cosmetic changes to current mechanisms; measures will be taken in all relevant areas of judicial cooperation in civil matters: international jurisdiction, applicable law, recognition and enforcement, cooperation and removal of barriers to smooth procedures, including better access to information concerning the situation of debtors wherever they live in the European Union. These responses will be brought together as far as possible in a single Community regulation.

This initiative is the culmination of a long process of reflection and consultation: comparative law study financed in 2003, Green Paper produced and followed up in 2004, several expert meetings organised between 2003 and 2005, and an impact analysis with the assistance of an outside contractor and under supervision by an interdepartmental steering group which met four times in 2005.

1.2.2. Legal basis for the proposal for a Regulation

The proposed Council Regulation on jurisdiction, the applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations is presented by the Commission on the basis of Articles 61(c) and 67(2) of the Treaty establishing the European Community.

This is a proposal relating to judicial cooperation in civil matters, as defined by Article 65 of the Treaty, which has “*aspects relating to family law*” within the meaning of the second indent of Article 67(5). The codecision procedure is accordingly not applicable, and the Regulation falls to be adopted by the Council, acting unanimously after consulting the European Parliament.

2. THE PROBLEM

The second indent of Article 67(5) of the Treaty, as amended by the Treaty of Nice, makes a distinction within the general field of judicial cooperation in civil matters, as the measures provided for by Article 65 are taken by the codecision procedure of Article 251, “*with the exception of aspects relating to family law*”.

Since 1 February 2003, when the Treaty of Nice came into force, there have thus been two procedural arrangements: codecision, now the standard procedure, and adoption by the

Council, acting unanimously after simply consulting the European Parliament, this being the exceptional arrangement for “*measures*” containing “*aspects relating to family law*”.

It is generally easy enough to make the demarcation. There is no doubt that, for example, matrimonial matters and parental responsibility are aspects relating to family law within the Treaty.

When the question arose with the new Brussels II Regulation of abolishing the *exequatur* procedure for decisions concerning visiting rights, it was accepted as a matter of course that this legislation would affect the operation of national judicial systems in family law matters. Preserving the unanimity rule despite the entry into force of the Treaty of Nice enabled the Member States to ensure that no provisions of Community law could be adopted without their agreement on anything that could concern personal relationships within the family, in particular following a separation: custody, visiting rights, consequences of unlawful removal of children, and so on.

Whenever core aspects of family relationships are at issue and the Community legislation affects the very organisation of the family, the desire to maintain the unanimity rule is more easily understandable. The recognition or otherwise of a judgment relating to custody or visiting rights undeniably has a direct effect on the personal relationship between children and parents and thus affects the equilibrium of the family relationship, which is heavily influenced by the Member States’ differing legal and cultural traditions.

But there are areas in which this link with the equilibrium of the family relationship is less tight and application of the second indent of Article 67(5) gives particularly unsatisfactory results. An example is the recovery of maintenance obligations.

In this context it is important to properly reflect the hybrid nature of the concept of maintenance obligation – a family matter in origin but a pecuniary issue in its implementation, like any other claim.

As has been seen, the Community legislature has so far always considered that maintenance obligations should be subject to the ordinary law on judicial cooperation in civil matters like any other civil claims. Consequently, the Brussels I Regulation, taking over the structure of the Brussels Convention of 27 September 1968, excludes family-law matters but preserves maintenance obligations within its scope. The new Brussels II Regulation, by contrast, covers a wide range of family-law matters (divorce, parental responsibility) but excludes maintenance obligations. And the EEO Regulation extends to maintenance claims and was adopted by the codecision procedure.

The new Commission proposal on maintenance obligations obviously falls within a different context. Unlike the Brussels I Regulation and the EEO Regulation, it deals exclusively with maintenance obligations and provides for specific measures applicable to them, whereas in the other two instruments maintenance obligations were merely ancillary issues in the application of the common rules to civil claims. Maintenance obligations are the sole concern of this proposal for a Regulation and its legal nature is determined accordingly.

The fact that maintenance obligations are a family matter means that Community legislation specifically devoted to them “relate to” family law within the meaning of the second indent of Article 67(5) of the Treaty and thus fall outside the ordinary law on judicial cooperation in civil matters, where the codecision procedure applies.

This conclusion, although legally inescapable, is unsatisfactory. While maintenance obligations do indeed “relate to” family law, they are but a small component of a larger set. Once its existence is acknowledged and confirmed by a court judgment or similar formal act, a maintenance obligation is a claim and is subject to legal rules that differ very little from the general rules governing asset-related claims. That is the reasoning behind the inclusion of maintenance obligations within the scope of the Brussels I Regulation.

So long as Community law does no more than make it easier to obtain a judgment on a maintenance issue and ensure that the judgment can circulate freely and be enforced throughout the European Union, it merely secures a creditor’s access to justice and the satisfaction of his claim. Community legislation seen in this light relates mainly to pecuniary interests. Admittedly, the maintenance obligation is somewhat *sui generis* but it remains a pecuniary claim representing a sum of money to be recovered with tools that are easy to identify and can be applied to any decision in a financial matter: harmonised rules of international jurisdiction, issuance of an enforceable order recognised everywhere in the European Union, seizures of bank accounts or wages and salaries, effective cooperation between Member States to facilitate the legal mechanisms that are in place.

3. PROPOSED SOLUTION

Under the second indent of Article 67(2) of the Treaty, the Council, acting unanimously after consulting the European Parliament, may take a decision with a view to providing for all or parts of the areas covered by Title IV of Part Three of the Treaty to be governed by the procedure referred to in Article 251. It is therefore legally possible to transfer maintenance obligations from the unanimity to the codecision procedure.

A Council decision to that effect, creating the “passerelle” between unanimity and the codecision procedure, would be doubly advantageous. For one thing, it would reflect the specific nature of maintenance obligations. While there can be no denying the existence of a close link between maintenance and family relationships, the fact remains that recovery of a maintenance claim does not go to the core of such relationships. Unlike a decision on visiting rights, implementing a maintenance decision has no effect on the fundamental nature and expression of personal relationships between members of the family. The unanimity rule, which is designed above all to reflect the Member States’ differing rules governing the organisation of the family, accordingly cannot be justified in matters of maintenance obligations.

Secondly, constructing the “passerelle” would allow the same legislative procedure, with the same prerogatives of the European Parliament, to be applied for specific measures relating to maintenance obligations as are applied for instruments such as the EEO Regulation which established a set of ordinary rules that apply to maintenance claims as to any other claims.

It follows that, by reason of the very nature of maintenance obligations and of the legislative context in which the Community has operated hitherto in this area, it would be legally appropriate and politically desirable for the codecision procedure established by Article 251 of the Treaty to be applied to maintenance obligations.

4. CONCLUSION

In view of the foregoing considerations, the Commission calls on the Council, in accordance with the second indent of Article 67(2) of the Treaty establishing the European Community, to decide that the procedure established by Article 251 of the Treaty is applicable to the measures referred to in Article 65 as regards maintenance obligations.

ANNEX

COUNCIL DECISION

calling on the Council to provide for measures relating to maintenance obligations taken under Article 65 of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular the second indent of Article 67(2) thereof,

Having regard to the opinion of the European Parliament,

Whereas:

- 1) Under the Treaty of Amsterdam the European Community acquired the power to adopt measures in the field of judicial cooperation in civil matters, as provided for by Article 65 of the Treaty establishing the European Community.
- 2) Under the second indent of Article 67(5) of the Treaty, as amended by the Treaty of Nice, the measures provided for by Article 65 of the Treaty are to be adopted by the Council, acting in accordance with the procedure laid down by Article 251 of the Treaty, with the exception of the aspects relating to family law.
- 3) Under the second indent of Article 67(2) of the Treaty, the Council, acting unanimously after consulting the European Parliament, is to take a decision with a view to providing for all or parts of the areas covered by Title IV of Part Three to be governed by the procedure referred to in Article 251 thereof and to adapt the provisions governing the jurisdiction of the Court of Justice.
- 4) Judicial cooperation in civil matters has been governed by two separate procedures since the Treaty of Nice entered into force – the codecision procedure, which is now the standard procedure, and adoption by the Council, acting unanimously after consulting the European Parliament, which is the exceptional procedure for measures involving aspects relating to family law.
- 5) The borderline between measures involving aspects relating to family law and other measures is sometimes difficult to define; in the case of maintenance obligations, for instance, which is a hybrid field with aspects relating to family law, since the maintenance obligation generally arises from a family relationship, but also with financial aspects, since the obligation generates a claim for a sum of money.
- 6) The Council took this specific factor into account when adopting Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the scope of which includes maintenance obligations but excludes family law.
- 7) Likewise, following the entry into force of the Treaty of Nice, Regulation (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims

was adopted by the procedure laid down in Article 251 of the Treaty even though it applies to maintenance obligations.

8) Given the specific nature of maintenance obligations, a decision should be taken that they should henceforth be governed by the procedure laid down in Article 251.

9) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Decision and is not bound by it or subject to its application.

10) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, those Member States have notified their wish to take part in the adoption and application of this Decision,

HAS DECIDED AS FOLLOWS:

Article 1

As from 1 June 2006 the Council shall act in accordance with the procedure laid down in Article 251 of the Treaty when adopting measures relating to maintenance obligations referred to in Article 65 of the Treaty.

Article 2

Article 251 of the Treaty shall apply to opinions of the European Parliament obtained by the Council before 1 June 2006 concerning proposals for measures with respect to which the Council shall act, pursuant to this Decision, in accordance with the procedure laid down in Article 251 of the Treaty.

Done at Brussels,

For the Council