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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 23.2.2009
COM(2009)81 final

2009/0023 (CNS)

Proposal for a

COUNCIL DECISION

**on the conclusion by the European Community of the Protocol on the Law Applicable to
Maintenance Obligations**

EXPLANATORY MEMORANDUM

1. OBJECTIVE

The proposal concerns the conclusion by the Community of the Protocol on the Law Applicable to Maintenance Obligations concluded on 23 November 2007 under the Hague Conference on Private International Law. The Protocol is designed to offer greater legal certainty and predictability to maintenance creditors and debtors. Since the vast majority of maintenance claims involve children, the Protocol is first and foremost a measure to protect children.

2. DEVELOPMENT OF A COMMON JUDICIAL AREA WITHIN THE COMMUNITY

The European Community has set itself the objective of creating a genuine judicial area based on the principle of mutual recognition of judicial decisions.

On 18 December 2008 the Council adopted Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations¹. Under Article 15 of the Regulation the law applicable to maintenance obligations shall be determined in accordance with the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations in the Member States bound by that instrument.

Application of the Protocol in the Community will guarantee the application within the Member States of uniform and harmonised rules on applicable law in maintenance matters.

In addition, harmonised rules on applicable law are a precondition for abolishing *exequatur* for decisions concerning maintenance obligations. As a result, decisions issued in Member States which are bound by the Protocol will circulate freely in other Member States without any form of control on the substance in the Member State where enforcement is sought. This will achieve the political objective that has been on the agenda since the meeting of the European Council in Tampere in 1999.

Because of the close link between the objective of the Regulation (EC) No 4/2009 and the rules on applicable law, the Protocol should apply in the Community at the latest on the date of application of the Regulation, i.e. on 18 June 2011.

3. THE 2007 PROTOCOL ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS

The objective of the Protocol is to improve legal certainty and predictability by creating common provisions on the law applicable to maintenance obligations. The main aim of harmonisation of applicable law rules is to enable creditors to act in full knowledge of the situation, without being subject to diverse national systems. The Protocol seeks to strike a balance between the rights of the maintenance creditor and of the debtor.

¹ OJ L 7, 10.1.2009, p. 1.

The Protocol determines the law applicable to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including any maintenance obligation in respect of a child regardless of the marital status of the parents (Article 1(1)).

The Protocol provides that as a general rule, maintenance obligations shall be governed by the law of the State of habitual residence of the creditor (Article 3(1)). Special rules provide protection for the maintenance creditor in situations where he or she is unable to obtain maintenance under the law of the State of his or her habitual residence (Article 4). In the case of spousal maintenance, either of the parties may request application of the law of another State that has a closer connection with the marriage (Article 5). A special rule on defence gives the debtor the possibility, in certain circumstances, to contest a claim for maintenance on the ground that there is no such obligation under both the law of the State of habitual residence of the debtor and the law of the State of the common nationality of the parties, if they have one (Article 6). Finally, parties may choose the law applicable to a maintenance claim either for the purpose of a particular proceeding (Article 7) or in general (Article 8).

Application of the law determined under the Protocol may be refused only to the extent that its effects would be manifestly contrary to the public policy of the forum State (Article 13). In determining the amount of maintenance, the needs of the creditor and the resources of the debtor must be taken into account, even if the applicable law provides otherwise (Article 14).

The Protocol includes the possibility for Regional Economic Integration Organisations to become a party (Article 24).

4. COMMISSION PROPOSALS

In accordance with the jurisprudence² of the Court of Justice, the Community has gained exclusive external competence in the fields covered by Regulation (EC) No 4/2009. This Regulation states that the rules on applicable law shall be determined in accordance with the Protocol and that the Protocol has to apply in the Member States at the latest on the date of application of the Regulation. The Commission proposes therefore that the Community should conclude the Protocol alone.

Article 24 of the Protocol allows the European Community to declare at the time of signature, acceptance, approval or accession that it exercises competence over all the matters governed by the Protocol and that the Member States that have transferred competence to it shall be bound by the Protocol. The Commission proposes that such a declaration should be made.

Article 76 of the Regulation specifies that the Regulation shall apply from 18 June 2011 subject to the 2007 Hague Protocol being applicable in the Community by that date. Failing that, the Regulation shall apply from the date of application of the Protocol in the Community.

Under Article 25 of the Protocol, the Protocol shall enter into force a set period after the deposit of the *second* instrument of ratification, acceptance, approval or accession. The Protocol has not yet been ratified by any State. Consequently, the Community could be the first party to conclude the Protocol.

² Opinion 1/03 of the Court of 7 February 2006 on the competence of the Community to conclude the new Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

Since the Protocol should be applied in the Community at the latest on the date of application of the Regulation, i.e. 18 June 2011, the Commission proposes to make use of the mechanism for provisional application of an international agreement before it enters into force. Provisional application is enshrined in Article 300(2) of the Treaty establishing the European Community. The Commission proposes that a unilateral declaration should be made to this effect upon conclusion of the Protocol.

Under Article 22 of the Protocol, the Protocol shall not apply to maintenance claimed in a Contracting State relating to a period prior to its entry into force in that State. In the Community, the new Regulation (EC) No 4/2009 on maintenance obligations shall apply to proceedings instituted, to court settlements approved or concluded and to authentic instruments established after the date of application of the Regulation (Article 75). Consequently, the Regulation may also be applied in cases where maintenance is claimed for a period preceding the date of application of the Regulation. Application of the Regulation in combination with Article 22 of the Protocol would have the undesirable effect that the same claim might be subject to different laws, depending on the period for which maintenance is claimed. In addition, the rule on abolition of *exequatur* concerns only decisions given on the basis of the harmonised rules on applicable law. The Commission proposes that the rules of the Protocol should also apply where, on the basis of the Regulation, maintenance is claimed relating to a period prior to application of the Protocol in the Community and that a unilateral declaration should be made to this effect upon conclusion of the Protocol.

The Commission proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, adopted on 15 December 2005, was accompanied by an impact assessment. Since the impact assessment covered the proposed harmonisation of the rules on applicable law, there is no need to conduct a new impact assessment.

Proposal for a

COUNCIL DECISION

on the conclusion by the European Community of the Protocol on the Law Applicable to Maintenance Obligations

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) in conjunction with Articles 300(2) and 300(3) thereof,

Having regard to the proposal from the Commission³,

Having regard to the opinion of the European Parliament⁴,

Whereas:

- (1) The Community is working towards the establishment of a common judicial area based on the principle of mutual recognition of decisions.
- (2) Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (hereinafter referred to as “the Regulation”), adopted on 18 December 2008, provides that the law applicable to maintenance obligations shall be determined in accordance with the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations (hereinafter referred to as “the Protocol”) in the Member States bound by that instrument.
- (3) The Protocol makes a valuable contribution to offering greater legal certainty and predictability to maintenance creditors and debtors. Application of uniform rules on applicable law will allow for a free circulation of decisions on maintenance in the Community, without any form of control in the Member State where enforcement is sought.
- (4) Article 24 of the Protocol allows the Community to sign, accept, approve or accede to the Protocol.
- (5) The Community has exclusive competence over all matters governed by the Protocol.
- (6) The Protocol should apply between the Member States at the latest on 18 June 2011, the date of application of the Regulation.

³ OJ C , , p. .

⁴ OJ C , , p. .

- (7) Because of the close link between the Protocol and the Regulation, the Protocol should be applied in the Community on a provisional basis where it has not entered into force on 18 June 2011, the date of application of the Regulation. A unilateral declaration should be made to this effect upon conclusion of the Protocol.
- (8) The Protocol should apply to all decisions that may be recognised and enforced under the rules concerning the abolition of *exequatur* laid down in the Regulation, including maintenance claimed in the Member States relating to a period prior to the entry into force of the Protocol in the Community. A unilateral declaration should be made to this effect upon conclusion of the Protocol.
- (9) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, as annexed to the Treaty on the European Union and to the Treaty establishing the European Community, Ireland will take part in the adoption and application of this Decision.[The United Kingdom will not take part in the adoption of this Decision.]
- (10) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, Denmark will not take part in the adoption of this Decision and will not be bound by it or subject to application thereof,

HAS DECIDED AS FOLLOWS:

Article 1

The Protocol on the Law Applicable to Maintenance Obligations is hereby approved on behalf of the Community.

The President of the Council is hereby authorised to designate the person(s) empowered to sign the Protocol in order to express the consent of the Community to be bound thereby.

The text of the Protocol is attached to this Decision.

Article 2

When concluding the Protocol, the Community shall make the following declaration in accordance with Article 24 of the Protocol:

“The European Community declares, in accordance with Article 24 of the Protocol that it exercises competence over all the matters governed by the Protocol. Its Member States will not sign, accept, approve or accede to the Protocol, but shall be bound by the Protocol by virtue of its conclusion by the European Community.

For the purpose of this declaration, the term “European Community” does not include Denmark, by virtue of Articles 1 and 2 of the Protocol on the position of Denmark, as annexed to the Treaty on European Union and to the Treaty establishing the European Community [, and the United Kingdom, by virtue of Article 3 of the Protocol on the position of the United Kingdom and Ireland, as annexed to the Treaty on European Union and to the Treaty establishing the European Community].”

Article 3

The Protocol shall apply provisionally from 18 June 2011, the date of application of the Regulation, where the Protocol has not yet entered into force on that date. When concluding the Protocol, the Community shall make the following declaration:

“The European Community declares that the Protocol will apply provisionally from 18 June 2011, the date of application of Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, where the Protocol has not yet entered into force on that date.”

Article 4

In the Community the Protocol shall also apply to maintenance claimed in the Member States relating to a period prior to the entry into force or provisional application of the Protocol in the Community in situations where proceedings are instituted, court settlements are approved or concluded and authentic instruments are established after 18 June 2011, the date of application of the Regulation.

When concluding the Protocol, the Community shall make the following declaration:

“The European Community declares that the Protocol will also apply to maintenance claimed in its Member States relating to a period prior to the entry into force or provisional application of the Protocol in the Community in situations where proceedings are instituted, court settlements are approved or concluded and authentic instruments are established after 18 June 2011, the date of application of Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.”

Done at Brussels,

*For the Council
The President*