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*Committee on Legal Affairs
The Chairman*

14.2.2007

Mr Jean-Marie Cavada
Chairman
Committee on Civil Liberties, Justice and Home Affairs
BRUSSELS

Subject: Opinion on the legal basis of the proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (COM(2005)0649 – C6-0079/2006 – 2005/0259(CNS))¹

Dear Mr Chairman,

By letter of 11 January 2007 you asked the Committee on Legal Affairs pursuant to Rule 35(2), to consider whether the legal basis of the above Commission proposal was valid and appropriate.

The committee considered the above question at its meeting of 30 January 2007.

The legal basis proposed is Articles 61(c) and Article 67(2). The reference to Article 67(2) implies that the proposed measure deals with aspects of family law and hence is not subject to the codecision procedure by virtue of the exception set forth in the second indent of Article 67(5).

Pertinent provisions of the EC Treaty

Article 61(c)

In order to establish progressively an area of freedom, security and justice, the Council shall adopt:

¹ Not yet published in the OJ.

(c) measures in the field of judicial cooperation in civil matters as provided for in Article 65;

Article 65

Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include:

(a) improving and simplifying:

- the system for cross-border service of judicial and extrajudicial documents;
- cooperation in the taking of evidence;
- the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;

(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;

(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

Article 67(1) and (2)

1. During a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.

2. After this period of five years:

-the Council shall act on proposals from the Commission; the Commission shall examine any request made by a Member State that it submit a proposal to the Council;

-the Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by this Title to be governed by the procedure referred to in Article 251 and adapting the provisions relating to the powers of the Court of Justice.

Article 67(5)

5. By derogation from paragraph 1, the Council shall adopt, in accordance with the procedure referred to in Article 251:

-the measures provided for in Article 63(1) and (2)(a) provided that the Council has previously adopted, in accordance with paragraph 1 of this article, Community legislation defining the common rules and basic principles governing these issues,

-the measures provided for in Article 65 with the exception of aspects relating to family law.

Aim and content of the proposal for a regulation

The proposal for a regulation intends to eliminate all obstacles preventing the recovery of maintenance within the European Union in accordance with the Mutual Recognition Programme in Civil Matters adopted on 30 November 2002 and the common Action Plan adopted on 2 and 3 June 2005.

The aim and content of the proposed regulation according to the preamble and enacting terms may be analysed as follows:

According to recital 7, the aim of the regulation is to enable maintenance creditors to obtain easily, in a Member State, a decision which will be automatically enforceable in any other Member State and the enforcement of which will be simplified and accelerated.

To this end the regulation seeks to bring together in a single instrument all the measures necessary to cover the recovery of maintenance obligations within the Community. It therefore contains provisions on jurisdiction, conflict of laws, enforceability and enforcement of foreign decisions and cooperation (recital 8).

The Regulation covers all maintenance obligations arising from family relationships or from relations which have comparable effects, in order to guarantee equal treatment of maintenance creditors (recital 9).

Recital 10 makes it clear that the rules on jurisdiction set out in the regulation differ from those applicable under Regulation (EC) No 44/2001 ("Brussels I"), the aim being to clarify the rules so to cover all cases in which there is a sufficient link between the parties and a Member State. The fact that the defendant is habitually resident in a non-member State of the European Union should no longer be a reason for not applying Community rules and referring to national law.

Recital 11 explains that the parties may agree on the competent court, except in the case of maintenance obligations in respect of a minor child, in order to protect the weaker party.

Recital 12 sets out the need to maintain a clear and effective mechanism for dealing with *lis pendens* and connexity.

Recital 13 makes it plain that the conflict rules should apply only to maintenance obligations and should not determine the law applicable to the establishment of the family relationships on which the maintenance obligations are based.

Recitals 14, 15 and 16 deal with the applicable law (basic principle: the law of the country of the habitual residence of the maintenance creditor should apply, but provision is made for applying the law of the forum or the law of another country with which the maintenance obligation is closely linked). A choice of law may also be made, subject to certain conditions designed in particular to protect children and vulnerable adults.

According to Recital 17, the debtor should be protected from the application of the law designated where the family relationship on which the maintenance obligation is based is not universally considered as being worthy to be honoured. It should be the case, in particular, for

relations between persons related collaterally or by affinity, descendants' maintenance obligations with regard to their ascendants, or maintenance after the dissolution of marriage.

Recital 18 explains that decisions given in a Member State relating to maintenance obligations should be recognised and enforceable in all the other Member States without any procedure being necessary. In order to abolish any intermediate measure, a minimum harmonisation of procedure should be carried out. It should guarantee compliance with the requirements of a fair trial according to common standards in all the Member States.

According to Recital 19, a maintenance decision given in a Member State should be enforced quickly and effectively in any other Member State. It should be possible for maintenance to be deducted directly from debtors' wages and bank accounts.

Authentic instruments and agreements between parties which are enforceable in a Member State should be treated as equivalent to decisions (Recital 20).

Recital 21 deals with the setting up of central authorities in the Member States for the exchange of information and to facilitate the recovery of maintenance claims.

The enacting terms are divided into nine chapters.

Chapter I deals with scope and definitions, Article 1 ("Scope of application") providing that the regulation "shall apply to maintenance obligations arising from family relationships or relationships deemed by the law applicable to such relationships as having comparable effects". It should be noted that the terms defined in Article 2 ("court", "judge", "decision", "authentic instrument", "Member State of origin", "Member State of enforcement", "court of origin", "creditor" and "debtor") are not specifically related to family law or defined in terms of family law.

Chapter II deals with jurisdiction (general jurisdiction, prorogation of jurisdiction, jurisdiction based on entry of appearance, residual jurisdiction, *lis pendens*, related actions, seising of courts, provisional measures, examination as to jurisdiction). Again this chapter has no bearing on family law, being concerned solely with jurisdiction over maintenance obligations, *i.e.* pecuniary claims.

Chapter III deals with applicable law. It should be noted here that the opening provision (Article 12) provides that "The provisions of this Chapter shall determine *only the law applicable to maintenance obligations* and shall *not prejudice the law applicable to any of the relationships* referred to in Article 1" (namely "family relationships or relationships deemed by the law applicable to such relationships as having comparable effects"). The remaining articles of this chapter set out the general rules, rules on choice of law, non-application of the designated law at the request of the debtor, the law applicable to public institutions, the scope of the applicable law, application of the law of a non-Member State, *renvoi*, public policy, and States with more than one legal system.

Chapter IV deals with common procedural rules - service of documents, examination as to admissibility, and decision and review.

Chapters V and VI treat of enforceability and enforcement of decisions (including legal aid, security, legalisation, a prohibition of any review of the substance of a decision whose enforcement is sought, refusal or suspension of enforcement, orders for direct payment, temporary freezing of bank accounts, ranking of claims).

Chapter VII deals with authentic instruments and agreements.

Chapter VIII is concerned with cooperation (designation and role of central authorities, access to and use of information, etc).

Lastly, Chapter IX sets out the general and final provisions (relations with other Community instruments, relations with international agreements, comitology, transitional arrangements and entry into force).

The problem

The letter from the Chair of the lead committee states as follows:

"The current choice of legal basis considers maintenance obligations as measures related to family law in the sense of the Article 67, paragraph 5, second indent, TEC. The consequence of this is that those measures fall outside of the common rules on judicial cooperation in civil matters for which the co-decision procedure applies."

The lead committee's rapporteur considers that maintenance obligations are closely related to family law, but that to classify them as such perhaps fails to take sufficiently into account the "hybrid nature of the concept of maintenance - familial by its roots but pecuniary in its implementation, like any other debt".

General considerations on legal basis from the case-law

All Community acts must be founded upon a legal basis laid down in the Treaty (or in another legal act which they are intended to implement). The legal basis defines the Community's competence *ratione materiae* and specifies how that competence is to be exercised, namely the legislative instrument(s) which may be used and the decision-making procedure.

It is clear from settled case-law of the Court of Justice that the choice of legal basis is not at the discretion of the Community legislator but must be determined by objective factors which can be subject to judicial review¹, such as the aim and content of the measure in question². Furthermore, the decisive factor should be the main object of a measure³.

According to the case-law of the Court of Justice, a general Treaty article constitutes a sufficient legal basis even though the measure in question also seeks, in a subordinate manner,

¹ Case 45/86, *Commission v. Council* [1987] ECR 1439, para. 5.

² Case C-300/89, *Commission v. Council* [1991] ECR I-287, para. 10, and Case C-42/97, *European Parliament v. Council* [1999] ECR I-869, para. 36.

³ Case C-377/98, *Netherlands v. European Parliament and Council* [2001] ECR I-7079, para. 27.

to attain an aim sought by a specific Treaty article¹.

However, where a measure has several contemporaneous objectives which are indissolubly linked with each other without one being secondary and indirect in respect to the others, the measure must be based on the various relevant Treaty provisions², unless this is impossible on account of the mutual incompatibility of the decision-making procedures laid down by the provisions³.

Appraisal

It may be stated in passing that it is a great pity that the Council has not yet decided to utilise the second indent of Article 67(2) in order to bring the "aspects related to family law" referred to in the second indent of Article 67(5) within the scope of the codecision procedure. This is despite the fact that Commission called on the Council as long ago as 2005⁴ to provide that measures relating to maintenance obligations be adopted under the codecision procedure. It seems absurd that a matter as closely connected with citizens' concerns and day-to-day lives as family law should not be subject to the legislative procedure which most closely involves the institution that they elect.

However, the case-law is clear that such considerations have no bearing on the choice of legal basis, which has to be determined in the light of objective factors which can be subject to judicial review, in particular the aim and content of the measure in question.

It is manifest that the main object of the proposal is to enable all maintenance creditors within the EU to obtain "easily, quickly and, generally, free of charge, an enforcement order capable of circulation without obstacles in the European area of justice" thereby enabling "regular payment of the amounts due".

New rules of private international law on jurisdiction, applicable law and the recognition and enforcement of decisions relating to maintenance claims will eliminate obstacles to the free movement of persons and therefore facilitate the proper functioning of the internal market.

It cannot be denied that without the existence of family law, the concept of maintenance would not exist; indeed Article 1 of the proposal makes it plain that maintenance obligations "arise" from family relationships. However, this having been said, once an obligation is to pay maintenance has been established under family law, what we are left with is simply a pecuniary obligation - a debt like any other. Once its existence has been acknowledged and confirmed by a court judgment, an authentic act or an agreement, a maintenance obligation is a pecuniary claim and the fact that it arose out of a family or similar relationship has scarcely any relevance.

¹ Case C-377/98 *Netherlands v. European Parliament and Council* [2001] ECR I-7079, paras 27-28; Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paras 93-94.

² Case 165/87 *Commission v. Council* [1988] ECR 5545, para. 11.

³ See, e.g., Case C-300/89 *Commission v. Council* [1991] ECR I-2867, paras 17-21 (*Titanium dioxide case*), Case C-388/01 *Commission v. Council* [2004] ECR I-4829, para. 58 and Case C-491/01 *British American Tobacco* [2002] ECR I-11453, paras 103-111.

⁴ Communication from the Commission to the Council, COM(2005) 648 of 15 December 2005.

The proposed regulation will have no effect on family law as such and Article 12 of the proposal makes this abundantly clear in so far as it provides that the provisions on the law applicable to maintenance obligations *"shall not prejudice the law applicable to any of the relationships referred to in Article 1"*. Reference should also be made to Recital 13, which states that the conflict rules should apply only to maintenance obligations and *should not determine the law applicable to the establishment of the family relationships on which the maintenance obligations are based*.

What is more, it is interesting to note that Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims¹ includes maintenance claims and was adopted under the codecision procedure².

Conclusion

At its meeting of 30 January 2007 the Committee on Legal Affairs accordingly decided, unanimously³, to recommend that the proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations should be based on Article 61(c) and the second indent of Article 67(5) of the EC Treaty and, as a result, subject to the codecision procedure.

Yours sincerely,

Giuseppe Gargani

¹ Official Journal L 143 , 30/04/2004, p.15.

² See Article 4(3), where "authentic instrument" is defined to include "an arrangement relating to maintenance obligations concluded with administrative authorities or authenticated by them".

³ The following were present for the final vote: Giuseppe Gargani (chairman), Carlo Casini, Cristian Dumitrescu, Monica Frassoni, Kurt Lechner, Klaus-Heiner Lehne, Manuel Medina Ortega, Aloyzas Sakalas, Francesco Enrico Speroni, Diana Wallis, Jaroslav Zvěřina and Tadeusz Zwiefka.