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NOTE

from:	Belgian delegation
to:	Committee on Civil Law Matters (Maintenance Obligations)
No. Cion prop.:	5199/06 JUSTCIV 2
Subject:	Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations Comments by the Belgian delegation

In response to the request from the Presidency, at the meeting of the Committee on Civil Law Matters on 27 and 28 September 2006, for written observations from delegations on the text in its entirety (5199/06 JUSTCIV 2), the comments of the Belgian delegation are set out below.

The Commission initiative is very welcome, for it clearly falls within the framework of the political mandate given by the Tampere European Council in 1999 and the mutual recognition programme adopted by the Council and the Commission in late 2000.

The fact that negotiations on maintenance obligations are under way within the Hague Conference on Private International Law should not be taken to mean that deliberations within the European Union are inappropriate. On the contrary, the specific nature of the European framework enables more to be achieved than in The Hague. That said, care should be taken to identify opportunities for synergy between the two exercises.

The inclusion of provisions on applicable law would appear to be very important, since it is likely to enhance the mutual trust that is needed to achieve the objectives set: abolishing recognition and enforcement procedures and making it easier to recover maintenance.

Chapter I – Scope and definitions

Article 1 – Scope

Article 1 should be read in conjunction with Articles 12 and 15.

Given the current and future sociological situation (i.e. an ageing and more impoverished population), the scope poses no problems. Since the cooperation mechanisms have been enhanced, some thought should be given to restricting cooperation to maintenance obligations towards children and between spouses or ex-spouses with children.

Article 2 – Definitions

It would be advisable to specify what is covered by the term "maintenance claim", drawing on the definition set out in Article 4(2) of Regulation (EC) No 805/2004 creating a European Enforcement Order.

Chapter II – Jurisdiction

Article 3 – General jurisdiction

Belgium favours a list which (a) draws on the criteria adopted in Regulation (EC) No 44/2201 and (b) tallies with those established under Regulation (EC) No 2201/2003 concerning matrimonial matters and parental responsibility.

(c)

As regards proceedings concerning the status of a person, Belgium feels that the solutions provided in Regulation (EC) No 2201/2003 in relation to court jurisdiction in matrimonial matters should be taken into account. With this in mind, for reasons of procedural economy, Belgium would suggest giving the court hearing the case unrestricted jurisdiction in maintenance-related matters as well. The last section of the sentence, i.e. "*unless that jurisdiction is based solely on the nationality of one of the parties*", should accordingly be deleted.

Article 4 – Prorogation of jurisdiction

General comment

The option of choosing a court in a Member State impinges upon the internal competence of Member States and can therefore not be included in the proposal for a Regulation.

Paragraph 1

Given that the circumstances surrounding the issue of maintenance obligations are often such that a weaker party has to be protected, Belgium takes the view that the principle of freedom of choice ought not to be absolute.

Accordingly, it would be appropriate to include a time framework regarding the validity of these provisions: concluding agreements on jurisdiction should be allowed only once a dispute arises and the matter is brought before a court.

Paragraph 3

Paragraph 3, which reproduces Article 23(3) of Regulation (EC) No 44/2001 (itself taken from Article 17 of the 1968 Brussels Convention), is a provision which is particularly difficult to implement. Where the court chosen is not seised by the parties, should the court seised in a Member State be required to stay its proceedings indefinitely? Must that court automatically request the chosen court to rule on its jurisdiction not only under the terms of the agreement but also in the light of its private international law?

Furthermore, what is the purpose of that provision? It can be said to have one in Regulation (EC) No 44/2001, since Article 71 provides for the possibility to continue applying agreements which were concluded between Member States, but not in the context of the present Regulation.

Generally speaking, Belgium feels that the principle of freedom of choice should not be absolute; the court chosen under the choice-of-forum clause should be able to decline jurisdiction if, given the circumstances, the dispute has no significant link with the chosen State. The choice of a Member State can indicate fraudulent evasion of the law on the part of the debtor with a view to benefiting from a more advantageous system.

Article 5 – Jurisdiction based on the appearance of the defendant

Belgium considers that Article 5 undermines the jurisdiction criteria laid down in Articles 3 and 4 and should therefore be deleted.

Should the other delegations not agree to this proposal, at the very least children below the age of 18 should be excluded by analogy with the provisions of Article 4(4).

Article 6 – Residual jurisdiction

No comments.

Article 7 – *Lis pendens*

Paragraph 1

For reasons of legal clarity, Belgium would suggest specifying that proceedings are between the same parties.

Article 27 of Regulation (EC) No 44/2001 should be taken over. Furthermore, a specific provision would be needed to cover the hypothesis set out in Article 3(c) (point (d) could be inserted under (c)).

Article 8 – Related actions

No comments.

Article 9 – Seising of a court

No comments.

Article 10 – Provisional, including protective, measures

Belgium suggests taking over Article 20(1) and (2) of Regulation (EC) No 2201/2003, adjusted to the field of maintenance obligations.

Article 11 – Examination as to jurisdiction

Belgium would suggest taking over the definition set out in Article 17 of Regulation (EC) No 2201/2003.

Chapter III – Applicable law

General remark

The Belgian delegation is in favour of introducing specific rules. The purpose of this chapter is not to determine the law applicable to the establishment of the family relationships on which maintenance obligations are based but to harmonise the conflict-of-law rules regarding maintenance obligations. Such provisions can strengthen legal certainty by making the applicable rules predictable.

Since negotiations on that matter are currently under way within the Hague Conference on Private International Law, a solution should be sought that is, as far as possible, in line with the options taken within that forum.

ISSUE OF DUAL AND MULTIPLE NATIONALITY

Given the rules set out in the proposal for a Regulation with respect to applicable law, which may possibly be determined in the light of the nationality of one or both parties, the question naturally arises as to issues relating to dual or multiple nationality, involving not only European but also non-European nationalities.

In this connection, the rules stemming from the Hague Convention of 12 April 1930 on Certain Questions relating to the Conflict of Nationality Laws – and in particular Article 3, which allows States, in cases of multiple nationality, to consider only their own nationality – are worth highlighting. Article 5 of that Convention should also be taken into account. Belgium would point out that it is a party to the Convention and has therefore always applied it.

However, the States' right mentioned above has been restricted by a judgment of the Court of Justice of the European Communities of 2 October 2003. The Court, ruling on the situation of a child with Belgian and Spanish nationality whose application for a change of name had been turned down on the basis of Belgian legislation on the determination of names, held that: "*Articles 12 EC and 17 EC must be construed as precluding, in circumstances such as those of the case in the main proceedings, the administrative authority of a Member State from refusing to grant an application for a change of surname made on behalf of minor children resident in that State and having dual nationality of that State and of another Member State, in the case where the purpose of that application is to enable those children to bear the surname to which they are entitled according to the law and tradition of the second Member State*".

Belgium would therefore ask the Commission to adopt a clear position on this issue, given the important consequences it entails for States and therefore for the parties involved. Community legislation cannot be a source of legal uncertainty in this respect.

Moreover, the question has implications for all other European instruments for which nationality is a relevant factor.

Article 12 – No effect on the existence of family relationships

Belgium endorses the French proposal to word Article 12 as follows: "… and shall not prejudice the law applicable to *determination of the existence of any* of the relationships referred to in Article 1".

Article 13 – General rules

Paragraph 1

To avoid any consequences of a change of residence during proceedings, Belgium suggests that this rule should apply at the time when the maintenance obligation is invoked: *"The maintenance obligations shall be governed, at the time when they are invoked, by the law of the country in whose territory the creditor is habitually resident."*

Paragraph 3

There is no point to this paragraph unless the designated applicable law grants maintenance. Also, it should be confined to maintenance obligations between spouses or towards minors. It should be redrafted as follows: *"Where the maintenance obligations involved are between spouses or towards a minor and where none of the laws designated in accordance with paragraphs 1 and 2 grants the creditor entitlement to maintenance while it appears from the circumstances as a whole that the maintenance obligation has, at the time when it is invoked, a close connection with another country which does grant such entitlement, in particular the country of the common nationality of the maintenance creditor and debtor, that entitlement shall apply."*

Article 14 – Choice of law by the parties

point (a)

Given the possibility of pressure on the "weaker" party, it would be better to require an explicit agreement between creditor and debtor. It would be advisable to exclude minors and vulnerable adults.

Article 15 – Non-application of the designated law at the request of the debtor

Paragraph 1

Belgium can endorse the thinking underlying Article 15. For reasons of family solidarity, however, it ought to be possible for cohabitants and ascendants to enjoy better protection. But if no agreement can be reached on this point, the exclusion should be limited to the case of common nationality.

It should also be specified in the text that the children referred to are those under 18 years of age.

Paragraph 2

This provision creates great uncertainty for creditors, as the concept of a marriage's "close connection with a country" is very loose.

In any case, this provision cannot be accepted as regards maintenance obligations between spouses.

Article 16 – Law applicable to public institutions

No comments.

Article 17 – Scope of applicable law

Paragraph 1

Provisions should be added concerning the applicable law for adjusting the maintenance:
"(b) whether and under what conditions the maintenance can be adjusted".

Paragraph 2

This provision is in the nature of a substantive-law provision and Belgium doubts whether it is appropriate in the proposed Regulation.

Article 18 – Application of the law of a non-Member State

No comments.

Article 19 – Renvoi

Like most other Member States, Belgium is in favour of deleting this paragraph as it would be complicated to apply.

Article 20 – Public policy

No comments.

Chapter IV – Common procedural rules

Article 22 – Service of documents

General comment

Particular rules based on Regulation (EC) No 805/2004 have a certain value in the light of the stated aim, which is to abolish *exequatur*, although the maintenance debtor is given substantial guarantees by Articles 24 and 33(b).

The general question arises as to the advisability of laying down such highly burdensome rules which derogate from ordinary law and could considerably restrict the scope of the European Regulation.

It would be better to take over the provisions of Regulation (EC) No 1348/2000, which provides sufficient guarantees for the defendant.

Paragraph 1

The link with Regulation (EC) No 1348/2000 on the service of documents is not made apparent.

What about Article 19(2) and (3) of Regulation (EC) No 1348/2000? In the interests of greater clarity and legal certainty and practicability for legal practitioners, the provision should be coordinated with that Regulation.

It may also be noted that Recital 21 of Regulation (EC) No 805/2004 made explicit – albeit insufficient – reference to Regulation (EC) No 1348/2000.

A problem also arises where the maintenance proceedings are secondary to matrimonial or parental-responsibility proceedings. Which rules apply here?

Paragraph 2

Belgium is not in favour of setting a time-limit for preparing the defence. It is for the court seised to assess the situation in the light of all the circumstances.

Paragraph 3

How are the internal methods of service to be organised when service takes place in non-Member States?

Article 23 – Examination as to admissibility

It would be appropriate to take over Article 18(1) to (3) of Regulation (EC) No 2201/2003.

Article 24 – Decision and review

It would be appropriate to take over Article 19(4) of Regulation (EC) No 1348/2000, except for the third subparagraph. The 20-day time limit is short but acceptable.

Chapter V – Enforceability of decisions

Article 25 – Enforceability

Belgium fully endorses this provision but suggests looking at the possibility of issuing a certificate – as in the case of Regulation (EC) No 2201/2003 (Articles 41 and 42) – which would confirm that the formalities required for the protection of the debtor have been completed.

This Article should not be limited to children and spouses or ex-spouses.

Article 26 – Provisional enforcement

The question of recovering sums unduly paid in cases where the first-instance decision is quashed on appeal can be a delicate one, unless provision is made for the central authorities to play a particular role in the matter.

Belgium considers that this should be left to the discretion of the court which has to take a decision. It would be inadvisable for this rule to be established by the Regulation.

Chapter VI – Enforcement

Article 27 – Enforcement proceedings

No comments.

Article 28 – Documents

The authorities of the Member State of enforcement must be assured that the form corresponds to the decision and that the rights of the defence have been respected. The proposed certificate would satisfy this requirement (see comments on Article 25).

In any case, a translation of the decision would be preferable and the Regulation could specify that the unsuccessful party should bear the costs.

Article 29 – Legal aid

A reference to the Directive on legal aid would be preferable to the text currently proposed. Furthermore, account should be taken of the positions adopted during the proceedings of the Hague Conference with regard to Article 13 of the future Convention, and it should be ensured that the Regulation is not more restrictive, in particular as regards children.

Article 30 – Security, bond or deposit

No comments.

Article 31 – Legalisation or other similar formality

No comments.

Article 32 – No review as to the substance of a decision

Paragraph 1

No comments.

Paragraph 2

Although Belgium supports the content of this paragraph, it considers that the text of paragraph 2 should be moved to Article 33 in view of the restrictive wording thereof.

Article 33 – Refusal or suspension of enforcement

For the sake of transparency, the Belgian delegation is in favour of full harmonisation of the grounds for refusal or suspension of enforcement.

Provision should be made for the possibility of such grounds being invoked not only by the debtor but also ex officio.

The Belgian delegation considers point (a) to be unnecessary since if the debtor wishes to assert new circumstances, he should seize the court of the Member State of origin.

With regard to paragraph (d), it would be useful to establish a link to Article 17.

Finally, the Belgian delegation welcomes the Commission's proposal regarding the additional ground for suspension of enforcement in the Member State of origin and the insertion of paragraph 3 of Article 32.

Article 34 – Order for monthly direct payment

To the Belgian delegation's mind, this provision seems too radical in that it fails to take account of the possibility of the debtor voluntarily making the payments for which he is liable. This provision does not provide sufficient guarantees to avoid the possibility of quasi-systematic recourse to this measure. Such a possibility should exist only if the debtor fails to pay voluntarily.

The Regulation fails to raise the issue of the possible revocation of such an order.

Article 35 – Order for temporary freezing of a bank account

This provision is particularly innovative, and is therefore worthy of further scrutiny.

While it is a strong measure, its main characteristic is that it is limited in time. It may be regarded as a protective measure preventing the disappearance of the debtor's assets. The existence of such a provision may have a dissuasive effect on debtors. The practice of the New York Convention is highly illuminating in this regard.

This provision makes it difficult for the court seised to assess the risk of non-enforcement, in particular as regards a creditor who may make excessive and repeated use of procedures in respect of the debtor.

Article 36 – Ranking of maintenance claims

As internal consultations have yet to be completed, Belgium is unable to adopt a position at present. A scrutiny reservation is therefore entered.

Chapter VII – Authentic instruments and agreements

With regard to agreements between parties, Belgium wonders why the proposed Regulation fails to cover settlements which have been approved by a court (see Article 58 of Regulation (EC) No 44/2001).

Provision should be made for the translation of such instruments and agreements.

Chapter VIII – Cooperation

Preliminary remark

In order to make the Regulation as clear as possible to practitioners, it would seem necessary for all the obligations of the central authorities to be specified in the text of the Regulation.

If we merely supplement the future Hague Convention, problems will very quickly arise regarding the comprehension and, above all, scope of the obligations imposed upon these authorities.

This chapter cannot be scrutinised in depth until other provisions, and the scope in relation to subject-matter, are finalised.

Article 39 – Central authorities

Paragraph 3

As regards the languages accepted for communications, the wording of Article 57(2) of Regulation (EC) No 2201/2003 should be used.

Article 40 – General functions

Belgium can support Article 40, which is identical to Article 54 of Regulation (EC) No 2201/2003. However, the fact that communication of information does not relate to individual proceedings should be specified; this could possibly be set out in a recital.

Article 41 – Cooperation in specific cases

General comment

Belgium has as yet no firm position as regards possible assistance for the debtor. That point should be further examined, bearing in mind the enormous additional workload that assistance could create.

Paragraph 1

In practice, Regulation (EC) No 2201/2003 has given rise to varying interpretations as regards the scope of information and, above all, assistance to be provided (Article 55, (b)). That point will probably have to be examined in greater detail during the second reading.

Paragraph 2

Having the creditor represented by the central authority is a step too far. Member States should be allowed to make their own arrangements, possibly by providing for a delegation.

Article 42 – Working method

Paragraph 1

The Belgian delegation cannot see the point of involving a court as provided for in the second subparagraph.

Article 43 – Meetings

No comments.

Article 44 – Access to information

Paragraph 1

Paragraph 1 should require Member States to organise access by central authorities themselves to information, and the central authorities to forward this information in accordance with the possibilities afforded by national law. Contrary to the statements by certain delegations at the meeting on 16 November 2006, the Belgian delegation feels that the mention of an evaluation of the debtor's assets in paragraph 1(b) should be kept, as it can be relevant in establishing maintenance payments.

Paragraph 2

In the interests of clarity, paragraph 2 would also appear to be very useful.

Article 45 – Transmission of information

Article 46 – Use of information

Article 47 – Information to the debtor

Data protection provisions make the cooperation mechanisms particularly complex and difficult to implement. These provisions should be more flexible, in particular as regards the obligation to erase the information immediately (Article 46). The information should be erased only once there is no longer any reason to keep it.