Maintenance Obligations: EP JURI Committee's Draft Opinion on the Commission's Proposal

On 11 April 2007 **Diana Wallis, in her capacity of draftswoman** appointed by the European Parliament's Committee on Legal Affairs (JURI) **for the maintenance obligations regulation**, has released a Draft opinion to be discussed at the committee's meeting of 2-3 May 2007.

Pursuant to Rule 47 of the European Parliament's Rules of Procedure (provisional version – January 2007), the maintenance regulation is subject to the **enhanced cooperation between committees**, since its subject matter "falls almost equally within the competence of two committees" (as determined in Annex VI to the Rules of Procedure), and it is under the primary responsibility of the Committee on Civil Liberties, Justice and Home Affairs (LIBE).

The amendments proposed by Mrs Wallis in her Draft opinion are thus intended to be incorporated, after adoption in the JURI Committee, in the Draft Report to be prepared by the rapporteur in the LIBE Committee (Genowefa Grabowska): according to Rule 47,

> *the committee responsible shall accept without a vote amendments from the committee asked for an opinion where they concern matters which the chairman of the committee responsible considers, on the basis of Annex VI, after consulting the chairman of the committee asked for an opinion, to fall under the competence of the committee asked for an opinion, and which do not contradict other elements of the report.*

Mrs Wallis has presented 37 amendments to the original Commission's proposal. Some of them will be addressed in the following, and deal with the legal basis, jurisdiction and applicable law: as stated by the draftswoman in the "short justification" that opens the Draft opinion,

> *The solutions she proposes are pragmatic and intended to be acceptable to the broadest range of Member States. They may offend purists, but in her view the*

> *interests of litigants in having a speedy resolution of a problem which causes real hardship, also and in particular to children, must outweigh all other considerations, having due regard to the needs of maintenance debtors and the rights of the defence.*

Mrs Wallis made a similar statement commenting the EP Second Reading on Rome II (see our post on the debate in the Parliament, where she called on the other institutions to bring "the subject of private international law out of the dusty cupboards in justice ministries and expert committees into the glare of public, political, transparent debate"), and some of the proposed amendments to the maintenance regulation are likely to raise a controversial debate vis-à-vis the Council's and Commission's solutions, especially if the codecision procedure will be finally established for the adoption of the act, as envisaged by the Parliament itself and the Commission (see below).

Legal basis

At present, the adoption of the maintenance regulation is subject to an unanimous vote in the Council, after the consultation of the European Parliament: the codecision procedure, ordinarily set out by the second indent of art. 67(5) of the Treaty for all measures provided for in art. 65, is in fact not applicable to measures involving "aspects relating to family law".

The situation is deemed unsatisfactory by the Commission itself, that in December 2005 presented a Communication to the Council calling on it to transfer maintenance obligations from the unanimity to the codecision procedure, using the "passerelle" provided for by art. 67(2) TEC. The Commission stressed

> *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 same view is obviously shared by the Parliament (see the letter from the JURI Committee to the LIBE Committee of 14 February 2007) and reflected in the amendments of the legal basis of the proposed regulation (see amendments 1, 2 and 3 of the JURI Draft opinion).

Jurisdiction (artt. 3-11 of the Commission's Proposal)

The draftswoman's main concern is to ensure that any prorogation of jurisdiction has been freely and consciously agreed by the parties, being aware of its legal consequences, and that an *ex ante* choice of forum "is still relevant having regard to the situation of the parties at the time when the proceedings take place" (see amendment 6 to recital 11): it is thus proposed to confer to the court seised a discretionary power to assess the jurisdiction agreement, adding a new paragraph 2a to art. 4 ("Prorogation of jurisdiction"), according to which

> *The court seised must be satisfied that any prorogation of jurisdiction has been freely agreed after obtaining independent legal advice and that it takes account of the situation of the parties at the time of the proceedings (amendment 22).*

As regards the form of the choice-of-forum agreement, communication by electronic means is not deemed equivalent to "writing", and thus excluded from art. 4(2) (see amendment 21).

Applicable law (artt. 12-21 of the Commission's Proposal)

A number of important modifications are envisaged by the draftswoman in the provisions concerning the applicable law. The law of the country of the creditor's habitual residence is maintained as basic rule, but an almost systematic application of the law of the forum is advocated by art. 13(2) and (3), as resulting from the amendments. Moreover, the exception clause set out in art. 13(3) ("General rules") of the Commission's Proposal is given a wider scope, since it is possible to apply the law of another country with which the maintenance obligation is closely connected (such as the law of the country of the common nationality of the parties) also when "it would be inequitable or inappropriate" to apply the law of the country of the creditor's habitual residence or the *lex fori*.

According to the revised text of art. 13 (amendment 25: French and Italian versions differ from the English one, the latter showing some mistakes in the translation),

> *1. Maintenance obligations shall be governed by the law of the country in whose territory the creditor is habitually resident.*
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> *2. The law of the forum shall apply:*
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> *(a) where it is the law of the country of the creditor's habitual residence, or*

(b) where the creditor is unable to obtain maintenance from the debtor by virtue of the law of the country of the creditor's habitual residence, or

(c) unless the creditor requests otherwise and the court is satisfied that he or she has obtained independent legal advice on the question, where it is the law of the country of the debtor's habitual residence.

3. Notwithstanding paragraph 1, the law of the forum may be applied, even where it is not the law of the country of the creditor's habitual residence, where it allows maintenance disputes to be equitably resolved in a simpler, faster and less expensive manner and there is no evidence of forum shopping.

4. Alternatively, where the law of the country of the creditor's habitual residence or the law of the forum does not enable the creditor to obtain maintenance from the debtor or where it would be inequitable or inappropriate to apply that law, the maintenance obligations shall be governed by the law of another country with which the maintenance obligation is closely connected, in particular, but not exclusively, that of the country of the common nationality of the creditor and the debtor.

The provision in art. 13(2)(a) seems not necessary; under the conditions set out in art. 13(2)(c) for the application of the law of the forum (as the law of the country of the debtor's habitual residence) it is not clear whether the creditor has a burden to expressly invoke the application of the law of the country of his habitual residence.

The preference expressed by the draftswoman for the *lex fori* is stressed by the conditions set out in art. 13(3) for this law to be discretionary applied by the court, and is clearly stated by Mrs Wallis in the justification accompanying amendment 7 to recital 14:

The Regulation's aim of enabling maintenance creditors easily to obtain a decision which will be automatically enforceable in another Member State would be frustrated if a solution were to be adopted which obliged courts to apply foreign law where the dispute could be resolved simpler, faster and more economically by applying the law of the forum.

Application of foreign law tends to prolong proceedings and lead to additional

costs being incurred in procedures which often involve an element of urgency and in which litigants do not necessarily have deep pockets. Moreover, in some cases application of the law of the creditor's country of habitual residence could give rise to an undesirable result, as in the case where the creditor seeks a maintenance order in the country of which she is a national having sought refuge there after leaving the country in which she had been habitually resident with her husband who is of the same nationality, who is still resident there.

On these grounds, this amendment provides for the discretionary application of the law of the forum, whilst safeguarding against forum shopping.

As regards the choice of the applicable law by the parties, also in respect of a choice-of-law agreement a discretionary power is given to the court seised to assess whether it "has been freely agreed after obtaining independent legal advice" (see amendment 26, inserting a new para. 1a to art. 14).

Finally, the draftswoman proposes the deletion of art. 15, on the non-existence of a maintenance obligation that the debtor may oppose to the creditor's claim under a law different than the applicable one (see amendment 27: this provision is deemed "to conflict with the principle of mutual recognition and to be discriminatory").

Public policy

An important amendment is proposed as regards the *ordre public* clause provided in art. 20: in the original Commission's proposal, public policy could not operate vis-à-vis the law of a Member State. The draftswoman advocates the deletion of this intracommunity exemption, thus allowing the application of the law of a Member State to be refused on such a ground (see amendment 29).

Alternative means of enforcement

Special attention is devoted by the draftswoman to issues relating to enforcement of maintenance decisions:

The draftswoman's chief concern in preparing these amendments to the proposal for a regulation has been to ensure that decisions relating to maintenance obligations, in the broadest sense of the expression, in cross-border cases are recognised and enforced across the Union in the quickest and

most effective way at the lowest possible cost. […]

While suggesting improvements to the provisions of the proposed regulation, the rapporteur takes the opportunity of calling on the Member States to consider novel forms of enforcement of maintenance decisions which have been found to be highly effective in non-EU jurisdictions.

An example of these "novel and effective means of enforcement" is given in the justification to amendment 11 (recital 19): confiscation of driving licences.

On the other hand, a new art. 35a is proposed (see amendment 34), which allows courts to "use the full panoply of measures available to them under their national law", not being limited to the orders listed in the regulation:

Article 35a – Other enforcement orders

The court seised may order all such other measures of enforcement as are provided for in its national law which it considers appropriate.

The maintenance regulation is scheduled in the plenary session of the European Parliament on 3 September 2007 (see the OEIL page on the status of the procedure); the JHA Council agreed on some political guidelines on the matter in its recent session in Luxembourg on 19 and 20 April 2007 (see our posts here and here).