

# **Judicial cooperation in civil matters: jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations**

2005/0259(CNS) - 15/12/2005 - Document attached to the procedure

In this document, the Commission calls 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 problem is described as follows: 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 reflect properly 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.

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 (Council Regulation 44/2001/EC) 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 (Regulation 805/2004/EC creating a European Enforcement Order for uncontested claims) extends to maintenance claims and was adopted by the codecision procedure.

The new Commission proposal on maintenance obligations 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 confirmed by a court judgment, 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 EU, 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. The maintenance obligation 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 EU, seizures of bank accounts or wages and salaries, effective cooperation between Member States to facilitate the legal mechanisms that are in place.

The Commission proposes the following 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. 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 (Regulation 805/2004/EC creating a European Enforcement Order for uncontested claims) 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.

The proposal states that 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 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 in accordance with the procedure laid down in Article 251 of the Treaty.