Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations

COUNCIL REGULATION (EC) No 4/2009

of 18 December 2008

on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(2) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. For the gradual establishment of such an area, the Community is to adopt, among others, measures relating to judicial cooperation in civil matters having cross-border implications, in so far as necessary for the proper functioning of the internal market.

(2) In accordance with Article 65(b) of the Treaty, these measures must aim, *inter alia*, to promote the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

(3) In this respect, the Community has among other measures already adopted Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[(3)], Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters[(4)], Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters[(5)], Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes[(6)], Council Regulation (EC) No 2201/2003 of 27 November 2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility[(7)], Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims[(8)], and Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on

Changes to legislation: *There are outstanding changes not yet made to Council Regulation (EC) No 4/2009. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)[(9)].

(4) The European Council in Tampere on 15 and 16 October 1999 invited the Council and the Commission to establish special common procedural rules to simplify and accelerate the settlement of cross-border disputes concerning, *inter alia*, maintenance claims. It also called for the abolition of intermediate measures required for the recognition and enforcement in the requested State of a decision given in another Member State, particularly a decision relating to a maintenance claim.

(5) A programme of measures for the enforcement of the principle of mutual recognition of decisions in civil and commercial matters[(10)], common to the Commission and to the Council, was adopted on 30 November 2000. That programme provides for the abolition of the exequatur procedure for maintenance claims in order to boost the effectiveness of the means by which maintenance creditors safeguard their rights.

(6) The European Council meeting in Brussels on 4 and 5 November 2004 adopted a new programme called 'The Hague Programme: strengthening freedom, security and justice in the European Union' (hereinafter referred to as The Hague Programme)[(11)].

(7) At its meeting on 2 and 3 June 2005, the Council adopted a Council and Commission Action Plan[(12)] which implements The Hague Programme in concrete actions and which mentions the necessity of adopting proposals on maintenance obligations.

(8) In the framework of The Hague Conference on Private International Law, the Community and its Member States took part in negotiations which led to the adoption on 23 November 2007 of the Convention on the International Recovery of Child Support and other Forms of Family Maintenance (hereinafter referred to as the 2007 Hague Convention) and the Protocol on the Law Applicable to Maintenance Obligations (hereinafter referred to as the 2007 Hague Protocol). Both those instruments should therefore be taken into account in this Regulation.

(9) A maintenance creditor should be able to obtain easily, in a Member State, a decision which will be automatically enforceable in another Member State without further formalities.

(10) In order to achieve this goal, it is advisable to create a Community instrument in matters relating to maintenance obligations bringing together provisions on jurisdiction, conflict of laws, recognition and enforceability, enforcement, legal aid and cooperation between Central Authorities.

(11) The scope of this Regulation should cover all maintenance obligations arising from a family relationship, parentage, marriage or affinity, in order to guarantee equal treatment of all maintenance creditors. For the purposes of this Regulation, the term 'maintenance obligation' should be interpreted autonomously.

(12) In order to take account of the various ways of resolving maintenance obligation issues in the Member States, this Regulation should apply both to court decisions and to decisions given by administrative authorities, provided that the latter offer guarantees

***Changes to legislation:** There are outstanding changes not yet made to Council Regulation (EC) No 4/2009. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

with regard to, in particular, their impartiality and the right of all parties to be heard. Those authorities should therefore apply all the rules of this Regulation.

(13) For the reasons set out above, this Regulation should also ensure the recognition and enforcement of court settlements and authentic instruments without affecting the right of either party to such a settlement or instrument to challenge the settlement or instrument before the courts of the Member State of origin.

(14) It should be provided in this Regulation that for the purposes of an application for the recognition and enforcement of a decision relating to maintenance obligations the term 'creditor' includes public bodies which are entitled to act in place of a person to whom maintenance is owed or to claim reimbursement of benefits provided to the creditor in place of maintenance. Where a public body acts in this capacity, it should be entitled to the same services and the same legal aid as a creditor.

(15) In order to preserve the interests of maintenance creditors and to promote the proper administration of justice within the European Union, the rules on jurisdiction as they result from Regulation (EC) No 44/2001 should be adapted. The circumstance that the defendant is habitually resident in a third State should no longer entail the non-application of Community rules on jurisdiction, and there should no longer be any referral to national law. This Regulation should therefore determine the cases in which a court in a Member State may exercise subsidiary jurisdiction.

(16) In order to remedy, in particular, situations of denial of justice this Regulation should provide a forum *necessitatis* allowing a court of a Member State, on an exceptional basis, to hear a case which is closely connected with a third State. Such an exceptional basis may be deemed to exist when proceedings prove impossible in the third State in question, for example because of civil war, or when an applicant cannot reasonably be expected to initiate or conduct proceedings in that State. Jurisdiction based on the forum *necessitatis* should, however, be exercised only if the dispute has a sufficient connection with the Member State of the court seised, for instance the nationality of one of the parties.

(17) An additional rule of jurisdiction should provide that, except under specific conditions, proceedings to modify an existing maintenance decision or to have a new decision given can be brought by the debtor only in the State in which the creditor was habitually resident at the time the decision was given and in which he remains habitually resident. To ensure proper symmetry between the 2007 Hague Convention and this Regulation, this rule should also apply as regards decisions given in a third State which is party to the said Convention in so far as that Convention is in force between that State and the Community and covers the same maintenance obligations in that State and in the Community.

(18) For the purposes of this Regulation, it should be provided that in Ireland the concept of 'domicile' replaces the concept of 'nationality' which is also the case in the United Kingdom, subject to this Regulation being applicable in the latter Member State in accordance with Article 4 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community.

Changes to legislation: *There are outstanding changes not yet made to Council Regulation (EC) No 4/2009. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(19) In order to increase legal certainty, predictability and the autonomy of the parties, this Regulation should enable the parties to choose the competent court by agreement on the basis of specific connecting factors. To protect the weaker party, such a choice of court should not be allowed in the case of maintenance obligations towards a child under the age of 18.

(20) It should be provided in this Regulation that, for Member States bound by the 2007 Hague Protocol, the rules on conflict of laws in respect of maintenance obligations will be those set out in that Protocol. To that end, a provision referring to the said Protocol should be inserted. The 2007 Hague Protocol will be concluded by the Community in time to enable this Regulation to apply. To take account of a scenario in which the 2007 Hague Protocol does not apply to all the Member States a distinction for the purposes of recognition, enforceability and enforcement of decisions needs to be made in this Regulation between the Member States bound by the 2007 Hague Protocol and those not bound by it.

(21) It needs to be made clear in this Regulation that these rules on conflict of laws determine only the law applicable to maintenance obligations and do not determine the law applicable to the establishment of the family relationships on which the maintenance obligations are based. The establishment of family relationships continues to be covered by the national law of the Member States, including their rules of private international law.

(22) In order to ensure swift and efficient recovery of a maintenance obligation and to prevent delaying actions, decisions in matters relating to maintenance obligations given in a Member State should in principle be provisionally enforceable. This Regulation should therefore provide that the court of origin should be able to declare the decision provisionally enforceable even if the national law does not provide for enforceability by operation of law and even if an appeal has been or could still be lodged against the decision under national law.

(23) To limit the costs of proceedings subject to this Regulation, the greatest possible use of modern communications technologies, particularly for hearing parties, would be helpful.

(24) The guarantees provided by the application of rules on conflict of laws should provide the justification for having decisions relating to maintenance obligations given in a Member State bound by the 2007 Hague Protocol recognised and regarded as enforceable in all the other Member States without any procedure being necessary and without any form of control on the substance in the Member State of enforcement.

(25) Recognition in a Member State of a decision relating to maintenance obligations has as its only object to allow the recovery of the maintenance claim determined in the decision. It does not imply the recognition by that Member State of the family relationship, parentage, marriage or affinity underlying the maintenance obligations which gave rise to the decision.

(26) For decisions on maintenance obligations given in a Member State not bound by the 2007 Hague Protocol, there should be provision in this Regulation for a procedure for

***Changes to legislation:** There are outstanding changes not yet made to Council Regulation (EC) No 4/2009. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

recognition and declaration of enforceability. That procedure should be modelled on the procedure and the grounds for refusing recognition set out in Regulation (EC) No 44/2001. To accelerate proceedings and enable the creditor to recover his claim quickly, the court seised should be required to give its decision within a set time, unless there are exceptional circumstances.

(27) It would also be appropriate to limit as far as possible the formal enforcement requirements likely to increase the costs to be borne by the maintenance creditor. To that end, this Regulation should provide that a maintenance creditor ought not to be required to have a postal address or an authorised representative in the Member State of enforcement, without this otherwise affecting the internal organisation of the Member States in matters relating to enforcement proceedings.

(28) In order to limit the costs of enforcement proceedings, no translation should be required unless enforcement is contested, and without prejudice to the rules applicable to service of documents.

(29) In order to guarantee compliance with the requirements of a fair trial, this Regulation should provide for the right of a defendant who did not enter an appearance in the court of origin of a Member State bound by the 2007 Hague Protocol to apply for a review of the decision given against him at the stage of enforcement. However, the defendant must apply for this review within a set period which should start no later than the day on which, in the enforcement proceedings, his property was first made non-disposable in whole or in part. That right to apply for a review should be an extraordinary remedy granted to the defendant in default and not affecting the application of any extraordinary remedies laid down in the law of the Member State of origin provided that those remedies are not incompatible with the right to a review under this Regulation.

(30) In order to speed up the enforcement in another Member State of a decision given in a Member State bound by the 2007 Hague Protocol it is necessary to limit the grounds of refusal or of suspension of enforcement which may be invoked by the debtor on account of the cross-border nature of the maintenance claim. This limitation should not affect the grounds of refusal or of suspension laid down in national law which are not incompatible with those listed in this Regulation, such as the debtor's discharge of his debt at the time of enforcement or the unattachable nature of certain assets.

(31) To facilitate cross-border recovery of maintenance claims, provision should be made for a system of cooperation between Central Authorities designated by the Member States. These Authorities should assist maintenance creditors and debtors in asserting their rights in another Member State by submitting applications for recognition, enforceability and enforcement of existing decisions, for the modification of such decisions or for the establishment of a decision. They should also exchange information in order to locate debtors and creditors, and identify their income and assets, as necessary. Lastly, they should cooperate with each other by exchanging general information and promoting cooperation amongst the competent authorities in their Member States.

(32) A Central Authority designated under this Regulation should bear its own costs, except in specifically determined cases, and should provide assistance for all applicants