

Towards and Area of Freedom, Security and Justice

Proposal on Maintenance Obligations

Proposal for a Council Regulation jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations of 15 December 2005

COM(2005) 649 final

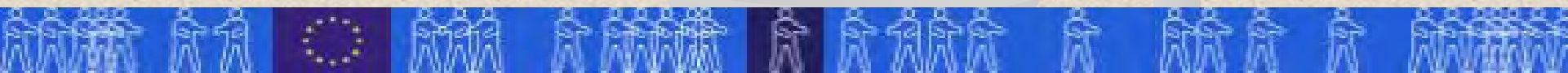
European Commission
DG Justice, Freedom and Security
Unit C.1 – Civil Justice

I. Current situation:

Jurisdiction:

- Brussels Convention/Brussels Regulation/Lugano Convention
 - *forum actoris* for the creditor - Article 5(2)
 - forum of the defendant - Article 2 (incl. claims of debtor against creditor)
 - prorogation of jurisdiction/ submission – Articles 23 and 24

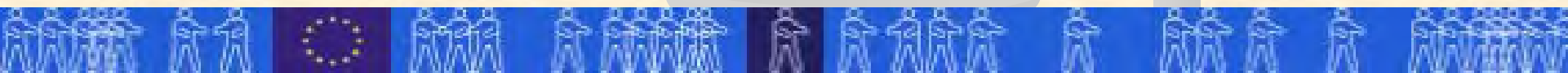
- *Applicability of rules*
 - Regulation – *in 26 EU Member States (except Denmark)*
 - *so-called Parallel Agreement between EU and Denmark (in force as of 1 July 2007)*
 - Lugano Convention – *between EU15 and Poland, Switzerland, Island, Norway*
 - National rules of jurisdiction: *if debtor in another third State (Article 4)*



I. Current situation:

Applicable Law

- No common rules in Community
- 1956 Hague Convention *applicable in Austria and Belgium*
- 1973 Hague Convention *applicable in Estonia, France, Germany, Greece, Italy, Lithuania, Luxembourg, Netherlands, Poland, Portugal and Spain*
- National conflict of law rules *applicable in Bulgaria, Cyprus, Czech Republic, Denmark, Finland, Hungary, Ireland, Latvia, Malta, Romania, Slovakia, Slovenia, Sweden and UK*



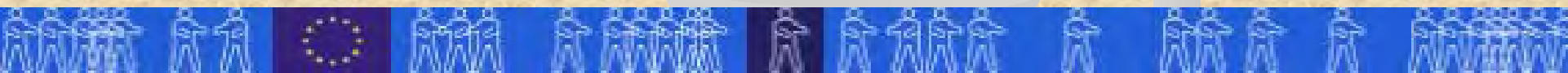
I. Current situation:

Recognition and enforcement of decisions

- 1968 Brussels Convention /Lugano Convention
 - Article 34 - "classical" recognition and enforcement system
 - review of bases of jurisdiction (Art. 28) and
 - review of grounds of recognition (Art. 27).
 - *Lugano Convention – EU15 and Poland, Switzerland, Island, Norway*

- 2001 Brussels regulation – a step forward: no review of bases of jurisdiction or grounds of recognition at the first stage (Art. 41).

- Regulation – *26 States*
 - *for the EU10 of decisions rendered after 1 May 2004*
 - *for Bulgaria and Romania of decisions rendered after 1 January 2007*

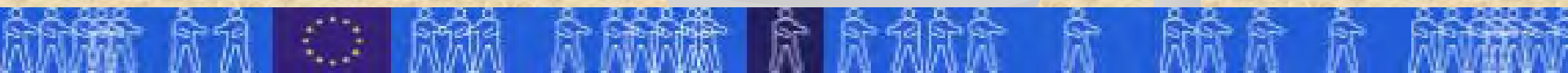


I. Current situation:

Recognition and enforcement of decisions (cont´d)

- *Under ALL systems – priority of international treaties in particular matters (Art. 57(2) Convention; Art. 71(2) Regulation)*
!! conditions of recognition/enforcement from convention
!! procedure may be from Brussels Convention/Regulation (choice left to the party)
- „Particular“ Conventions:
 - 1958 Hague Enforcement Convention: Austria, Belgium, Hungary
 - 1973 Hague Enforcement Convention:
Czech Republic*, Denmark*, Estonia, Finland*, France*, Germany*, Greece, Italy*, Lithuania, Luxembourg, Netherlands*, Poland, Portugal*, Slovakia*, Spain*, Sweden*, UK

* These States maintain the 1958 Convention in their relations with AT, BE, HU

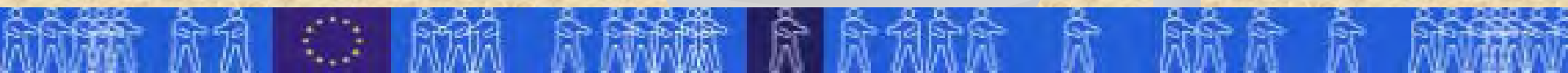


I. Current situation:

Recognition and enforcement of decisions (cont´d)

Reservations on the 1973 Hague Convention:

- Non recognition of decisions insofar as they relate to period after the creditor attains 21 years or marries (reservation not applicable to spouses):
Denmark, Finland, Lithuania, Portugal and Sweden
- Non- recognition of decisions relating to maintenance between persons related collaterally:
Czech Republic, Denmark, Estonia, Finland, Germany, Greece (except for siblings), Lithuania, Luxembourg, Netherlands, Slovakia, Sweden and UK
- Non- recognition of decisions relating to maintenance between persons related by affinity:
Czech Republic, Denmark, Estonia, Finland, Germany, Lithuania, Luxembourg, Portugal, Slovakia, Sweden and UK
- Non-recognition of decisions which do not provide for periodical payment of maintenance:
Estonia, Italy, Luxembourg, Poland and UK



I. Current situation:

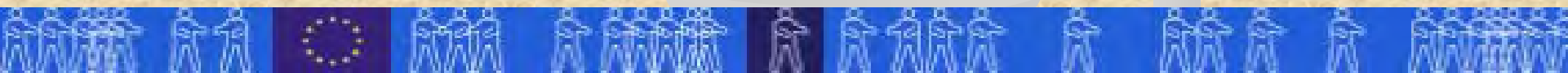
Recognition and enforcement of decisions (cont´d)

Regulation "only" system applies in Bulgaria, Cyprus, Ireland, Latvia, Malta, Romania and Slovenia.

EEO - regulation 805/2004 creating a European Enforcement Order for uncontested claims

Article 5 – abolition of exequatur

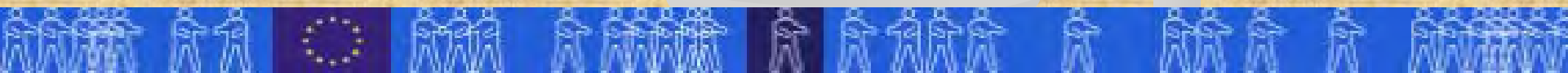
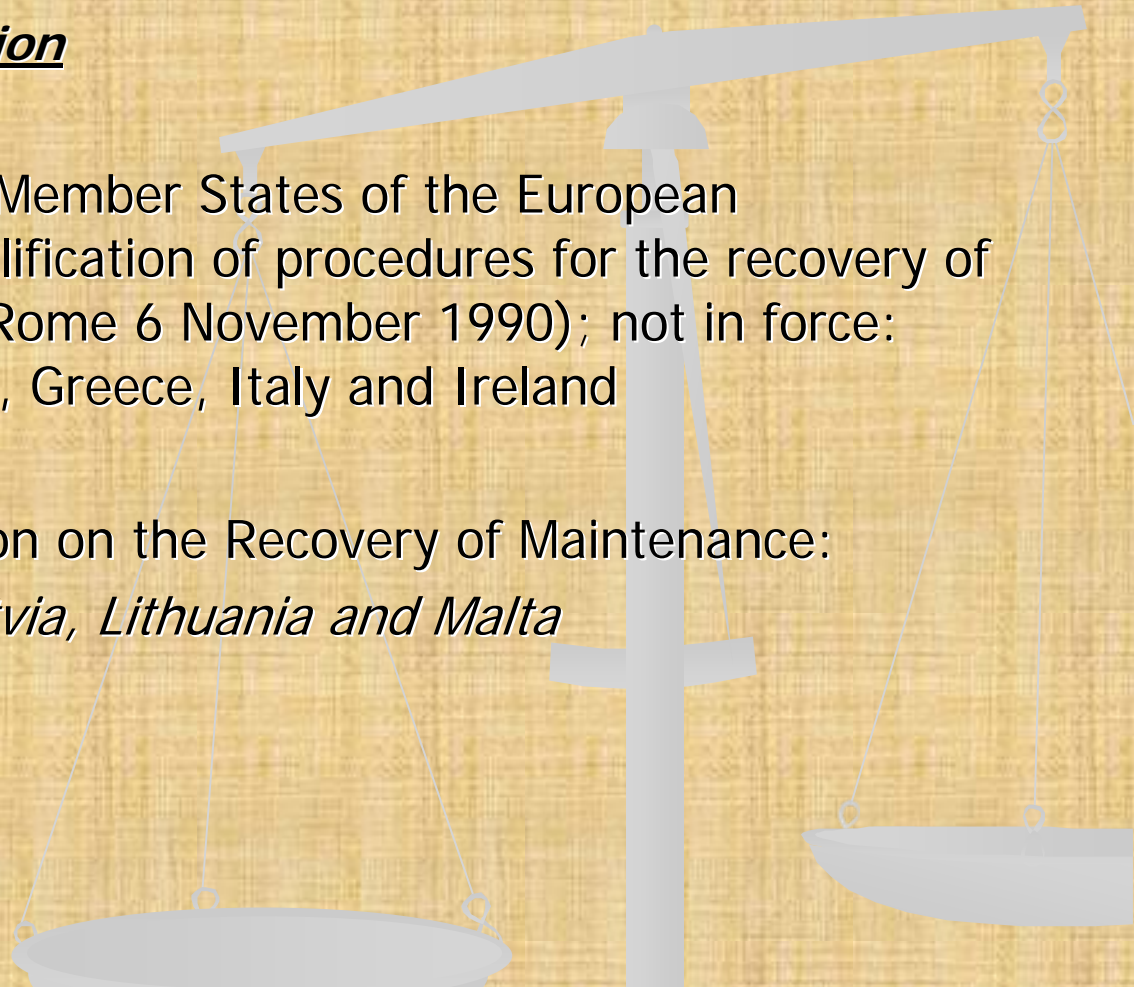
- without the need for a declaration of enforceability
- and without any possibility of opposing recognition (i.e. without the possibility to use a reservation from a convention in a particular matter)



I. Current situation:

Administrative Cooperation

- Convention between the Member States of the European Communities on the simplification of procedures for the recovery of maintenance payments (Rome 6 November 1990); not in force: ratified only by Spain, UK, Greece, Italy and Ireland
- 1956 New York Convention on the Recovery of Maintenance: *not parties: Bulgaria, Latvia, Lithuania and Malta*



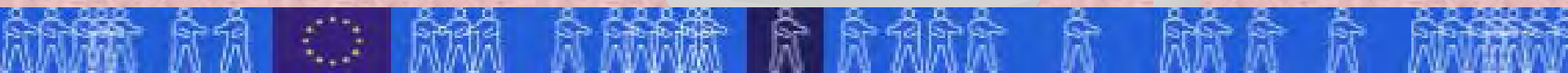
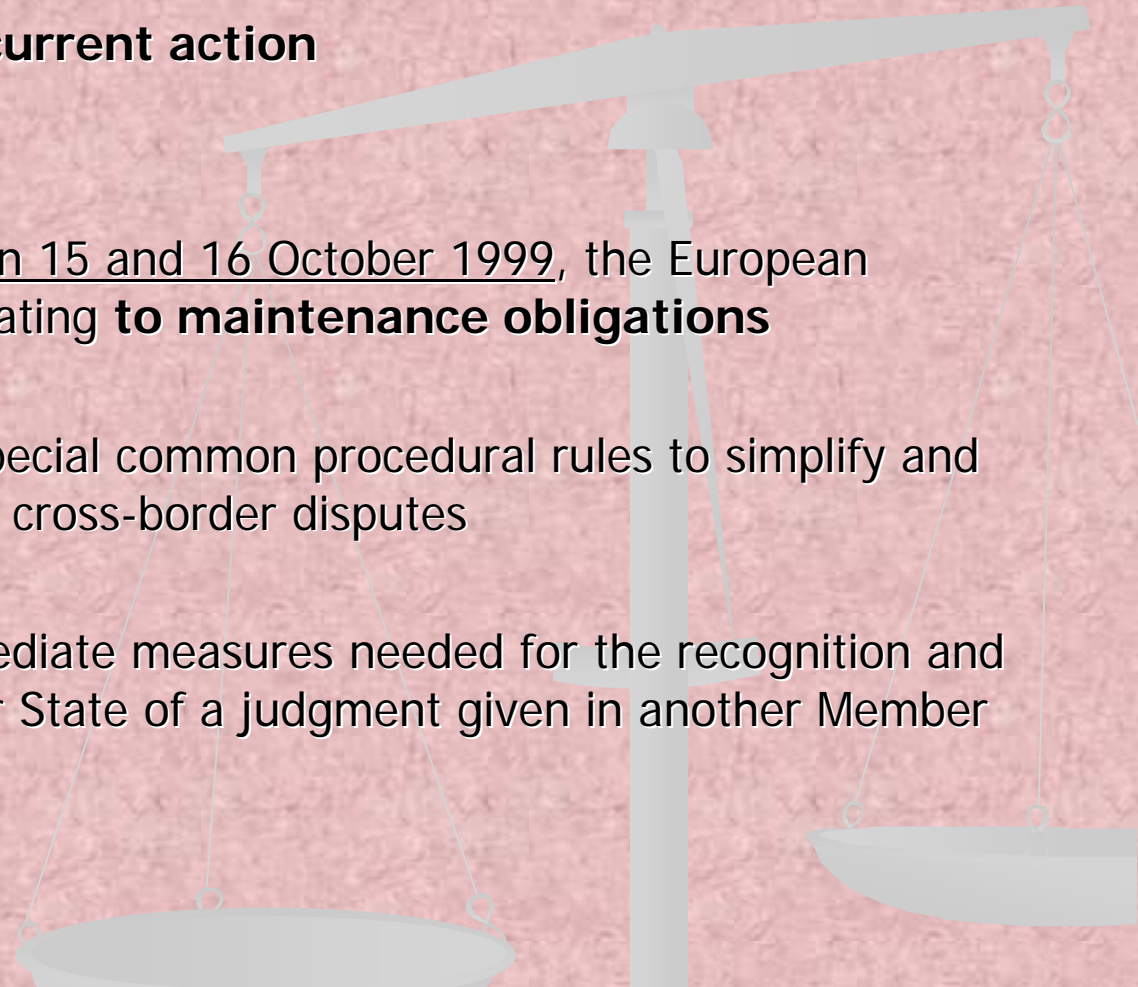
II. New Proposal

Political background to current action

- Tampere

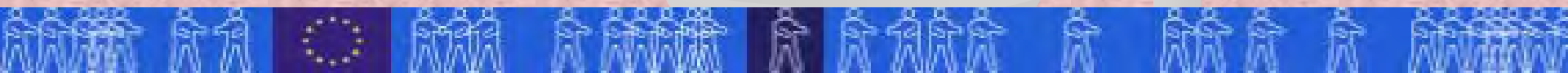
At its meeting in Tampere on 15 and 16 October 1999, the European Council asked in matters relating **to maintenance obligations**

- for the establishment of special common procedural rules to simplify and accelerate the settlement of cross-border disputes
- and
- for the removal of intermediate measures needed for the recognition and enforcement in one Member State of a judgment given in another Member State.



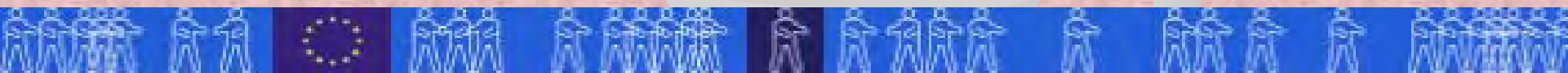
II. New Proposal

- The Mutual Recognition Programme in Civil Matters, adopted on 30 November 2000, calls for elimination of the *exequatur* procedure in matters related to maintenance obligations.
- The relevance of this programme was reaffirmed by the European Council in November 2004 at the time of the adoption of 'the Hague programme', in which it is underlined that *"continued implementation of the programme of measures on mutual recognition must therefore be a main priority in the coming years to ensure its completion by 2011"*



II. New Proposal

- The Council and the Commission adopted, on 2 and 3 June 2005, a common Action Plan which translates the Hague programme in concrete actions and which mentions, as regards judicial cooperation in civil matters, the adoption in 2005 of *“proposals on maintenance obligations”*.
- Proposal for a Regulation adopted on 15 December 2005.

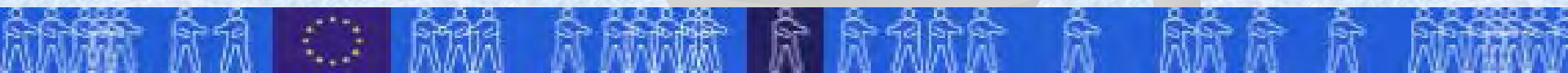


II. New Proposal

Philosophy of the Commission's proposal

Balance every traditional ground of non-recognition by a set of rules which make the review of the individual ground unnecessary or, at least, lower the threshold of objectionability:

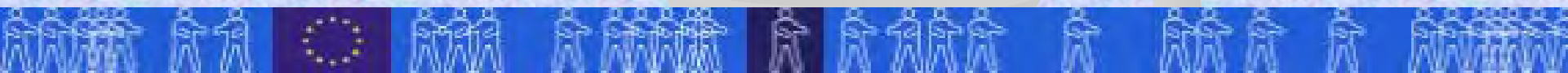
- Review of jurisdiction – countered by complete set of jurisdiction rules
- Default judgments - countered by the minimum common procedural rules (service and review)
- Public Policy – applicable law rules
- Irreconcilable judgments – in principle should not exist (*lis pendens*), typical for maintenance (creditor vs. debtor)
 - cannot exclude the existence (multiplicity of fora) – solution within the realm of enforcement (as prohibition of enforcement).



II. New Proposal

Coordination with the Hague Conference

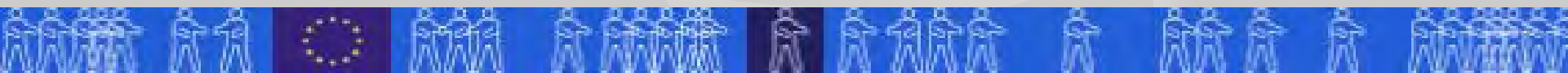
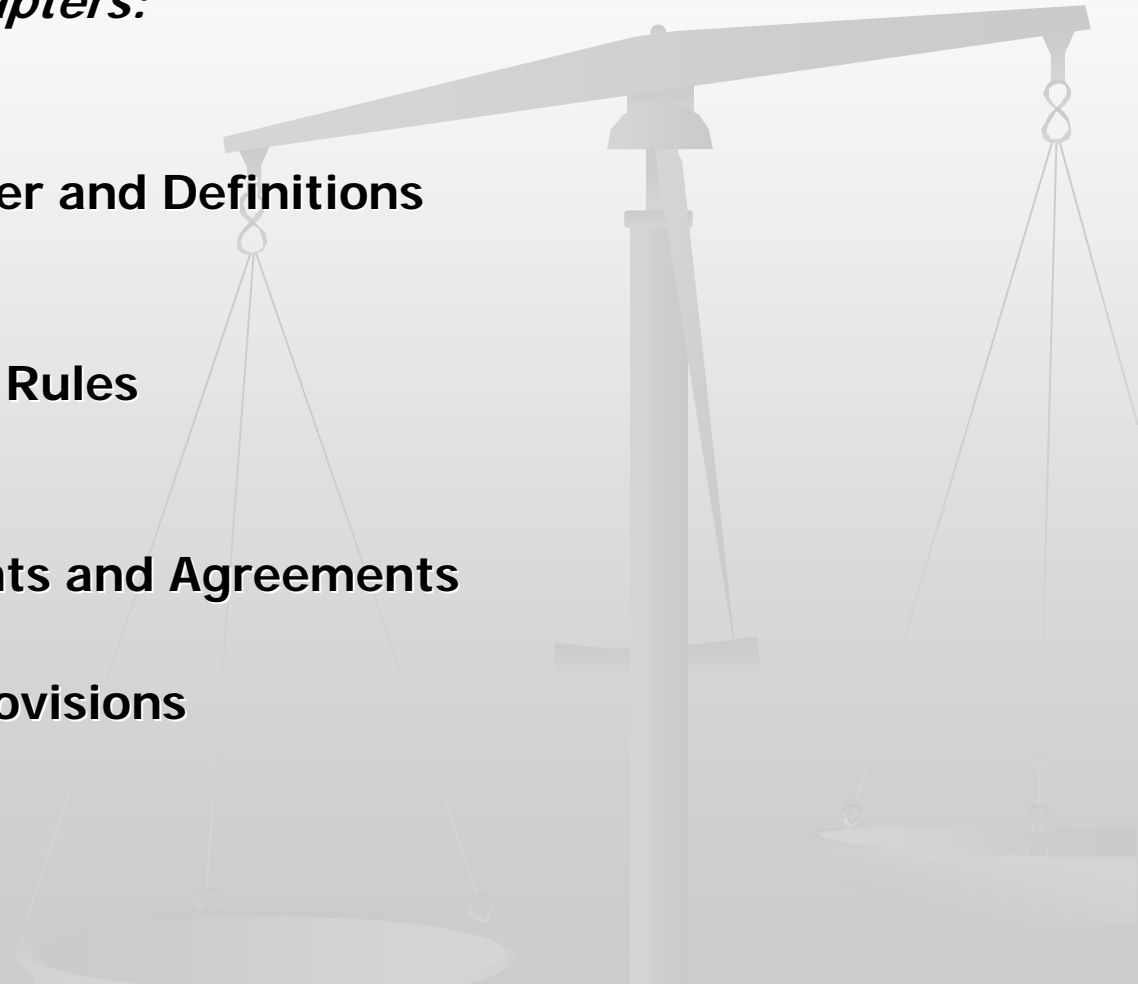
- The Hague Conference of Private International Law also launched work on maintenance obligations so as to modernise the rules in the existing Conventions.
- The relationships between the negotiations undertaken in The Hague and Community work should be seen in terms of the search for possible synergies between them.
- It is not excluded that in certain specific matters the negotiations in The Hague could produce results which might prove transposable within the European Union.



II. New Proposal

The proposal contains 9 chapters:

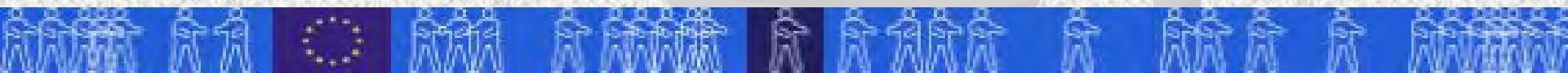
- I. Scope, Subject-matter and Definitions**
- II. Jurisdiction**
- III. Applicable Law**
- IV. Common Procedural Rules**
- V. Enforceability**
- VI. Enforcement**
- VII. Authentic Instruments and Agreements**
- VIII. Cooperation**
- IX. General and Final Provisions**



II. New Proposal

Chapter II - Jurisdiction

- Departs from Regulation:
 - the rule of general jurisdiction applies wherever the defendant is habitually resident;
 - the concept of domicile is replaced fully by habitual residence;
 - scope of prorogation clauses is significantly restricted, since they are prohibited in disputes relating to a maintenance obligation towards a minor (paragraph 4).
- Clarification:
 - court having jurisdiction as regards parental responsibility under Brussels IIa shall also have jurisdiction as regards maintenance if the maintenance application is ancillary to the proceedings relating to parental responsibility.

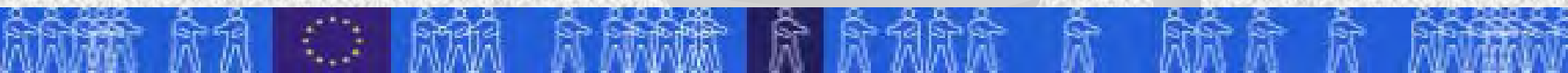


II. New Proposal

Chapter III - Applicable Law

Absence of choice

- Law of the country of the creditor's habitual residence remains predominant (as in the Hague Convention of 2 October 1973 on the law applicable to maintenance obligations)
- Lex fori ranks second in two situations:
 - where the law of the country of the creditor's habitual residence does not make it possible for the creditor to obtain maintenance;
 - creditor asks for the lex fori to apply and lex fori coincides with the law of the debtor's country of habitual residence.
- Displacement from the 2 basic rules only if two conditions are satisfied simultaneously:
 - it must be impossible under the laws designated by the main rules to obtain maintenance from the debtor, and
 - there must be another country with which the maintenance obligation has a close link (e.g. common nationality).



II. New Proposal

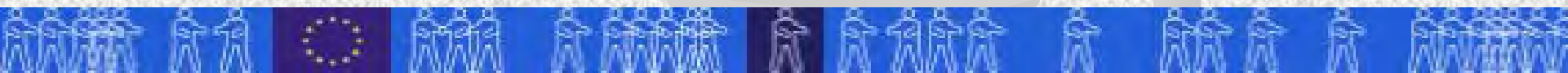
Chapter III - Applicable Law

Choice of law

- agreements prior to any dispute are prohibited as regards maintenance obligations towards children and vulnerable adults;
- parties can agree to designate only certain laws with which their situation is connected;
- agreements must be concluded in writing.

Debtor protection

- 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.
- cases of spouses and ex-spouses: 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.

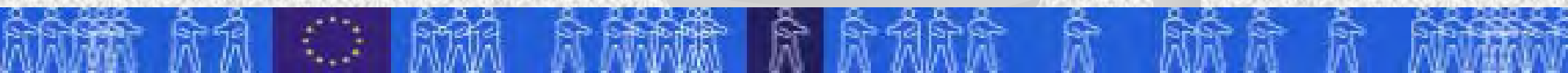


II. New Proposal

Chapter IV – Common Procedural Rules

These rules constitute one *essential accessory* to the abolishment of the exequatur:

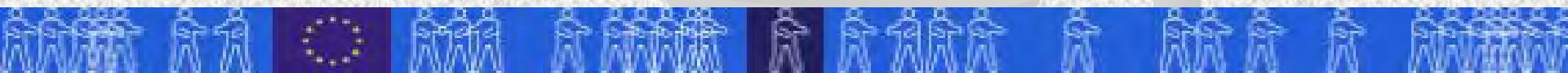
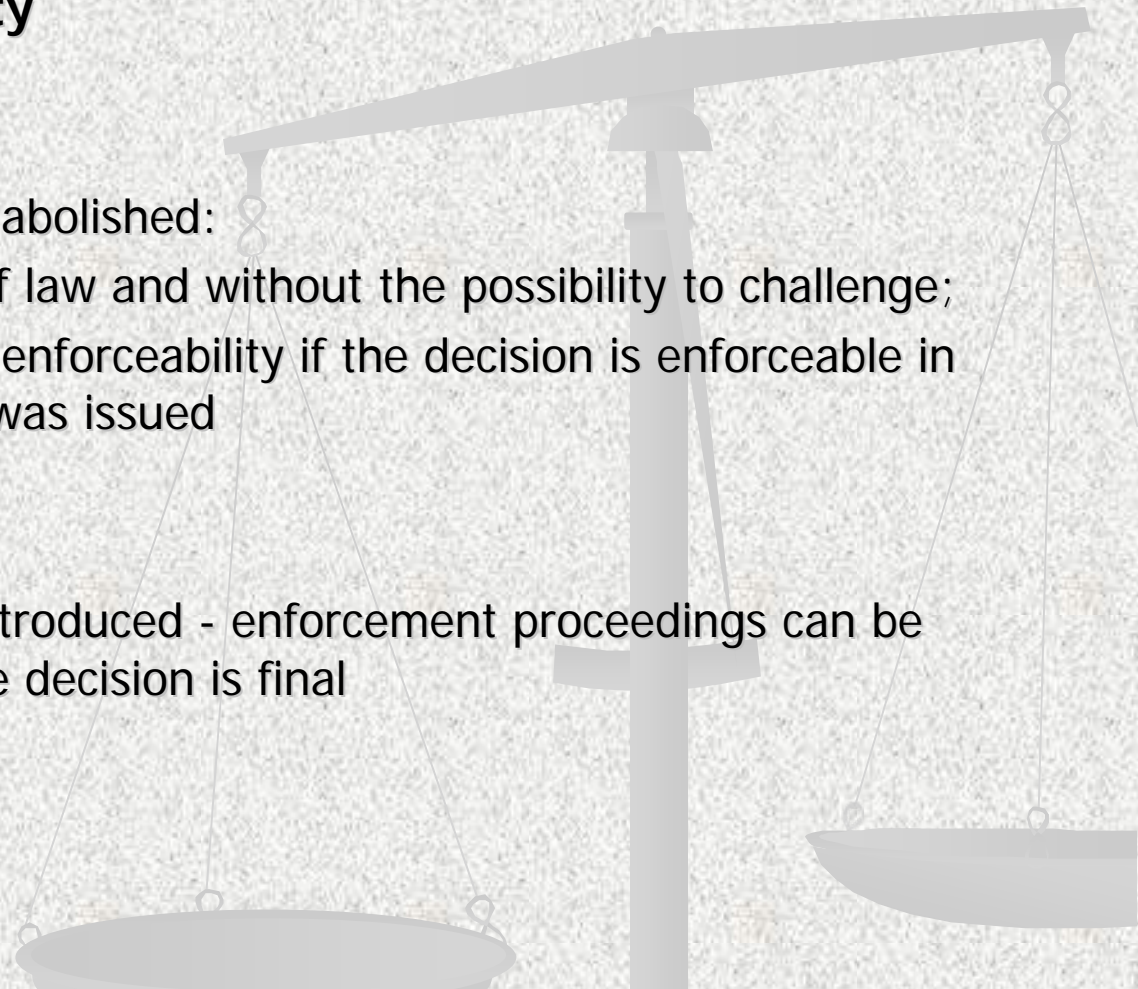
- harmonised methods of service of the document instituting proceedings (taking over the provisions of Article 13 of EEO Regulation); MS must provide at least one of these methods.
- minimum period for a defendant from the day when he receives the document instituting proceedings to prepare his defence.
- possibility of review, in particular if the defendant was informed of the decision during enforcement; such review suspends enforcement measures.



II. New Proposal

Chapter V – Enforceability

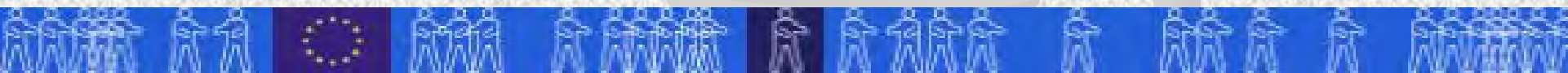
- intermediate measures are abolished:
 - recognition by operation of law and without the possibility to challenge;
 - no need for declaration of enforceability if the decision is enforceable in the Member State where it was issued
- provisional enforceability introduced - enforcement proceedings can be commenced even before the decision is final



II. New Proposal

Chapter VI – Enforcement

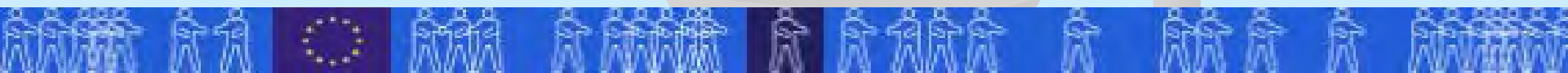
- Derogates from the traditional principle that enforcement proceedings are governed by the law of the enforcing Member State.
- Introduces enforcement measures for cross-border situations.
- Other novelties:
 - only translation of an extract from the decision on standard form is required;
 - enforcement authorities may limit the enforcement of the decision to the attachable part of the assets, without undermining the amount of the claim itself;
 - 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.



II. New Proposal

A monthly direct payment order

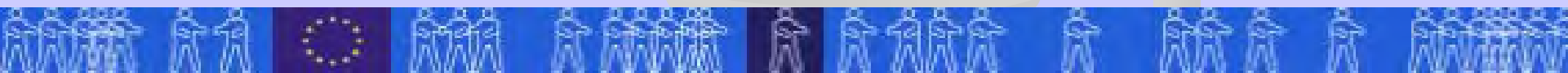
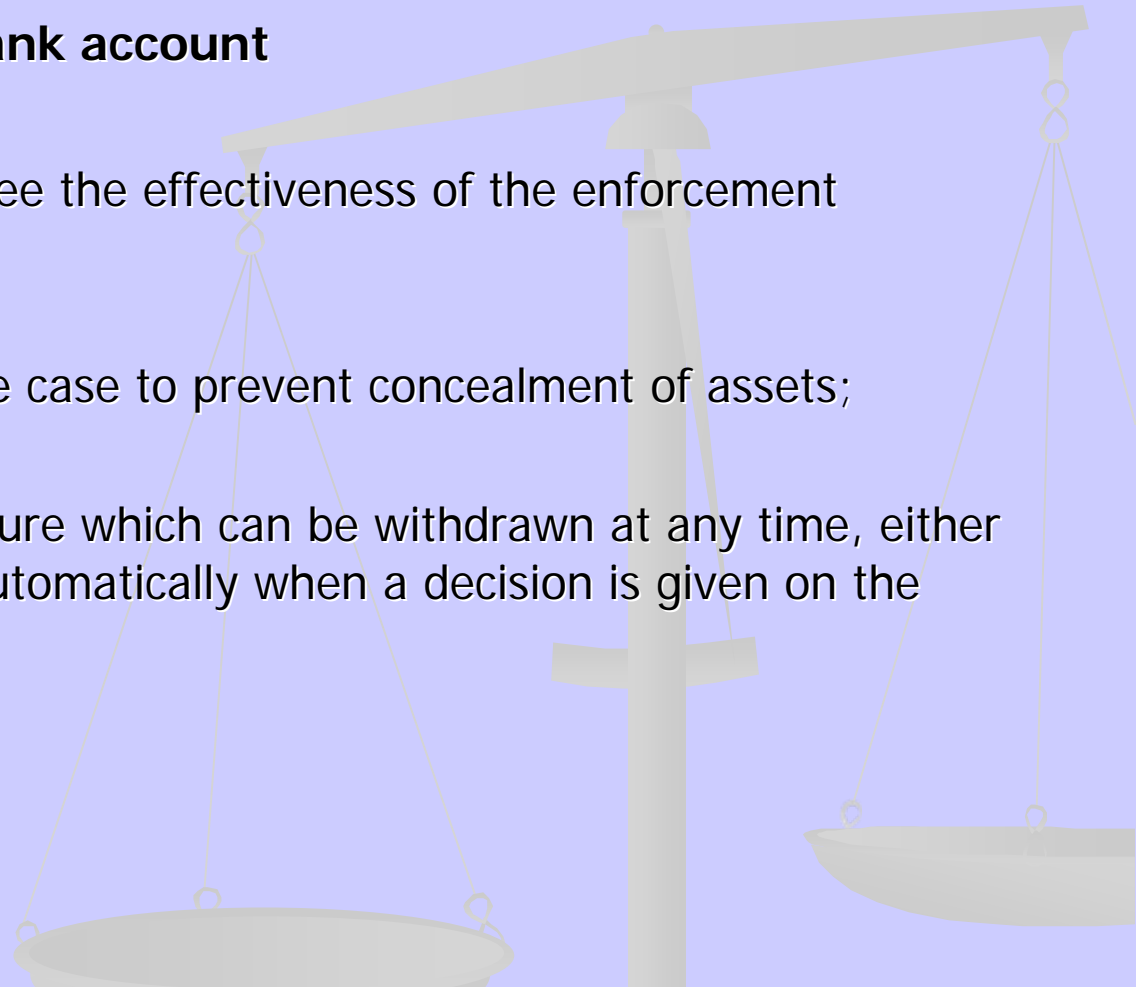
- offers the certainty that this type of enforcement measure will be available everywhere in the European Union;
- offers a maintenance creditor the possibility of obtaining an order from the original court which will be enforceable in all the Member States;
- if creditor takes action in the court for 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.



II. New Proposal

Temporary freeze of a bank account

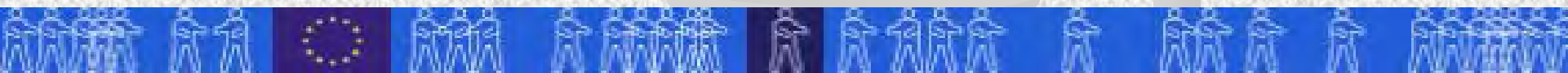
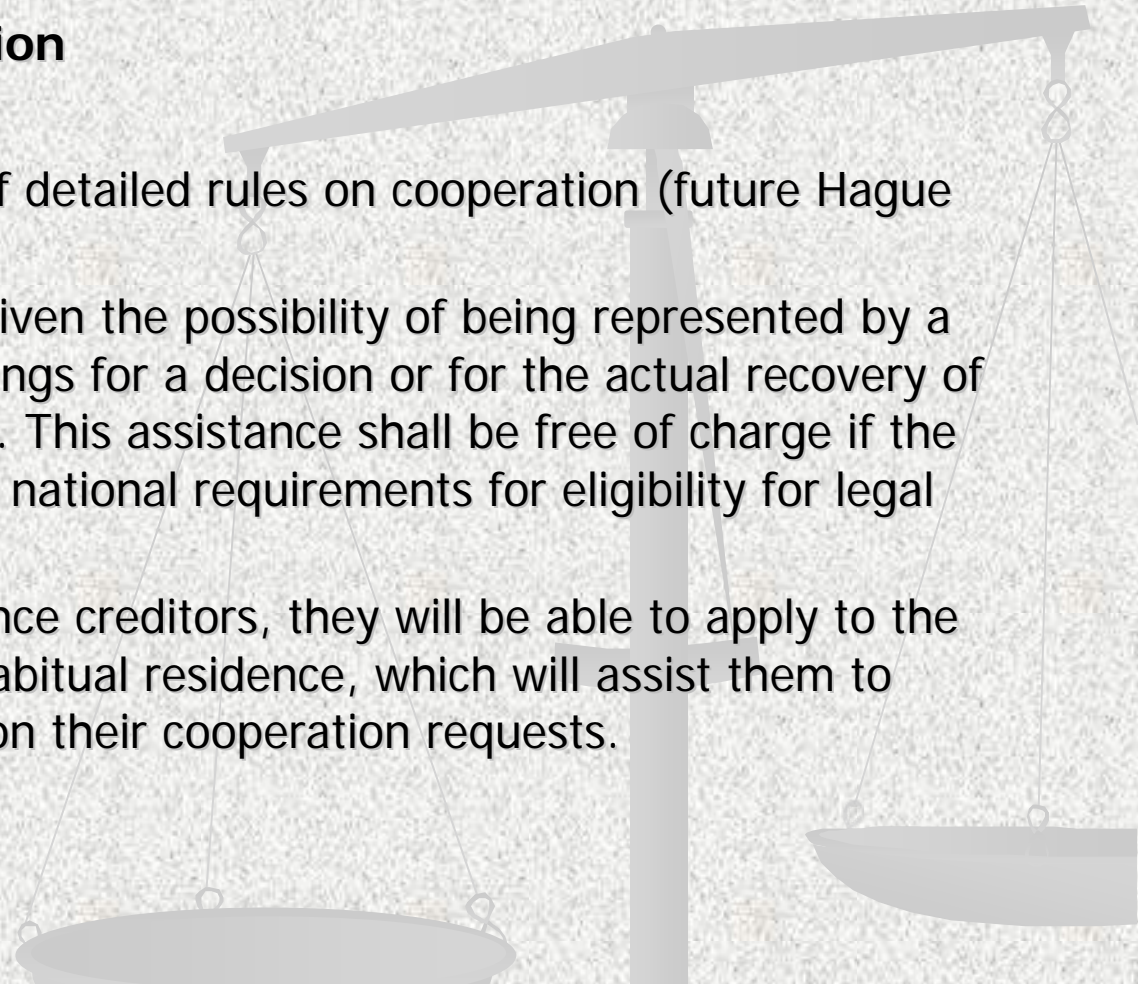
- may be obtained to guarantee the effectiveness of the enforcement measures;
- allows the court hearing the case to prevent concealment of assets;
- provisional safeguard measure which can be withdrawn at any time, either at the debtor's request or automatically when a decision is given on the substance.



II. New Proposal

Chapter VIII – Cooperation

- does not contain a full set of detailed rules on cooperation (future Hague Convention);
- 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 assistance shall be free of charge if the maintenance creditor meets national requirements for eligibility for legal aid;
- 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.

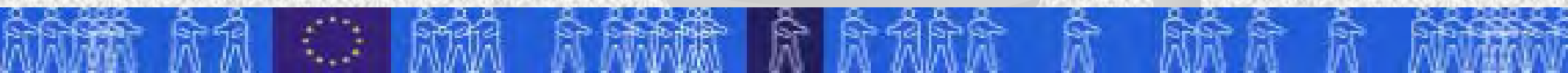
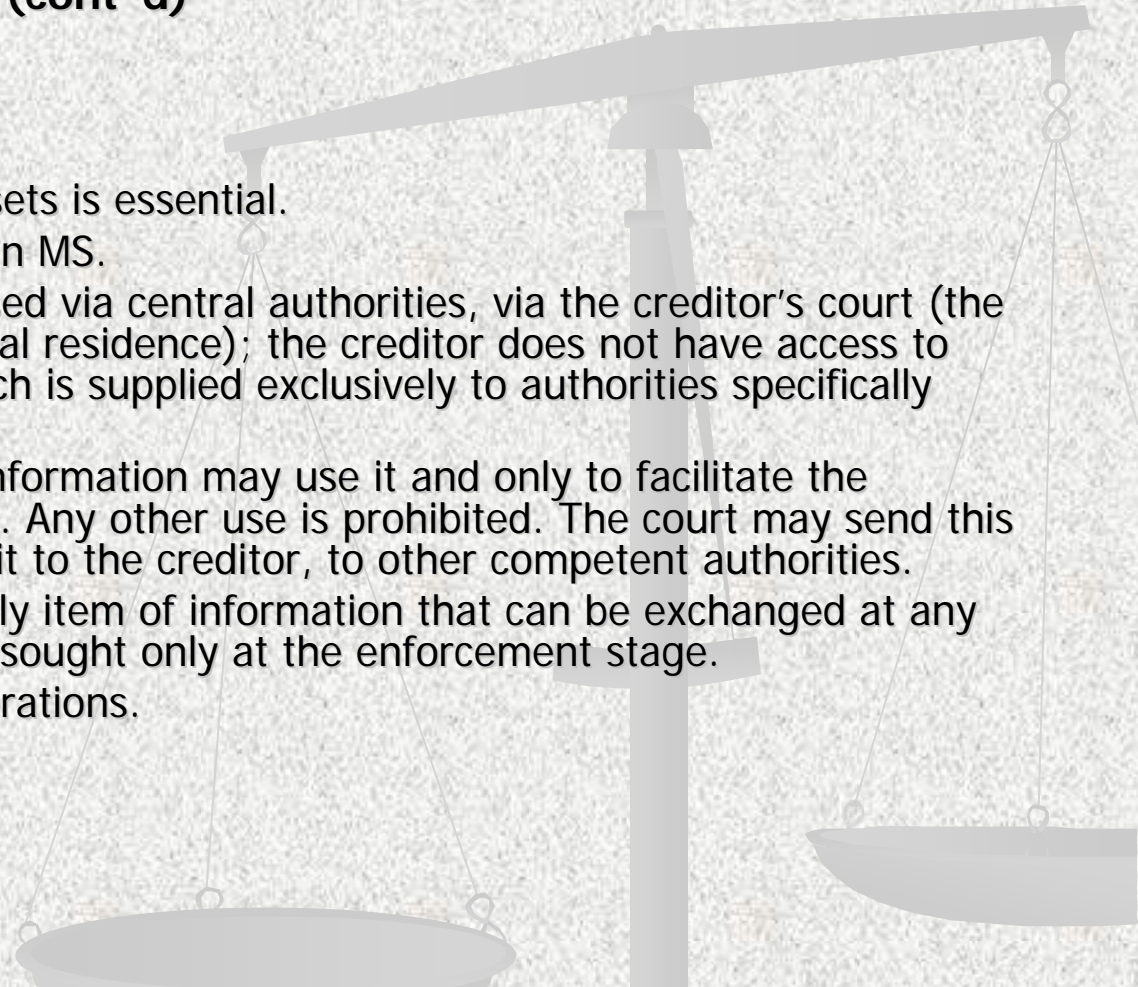


II. New Proposal

Chapter VIII – Cooperation (cont´d)

Access to information/data

- Locating the debtor and the assets is essential.
- No new registers are required in MS.
- Access to information is organised via central authorities, via the creditor's court (the court for the place of his habitual residence); the creditor does not have access to the debtor's personal data, which is supplied exclusively to authorities specifically empowered to receive it.
- Only the court which receives information may use it and only to facilitate the recovery of maintenance claims. Any other use is prohibited. The court may send this information, without disclosing it to the creditor, to other competent authorities.
- Location of the debtor is the only item of information that can be exchanged at any time. Other information can be sought only at the enforcement stage.
- Specific data protection considerations.



II. New Proposal

Chapter IX – General and Final Provisions

The Regulation, an autonomous Community instrument for maintenance obligations, replaces Regulations 44/2001 and 805/2004 which will no longer apply in this field.

