COUNCIL OF THE EUROPEAN UNION

Brussels, 25 January 2007

5318/07

LIMITE

JUSTCIV 5

Interinstitutional File: 2005/0259 (CNS)

NOTE

from :	General Secretariat of the Council
to :	Committee on Civil Law Matters (Maintenance Obligations)
No. prev. doc. :	15856/06 JUSTCIV 260 + ADD 1 to 22
No. Cion prop.:	5203/06 JUSTCIV 3 CODEC 18
Subject:	Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations

Delegations will find herewith a compilation of the observations sent in by Member States[1] on the Commission proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

---

[1] See 15856/06 JUSTCIV 260 + ADD 1 - 22

TABLE OF CONTENTS

GENERAL COMMENTS

BELGIUM

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.

DENMARK

Technical problems and questions

Jurisdiction - insert a new article between articles 5 and 6

To reduce the scope on article 6 - residual jurisdiction - a new article could be inserted establishing jurisdiction in a state where the defendant has assets or is employed.

Articles 4 and 14

Articles 4 and 14 should also include agreements on child maintenance.

In any case, in relation to other forms of maintenance than child maintenance, article 14 should allow for agreements in as many circumstances as possible, including agreenments made after seising the competent court.

Article 45 (1)

The delegation assumes that the court mentioned may be a administrative authority, see article 2 (1) and (2).

Article 46 (2)

The delegation understood by the comments by the Commission on article 46 (2) that it did not prevent transmitting the information to the parties, if it is necessary for a contradictional procedure such as used by the Danish administrative authorities. This should be stated clearly in the article.

GERMANY

Germany welcomes the proposal's goal of facilitating the recovery of maintenance. Despite the progress achieved in the past few years in the area of judicial cooperation in civil matters, some hurdles still remain which make it more difficult for creditors to assert their claims if the debtor resides in a European foreign country. The Regulation can help to improve this situation.

The Commission's proposal contains a multitude of points which overlap with other EC legal instruments, as well as with the draft Convention on the international recovery of child support, which is currently being deliberated within the framework of the Hague Conference on Private International Law. It is important to ensure that there is consistency with these instruments. In terms of practical application, it must be clear which rules will be applicable. This is especially true because the Commission's proposal is extremely comprehensive so that a large number of people – some of whom have no legal training – will be applying it. For that reason, a clear and comprehensible delineation of the scope of application of the international Convention, the European Regulations and national law is particularly crucial in this area.

In this connection, the issue of the scope of application includes both the aspect of which types of maintenance obligations the Regulation should cover (substantive scope of application) and the aspect of whether the Regulation should also be applicable with regard to non-Member States and for purely national cases (geographic scope of application). In terms of the substantive scope of application, the core issue is the claims for which one may take advantage of the two substantial benefits of the Regulation – unconditional recognition of relevant orders without reservations based upon public policy, and enforcement of claims by national authorities. In defining the geographic scope of application, the key issues are subsidiarity – must a purely national case be governed by an EC Regulation? – and reciprocity – should creditors from non-Member States be able to profit from a procedure that is not open to EU citizens in the reverse case?

The Regulation must clearly and appropriately address both of these aspects so that it works effectively in practice.

Furthermore, one must take into consideration the fact that the proposal contains a number of measures for the benefit of creditors. Although it is an extremely important goal to improve and accelerate the recovery of maintenance claims, there is the question of whether the planned relief, taken in its entirety, constitutes excessive infringement of the rights of debtors.

FRANCE

The French delegation welcomes the proposed Community Regulation on maintenance obligations. The first reading at the Council confirmed this approach and demonstrated the **value of having combined within a single text all the issues concerning maintenance obligations, in particular those relating to the applicable law**. Only a comprehensive approach of this kind will make for conditions of sufficient mutual trust to achieve the Council's objectives of abolishing exequatur and making it easier for maintenance to be recovered across borders.

The French delegation fully supports these objectives, although it believes that some of the rules envisaged in the draft go beyond what is strictly necessary, contrary to the principle of proportionality to which the European Community as legislator is subject. It will draw attention to the provisions it thinks disproportionate, with the aim of finding more appropriate solutions in terms of procedural rules (I), enforcement measures (II) and cooperation (III).

In line with this constructive approach, we have summarised in the Annex the main technical and drafting improvements which were suggested during the first reading and which we endorse.

I. Harmonisation of procedural rules

The Regulation's aim being to abolish exequatur, it was apparent that procedural guarantees needed to be established which would apply to any judicial procedure concerning maintenance, including in cases with no cross-border aspect. In so doing, the draft lays down very strict rules, such as the personal service of the document instituting the proceedings, which could preclude the trying of many cases and so reduce the Regulation's scope considerably. While it is understandable that procedural guarantees should be provided by the Regulation at an earlier stage to the defendant, who cannot object at a later stage (the exequatur stage) to a decision, these guarantees must be kept to what is strictly necessary.

The draft provides two types of guarantee (personal summons of the defendant within at least 30 days before the hearing (Article 22); right to review of decisions rendered in absentia (Article 24)); these are based on the conditions laid down by the Brussels I Regulation for declaring a decision to be enforceable, although they depart from it with no good reason, in two respects.

Firstly, the Brussels I Regulation does not require a personal summons of the defendant but a summons delivered in sufficient time and in such a way as to enable him to arrange for his defence (Article 34), which clearly includes other forms of summons which nevertheless fully comply with the requirement of the right to fair trial laid down by the European Convention on Human Rights. Personal summons is therefore unnecessary and would indeed preclude the trying of cases in which the summons cannot be delivered to the defendant in person. It may be noted that in France a defendant cannot be tried if he has not been properly summoned.

Secondly, in the Brussels I Regulation this condition is not cumulative with the requirement of the right to a review of a decision rendered in absentia but is an alternative: either condition guarantees that the defendant was able to defend himself, whether immediately or by bringing an action.

The French delegation is therefore calling for the deletion of Article 22 and its corrective Article 23, since these create unnecessary and counter-productive rigidity; however, it wants to maintain the right to a review of a decision rendered in absentia.

It is also essential that this latter requirement be strengthened so as to preserve the same level of guarantee as the Brussels I Regulation. That Regulation rightly retains the necessity of putting the defendant in the position of being able to bring an action, which implies that the decision has been properly served on him in a language he understands (see here the conclusions of the Advocate-General and the written submissions of the German, Netherlands, Austrian and Polish governments and the Commission in case C283/05 pending before the Court of Justice). For this reason, **Article 24(2) needs to be reinforced by a requirement that the decision be served in accordance with Regulation (EC) No 1348/2000**, which would in fact simplify the process of establishing the starting point for the time limit for applying for a review of the case and would make it possible, at the enforcement stage, to ask for a translated decision to be sent, if a translation has been made in the context of the service of the decision.

To make this review option effective, it is necessary to remove the principle (in Article 26) of the provisional enforcement, by operation of law, of maintenance decisions. Generally speaking, it is quite sufficient to maintain, as most delegations have suggested, that a decision which is enforceable – even provisionally – in one Member State is enforceable in the others.

Likewise, the abolition of exequatur should result in the Regulation strengthening the exceptions which the debtor may invoke against the creditor. However, the Regulation removes the possibility of objecting, as between Member States, to legal provisions whose effect is manifestly contrary to the public policy of the country of the forum (Article 20). It is worth considering again whether, conversely, the abolition of the exequatur stage should not be coupled with greater protection in terms of the content of the right, by reintroducing, where appropriate, the exception of public policy as between Member States.

II. Compulsory enforcement of decisions

For the first time in an EU instrument, the proposed Regulation seeks to create compulsory enforcement measures (Articles 34 and 35), which would, moreover, be ordered by the court that ruled on the maintenance obligation while being directly applicable in the State of enforcement.

These enforcement measures involve an unnecessary, complex and unacceptable "judicialisation" of civil life, at the discretion of the court seised.

Firstly, the Regulation allows the court to reject any amicable enforcement and proceed straight to compulsory enforcement as envisaged by the decision itself. This lack of clarity is entirely contrary to our law. In the interests of the proper administration of justice, a distinction should be maintained between the decision stage and the recovery stage. This is especially important since, after a decision has been given and served, the bulk of the maintenance is recovered amicably, without any compulsory enforcement measure. By allowing any amicable enforcement stage to be excluded from the outset, the Commission's proposal goes against the underlying trend towards alternative methods of resolving family conflicts, such as mediation, which enables the parties to become aware of their responsibilities and takes the tension out of family relationships.

Secondly, the Regulation would impose procedures for enforcement by the courts, whereas under French law and in the legal systems of a number of other Member States, enforcement is carried out extra-judicially by bailiffs, who have a monopoly in this respect. This is not a matter to be decided by the European Union: for reasons of expediency, it must stay under the control of the Member States.

The arrangements devised by the draft Regulation are, to say the least, unclear and incomplete, especially as regards banking law and the partial attachability of salaries. These shortcomings, together with the particularly expeditious nature of these enforcement measures, seriously infringe the rights of the debtor, even before any substantive decision is given, and fails to establish a balance between the rights of creditors and debtors.

It seems that suitable arrangements will only be arrived at through the current discussions on the Green Paper concerning EU bank attachments.

In general, these measures clearly go beyond one of the objectives of civil-law cooperation, namely to facilitate the recovery of maintenance. Recovery can be secured by measures under the internal law of each Member State, the role of the central authorities being precisely to provide creditors with the necessary assistance to offset the effects of the debtor living at a distance and of the differences between legal systems.

To comply with the principle of proportionality, the European Union might conceivably require Member States to offer a particular type of enforcement measure, taking as a basis the path envisaged by the draft international Convention on the recovery of child support and other forms of family maintenance being negotiated at The Hague, or by having the European Judicial Atlas include for each Member State a detailed description of the enforcement measures available to maintenance creditors.

III. Functioning of administrative cooperation

Because a Convention is simultaneously being negotiated in The Hague, the Commission has adopted a piecemeal draft Regulation on administrative cooperation. This is not a desirable solution, however, since it makes the Regulation difficult for ordinary Europeans to grasp: a reading of the draft would suggest that a debtor could not obtain any assistance himself. Nor is it a necessary solution, since the Convention, which has a more restricted scope than the Regulation, will take precedence over the Regulation.

The Regulation therefore needs to be drafted exhaustively.

The imperative style of the draft Regulation's pursuit of further administrative cooperation necessitates cumbersome arrangements for the collection, transmission and protection of the debtor's personal data (Articles 44 to 47).

The danger with this imperative style of functioning is that it will be counter-productive and undermine the functioning of the cooperation, which should, by contrast, be pursued according to more flexible procedures.

The French delegation suggests differentiating within the functioning of administrative cooperation according to the stage under consideration.

During the stage prior to the obtaining of a judicial decision, when no party has been officially recognised by the court as the creditor, the complex arrangements envisaged by the Regulation could be retained, in the interests of protecting the eventual debtor.

During the compulsory enforcement stage, however, the functioning needs to be more flexible. The proposed arrangement is too cumbersome and will be impossible to implement if the central authority has to transmit all the information mentioned in Article 44 without any evaluation. Cooperation, which necessarily functions on the basis of trust beween central authorities, ought to result in the requested central authority being able to make a selection so that the relevant information is transmitted.

Likewise, a creditor who has obtained a substantive decision must be able to secure its compulsory enforcement, in accordance with the case law of the European Court of Human Rights. It is therefore hard to see why the draft Regulation should require that a new judicial decision must be sought before information on the debtor can be transmitted (Article 45(1)). Similarly, there is no need whatever to provide for the debtor to be systematically informed, since he will willingly refrain from carrying out the decision and could indeed use such information to avoid his obligations (Article 47). Lastly, there is no justification for immediately erasing the information gathered: this should be done after the decision has been enforced (Article 46(1)).

There is absolutely no need for the central authority to represent the creditor to ensure that the maintenance is actually recovered. Representation of a party by the central authority is an onerous task giving rise to liabilities. **Each Member State should therefore be required to declare whether its central authority will be able to represent the creditor, either directly or by proxy.**

The burdensome nature of this administrative cooperation justifies looking for an arrangement that will enable the central authority to be reimbursed its "external" costs in compliance with the horizontal framework established by the Directive on legal aid. In this connection, there is no need to retain the rules derogating from that Directive which are contained in Articles 42(4) and 45(5). If the future Hague Convention adopts stricter arrangements than those in the Directive, they will apply automatically.

IRELAND

Before commenting on the individual Articles there are two general issues which we would like to raise and which are reflected in our suggestions.

Firstly, we take the position that it should be absolutely clear that the Regulation should only apply to cases arising in a cross-border context, as defined in other Regulations. This is especially relevant in the jurisdiction context where the proposal as drafted does not put the matter beyond doubt.

Secondly, there are many provisions in this Regulation which mirror provisions contained in recently adopted proposals, or proposals the negotiation of which is about to conclude. We consider it of the utmost importance that procedures which already exist should be relied on in this Regulation, unless it can be demonstrated that they are completely unsuitable for their intended purpose. For the avoidance of doubt, care should be taken to ensure textual congruence with those Regulations when similar provisions are being used in this Regulation.

LITHUANIA

We support the Commission's initiative to draw up an EU document which creates the environment for people needing maintenance to obtain, in a quicker and easier manner, the maintenance payments they are due. Lithuania is also in favour of harmonising this document with the draft on maintenance being prepared in parallel within the framework of the Hague Conference of Private International Law. As the objective of the document under consideration is, inter alia, legal certainty and predictability, it should seek to establish clear rules that help EU citizens obtain the maintenance they are entitled to without getting involved in lengthy and complicated legal procedures.

LUXEMBOURG

It goes without saying that the Luxembourg delegation fully supports the objectives set out in the programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters adopted in 2000.

Doing away with exequatur will constitute a major step towards the goal of securing fast and effective recovery of maintenance claims. However, this measure is just the start: it is not in itself sufficient to meet the legitimate expectations of maintenance creditors on the one hand, while even-handedly protecting the interests of debtors on the other.

In this connection, we are in favour of a number of important moves to make it easier to recover maintenance:

– no *renvoi* to national law and hence inclusion of Community rules on residual jurisdiction;
– harmonisation of conflict-of-law rules, which will make it easier to implement the mutual recognition principle;
– adoption of minimum procedural rules on the service of documents, as an ancillary measure to the abolition of exequatur.

Likewise, we are ready to explore new avenues of legal assistance, with particular reference to child support. The negotiations at the Hague Conference on Private International Law (negotiations on the convention on the international recovery of child support and other forms of family maintenance) should be followed carefully.

However, the Luxembourg delegation does have reservations on the enforcement machinery. The provisions on administrative cooperation are likewise unsatisfactory in some respects. These enacting terms seem to us to be too much focused on coercion.

The actual principle of drawing up a separate legal instrument, designed exclusively to deal with maintenance obligations in a cross-border context, will offer practitioners essential added value and thus meets with our full approval.

THE NETHERLANDS

The delegation of the Netherlands subscribes to the objective of the proposal, which is to create a coherent system of rules on the recovery of maintenance in cross-border situations within the EU. For practical purposes it is considered appropriate that all provisions relating specifically to maintenance are combined in a single instrument.

This delegation does not consider that there is a need to make specific provisions in all areas related to international maintenance proceedings. In several areas, e.g. the service of documents, it should be possible to refer to existing instruments. Legal practitioners should not be confronted with a too large variety of rules on related subjects such as divorce, child protection and maintenance.

This delegation would stress the need to develop a European instrument which complements and does not waive the future Hague Convention. The relevant provisions, in particular article 49 will have to be redrafted so as to exclude any doubt in this respect. In fact, in certain respects the standards set in the present draft Regulation are lower than those contained in the draft Convention.

Some elements of the proposal go well beyond the mandate given in the Hague Programme. To what extent do we need harmonised provisions of substantive law, if any?

The inclusion in the proposed instrument of a chapter on applicable law raises major concerns. A European regime of universal rules on applicable law cannot coexist with a global regime on the same subject. In view of the fact that the Brussels 1 Regulation already provides for mutual recognition irrespective of the law applied, such a chapter is not indispensable. It gives rise to an important issue of subsidiarity, also in the light of the efforts which are being made within the Hague Conference to draw up an instrument on the same subject.

This delegation questions several elements of the chapters on enforcement. On the one hand the proposal purports to abolish exequatur. On the other hand the proposal introduces enforcement proceedings without specifying whether it is the party seeking enforcement or the party against whom the order is to be enforced who should address itself to the court. If it is the party seeking enforcement, this would be viewed by the Netherlands as a reintroduction of exequatur proceedings in a different form.

AUSTRIA

As indicated at the meetings, the deadline given for written observations is extremely tight. Chairman *Marku Helin* declared that the Commission and the Council consider it important to have quick and therefore necessarily provisional observations, subject to further written and oral discussions. Accordingly, the following comments are to be regarded only as a provisional and certainly not as a final position on the draft.

If certain points are not discussed below, that is not to be taken as a sign of either acceptance or rejection of the rules involved.

An effort has been made to ensure that comments are as brief and succinct as possible. To that end, we have followed a fairly **detailed breakdown**, which enables the reader to pass over individual points.

Re national substantive law

It seems imperative to at least **outline** the premises on which the Austrian delegation is working. These are naturally determined above all by **the Austrian State's substantive-law and procedural provisions on maintenance claims**. A brief explanation of these will therefore be given. Readers who are not concerned can skip the next two points.

Under Austrian law, those entitled to maintenance are **children, spouses,** in certain cases also **divorced spouses** and **parents** (the terms "children" and "parents" are always taken to cover grandchildren and grandparents as well), but never stepchildren, foster children, brothers and sisters or cohabitants.

Maintenance is calculated on the basis of a **need/ability-to-pay principle**. The first thing to be decided is whether there is a need for maintenance. Irrespective of the age or mental condition of the creditor, this depends solely on whether the creditor can support himself (is not capable of supporting himself). This means that in principle no distinction is made between the maintenance claims of children who are minors and those who are of age as long as they are not capable of supporting themselves.

Insofar as a creditor is not able to support himself, he is entitled to maintenance. Parents are required to contribute to the maintenance of their children in proportion to their means. The consequences of this are twofold: on the one hand, it is not necessarily a question of actual income, but a fictitious income that is achievable through additional effort may also come into play as a basis for calculation and, on the other hand, the parents are not jointly and severally liable.
For the usual type of case (child living with one of the parents claims maintenance from the other), the concept of **percentage components** has been evolved in case law so that equivalent account is taken of ability to pay in comparable cases. A percentage share of the income (more exactly of the monthly average net income less extra occupational and sickness costs) of the debtor is to be allocated to the creditor. This is graded according to the age of the children and is reduced by specific percentages where there are other maintenance claims vying for a share. In the case of very low incomes and numerous maintenance obligations, a further limit on the financial burden may have to be imposed so that the debtor still has sufficient resources to ensure that he retains his earning capacity.

Spouses must in principle contribute to joint maintenance in proportion to their means. Where one of the partners in a marriage is not working, the practice has always been that the spouse who is not earning is entitled to 33 % of the average net income by way of maintenance claim, while when both partners are earning there is a supplementary entitlement bringing the claim up to 40 % of the overall income (i.e. once the income difference is more than 3 : 2).

Apart from the need limit in the usual type of case (exceptions are made for persons who are bringing up children or can no longer be gainfully employed and persons who were divorced through no fault of their own or against their will), **alimony** also depends on the debtor being solely or predominantly at fault in the failure of the marriage. It is mostly granted for the duration, without any time limit.

Parental maintenance is worked out on a specific-need basis. It is characterised by a view of what constitutes reasonable limits that is more favourable to the debtor and it is not very common in practice, mainly because there is a social network that generally functions well.

All maintenance claims are subject to the *rebus sic stantibus* **clause**, and are adapted accordingly if there is a significant (at least 10 %) change in circumstances (e.g. income of the debtor, emergence or disappearance of additional care obligations, needs of the creditor).

It is not possible to **waive** the maintenance entitlement in advance. Any limitation (in particular also by settlement) of the maintenance entitlement of a child who is a minor can only take effect if **authorised** by the guardianship court.

Recovery of maintenance under Austrian law

Since 2005, a new non-contentious cases law (voluntary jurisdiction) has been in force. In cases where that Law is applicable, there is no civil procedure concerning the maintenance, but a non-contentious procedure. Both the maintenance of children (whether of age or minors) and parental maintenance are to be claimed through the non-contentious procedure. This results in two distinct approaches to claiming maintenance.

For children and parents: The non-contentious procedure

The procedure begins with an **application**, which may involve a specific statement of claim but need not do so. The application is served on the defendant for comment. If the court sets a deadline for comment on an application stating a figure and draws attention to the legal consequences, it is possible in the absence of comment to proceed on the basis of the factual information in the application. The application (unless a decision is not actually taken) is then granted and the possibility of a successful appeal by the debtor becomes very unlikely.

If the debtor contests the application (or the application is submitted without a specific statement of claim), the debtor is required to disclose his income and property situation to the extent necessary for calculation of the maintenance. If he fails to do this or does not do so in time or fully, his employer or the social-security provider may also be questioned. In addition, the tax office may be **obliged to provide information**. Banks are not obliged to do so.

Oral proceedings are not mandatory. The decision is taken by a **ruling**, which is only **immediately enforceable** if the court so orders. Otherwise legal force is pending. It becomes effective if there is no appeal within 14 days (or the appeal is not in the end admitted). A third instance (further appeal to the Supreme Court) is really only available if authorised by the court of appeal.

In first-instance proceedings, the parties do not have to be represented by a lawyer. The appeal, too, can be lodged by the party itself. Legal representation is only compulsory before the Supreme Court. Costs are only reimbursed in proceedings if the case concerns the maintenance claim of persons who have attained their majority (children or adults).

Protective measures are possible. **Provisional maintenance** (minimum needs allowance) may on application be granted by a decision in summary proceedings for children who are minors. Higher decisions in summary proceedings are also possible, but only if confirmation of entitlement and risk is provided.

Spouse and divorce maintenance

This is not to be pursued through the non-contentious procedure, but through the civil procedure. Here, too, there is no obligation to have a lawyer in first-instance proceedings. But the parties must at least make a specific statement of claim. The information obligations described above do not apply. The evidentiary proceedings are more formal than in the non-contentious procedure and lawyer's costs must be reimbursed by the losing party.

The judge must decide following oral proceedings. The decision is issued in the form of a **judgment** and may be contested by appeal (within 4 weeks). Provisional enforceability cannot be ordered. The appeal court decides either through a documentary procedure or following oral appeal proceedings. For the appeal procedure it is compulsory to have a lawyer. Costs are reimbursed. A third judicial process is in certain circumstances available if authorised by the court of appeal.

Decisions in summary proceedings are also possible here, but only if confirmation of entitlement and risk is provided. Minimum maintenance is not granted.

Enforcement (execution)

Both the maintenance judgment in the contentious procedure and the ruling in the non-contentious procedure are execution orders. The execution procedure is divided into authorisation and enforcement, with smooth transition from one to the other, and both are implemented by the court at fairly low cost. The process begins with the application for **authorisation of execution**, which is issued through a written procedure and may be appealed against (within 14 days).

This is followed by the **enforcement procedure**, which varies according to the object of the execution. The attachment, sale and distribution of proceeds of movable or immovable property is of course possible, but is not a particularly suitable means of execution for maintenance accruing. Maintenance accruing is therefore best recovered through **execution relating to receivables**, especially wages and salaries (orders for direct payment from income to be transferred to the collecting creditor to whom the employer as third-party debtor has to pay what is in fact due to the party liable).

The fact that a claim is for maintenance does not give it any precedence in the pledging of payments, and the order in which they are pledged is to be determined rather by the **priority principle**. Creditors are not given any preference with respect to their arrears, which constitute a claim like any other (indeed, public-authority claims are also hardly ever given preference in Austria).

There is however special provision for **maintenance accruing**. Although this does not have absolute precedence, there are **more extensive payment possibilities**. While other claims can only be satisfied within the framework of the "general minimum living standard" (that minimum amount which the party liable must be allowed to retain even in the course of execution in order to avoid ruining him and to ensure that he can earn a modest living), there is, owing to the lower "maintenance minimum living standard", an additional payment fund available exclusively to the creditors. In the course of execution of maintenance accruing, the person liable consequently retains a **lower minimum living standard** than in relation to other creditors. As a textbook colourfully puts it, "parents must share their last crust with their children".

Basic protection through maintenance advances

Children who are minors are given social protection in a different way through the "maintenance advance". If they have a civil-law maintenance claim against one of their parents, the State "comes forward" with **advance payment** of the maintenance claim. It is only logical that the minor can then no longer demand the amount of this maintenance advance from the debtor as it has thus already been paid. The **claim then passes to** the public authority which paid out the maintenance advance (in Austria this is the President of the Higher Regional Court concerned).

This of course in no way alters the fact that the creditor who is a minor is entitled to the maintenance accruing. The President of the Higher Regional Court becomes a "maintenance creditor" only when and to the extent that he has paid out the advance, so that he is only ever entitled to arrears.

The social upshot is that, at least in the case of average income and property situations, children who are minors come off best as far as basic protection is concerned. **Greater need** for swift recovery of maintenance than that of minors whose maintenance is advanced is therefore experienced by **children who have come of age** (particularly those requiring care, the handicapped and students). They are not entitled to any maintenance advance and really are dependent on recovery of maintenance from the debtor. This puts the argument for greater protection of minors into perspective. Anyone who gives children who are minors precedence over children who have come of age are, from Austria's point of view, favouring our four Higher Regional Court Presidents over poor students!

General observations on the maintenance draft

Austria endorses the Commission's finding that maintenance claims in cross-border cases require particularly effective enforcement. Without wishing to appear smug, Austria has the strong impression that it is not the organisation of Austrian national maintenance law which is open to accusations of slowness in maintenance recovery.

The exequatur procedure under the Brussels I Regulation does not last very long and the authorisation of execution follows swiftly, so that the only problem which may occur is that of assembling and translating all the documentary evidence. Neither the decision procedure nor the enforcement procedure involve a high financial burden and even the relatively modest charges are covered by generous use of the procedural-aid provisions (legal aid). This is not of course a reason to remain complacent or deny the need for the draft. There is always room for improvement and every day gained for the creditor is to be unreservedly welcomed.

However, and this has already been criticised in German texts on the subject (*Rauscher*, Europäisches Zivilprozessrecht [European Rules of Civil Procedure] II/2 [2006]), undue emphasis is given to the need to protect the creditor while the need to protect the person who has to pay the maintenance is totally disregarded. In particular, it is made to look as if the demand for maintenance automatically means that the claim is justified. This is e.g. in the case of maintenance of a spouse certainly not true, in the case of older minors their ability to support themselves may also need to be looked at very closely and in the case of children who have come of age or parents it cannot automatically be assumed, until a legally valid order exists, that the claim is justified on the basis of the reason given, and certainly not on the basis of the size of the claim. Simply to dismiss the need to protect the person against whom the maintenance claim is being made is therefore an infringement of the **principle of equal treatment under procedural law**. The "big guns" should only be wheeled out once a maintenance order exists.

Moreover, many of the provisions in the Regulation have – leaving aside the question of whether this was intentional or not – been drafted without paying careful attention to internal cases. Even where a **purely internal case** may indeed be more usefully dealt with under the Regulation than under national law, usefulness is still not a basis for the jurisdiction of EU law. Only within the bounds of the EU's legislative jurisdiction – and that jurisdiction goes no further than is necessary for the functioning of the internal market – is it possible to conduct a serious debate on the content of the proposal for a Regulation. If the proposal goes further than that, any substantive discussion of it is out of the question for institutional reasons.

Too little consideration – but this may also be for purely historical reasons – has been given to **linkage with the parallel project** of a new **Hague Maintenance Convention**. Even if, as passionate Europeans, we would like to demonstrate that within the Community things work better than with the rest of the world, it will be difficult to put this across in terms of the practical functioning of international maintenance recovery if a maintenance application from Austria to Switzerland and to Germany is to be subject to two totally different sets of rules. It is therefore desirable that the Regulation's contents should be as similar as possible to those of the Hague Convention.

Dual systems are a laborious task which might just be of some slight pedagogical value in that it obviates the need to consult two separate legal instruments when dealing with a particular case, but this is not what current German-language legislative practice is really about.
An effort should accordingly be made to ensure that the EC Maintenance Regulation supplements and maybe reinforces the new Hague Convention, but does not unnecessarily diverge through only marginally different ideas of its own. There is quite clearly a gulf here between theory and practice. Points will of course repeatedly arise which in the Hague Convention were the subject of a hard-won compromise but could be better and more tightly regulated in a united Europe. The more subtle distinctions there are, however, the greater the uncertainty will be in practice and the less it will be possible for "the international maintenance procedure" to become practical common property. An 80 % solution which has been run in and is operating smoothly is always preferable to a 99 % solution which does not gain acceptance and leads to friction in practice.

In the light of the above, a Maintenance Regulation in the EU context could well **restrict itself to very few provisions**: abandonment of the exequatur, or perhaps of public policy, more generous language or translation arrangements and closer cooperation between administrations. This would be a streamlined instrument which could only seriously be tackled after the new Hague Convention had been signed, rather than a spectacular and ambitious draft. But there is some likelihood of it gaining greater acceptance and functioning better than all the additional material which is currently packed into the draft.

ROMANIA

Overview of the legislation applied to child maintenance decisions made in Romania

The substantive rules on maintenance claims are regulated in the Family Code, while the procedural rules are comprised in the Civil Procedure Code.

Provision on applicable law and jurisdiction, recognition and enforcement procedure are included in Law No. 105/1992, regulating the relations of private international law, and Regulation no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. [1]
Romania is, since 1991, signatory state to the New York Convention of 1956 on the recovery of maintenance abroad.

Romania and Belgium apply a bilateral Convention on the recognition and enforcement of decisions in the matter of maintenance obligations.

[1] The latter is applicable in Romania as of January 1st, 2007. Before this moment, a special law (Law no. 187/2003) took over the rules of Regulation 44 and implemented them in Romanian law, so as to prepare the smooth implementation of the Regulation as of the date of accession.

Romania signed bilateral conventions on international judicial assistance containing family law-related provisions with the following states *that are non-signatories of the New York Convention:* Albania, Bulgaria, the Czech Republic, Northern Korea, Egypt, Moldova, Mongolia, Russia, Serbia, Syria.

Who is entitled to benefit from a maintenance decision under Romanian law

According to Articles 86 and 89 of the Romanian Family Code, a maintenance obligation exists between husband and wife, parents and children, the adopter and the adoptee, grandparents and grandchildren, great-grandparents and great-grandchildren, brothers and sisters (siblings) and between the other persons provided for by the law. It is entitled to maintenance only the one who is in need, who does not have the possibility to derive an income from his work, on account of the incapacity to work. *The descendant, as long as he is underage, is entitled to maintenance, regardless of the nature of his/her need.*

The creditor of maintenance under Romanian law

The creditor of a child maintenance obligation provided for under Articles 86 and 107 of the Family Code, is the underage child (the law does not differentiate between the child resulted from marriage and the child resulted out of wedlock) towards whom there are parental rights and obligations. The child out of wedlock is entitled to child maintenance as against his parent if parenthood was established, under the same conditions as the child resulting out of marriage.

Likewise, the minor adoptee is entitled to child maintenance. In this cases, the parent who was entrusted with the minor child or the tutelage authority have legal standing in court in order to oblige one of the biological parents to pay for the child maintenance.

The calculation of maintenance under Romanian law

According to Article 94 of the Family Code, maintenance is due proportional to the needs of the person claiming it and to the means of the person liable to pay it. The Court may increase or diminish the obligation of maintenance or order its termination, in accordance with the changes occurring in the means of the payer or the needs of the receiver. When maintenance is owed by a parent or by an adopter, the amount established shall not exceed one fourth of his income for one child; one third for two children and one half for three or more children.

The competent authority to render a child maintenance decision in Romania

A child maintenance decision or a court settlement is rendered by a court of law. The parties can also sign a notarized convention. For the purposes of Law No. 105/1992 (Article 165) the term of *foreign decisions* refers to acts of jurisdiction made by courts of law, notary's offices or any other competent authorities from another State.

The age of majority under Romanian law

The age of majority in Romania is 18 years. According to Article 86(3) the descendant, while underage, is entitled to receive maintenance, regardless of the nature of his/her need.

The child maintenance can be extended beyond the age of majority. If the child of legal age is pursuing his education, he/she is entitled to receive maintenance from his parents until he reaches 25 or 26 years of age (for higher education studies beyond 25 years of age).

Romanian rules on jurisdiction in private international law relations

According to Article 149(1) and (3) and the following of Law no. 105/1992, the Romanian courts shall be competent (*inter alia*) if the defendant or one of the defendants has his domicile or residence in Romania; or if the claimant in an action for maintenance has the domicile in Romania.

The Romanian courts shall also have jurisdiction to hear cases between persons having the domicile abroad, referring to acts or facts of legal status registered in Romania, if at least one of the parties is a Romanian citizen; suits referring to the protection of an infant or of a person under incapacity, if these be Romanian citizens domiciled abroad.

The Romanian courts have exclusive jurisdiction for suits concerning:

- private international law relations referring to legal status acts drawn up in Romania and which refer to persons domiciled in Romania, who are either Romanian citizens or stateless persons;
- dissolution, cancellation or nullity of marriage, as well as other litigations between spouses, except those regarding real properties from abroad, if both spouses have their domicile in Romania at the date of the request, and one of them is a Romanian citizen or a foreigner without citizenship.

If the parties have submitted, by a convention, the litigation between them or the litigations originating in the act they have concluded to the jurisdiction of a certain court, this court will be vested with jurisdictional competence, unless:

- the chosen court is a foreign one but the matter falls under the exclusive jurisdiction of a Romanian court; or
- the chosen court is a Romanian one but one of the parties proves that a foreign court has exclusive competence to hear the case.

According to article 10 of Law no. 105/1992, the rules described above are applicable unless other rules are provided by the international conventions Romania is a party to.

Choice of law rules under Romanian law in matters pertaining to maintenance

Article 34 and the following of Law no. 105/1992 provide that the law applicable to the maintenance obligation shall be:

a) between parents and children – the law which governs the effects of filiation. The latter is determined as follows:

- the filiation of the child born from marriage, using the following "cascade": 1. the law of the common nationality of the spouses; 2. the law of the common domicile of the spouses; 3. the law of the state on the territory of which the spouses have or had their common residence; 4. the law of the state with which the spouses have the closest connection;
- the filiation of the child born out of wedlock, using the following "cascade": 1. the child's national law (established as from the date of his/her birth); or 2. the law the most favourable for the child;
- the effects of the adoption, as well as the relations between the adopter and the adopted child, as follows:
    - the law of the adopter's nationality; or
    - in the case of adoption consented to by the spouses: the law of the state on the territory of which the spouses have or had their common residence or with which they have the closest connection.

b) between spouses – the law which governs the marriage, established using the following "cascade": 1. the law of the state on the territory of which the spouses have or had their common residence; 2. the law of the state with which the spouses have the closest connection.

c) between former spouses - the law which governs the divorce, established using the following "cascade": 1. the law of the state on the territory of which the ex-spouses have or had their common residence; 2. the law of the state with which the ex-spouses have the closest connection.

SLOVAKIA

In general the Slovak Republic supports the regulating of jurisdiction, applicable law, recognition and enforcement and cooperation by central authorities in matters relating to maintenance obligations in a single EU legal instrument. It recognises the complexity of such regulation and considers the proposal as a whole extremely valuable. We believe that it will help integrate and accelerate the recovery of maintenance in individual Member States in cross-border disputes, and not least with the abolition of the exequatur procedure, which we fully support.

SWEDEN

It is important that the scope of the Regulation should be clarified and kept within the bounds set by the legal basis. Article 65 of the EC Treaty confines the European Community's powers to situations with cross-border implications and allows legislation to be adopted only if necessary for the proper functioning of the internal market.

It is crucial that issues regarding confidential information, such as protected personal data, should be satisfactorily dealt with. It must be possible to supply information in such a way as to facilitate the awarding and recovery of maintenance, while ensuring that confidential data are not disclosed.

One of the prime aims of the Regulation should be to improve administrative cooperation between Member States. Smooth administrative cooperation is needed in practice if maintenance is actually to be recovered across borders. The proposed Regulation does not include sufficiently strong requirements for administrative cooperation.

UNITED KINGDOM

As you know, the UK has been closely involved throughout First Reading even though we have not exercised our opt-in to this instrument. Given this position, we have not judged it appropriate to offer detailed comments on each article but instead we set out below the key issues we would seek to resolve to enable us to accept the measure once agreed, as is provided for under Article 4 of our Protocol. We have offered some detailed comments during the Working Groups of course and will continue to do so where this is helpful.

CHAPTER I

Scope and definitions

LATVIA

Latvia agrees in principle to Chapter I of the proposal for a Regulation, establishing the scope and defining terms.

It could agree to the scope as defined in **Article 1**. However, to obviate any future differences of opinion on how and when the Regulation should apply, it would be preferable to specify exactly what is meant by "relationships deemed by the law applicable to such relationships as having comparable effects". This is necessary because in some Member States, including Latvia, there is no provision in law for maintenance obligations arising from relationships comparable to family relationships, e.g. civil partnerships.

In Latvia's view, Article 1 of the proposal should be worded more precisely, to indicate clearly the circumstances in which the Regulation is applicable, i.e. the application of the Regulation should not be abstractly connected with the interpretation of Article 65 of the TEC, but spelt out in the Regulation. While Article 1 lays down various provisions applying the Regulation to maintenance obligations arising from family or comparable relationships, it does not clearly distinguish between the instances in which the Regulation applies and those in which other international agreements or national law apply.

Latvia considers it essential that Member States be able to deal with national maintenance obligation proceedings under national law and, in accordance with each State's possibilities and legal system, apply the Regulation solely to cross-border proceedings.

Latvia considers that **Article 2,** defining terms used in the Regulation, could usefully include a definition of "maintenance obligations". Various terms are used for this concept in Latvia and, in addition, other types of payments between spouses exist which may not be understood as maintenance obligations within the meaning of the Regulation. Defining maintenance obligations would make it easier for practitioners to determine whether or not the Regulation is applicable.

ARTICLE 1

BELGIUM

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.

CZECH REPUBLIC

We consider this Article to be one of the proposal's key provisions. Our final position on the other chapters will depend on how the scope is defined.

Although in principle we do not object to a broad definition of family relationships, we would prefer it to be more precise. The vast majority of cases of cross-border recovery of maintenance claims are likely to involve maintenance claims for children or between spouses or ex-spouses. It goes without saying that such types of maintenance obligation must be covered. Nor do we oppose maintenance obligations between relatives in the direct line or claims by unmarried mothers against the child's father.

We can see certain problems with automatically including maintenance obligations for persons related collaterally or by affinity, which, according to the overview of maintenance obligations in place in each Member State (see 11885/3/06), are clearly rare. This might give rise to a situation in which a citizen and long-term resident of one Member State would be obliged to pay maintenance pursuant to a decision issued in another Member State, even if the maintenance obligation concerned related to a family relationship not provided for under the law of the Member State of the debtor, despite the fact that Article 15 authorises the defendant, in specific cases, to use that argument to contest the proceedings (as a result of the application of Article 24, for instance).

In our view, the proposed definition of other relationships with the same or comparable effects as family relationships is inadequate insofar as the law applicable in judging the effects of such relationships is unclear. In principle we do not object to Member States whose domestic legislation provides for registered partnerships and marriages for same-sex couples being able to apply the future Regulation to those couples. We think that the proposal by the Netherlands to apply the law of the forum might provide the answer.

Article 1 of the proposal does not deal with retroactive claims by a public body for reimbursement of benefits provided to maintenance creditors in place of maintenance (unlike Article 2 of the draft new Hague Convention). Moreover, the definition in Article 2, point 8 does not refer to public bodies as creditors, despite the fact that the ECJ has previously recognised the civil-law nature of retroactive claims by public bodies under certain circumstances (Case C-271/00, Gemeente Steenbergen / Luc Baten). Were these claims to be left out of the future Regulation, the procedure in such cases would continue to follow the Brussels I Regulation, thereby placing public bodies at a disadvantage, despite their being creditors. However, in the chapter on applicable law (Article 17(1)) the proposal provides for such claims. That is why the approach of the future Regulation in respect of retroactive claims by public bodies must be clearly worked out and the claims included in Article 1 of the Regulation.

DENMARK

The Danish delegation has no objections against the fact that maintenance obligations besides child and spousal maintenance falls within the scope of regulation, provided that article 15 also makes it possible to oppose a claim on maintenance because there is no such obligation according to the law of the state having jurisdiction.

GERMANY

The current version of the introductory provision raises problems in several respects:

(a) Substantive scope of application

The provision is designed to regulate the substantive scope of the Regulation's application in the way described above. However, the definition is not sufficiently precise because the determinative element – the term "maintenance obligations" – is itself not defined in more detail. In Germany's view, however, it is crucial to clearly determine the substantive scope of application – and thereby ultimately the type of maintenance obligations that the Regulation is supposed to include.

The current version does not make it clear whether the Member States' national legal systems decide as to whether a maintenance obligation within the meaning of the Regulation exists, or whether this term is to be interpreted autonomously. It is to be expected that controversy will ensue on this point, which only the European Court of Justice will be able to resolve. The result would be years of legal uncertainty and thus significant disadvantages for creditors.

As already mentioned, the substantive scope of application is to be viewed particularly in conjunction with the provisions on the unconditional recognition of maintenance orders (Article 25) and on the cooperation between central authorities (Articles 39 to 47). But very different traditions with regard to maintenance obligations exist among the Member States, as was shown again recently by the compilation in Council doc. 11885/06 JUSTCIV 177; and this is particularly true for maintenance obligations arising from same-sex partnerships and between siblings. It is therefore necessary to avoid differences of opinion emerging between the Member States as to the cases in which the Regulation – and thus the two abovementioned issues – is applicable.

(b) Geographic scope of application

Currently, there is no clear provision that expresses whether and in what cases with cross-border implications the Regulation should be applicable, and whether it also covers purely national cases. Rather, this becomes clear only from the context of the respective provision. For example, the provisions on private international law are *per se* of a cross-border nature; a purely national case is not conceivable in this context. The provisions regarding the unconditional recognition of decisions are only in terms of the Member States; in contrast, the system of central authorities (Articles 39 to 47) seems to be open to creditors from non-Member States as well. No concentration on cross-border cases can be discerned from the language of the procedural rules (Articles 22 to 24) or, to some extent, from that of the compulsory enforcement provisions (e.g. Articles 26 and 36).

Germany advocates specifying the scope of application at a key point. What is needed here is a delimitation vis-à-vis the outside, i.e. cases involving non-Member States, and also vis-à-vis the inside, i.e. purely national cases (parties and court within one country). This is because cases with non-Member States will be covered by the new Hague Convention on child support. And purely national cases are already included within the established rules of the Member States.

The scope of application should therefore take into account the Regulation's specified basis of competence (Article 65 EC Treaty), the principles of subsidiarity (Article 5 EC Treaty) and reciprocity, as well as the already-existing instruments of judicial cooperation (e.g. Legal Aid Directive, Regulation creating a European Enforcement Order for uncontested claims, and also the future Regulations creating a European order for payment procedure and establishing a European Small Claims Procedure).

Accordingly, the Regulation should concentrate on cases of a cross-border nature between the Member States. Only in this way is it possible for practitioners to rapidly recognise in which cases the new Hague Convention, the EC Regulation, and national law, respectively, are applicable.

Moreover, in substantive terms, the situation is comparable with that in the future Regulation creating a European order for payment procedure. There as well, concentration of the scope of application was on cross-border cases between Member States, because firstly, it would not have been justifiable to open up the order for payment procedure to creditors from non-Member States; and secondly, established national concepts already existed for purely national cases.

The proposal should be geared to the abovementioned legal instruments not only with regard to whether there should be concentration, but also in the definition of cases considered to be of a cross-border nature. Its criteria should therefore focus on situations where one of the parties is located in a different Member State to the other party or the court seised (see e.g. Article 3 of the proposal for a Regulation creating a European order for payment procedure in the version of the Council Common Position dated 27 June 2006). The following arguments speak in favour of this:

- Secure legal basis in Article 65 EC Treaty: Avoiding years of legal uncertainty regarding the scope of application
- Clear delimitation vis-à-vis the scope of application of the future Hague Convention on child support (the latter would apply if non-Member States are involved, while the Regulation would take precedence for cases between different States within the EU) and vis-à-vis national law (which would apply for purely national cases).
- Preservation of reciprocity: Without concentration on the Member States, the central authority system, for example, would be open to creditors from non-Member States, while creditors within the EU would have no guarantee of comparable support in reverse cases.
- Preservation of subsidiarity: It could not be made comprehensible to citizens and practitioners why procedural rules for purely national proceedings (parties and court within one country) would need to be governed by an EU Regulation. Increasing scepticism about the EU on the part of citizens should be taken into account here as well.
- Consistency with the other abovementioned instruments of judicial cooperation

(c) Applicability to public bodies

Germany advocates expressly including public bodies within the scope of application. After all, most parts of the Regulation (e.g. the rules on the applicable law and on the recognition of maintenance orders) are independent of whether the creditor asserts a claim him/herself, or whether an authority asserts a claim which has been transferred to it.

The core question is thus whether a public body may turn to the central authorities pursuant to Chapter VIII. Practice has shown that in such cases, public bodies have a need for support comparable to that of natural persons. This is because even public bodies generally do not have expertise in foreign law or the organisation of judicial bodies, and do not have the capacity to, for example, undertake compulsory enforcement of a judgment in a foreign country. This is especially true when and because the relevant authorities – as is generally the case in Germany – are organised at the local level (district and local authorities).

If these authorities are not permitted to make use of the central authorities' system, a paradoxical situation might result in which the debtor is protected from measures specifically because he/she has not paid voluntarily and a public body has therefore had to provide benefits in advance. Furthermore, the most recent draft for a new Hague Convention on child support (Working Doc. 98, Article 32) expressly includes public bodies.

(d) Inclusion of proceedings for modification

In practice, it is not only obtaining an enforceable order for maintenance claims which plays a major role; what is also important is the modification of such enforceable orders resulting from changed circumstances. But the proposal has not yet addressed such proceedings; this is especially true with regard to the debtor who wishes to assert that a change in circumstances (e.g. loss of employment) requires a decrease in maintenance payments. On this point as well, the draft Hague Convention has hitherto gone further and provided for relevant rules (cf. Working Doc. 98, Article 10).

Germany is of the opinion that a future European Regulation should also contain provisions on this constellation, because otherwise it would not be applicable to a substantial portion of the cases which arise in practice. In addition to the role of the central authorities, court jurisdiction and applicable law will need to be clarified in this context as well.

ESTLAND

The Estonian delegation would prefer the scope of the Regulation to be as broad as possible.

GREECE

We believe that this Article should be redrafted. The current wording of the proposal is vague, insofar as the concept of "family relationships" varies from country to country, with the result that public policy issues are likely to arise in certain countries when such a decision is enforced.

IRELAND

Drafting suggestion:

1. This Regulation shall apply, *in cross-border cases*, to maintenance obligations arising from family relationships or relationships deemed by the law applicable to such relationships as having comparable effects.

2. *For the purposes of this Regulation, a cross-border case is one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the seised court.*

3. Domicile shall be determined in accordance with Articles 59 and 60 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

4. The relevant moment for determining whether there is a cross-border case is the date of commencement of the case.

Comment: This proposal reflects our opening comments on the desirability of limiting application of this proposal to cross-border claims.

ITALY

It should generally be made clear, and therefore stated in this Article, whether the Regulation applies to cross-border cases only, which would be Italy's preference, or not. This question affects the scope of the entire instrument and should be spelled out; it cannot be left to interpretation at the implementation stage.

LATVIA

See comments under Chapter I

LUXEMBOURG

The formulation of Article 1(1) should be clarified. We would prefer a wording similar to that of the 1973 Hague conventions. Hence, the substantive scope could be defined as follows:

"The Regulation shall apply to maintenance obligations arising out of family relationships, parentage, marriage or affinity."

In addition, it might be worth considering whether to differentiate the substantive scope according to the different chapters of the Regulation. It is not out of the question that some provisions could be confined to maintenance obligations towards children.

MALTA

Malta is concerned about the very scope of the Regulation as defined in Article 1 of the Proposal. The definition is too wide and should be redrafted in narrower and clearer terms. Malta is prepared to accept the application of the Regulation to maintenance obligations at least between spouses and former spouses, between parents and children whether born in wedlock or out of wedlock. Malta, therefore, calls for a clear definition of 'family relationships' to cover these cases.

Malta also considers that the term 'relationships deemed by law applicable to such relationships as having comparable effects' as unacceptable and, therefore, proposes its deletion from the text.

THE NETHERLANDS

It should be recalled that in the Netherlands the widest possible interpretation is given to the provisions on scope of the two 1973 Hague Conventions. It would be detrimental to the objective of the Regulation if its scope were narrower than the scope of existing instruments. Moreover, it is considered essential that the scope should be defined using the same terms as the future Hague Convention. Differences in interpretation should be avoided.

The words "deemed by the law applicable to such relationships as" should be deleted. See article 12.

AUSTRIA

The description of Austrian law and also the generously provided maintenance table have already made it quite clear that the EU Member States recognise an extremely varied range of maintenance claims. Thus there are legal maintenance claims between siblings, between (registered or unregistered, heterosexual or homosexual) partners, between foster children and foster parents, step children and step parents – to very varying degrees. Many of these are not recognised by other Member States. The Commission's contention that Heads of State and Government (in particular in the Tampere Conclusions) did **not differentiate between individual maintenance claims** is not a convincing argument for the need to enforce a maintenance regulation in respect of all legal maintenance claims established in any Member State. It is almost unthinkable that a conservative Austrian politician when referring to legal maintenance claims would intend to include those between homosexual life partners. Considered empirically, the idea that there is political opposition to differentiation does not hold water.

This does not however mean that a **broad scope** should ultimately be rejected. The question of the scope will arise with increasing frequency; it relates to the substantive contents of the Regulation in the manner of communicating vessels. The less radical the substantive contents, the more tolerable a broad scope. The more the substantive contents of the Regulation intervene in national law and alter it (often by 180 degrees), the more problematic it becomes to have an area of application which extends far beyond the existing legal maintenance obligations in one's own State. It would be preferable to use a test which primarily looks at the appropriateness of the substance. Many of the proposed provisions are problematic in terms of substance. That is not so important if we take the view that they are at most acceptable for maintenance of minors, but under no circumstances over a broad area of application. Should we not rather aim at legislative provisions which are acceptable for all conceivable legal maintenance obligations, even if they are not provided for in national law? Thus the extent to which consensus is achievable depends essentially on controlling the ambitions of the drafter.

An alternative view might accordingly perhaps be expressed to the effect that legislation should preferably be rejected, but if introduced, limitation of its scope to core maintenance should be advocated.

In the view of the Austrian delegation there are few provisions in regard to which minor children need greater protection than children who are of age. It is precisely the protection of minor children by means of the maintenance advance as described above (paragraph 21 ff.) which makes **those who have come of age** often appear **more in need of protection**. The fact that minors are not able to act on their own behalf cannot basically be regulated by the maintenance system. Minors require legal care by a legal representative. If a minor has no legal representative, we are in an area of guardianship legislation which brings the award of custody to a designated person (in Austrian terminology, "Obsorgeträger"). Action for maintenance is not the reason, but only the occasion, for the representation requirement, which thus has only a very marginal connection with maintenance.

Where a minor is properly represented however – in other words provided with an impartial, scrupulous legal representative – there is no reason to give him special consideration in the maintenance procedure. Consequently, from the Austrian point of view the first category should extend not to minor children but to all children who are not capable of supporting themselves.

In a **second category**, according to traditional reasoning, one might then place spouses. But is this not merely for the reason that spouse support exists in almost all jurisdictions, whereas maintenance for parents or siblings is not quite as much the rule? The draft and many comments on the maintenance table appear also to indicate that neither the other Member States nor the Commission would like to introduce any differentiation between spouse maintenance and divorce settlement. Whether a maintenance payment which is due after divorce – in Austria this continues indefinitely, not merely for a short transitional period – may not in fact constitute a completely separate category probably needs to be more carefully considered than has hitherto been the case.

However, the wide-ranging nature and ambivalence of these considerations shows that the distinction between "core maintenance" for genuinely vulnerable creditors and "marginal maintenance" is somewhat nebulous. In particular for this reason the Austrian delegation supported the view that a **broader area of application** should at least be the **starting point for the Regulation** without this excluding occasional differentiation for individual substantive provisions. On one point the European Commission is however right: a set of maintenance instruments for child maintenance alone would not be the best solution.

POLAND

Poland would like the scope of the Regulation to be broad, both in terms of persons covered and of subject matter (legitimate, illegitimate and adopted children, spouses and ex-spouses, siblings, relatives in the descending and ascending line, including grandparents, also consideration of claims by the mother of an illegitimate child for the father of the child to cover expenses in relation to pregnancy and childbirth and the mother's living costs during the period around childbirth).

PORTUGAL

We see two possibilities with regard to the submitted proposal for a Regulation, which introduces a broad concept of maintenance obligations and an extremely ambitious system for recovery of maintenance and the connected abolition of *exequatur*: (1) propose restricting the scope of the instrument (probably to minors and spouses/ex-spouses only); or (2) accept a broader scope and introduce some restrictions and safeguards into the proposed system.

Portugal tends to favour the second option - a broad concept of maintenance obligations defined in terms of private international law, but with some additional guarantees. We consider that this option makes it possible to include all the specific features of the legal systems of each Member State, since it will be possible through the use of applicable legal provisions to guarantee a significant link and connection to the State of the forum, thus avoiding extraneous and inappropriate applications. If on the other hand it is decided to restrict the scope of the instrument to certain categories of creditors, that restriction will create a new problem - it will be extremely difficult to reach agreement on the categories falling within the scope of the instrument.

If the latter approach is chosen, Portugal considers it essential to introduce certain restrictions and safeguards, such as: reserving the possibility of using the public policy exception; the Regulation including common procedural rules to ensure a just and fair process; restricting the scope of certain implementing measures currently proposed (Article 34, monthly direct payment order and Article 35, temporary freezing of a bank account); and, possibly, restricting administrative cooperation to certain categories of creditors.

ROMANIA

Article 1(1) and Article 15

Romania agrees with the general drafting of Article 1(1) and has no objection to granting maintenance to other members of the family *as long as* article 15 offers the possibility to oppose such a claim if it is not provided by the law of the requested state.

Also a set of restrictions might be added, along the lines of the draft Hague Convention. A definition of the *vulnerable adult* mentioned in Article 15 should be included in Article 2, using the definition included in the Hague Convention on the International Protection of Adults. Also, Romania takes the view the "*law of the closest connections*" in Article 15(2) should be replaced with "*the last habitual common residence, common nationality or law of the closest connections*". We appreciate that Article 15 does not provide for the unilateral right of the debtor to oppose the maintenance claim for children and vulnerable adults.

SLOVENIA

We agree with a generic concept of family maintenance obligation without listing the types of relationships.

SLOVAKIA

The Slovak Republic agrees with the proposed change to Article 1(1). In our view the definition of the concepts of "family relationships" and "relationships having effects comparable to family relationships" should be left to the internal law of the Member States.

FINLAND

Paragraph 1 is problematic, because the reference to "the law applicable" would mean that the Regulation does not have a unified scope. It should be replaced by: "The Regulation shall apply to maintenance obligations in respect of a child, as well as maintenance obligations arising from other family relationships, parentage, marriage or affinity".

Relationships between registered partners and between cohabiters are family relationships and, accordingly within the scope.

SWEDEN

The substantive scope is very broad and Sweden would be in favour of limiting it. The advisability of eliminating the need for a declaration of enforceability in cases other than child maintenance at present is also open to question. Sweden should nevertheless be able to agree to the article, as there are safeguards, e.g. in Article 15.

UNITED KINGDOM

Scope

There is currently no definition of scope (ie the types of relationships from which a maintenance obligation can be derived) within the proposal. It seems to cover any and all relationships and, since it seems also to have no limit to EU law only either, it means any and all relationships throughout the world could stand to be recognised and enforced. Such a wide scope makes it impossible sensibly to assess its impact and hence very difficult to see how the aim of abolishing the protection of the exequatur system could be readily agreed. The UK's preferred definition of scope (Article 1) would be to include children, spouses and civil partners only.

We recognise that some other Member States may have different definitions and the unanimity required may mean that reaching consensus would be difficult. The UK is clear that in any such definition children must be the priority and would be willing to focus the proposal wholly on these. This tighter and more focussed definition on this priority group would perhaps allow readier agreement to other aspects of the proposal between Member States and, indeed, perhaps go further to strengthen, for example, enforcement measures given all will agree to the priority afforded to children.

Treaty Base

The Treaty Base justification of aspects of the proposal are not apparent. The proposal currently extends to non-EU citizens/laws and as such it is not clear how this could be necessary for the functioning of the internal market. To address this the residual jurisdiction provisions contained in Article 6 should be deleted.

ARTICLE 2

BELGIUM

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.

CZECH REPUBLIC

Point 3 – definition of the term "decision": in our view it is inappropriate to use the same definition of the term "decision" throughout the Regulation. For instance, it also encompasses a writ of execution, which should not feature under chapters V and VI on enforceability and enforcement of decisions issued in another Member State. A separate definition would be more fitting for these chapters (as is the case, for example, with Article 15(1) of the draft new Hague Convention).

The basic shortcoming of this definition is that it merely covers decisions by a court in a Member State because, if combined with Article 33 point e), it would mean that decisions to be enforced could be found irreconcilable only with decisions issued by courts in a Member State, and not with decisions from third countries. This would place Member States in a position in which they would be unable to honour obligations under international agreements – one specific example being the 1973 Hague Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations (to which 19 Member States, including Denmark, are States signatory). This shortcoming must be remedied.

Point 4 – definition of the term "authentic instrument": here, too , how the general definition relates to the provisions of Chapter VII needs to be clarified. Moreover, neither this definition nor the definition of the term "decision" alludes to court settlements; we consider this a shortcoming.

Point 8 – the term "creditor" should also include a reference to public bodies.

GERMANY

The list of definitions of terms is sensible and appropriate. However, to the extent possible the definitions should be consistent with the definitions in the already-existing legal instruments of judicial cooperation (e.g. Brussels I Regulation, Regulation creating a European Enforcement Order for uncontested claims, future Regulation creating a European order for payment procedure).

Furthermore, Article 2 seems to require revision as to the following points:

- Paragraph 4: The definition of "authentic instrument" does not seem to be consistent in terms of content with that of the Regulation creating a European Enforcement Order for uncontested claims (Article 4 (3)); here, Article 4 (3) of the Regulation on the European Enforcement Order should be taken over.
- Paragraphs 8 and 9: The definitions of the terms "creditor" and "debtor" should encompass both the substantive-law position as creditor and debtor, and the procedural position – those who are asserting claims and those against whom claims are asserted, respectively. But regarding the procedural aspect, the proposal also synonymously uses the terms "applicant", "plaintiff" and "defendant". Therefore, the procedural aspect in the definitions of creditor and debtor is not only confusing, but also superfluous. In the remainder of the Regulation as well, the substantive-law and the procedural position of the participants must be clearly differentiated, particularly if the Regulation – as advocated by Germany (see above, comment (d) on Article 1) – is amended to include provisions dealing with modification proceedings.

IRELAND

Drafting suggestion:

“For the purposes of this Regulation:

(1) the term ‘court’ shall cover all the authorities in the Member States with jurisdiction in matters relating to maintenance obligations;

(2) the term ‘judge’ shall mean the judge or an official having powers equivalent to those of a judge in matters relating to maintenance obligations;

(3) the term ~~'decision' shall mean a decision given in matters relating to maintenance obligations by a court of a Member State, whatever the decision may be called, including a decree, order, judgment or writ of execution, as well as the decision determining the costs or expenses by an officer of the court; 'judgment' shall mean any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court~~;

(4) the term 'authentic instrument' shall mean:

a) *a* document which has been formally drawn up or registered as an authentic instrument in matters related to maintenance obligations, and the authenticity of which:

i) relates to the signature and the content of the instrument; and

ii) has been established by a public authority or other authority empowered for that purpose by the Member State in which it originates, or

b) an arrangement relating to maintenance obligations concluded with administrative authorities or authenticated by them;

(5) the term 'Member State of origin' shall mean ~~the Member State in which the decision was given;~~ *the Member State in which the judgment has been given, the court settlement has been approved or concluded or the authentic instrument or agreement under Article 37 has been drawn up or registered, as appropriate.*

(6) the term 'Member State of enforcement' shall mean the ~~Member State in which the enforcement of the decision is sought:~~ *the Member State in which enforcement of the judgment, court settlement or authentic instrument is sought*

(7) the term 'court of origin' shall mean ~~the court which has given the decision to be enforced~~ *the court or tribunal seised of the proceedings at the time of fulfilment of the conditions set out in Article 1*;

(8) the term 'creditor' shall mean any natural person *or authority* to whom maintenance is owed or is alleged to be owed,

(9) the term 'debtor' shall mean any natural person who owes or who is alleged to owe maintenance."

Comment: To ensure coherence with other Regulations, it is proposed that the Article be amended as indicated (amendments are based on the definitions in the EEO Regulation).

ITALY

We would proposed defining the "authentication" by administrative authorities of an arrangement relating to maintenance obligations concluded between private individuals, since the process involves non-negotiable rights, especially those of minors. The definition could rule out, among other things, the possibility of authenticating formal aspects only. Even though Article 2(4)(b) of this Regulation reproduces the similar provision in Article 4(3)(b) of Regulation (EC) No 805/2004, the purpose of the instrument under discussion is much broader but also specific.

LATVIA

See comments under Chapter I

LUXEMBOURG

See comments on Article 25.

THE NETHERLANDS

The importance of consistency with definitions in the future Hague instrument is stressed.
It may be useful to include a definition of "settlement", in line with the definition in existing instruments.

AUSTRIA

The definitions and also the terminology in the rest of the draft are frequently based on Brussels I, Brussels IIa, the Regulation on the service of documents or the Regulation on the European enforcement order. Where they nevertheless occasionally depart from these this may be partly explained by a less than brilliant translation. The Commission must however also be asked to show understanding for the fact that delegations have difficulty in distinguishing between translation errors and deliberate changes. Even when the French and English texts are read alongside it is not easy.

The principle should be affirmed: **Definitions** should be **as close as possible to those already established**. Only where it is absolutely necessary to have a differing wording for the definition should this occur. The draft text does not always adhere to this principle.
More detail could be added to the concepts of "court", "decision" and authentic instrument" in the present context. The remaining definitions are either uncontroversial or in some cases may be dispensed with (e.g. "judge").

The fact that a "creditor" is a natural person is an important restriction because the public authorities who pay advances are thereby excluded. Further consideration should be given to whether this is intended in all subsequent provisions.

POLAND

Article 2(3)

The definition of a decision should not refer to "a decision given in matters relating to maintenance obligations", but to any decision whose content regulates issues of maintenance (e.g. a divorce decree).

Article 2(4)(b)

Arrangements relating to maintenance obligations concluded with administrative authorities do not exist in Polish law; Poland would therefore like a more precise explanation in the Regulation.

PORTUGAL

If this instrument makes agreements enforceable, in the same way as decisions and authentic instruments, we believe it is essential that the Regulation include a definition of "agreements".

ROMANIA

Romania considers that this Article should include definitions for the notions of "*vulnerable adult*" and "*agreement*". Also the list of possible creditors could include public bodies.

SLOVENIA

With regard to the definitions, they should be coherent with other Community acts. Therefore we agree with the proposed definitions. Furthermore, we are of the opinion that point 2 is not necessary, since the word judge does not appear in the text.

SLOVAKIA

The Slovak Republic proposes adding the term "vulnerable adult" to the definitions in this Article. A possible gloss of the term can be found at point (b) of Article 14, but for the sake of consistency we think it better to add it to this Article.

Likewise we suggest including the terms "closest connection" and "close connection" in the proposal for a Regulation and defining them in this Article. This will simplify the interpretation of the proposal and in practice it will remove difficulties caused by divergent interpretations of these terms.

CHAPTER II

Jurisdiction

GERMANY

Germany requests that an examination of whether it is actually sensible to include a chapter on the jurisdiction of the courts in the future Regulation. The Brussels I and IIa Regulations are two existing instruments that already address these questions in detail. Further, the provisions of Chapter II closely follow the Brussels I Regulation and copy a series of those provisions. With regard to simplification of the Community acquis, it therefore seems more sensible to make an overall reference to the Brussels I Regulation and potentially – to the extent that changes are necessary – make appropriate revisions to the Brussels I Regulation.

LATVIA

Latvia agrees in principle to Chapter II, determining jurisdiction and laying down various provisions on the subject.

To make the provisions clearer and more readily understandable, Latvia suggests that the Regulation be more specific as to the instances in which jurisdiction is awarded to a State, and those in which the particular court in the State concerned is already specified.

A party's place of habitual residence is one of the most important bases for determining jurisdiction under the Regulation. However, whether and under what circumstances a party is deemed to be habitually resident in one or other State is a matter for the Member States to determine nationally. Latvia therefore proposes the inclusion of provisions more clearly specifying, for legal practitioners and parties, how the place of habitual residence is to be determined and established.

Latvia is in favour of universal provisions on jurisdiction in maintenance obligation proceedings. Such rules make it much easier for parties to establish the competent court in all circumstances. At the same time, Latvia considers that if such arrangements are to be made at Community level they must be based on Community competence under Article 65 of the TEC.

Latvia approves the fact that **Article 4** allows the parties to agree on the competent court. However, with regard both to limiting the choice and the required form of the agreement conferring jurisdiction, Article 4 must be consistent with Article 14, which allows the parties to choose the law applicable. Accordingly, the universal principle should also be observed in Article 4, by not making various provisions dependent on a party's being resident in a Member State, and striking a balance between Article 4(3) on the one hand and Article 3 and Article 4(1) on the other.

Latvia considers that the words "or where another court has exclusive jurisdiction by virtue of Article 4" should be deleted from the second sentence of **Article 5**. Latvia is in favour of a rule which offers the possibility of "revoking" a prior agreement conferring jurisdiction on a court if the defendant does not object to the case being heard in the court in which he entered an appearance. Latvia is aware that Article 5 was taken from Article 24 of the Brussels I Regulation, with a view to ensuring consistency with that Regulation. However we would point out that, in Latvian terminology in particular, the words "defendant enters an appearance" do not indicate any reaction by the party other than physical appearance in court. But the phrase is not meant in that narrow sense in the Regulation. We therefore believe it essential to clarify this aspect in the preamble.

Latvia could accept **Article 6**. Comprehensive provisions on jurisdiction in cross-border proceedings would be introduced at Community level, and the situation would be perfectly clear both for practitioners and for parties. However, if such provisions are to be introduced in the Regulation they must be based on Community competence under the Treaty establishing the European Community: clarity could not compensate for a lack of Community competence. Alternatively, therefore, Latvia could agree to deletion of Article 6, so that maintenance claims in cross-border proceedings could be brought solely in accordance with the grounds of jurisdiction provided for in Articles 3 to 5.

Latvia considers that the wording of **Article 11** should be more precise. At present it is not clear how this provision relates to Article 5. When a court is seised of a case, it cannot assess the grounds of jurisdiction until it has been established whether or not the defendant agrees to the case being heard in that court in accordance with Article 5. In addition, Article 11 should stipulate what is to happen when the provisions governing jurisdiction arise from bilateral or multilateral agreements between one or more Member States on the one hand and a third State on the other.

THE NETHERLANDS

It is understood that that unlike the jurisdiction rules contained in the Brussels 1 Regulation, the proposed jurisdiction rules are to have a universal territorial scope. This calls for careful examination of each of these rules in light of its value as a rule attributing jurisdiction. Will an order based on a proposed ground be recognized in a third country? Is the *forum creditoris* generally accepted as an international jurisdiction ground outside Europe? What is the likelihood of recognition outside Europe of an order made by a forum chosen by the parties?

This delegation supports the idea of inserting in this chapter a provision on modification jurisdiction (cf. Article 14 of the draft Hague Convention).

AUSTRIA

Little needs to be said against the content of the general jurisdiction arrangements in Article 3, except that there is a lack of a **clear reference** to **cross-border cases**. Jurisdiction arrangements for purely domestic cases cannot addressed be here, and jurisdiction in regard to third countries ought not to be.

With regard to the prorogation of jurisdiction, Austria must reiterate its already expressed view that the restriction in the case of children under 18 is not very reasonable. On an initial view of the problem, such a restriction is too narrow, because, if necessary at all, it should cover also individuals who are unable, not because of their age, but because of their lack of mental capacity, to manage their own affairs. On closer scrutiny the concept is, however, entirely unconvincing. In its verbal clarifications, the Commission stated that the question of the **validity of a statement is a matter for national law**. Yet the question of ability to manage one's own affairs may also be a matter for national law. A minor or a person who requires a trustee either has or needs to have a legal representative to act on his behalf – which however should not be a matter for maintenance proceedings but for legal custody proceedings. If legal representation exists, to exclude **prorogation of jurisdiction for the subjects of care orders** in the case of adult individuals of sound mind would be an act of discrimination against handicapped persons. Where no legal representation exists, it must be provided by the court responsible for arranging care. This has little to do with maintenance proceedings or the jurisdiction arrangements. There should therefore be **no restriction of prorogation of jurisdiction**.

Article 5 concerning jurisdiction based on the appearance of a defendant in a dispute should – if it is necessary – have the same wording as in Brussels I. Any departure from this bodes ill. The residual jurisdiction referred to in Article 6 could be dispensed with.

The provision on lis pendens appears to be satisfactory, taken on its own. The problem, however, is that it is necessary to distinguish new proceedings (legal actions) brought because of changes in circumstances or an action for modification of an order, more clearly from genuinely parallel proceedings. The lis pendens rule is of value only in order to avoid parallel proceedings. The question of **who has jurisdiction to increase or reduce a maintenance amount** (action for modification of an order, re-application following changed circumstances), should be determined independently.

Article 10 as a provision purely regulating jurisdiction is unassailable: whether any legal enforcement is possible in all Member States on the basis of provisional and protective measures must be discussed from Chapter IV onwards. Article 11 could be dispensed with if Article 4(4) is dropped.

ARTICLE 3

BELGIUM

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.

CZECH REPUBLIC

We support extending the rules governing jurisdiction to include point d). We have no objections to the Economic and Social Committee's proposal to reverse the order of points a) and b).

We do, however, have certain reservations vis-à-vis enforcing the rules on jurisdiction, regardless of whether or not the defendant is resident in a Member State. Should a court whose jurisdiction stems from Community rules – such as a court at the creditor's place of residence – issue a decision against a defendant resident in a third country, the creditor will be obliged to request recognition and enforcement of the decision from the country concerned under the terms laid down in its domestic law or, where appropriate, in international treaties by which the country of enforcement may be bound.

In practice this might give rise to a situation in which, despite having an easy approach to the maintenance decision in their country of residence under Community law, creditors would fall at the following hurdle in seeking to recover maintenance – i.e. in the enforcement procedure in the third country. We would be willing to endorse this approach on condition that, in the event of a conflict between the rules on jurisdiction in the Regulation and an international agreement – most likely bilateral in nature – with a third country, the international agreement may be enforced.

GERMANY

Germany welcomes the concept of concentrating the most important jurisdictions in one place. The criteria employed (e.g. habitual residence of the defendant or the creditor) are appropriate as well.

However, we have reservations regarding the fact that the provision expressly regulates not only international but also local jurisdiction. This intrusion into the law of the Member States – especially since it lacks concentration on cross-border cases – seems to be critical. Article 3 and the following provisions should be limited rather to international jurisdiction.

Otherwise, Germany would make the following suggestions with regard to Article 3:

- It should be made clear that alternatives (a) to (d) are not in any particular order of priority, but rather the plaintiff may select the court before which he/she decides to take the legal action.
- Point (c): The term "*eine Personenstandsklage*" in the German version should be reformulated to be consistent with Article 5, point 2, of the Brussels I Regulation: "*Verfahren in Bezug auf den Personenstand*" ("proceedings concerning the status of a person"). Also, there should be examination of whether the last half-sentence ("unless…") may be dispensed with, since it could lead to the splitting of jurisdiction for closely connected cases.
- Point (d): The jurisdiction described here should also apply when a matrimonial matter within the meaning of the Brussels IIa Regulation is pending. In the German version, instead of "*Sorgerechtsklage*," the language should be made consistent with that of the Brussels IIa Regulation and read "*Entscheidung betreffend die elterliche Verantwortung*" ("jurisdiction in matters of parental responsibility" instead of "jurisdiction to entertain proceedings concerning parental responsibility").

GREECE

We agree with the provisions proposed. The introduction of subparagraph (d) is welcome.

FRANCE

Drafting suggestions

Article 3

General jurisdiction

Subject to their jurisdiction in matters of enforcement, the following courts shall have jurisdiction in a Member State in matters relating to maintenance obligations:

(a) the court for the place where the defendant is habitually resident,

(b) the court for the place where the creditor is habitually resident, or

(c) the court which has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;

(d) the court which has jurisdiction to entertain proceedings concerning parental responsibility, under the Regulation (EC) No 2201/2003, if the matter relating to maintenance is ancillary to those proceedings.

Explanations: this Article should not regulate jurisdiction in matters of enforcement, which is left to the law of the Member States by Article 27 (see also proposed amendment to Article 48).

IRELAND

We have concerns about the relationship between paragraph (d) of this Article and paragraph 4 of Article 4 which are elaborated upon in our comments on the latter Article.

ITALY

We agree with the proposals regarding ancillary jurisdiction, which are conducive to uniform decisions.

LUXEMBOURG

Luxembourg supports this provision, in particular the idea of uniform protection for maintenance creditors, who will no longer have to contend with different rules on jurisdiction depending on whether or not the defendant lives in the EU.

THE NETHERLANDS

This delegation accepts the proposed article. It would point out that there is no reason to have a distinct article 6. Any additional grounds to be proposed under article 6 should be inserted in article 3. Neither article 6, nor any other provision in the draft leaves any room for jurisdiction on the basis of national law. The territorial scope of the proposed rules on jurisdiction is universal. This implies that the grounds listed in article 6 are “alternative” or “additional” or subsidiary” rather than “residual”.

POLAND

The connections made in points (c) and (d) are unclear. The rules on jurisdiction should be the same whenever the Regulation is applied, irrespective of whether the obligation arises from strictly family relations or relations of a similar character. Poland suggests that the court with jurisdiction for the creditor should be placed in point (a), in order to highlight the need to defend the creditor's interests.
The title should read "agreement on jurisdiction".

PORTUGAL

As regards wording, it would be helpful to harmonise the terms used in subparagraphs (a) and (b) of the Article. We suggest substituting the terms defendant and claimant for the terms defendant and creditor used here.

ROMANIA

We agree with the provisions of Article 3, which unify the rules on jurisdiction in cases involving maintenance obligations. Also we would encourage the use of an Annex, as in Regulation 44/2001 in applying Articles 3(2) and 4(2), for the nomination of the level of the competent courts.

FINLAND

It might be better to restrict the Article to cover the issue, which Member State has jurisdiction. The question, which court in the Member State concerned has jurisdiction would then be subject to national law.

ARTICLE 4

BELGIUM

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.

CZECH REPUBLIC

We have no substantive reservations about this Article, including paragraph 3 thereof. We would suggest adding a reference to disabled adults in paragraph 4.
In our view, if time limits are to be imposed on agreements conferring jurisdiction, provision ought to be made for the moment at which they are concluded, rather than their duration.

GERMANY

Germany is open to the possibility of allowing agreements regarding jurisdiction over maintenance claims. This enhances the autonomy of the parties. However, it would seem sensible for the freedom to choose to be limited to be limited to those courts with which a direct connection exists, for example because the court is located in one of the places enumerated in Article 3. Firstly, this would prevent any abuse intended only, without an objective reason, to make it more difficult for a participant to assert his/her rights. Secondly, a direct connection would also promote synchronisation with the applicable law, which would considerably simplify the processing of the case before the court.

Furthermore, Germany advocates revising the form requirement contained in paragraph 2. The mere requirement of a written form does not seem adequate to protect the participants. A notarially attested act should be necessary. This would ensure that sufficient legal advice regarding the consequences is available. In practice, this would not lead to disproportionately increased costs, because the agreement may be made, for example, within the scope of a marriage contract, which would be recorded by a notary in any event.

Also, it should be assessed whether it is sensible to maintain the exclusion of agreements as to jurisdiction pursuant to paragraph 4 if children are involved. Of course, we welcome the notion upon which it is based: the special protection that children deserve. On the other hand, however, this could result in the splitting of jurisdiction for proceedings that actually belong together. For example, under the current wording it could happen that the wife, whose children live with her following the separation from the husband and father, must assert the maintenance claims for herself and for her children before different courts.

GREECE

We disagree with the exception in paragraph 4, since minors have representatives who look after their interests. For the same reason, we do not support extension of the exception to "vulnerable persons", as proposed by certain delegations. We have doubts about the breadth and lack of clarity of paragraph 1 ("disputes which have arisen or which may arise") and about the possibility of regarding an electronic message as the equivalent of a written agreement.

IRELAND

We object in principle to fact that the parties can agree to assign jurisdiction in maintenance matters to a court of another Member State with which they have little or no connection. This ignores the fact that, in some MS, a determination regarding maintenance is intimately connected with a determination regarding status, i.e., provision for spouses and children is an essential aspect of divorce jurisdiction. In Ireland, a court granting a divorce must be satisfied that such provision as it considers proper having regard to the circumstances exists for will be made for the spouses and any dependent members of the family. The provision as drafted could, in certain circumstances, see a split in jurisdiction between divorce proceedings, on the one hand, and maintenance proceedings on the other. The Article seems to treat the maintenance relationship as primarily commercial/contractual in character. It does not recognise the sensitivities present in what we would see as primarily a family matter.

As regards the similarity with Article 23 of Brussels I, we feel that this is not a valid comparator for the new Instrument, which is to deal solely with maintenance matters. In any event, it is noteworthy that the scope of Article 23 is somewhat circumscribed when it comes to insurance, consumer contracts and employment contracts - the basic protections offered by the relevant sections may be departed from only by an agreement entered into after the dispute has arisen. This recognises that these categories of litigant are in an inherently weak position. This also holds true for the maintenance creditor and is the justification for the special jurisdiction rule in Article 5.2 of Brussels I. At the very least, similar protections should apply in this Regulation.

While our preference is for the deletion of the Article, if it is to remain in the text we are of the view that it must be drafted much more tightly. At a minimum, prorogation should not be possible where both parties are present in the same State. The position of dependent members of the family also needs further thought.

As indicated above, we also have difficulties with the relationship between Article 4, paragraph 4 and paragraph (d) of Article 3. (Paragraph (d) contemplates that the courts with jurisdiction to entertain parental responsibility proceedings under Brussels IIa would also have a maintenance jurisdiction where the matter relating to maintenance was ancillary to those proceedings. The relevant Articles are Articles 8 (general jurisdiction) and 12 (prorogation). Under Brussels IIa, the maximum age for children covered by the Regulation is left to national law. Under the proposed Maintenance Regulation, Article 4 does not apply where the maintenance dispute concerns a child below the age of 18. Presumably, this means that Article 12, with its inherent protections (substantial connection with MS in question and best interests test) could apply instead? However, where the "child" is 18 or over but is in fulltime education or in an otherwise dependent state (where maintenance might be relevant) Article 4 would apply. This seems illogical and arbitrary.

LATVIA

See comments under Chapter II.

LITHUANIA

Article 4 of the proposal for a Regulation provides that the parties can, by common agreement, choose the court that will have jurisdiction save where the maintenance obligation is towards a minor, in order to ensure that the "weaker party" is protected. Lithuania is of the opinion that given this possibility of common agreement it would be appropriate to discuss when and at what stage agreement should be reached and how long this agreement is valid for. Consideration should also be given to whether the parties' choice should not be limited to specific jurisdictions in order to prevent the situation where a court is chosen in a State which is not in any way related to the parties in the dispute.

LUXEMBOURG

Although maintenance obligations are currently covered, without any qualification, by Article 23 of Brussels I (prorogation of jurisdiction), we feel that the ability to conclude agreements conferring jurisdiction should be adjusted in order to take account of the specific nature of maintenance obligations.

Article 4(1): it would be preferable to limit prorogation of jurisdiction to disputes which have already arisen and to rule it out for future disputes. Agreements conferring future jurisdiction prevent new factors from being taken into account which may change the situation of the parties so that an agreement is no longer justified.

In addition, as regards existing disputes, it should not be possible to conclude choice-of-forum clauses after proceedings have been instituted.

Article 4(2): the alternatives to written formalities set out in the Brussels I Regulation are not suited to the area of family law. The agreement should be concluded in writing in all cases.

Article 4(4): it is important not to apply this Article in a dispute relating to a maintenance obligation towards a child of under 18. This exemption should be extended to "vulnerable" persons.

MALTA

In principle, Malta supports this Article, however, with regard to sub-article 2, since a sensitive issue as maintenance is being discussed, Malta prefers that any agreement conferring jurisdiction has to be in writing so as to have more legal certainty.

Malta has no issues with regard to sub-article 3 to have it retained in Article 4, however, Malta proposed that in order of sequence it should be placed prior to sub-article 2.

With regard to sub-article 4, Malta is of the opinion that it should be extended to vulnerable adults.

THE NETHERLANDS

Like the Commission, the delegation of the Netherlands considers that the existing Brussels 1 regime for choice of court agreements should be adjusted. The following comments are made on article 4.

Para. 1 provides for the choice of any forum within the European Union. This delegation questions the need to have such a broad choice. The choices could be limited to the grounds already mentioned in article 3.

In view of the intended universal territorial scope of the provisions on jurisdiction, there is no need to restrict the choice of forum provided for in in para. 1 to cases where one party is habitually resident in the European Union. Para. 3, which is considered acceptable by the Dutch delegation, is based on the assumption that parties who are both habitually resident outside the EU can make a choice.

The Dutch delegation is of the opinion that an agreement conferring jurisdiction in a maintenance matter can only be properly made by the parties at the time the court is seized or shortly before, when maintenance proceedings are actually contemplated. Only at that stage can the parties properly assess their interests. Allowing the parties to make a choice of court many years before the proceeding or even before they get married, could give rise to serious issues: what law should apply to a party's contention that its consent was vitiated or that there are unforeseen circumstances? Therefore this delegation considers that it is not enough to provide that the choice can be made "for any disputes which have arisen or which may arise". The requirement in article 23, para. 1 of the "Brussels 1" Regulation, that there should be a "particular legal relationship", is not sufficient either. It is therefore suggested that article 4 should provide that a choice of court should be in writing and be signed by the two parties at the time the court is seized or no more than six months before the court is seized.

The issue of (non)-exclusivity has to be addressed in the Regulation. If the Regulation requires that the choice should be made with a view to imminent proceedings at the time the court is seized or shortly before, there is no reason why the choice should be non-exclusive.

The question was raised by several delegations whether a choice of forum should be excluded also for "adults who by reason of an impairment or insufficiency of his or her personal faculties, is not in a position to protect his or her interests". In essence this is regarded by this delegation as a matter of personal status. The issue of *ius standi* of such a person can be left to national law.

Provision would have to be made for the case that the court finds that a court in a third State has been chosen jointly by the parties and/or has been seized. Should the *lis pendens* rule in article 7 apply mutatis mutandis in the latter case? If so, it should be stated in the Regulation by making allowance for *lis pendens* situations in which a court in a non-Member State has been seized.

POLAND

Article 4(4)

Children under 18 should be able to conclude prorogation agreements. To deny them this right is to deny them equal treatment and thus discriminate against them, particularly bearing in mind that the Regulation is intended to protect minors, who make up approx. 99% of all maintenance creditors. Children under 18 do not act on their own, but through their statutory or legal representatives (person with parental responsibility or guardian). Moreover, Article 8(2) of the draft Regulation states that the court may decline jurisdiction on the application of one of the parties, i.e. even on the application of a child under 18, thereby creating an inconsistency in the treatment of children under 18 in two similar situations. Furthermore, Chapter III of the draft Regulation refers to adults who, by reason of an impairment or insufficiency of their faculties, are not in a position to protect their interests; there seems to be no reason why these persons should keep the right to conclude prorogation agreements, but not choice-of-law agreements.

PORTUGAL

We consider the importance assigned here to the parties' wishes to be appropriate. We add below some technical comments:

- since this rule refers only to private agreements conferring jurisdiction, we suggest changing the heading of the Article to "agreed jurisdiction";
- as regards paragraph 2 of the Article, we believe these agreements must be made in writing.

We suggest, with regard to the exceptions provided for in paragraph 4 concerning the possibility of choosing the court with jurisdiction, that "vulnerable adults" be excepted along with children below the age of 18.

ROMANIA

We are in favor of including reference to the *vulnerable adults* in article 4(4), together with the reference to children. We also take the view that the agreements conferring jurisdiction should be in writing.

SLOVENIA

In general, we support the proposal. However, we have a few remarks:

- the third paragraph of Article 4 is not necessary, because the first paragraph provides that the jurisdiction is exclusive;
- the proposal should provide to which period the agreement refers (before the dispute occurs or after lodging the claim before the court) and;
- in the fourth paragraph vulnerable adults should also be excluded.

SLOVAKIA

The Slovak Republic suggests adding that the parties may conclude an agreement on prorogation of jurisdiction at any time, but not later than at the institution of proceedings. This will ensure a higher degree of predictability and will avert speculation, and not least it fits in with the principle of efficiency and speed of action which we consider one of the key aspects of the proposal for a Regulation.

On the other hand, the Slovak Republic does not believe it is necessary to restrict the earliest time when the parties can choose which court has jurisdiction (e.g. a year before proceedings begin). Our view is that under the rules governing civil proceedings it is possible to cancel such an agreement at any time and thus prevent its leading to an unfair outcome. To remove uncertainties and harmonise application, the following sentence could be added to Article 4: "The parties may revoke the agreement conferring jurisdiction at any time before the beginning of the proceedings."

The Slovak Republic considers it important that this agreement should be made in writing and fully supports the measure contained in paragraph 2 of this Article.

The Slovak Republic also proposes that the order of paragraphs 2 and 3 be inverted to improve the logical sequence.

We propose also adding a reference in paragraph 4 to extend the non-applicability of Article 4 to so-called vulnerable adults.

SWEDEN

This article broadly matches Article 23 of the Brussels I Regulation. In Sweden's view, it should be possible for a jurisdiction agreement to be concluded with (or on behalf of) a child under 18 years of age for a specific dispute which has already arisen or to enable the child to take legal action in a particular place. That is the arrangement favouring the weaker party which was opted for in the Brussels I Regulation in the case of insurance policyholders, consumers and employees.

ARTICLE 5

BELGIUM

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).

CZECH REPUBLIC

We suggest removing the reference to exclusive jurisdiction by virtue of Article 4 in the second sentence. This might go some way towards resolving the issue of the duration of an agreement conferring jurisdiction.

GERMANY

Basing jurisdiction on appearance without contesting jurisdiction is consistent with Article 24 of the Brussels I Regulation and is also appropriate for maintenance matters. To protect those affected, the Regulation could provide for a duty to inform on the part of the court.

However, the German version of Article 5 should be formulated exactly like Article 24 of the Brussels I Regulation to read "*sich einlässt*" ("appearance was entered") instead of "*erscheint*". Otherwise, doubts could arise as to whether the defendant still has the right to contest in an oral hearing if the applicable national procedural law provides that the lack of jurisdiction must be asserted at an earlier stage, for example in the answer to the complaint.

The second exception at the end of Article 5 ("…or where another court has exclusive jurisdiction by virtue of Article 4" [i.e. by virtue of an agreement as to jurisdiction]) should be deleted as well. Pursuant to Article 11 of the proposal, the court is required to examine its jurisdiction of its own motion. If jurisdiction were dependent upon the existence, even in the case of appearance without contesting jurisdiction, of an agreement as to jurisdiction, the court seised would have to investigate of its own motion whether such an agreement existed. This would be contrary to the fundamental principle in civil proceedings that it is the task of the parties to present the facts favourable to them. Furthermore, there is no such exception in the Brussels I Regulation; it refers to Article 22 rather than Article 23.

GREECE

We support deletion of the last sentence of the provision proposed.

FRANCE

Drafting suggestions

Article 5

Jurisdiction based on the appearance of the defendant

Apart from jurisdiction derived from Articles 3 and 4, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction ~~or where another court has exclusive jurisdiction by virtue of Article 4~~.

Explanations: *in practice, the court seised will know of the existence of a choice-of-court clause only if it is invoked by the parties. Thus, there are two alternatives: either the clause is invoked and the court without jurisdiction will have to take note of its lack of jurisdiction; or the parties do not invoke the clause and it is not possible to impose on the court the obligation to take note of its lack of jurisdiction automatically.*

LATVIA

See comments under Chapter III.

LUXEMBOURG

Luxembourg is in favour of jurisdiction based on the voluntary appearance of the defendant, even where there is another court with exclusive jurisdiction under a previous agreement.

MALTA

In principle, Malta has no issues with regard to this Article except that Malta proposes the deletion of the second sentence since it is not necessary. The second sentence currently reads:

This rule shall not apply where appearance was entered to contest the jurisdiction or where another court has exclusive jurisdiction by virtue of Article 4.

THE NETHERLANDS

This delegation agrees with the inclusion of a provision on tacit acceptance of jurisdiction with respect to maintenance issues. It is difficult to see why tacit acceptance of jurisdiction is allowed in maintenance matters while the proposal on divorce jurisdiction requires an express acceptance at the latest at the time the court is seized. This delegation supports an identical approach to this topic in both instruments. The disparity between the two proposals would turn article 5 into a dead letter if a maintenance issue would come up in divorce proceedings before a court chosen by the spouses in conformity with the divorce proposal.

The words "or where another court has exclusive jurisdiction" should be deleted. They are of no help if neither party contests the court's jurisdiction. The judge will not be aware of the prior agreement.

Article 5 should specify that article 4, fourth paragraph, also applies with respect to tacit acceptance of jurisdiction..

PORTUGAL

We consider the principle set out here to be appropriate. Nevertheless, for reasons of legal certainty, the "appearance of the defendant" should be backed up by a statement to be made by the defendant in the case, with a simple standardised formula being used for the purpose, expressing acceptance of the jurisdiction of the court before which he was summoned.
As with Article 4, disputes concerning children under the age of 18 or concerning vulnerable adults should be excluded from this method of establishing jurisdiction, or at least in such cases confirmation of a significant connection with the child's or vulnerable adult's situation (e.g. place of habitual residence) should be required. The purpose of this is to avoid other interests being placed above those of the child or vulnerable adult.
We would not object to the deletion of the final sentence of this Article; if the parties do not mention the existence of an agreement, the judge should not have to pronounce on the possibility that one exists.

ROMANIA

We believe that the reference to exclusive jurisdiction in this Article could be removed, because it is provided in Article 4.

SLOVENIA

In general we support the proposal but we are of the opinion that the reference to Article 4 should be deleted, because it restrains the autonomy of parties.

FINLAND

The end of the last sentence starting with “or where another…” should be deleted as an error.

Limit on proceedings

Consideration should be given to the issue, whether a provision similar to Article 14 of the Hague Draft (work. doc. 98) is needed in the Regulation. If that article will not be included in the Regulation, the recognition and enforcement of European decisions made in violation of it would be refused in the third Convention States. That might cause difficulties for the operation of the Hague Convention.

SWEDEN

In Sweden's view, an agreement between the parties under Article 4 should not prevent the defendant from accepting the jurisdiction of another court in accordance with Article 5. The article could therefore be worded as follows:

"Apart from jurisdiction derived from Articles 3 and 4, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where an appearance was entered to contest jurisdiction ~~or where another court has exclusive jurisdiction by virtue of Article 4~~.".

ARTICLE 6

CZECH REPUBLIC

Along with the vast majority of our fellow Member States, we are not convinced of the need for this Article to appear in this Regulation. The aim is to harmonise the rules on jurisdiction in cases in which neither the creditor nor the debtor has his or her habitual residence in a Member State and jurisdiction has not been assigned under Article 4 or 5. On the one hand we understand the good intentions of the Commission in seeking to introduce uniform rules in the interests of legal certainty; however, on the other hand we must weigh up the impact that such harmonisation would have, above all for the potential recognition and enforcement of decisions in third countries. There is reason to believe that such situations might be better served by enforcing domestic law. The most pressing issue to be resolved will be that of the legal basis and compatibility with the subsidiarity principle.

Should this Article be retained, it is vital that specific provision be made for the relationship with international agreements with third countries, which ought to take precedence.

GERMANY

Germany advocates deleting this provision. The competence of the Community for such a provision is questionable here as well, as no, or merely a slight, connection to the internal market is likely to exist under the conditions listed in Article 6. The four alternatives in Article 3 in particular will cover nearly all possible situations. Therefore, the practical utility of a rule which is uniform throughout Europe would also be slight. Moreover, letter (a) is critical in any case, because reliance on the criterion of nationality is outdated and, in cases which Article 6 is to cover, is probably not appropriate either.

In order to create a greater degree of legal certainty, Article 6 could be formulated in a manner similar to that of Article 14 of the Brussels IIa Regulation.

FRANCE

Drafting suggestions

Article 6

Residual jurisdiction

Where no court of a Member State has jurisdiction pursuant to Articles 3 to 5, the following courts shall have jurisdiction:

(a) the courts of the Member State of the common nationality of the creditor and the debtor, or

~~(b) in the case of maintenance obligations between spouses or ex-spouses, the courts of the Member State of was the last common habitual residence of the spouses provided such habitual residence had still existed at least one year before the institution of the proceedings.~~

Explanations: Article 6 provides for "residual" jurisdiction, which actually consists in extensions of the jurisdiction of European Union courts. While the first of these poses no problems as regards the close link between the parties and one of the EU Member States, the second calls for particular scrutiny. It raises the question of the relevance of this criterion, which does not seem to have the characteristics of a close link between the dispute and the European Union, and at the same time it could lead to conflicts with the jurisdiction rules laid down in agreements, especially bilateral ones, between the Member States.

IRELAND

Drafting suggestion:

Where no court of a Member State has jurisdiction pursuant to Articles 3 to 5, the following courts shall have jurisdiction:

a) the courts of the Member State of the common nationality of the creditor and the debtor, or *in the case of Ireland, of the 'domicile' of the creditor and the debtor which term has the same meaning as it has under the legal system of Ireland.*

b) in the case of maintenance obligations between spouses or ex-spouses, the courts of the Member State of was the last common habitual residence of the spouses provided such habitual residence had still existed at least one year before the institution of the proceedings.

Comment: We question the competence of the Community in this area. However, if it is deemed appropriate to harmonise residual jurisdiction in the manner proposed, the connecting factor at (a) need to be amended as demonstrated to make reference to domicile as in A. 3 of Brussels IIa, as nationality is not a recognised connecting factor under Irish law.

LATVIA

See comments under Chapter II.

LUXEMBOURG

This provision contains an interesting innovation in that, in the interests of transparency and legal certainty, it harmonises the rules on residual jurisdiction.

This approach of replacing the traditional procedure of *renvoi* to the national law of each Member State by a Community rule is a judicious one. However, it will not be acceptable to us unless the criteria set out in points (a) and (b) are kept as the sole connecting criteria.

MALTA

Malta is not in favour of this Article. Since this Article is based on the principle that the parties are not based in the EU, Malta doubts as to whether there is legal basis for this Article to be part of this proposed Regulation. Moreover, Malta is of the opinion that there are enough adequate criteria under Articles 3, 4 and 5 of the Proposal.
Malta, therefore, proposes the deletion of this Article and prefers to have reference to National Law instead.

THE NETHERLANDS

As the Commission proposal is to establish rules on jurisdiction with a universal territorial scope, and as no room is to be left for national rules on jurisdiction, there is no good reason to have a distinct category of rules on "residual jurisdiction". See also the delegation's comments on article 3.

Moreover, this delegation questions the need to add any grounds of jurisdiction to those already offered in articles 3, 4 and 5. Such additional grounds are likely to increase the risk of non-recognition of maintenance orders in third states.

The following comments are made with respect to the actual grounds proposed.

- From the combination of provisions under a and b it is not clear whether a includes spouses and (ex)-spouses, which we believe it does. This might be remedied by replacing "or" at the end of the provision sub a. by "and".

- The "common nationality" is understood as referring to the "nominal" common nationality in the case of multiple nationality. In the case of Dutch binationals this means that the Dutch nationality should not necessarily be the "effective" nationality of the two spouses, i.e. the nationality of the State with which the persons concerned are most closely connected. If this assumption is correct, it should be laid down in the Regulation. The issue of multiple nationality cannot be left to national law.

- The English version of the provision under b should reworded so as to correspond to the French. Its last part should read: Member State of the last common habitual residence of the spouses provided such habitual residence still existed less than a year before the institution of the proceedings.

SWEDEN

If this article is to apply, none of the parties may be habitually resident in any Member State. The connection with the European Community is in that case so weak as to make it doubtful whether there is any legal basis for the article. In Sweden's view, the article should be reworded so as to allow national jurisdiction rules to apply, lest there be a denial of justice.

ARTICLE 7

BELGIUM

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)).

CZECH REPUBLIC

We have no substantive comments to make on this Article. Only the term "same maintenance obligation" appears inadequate to us in determining *lis pendens*. In our view, the wording of Article 27 of the Brussels I Regulation is more precise. For that reason it would be worth incorporating it and, if necessary, giving thought as to the need to draft new wording to reflect the peculiar nature of maintenance obligations (with account taken of the difference between determining the amount of maintenance and recognising a claim for payment of maintenance owed, as well as the possible transfer of entitlement from the creditor to a public body). This rule ought also to cover procedures in cases involving parental responsibility, where this is linked under domestic law to a decision on maintenance obligations towards children.

GERMANY

This rule appears sensible; however, its wording should be as consistent as possible with that of Article 27 of the Brussels I Regulation. In any event, it must be clear that it refers to claims between the same parties.

However, Germany requests that consideration also be given to whether an appropriate rule can be found for cases where a court is initially seised in a maintenance case alone and later the court of another Member State is called upon to deal comprehensively with connected family-law disputes (e.g. divorce with provision of rights of access for children and maintenance claims). Currently, the court first seised would retain jurisdiction, although this may no longer be sensible due to the later more comprehensive proceedings.

GREECE

We consider that the wording of the corresponding provision in the Brussels I Regulation (Article 27) is clearer.

FRANCE

Drafting suggestions

Article 7

Lis Pendens

1. Where proceedings involving the same maintenance obligation are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

3. By way of exception to paragraphs 1 and 2, the court first seised shall of its own motion stay its proceedings where its jurisdiction is based on points (a) or (b) of Article 3, while the jurisdiction of the court other than the court first seised is based on points (c) or (d) of Article 3.

   In this case, where the jurisdiction of the court other than the court first seised is established, the court first seised shall decline jurisdiction in favour of that court.

Explanations: in the case of "lis pendens", the draft Regulation places the different jurisdictions on the same footing and opts for the jurisdiction of the court first seised. From a practical as well as a legal point of view, however, a ranking should be established between the criteria for jurisdiction: where one of the courts seised has equal jurisdiction to entertain proceedings concerning the status of a person (Article 3(c)) or parental responsibility (Article 3(d)), it is a matter of sound administration of justice that the case should be heard by the court with the most extensive jurisdiction, thus avoiding the dispersal of jurisdiction and lengthening of proceedings.

IRELAND

Article 7 (Lis pendens) & Article 8 (Related actions)

The expression "same maintenance obligation" (Article 7) needs to be clarified – we suggest using the wording used in Article 27 of Brussels I "same cause of action and between the same parties". Use of this expression would also clarify the reference to "related actions" in Article 8. The link between Article 3 and Articles 7 and 8 needs to be demonstrated more clearly – there is potential for irreconcilable judgments if one spouse looks for maintenance in court A (creditor jurisdiction) while the other spouse looks for maintenance in court B (also creditor jurisdiction)

LUXEMBOURG

We believe that Article 7(1) should be worded in the same way as Article 27(1) of the Brussels I Regulation ("Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established").

MALTA

Malta is generally in favour of this Article, however, it prefers to have more legal certainty by saying that the proceedings are between the same parties. For this reason and in line with Article 27 of the Brussels I Regulation, Malta proposes the following amendment to Article 7(1):
Where proceedings involving the same maintenance obligation and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

THE NETHERLANDS

The reference to "the same maintenance obligation" is inadequate. The provision should be about a maintenance obligation between the same persons. The two proceedings may relate to different periods in time. Also, as time passes, the obligation may take a different form. Therefore the wording of article 27, para,1, of the Brussels 1 Regulation (involving the same cause of action and between the same parties) is preferred.

See the comment on article 4.

ROMANIA

We believe that Article 7 successfully harmonises the *lis pendes* provisions to avoid parallel proceedings. However, as far as drafting is concerned, we consider that Article 27 of the Brussels I Regulation is more clearly worded.

We would prefer if provision limiting the debtors' possibility to bring suit in any court be introduced, along the lines of Article 14 of the draft Hague Convention.

SLOVENIA

We support the Commission's proposal; however, for the sake of clarity the term "the same maintenance obligation" should be more clearly defined (similarly as in Article 27 of Brussels I Regulation – “the same cause of action and between the same parties”).

ARTICLE 8

GERMANY

Articles 8, 9 and 10 are consistent with Articles 28, 30 and 31 of the Brussels I Regulation and are appropriate. As such, the provisions should be as consistent as possible in wording. In the German version of Article 10, "*Justizbehörden*" should be changed to "*Gerichte*" – to correspond with Article 31 of the Brussels I Regulation.

IRELAND

See Article 7

MALTA

Malta agrees with this proposed Article.

ROMANIA

Romania agrees with the wording of articles 8 - 10, as they are identical to Articles 28, 30 and 31 of Regulation 44/2001.

ARTICLE 9

GERMANY

See Article 8

ITALY

We agree with the wording of this Article, in particular the reference to the time when the plaintiff lodges the document to be served with the authority responsible for service, in accordance with Article 30 of Regulation (EC) No 44/2001.

MALTA

Malta agrees with this proposed Article.

ROMANIA

See Article 8

SLOVAKIA

The Slovak Republic supports the position that maintenance proceedings should be considered as initiated under the law of the forum. In that connection we must point out that this Article does not cover cases in which proceedings are initiated *ex officio*. Initiating procedings *ex officio* expresses the special active interest of the state in the protection of minors in terms of material provision for their proper physical and mental development. We consider it very important that Article 9 also refer to such cases, since in the Slovak Republic proceedings concerning maintenance for minors are initiated *ex officio*, and with the current text of Article 9 it would not be possible to apply the provisions of a single paragraph of this Article.

ARTICLE 10

BELGIUM

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

GERMANY

See Article 8

MALTA

Malta understands the necessity of this Article in that it guarantees provisional measures to protect the rights of the creditor. Malta, therefore, fully supports this Article.

ROUMANIA

See Article 8.

SWEDEN

This article corresponds to Article 31 of the Brussels I Regulation and Article 20 of the Brussels II Regulation, but omits the latter provision's second paragraph, stipulating that provisional measures are to cease once the court hearing the main proceedings has taken appropriate measures. Sweden would suggest adding a second paragraph, as in Brussels II, to impose a further limit on the duration of provisional orders issued by a court lacking jurisdiction as to the substance of the case. The article would then read as follows:

"1. Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

2. The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.".

ARTICLE 11

BELGIUM

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

CZECH REPUBLIC

The wording of this Article is dependent on Article 6. We will keep an open mind until such time as the issue of harmonising residual jurisdiction has been resolved.

During first reading some delegations warned of the need to align the Regulation with Article 14 of the new Hague Convention (limited jurisdiction for modifying a decision). We back this approach and would favour inserting the corresponding rules into the body of the Regulation itself.

GERMANY

This rule is appropriate. Germany suggests that it would be better for this provision to be formulated as in Article 17 of the Brussels IIa Regulation; Article 11 would then be amended to include the following insertion: "and over which a court of another Member State has jurisdiction by virtue of this Regulation."

Germany also suggests that the relationship to Article 5 be clarified. Because, pursuant to the definition in Article 9, a court is deemed to be seised when the document instituting the proceedings is filed with the court, it may not declare at that stage that it does not have jurisdiction: it is possible that the defendant will not contest the jurisdiction and the court is therefore seised pursuant to Article 5.

Jurisdiction over actions for modification

Germany advocates amending the provisions on jurisdiction to include a rule covering actions for modification. Competing jurisdictions should be avoided at all costs. The approach selected for the most recent draft of Article 14 of the new Hague Convention on child support (Working Doc. 98) seems to be particularly appropriate. Pursuant thereto, the court that made the original decision also has jurisdiction for modification proceedings, as long as the creditor remains resident in that State or he/she does not agree to a change in the place of jurisdiction.

FRANCE

Drafting suggestions

Article 11

Examination as to jurisdiction

Subject to the application of Article 5, where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation, it shall declare of its own motion that it has no jurisdiction.

Explanations: see explanations given under Article 5.

IRELAND

We are not convinced as to the need for this provision.

LATVIA

See comments under Chapter II.

LUXEMBOURG

We believe that it is important to keep this provision: if there is no exequatur procedure in the Member State of enforcement, provision must be made for the court of origin to examine the question of jurisdiction. It should be under a duty to consider its jurisdiction of its own motion, except in the cases set out in Article 5: either the defendant appears to contest the jurisdiction or the defendant appears voluntarily to accept the jurisdiction. There is no need for the court to examine jurisdiction in either of these cases.

Limit on proceedings

The inclusion in the Regulation of a provision similar to Article 14 of the draft convention under negotiation at the Hague Conference (Article 14 – limit on proceedings) is welcome. However, the second paragraph of Article 14 of the draft convention should be adapted to the specific circumstances applicable between EU Member States, in particular point (d) of Article 14, which is no longer justified between EU Member States owing to the abolition of exequatur. Conversely, consideration should be given to including the situation where enforcement of a foreign decision is refused, as envisaged in Article 33 of the proposal for a Regulation.

MALTA

Malta has some difficulty in seeing the added value and utility of this Article. Its only utility would be if the defendant does not appear, since if he does, then Article 5 applies.
Malta is of the opinion that if the last sentence of Article 5 is deleted as proposed above, Article 11 would not be needed at all.

THE NETHERLANDS

There should be an ex officio examination of the jurisdiction of the court before which a maintenance claim is brought *in all cases*. If any room is left for jurisdiction grounds under bilateral conventions, the article enumerating these conventions should be referred to in article 11.

POLAND

Article 11 should be deleted. A court may declare that it has no jurisdiction (or that it has jurisdiction) on the basis of Articles 3 – 10, without the need for any further reference to the subject. The relationship between Article 3 and Article 49 has not been regulated. If a court declares of its own motion that it has no jurisdiction on the basis of the draft Regulation, will it still be able to consider whether it has jurisdiction on the basis of other multilateral or bilateral international agreements or on the basis of national rules?

ROMANIA

Article 11 is an important provision for safeguarding legal security in the context of the abolition of the exequatur. However, we take the view that its relationship with Article 5 should be clarified.

We also believe that special provision should be made on the modification or cessation of maintenance, as provided by Article 8 of the New York Convention on the recovery of maintenance abroad.

SLOVENIA

We would like Article 14 of the draft Hague Convention on the recovery of maintenance obligation to be included in the text (the proposal of a Chairman).

CHAPTER III

Applicable law

BELGIUM

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.

CZECH REPUBLIC

In our view, bringing conflicting laws into line is a logical and vital addition to the rules on jurisdiction (the idea being to prevent "forum shopping") and a precondition for abolishing the exequatur procedure. We are not averse to discussing this matter during the negotiations on the new Regulation, provided that the outcome is coordinated with the draft Hague Convention. Where possible we should avoid creating duplicate provisions. Member States ought to work to establish an international instrument that can meet their requirements and also be available to third countries.

GERMANY

In parallel with the work on the existing proposal, the Hague Conference on Private International Law is working on a reform of the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations. A working group has been established for that purpose, and it has already drawn up a proposal. This proposal is to be further developed in the working group. The most recent draft is dated June 2006 (hereinafter referred to as the Draft Convention).

It is of crucial importance that there be consistency between the rules on the applicable law in an EC Regulation on maintenance obligations on the one hand, and in the reform of the Hague Convention on the other, in order to avoid a split between the conflict-of-law rules of the EU Member States and those of the other contracting states to the Hague Convention. German conflict-of-law rules on connecting factors regarding maintenance claims are based upon the Hague Convention of 1973, which Germany has ratified and incorporated into its Introductory Act to the Civil Code (Article 18 EGBGB).

In Germany's view, it is crucial that conflict-of law rules regarding the law of maintenance be regulated comprehensively and definitively, and not, for example, be limited only to child maintenance. In that regard, we expressly welcome the Commission's approach of a comprehensive rule. Restricting the scope of application to maintenance for children or spouses would result in different choice-of-law rules being required in addition to a Regulation on maintenance obligations – either in national law or based on additional international provisions. This would lead to a considerable lack of clarity for those who apply the law.

ESTONIA

Articles 12 - 21

The Regulation should not create a situation in which there is one set of conflict-of-law rules in the new Hague Convention and another in the Regulation. For the sake of consistency, consideration could be given to leaving conflict-of-law rules out of the Regulation.

GREECE

As regards the issue of whether the Regulation should include rules on the law applicable, we take the view that this should be left to the Hague, i.e. the competent private international law forum, since the existence of several legislative instruments creates problems for those applying the law, making it more difficult for rights to be satisfied. If this view is rejected, we consider that the rules in the Regulation should be in harmony with those to be drawn up at The Hague.

FRANCE

The approaches adopted in this chapter ought to be aligned with those adopted in connection with the draft Hague Convention.

IRELAND

Articles 12 - 21 incl.

We have difficulties with the conflict of law proposals set out in Chapter III, for the reasons outlined underneath, and our preference would be for the deletion of this particular Chapter.

Background information

The **fundamental problem** is that under Irish law, divorce or judicial separation and the financial consequences thereof are inextricably linked. A court cannot deal with one without dealing with the other. Even if the spouses have entered into a pre-nuptial or post-nuptial agreement which deals with the financial consequences of divorce or judicial separation, the Irish Courts may not give full, or even any, effect to it on divorce or separation. The financial rights of the spouses on divorce or judicial separation are governed by statute.

A spouse's only right is to apply to the court to exercise its discretion to award periodical payments, a lump sum, transfer of property orders or any combination of these which may seem fair in the circumstances of the particular case for the maintenance of the spouse and any dependant children. The right to make such an application is ancillary to the divorce or judicial separation proceedings; for this reason the award of financial relief in whatever form is known as ancillary relief. It is clear therefore that while the financial consequences of the breakdown of the marriage are treated in Ireland entirely as part of the divorce or separation proceedings, this contrasts with the situation in some Member States where it seems that they are, to a large degree, dealt with as a separate process.

An issue which needs to be considered is **the manner in which foreign law is proved in Irish Courts**. Foreign law must, in general, be proved by evidence given on oath by an expert witness. We have concerns that in maintenance cases this could cause delay and inconvenience to the parties and could inhibit access to the courts. It would also give rise to substantial additional expense, either to the parties themselves, or to the State if either or both spouses were in receipt of legal aid.

If the **courts of other Member States have to apply Irish law**, there are also additional practical problems which may arise in situations involving third parties. An example of where this might arise is if one spouse claims that an asset ostensibly owned by a third party is in reality owned by the other spouse, and that the third party holds it as a trustee for that spouse. In such a case the third party is usually joined as an additional party to the proceedings, so as to enable the court to determine the true ownership of the asset in order to do justice between the spouses. Irish courts have very wide-ranging, procedural, powers to investigate the true financial position of the parties, but the courts of at least some other Member States seem to have much less sweeping powers to order disclosure. Apart from the inconvenience caused to the third party by the need to appear before the courts of another MS, if a party who had set up an offshore trust, for instance, and settled most of his or her assets into that trust was not required to give disclosure of this, substantive injustice could be done as between the parties.

In broad terms, we think that it is very difficult to predict how Irish ancillary relief law would, in practice, be applied elsewhere. This is entirely contrary to the proposal's objectives of simplifying the citizen's life and strengthening legal certainty. The problems referred to cannot be circumvented by re-drafting or minor changes of approach, as they derive from the underlying structural problem that the approach of Irish law to maintenance claims and obligations is fundamentally and conceptually different to that of most Member States.

ITALY

In general we support the Regulation's inclusion of this Chapter. It consolidates the objective of giving Member States' private international law Community-wide application and it strengthens the Union's joint position in the current negotiations on this subject in the Hague Conference.

For the same reasons we agree with the decision to apply the Regulation even when the designated law is that of a third country; this is in line with the consensus reached on the subject in the negotiations on the Regulations on the law applicable to contractual obligations and to non-contractual obligations (Rome I and Rome II).

LATVIA

Latvia supports the aim of Chapter III and recognises the need for Community-wide common provisions on the law applicable to maintenance obligations: common provisions on the law applicable, forming a single instrument/regulation common to all the Member States, would clearly determine the circumstances in which the law of this or that Member State is applicable to maintenance obligations.

As regards the special conflict of law rules in **Article 13,** it is important that provisions relating to the creditor's habitual residence and derogations from the habitual residence principle be laid down in a form sufficiently clear and comprehensible for both parties and practitioners. It is also important to strike a balance between the interests of the maintenance creditor and the maintenance debtor.

Latvia in principle agrees to the provision in **Article 14** stipulating that the parties may agree on the law applicable to the maintenance obligation and to the limitations placed on that possibility, particularly as regards designation of the law applicable where the creditor is a child (a child's legal representative) or a person of limited legal capacity.

As regards **point (b) of Article 14**, whereby the parties may at any time agree on the law applicable, Latvia concurs with those Member States which believe that the draft Regulation should specify exactly when it may be agreed to apply the law of a State other than the State of the court. At present the provision is not clear and the parties have too much freedom as regards the choice of law applicable.

Latvia in principle opposes **point (b)(iii) of Article 14**, whereby the parties may choose the law applicable to their property relations in the case of maintenance obligations between two persons who are or were married or in a relationship which has effects similar to marriage under the law applicable to it. Latvia's opposition stems from the fact that, as the provision currently stands, the courts, including Latvian courts, would be obliged to apply a foreign law without any possibility of restricting its application under Article 15. Latvian law provides for property relations solely between spouses, not between persons in relationships having effects similar to marriage. It is therefore unacceptable for the parties to be able to agree, for example, to apply the law applicable to property relations within a civil partnership and for the case to be heard before a Latvian court. Furthermore, under Latvian law, a maintenance obligation arising from a marital relationship is not associated with the spouses' property relations but with their personal relations.

Latvia basically agrees on the need for **Article 15** to provide for a unilateral right on the part of the debtor to oppose a maintenance claim if no such claim can be made under the law of the State of which both parties are nationals or with which they both have a connection. Latvia agrees that only in cases of maintenance claims on behalf of children or persons of limited legal capacity should the debtor not have the right to object to the designated law. The Regulation must of course facilitate child maintenance claims, for such obligations are provided for in the national law of every Member State.

With regard to **Article 19**, Latvia is not in favour of prohibiting *renvoi* between Member States but applying it where the law of a third State applies. Ascertaining the conflict of law rules of a third State and designating the law applicable on that basis considerably complicates application of the foreign law. If common conflict of law rules were laid down *renvoi* would be prohibited even where the law of a third State applied. Such rules are already laid down in the Rome Convention and the draft Rome II Regulation.

With regard to the **second sentence of Article 20,** Latvia is opposed to any restriction on the application of public policy provisions in the Member States. The Regulation's provisions on the law applicable may require Latvian courts, too, to hear, on the basis of a foreign law, cases involving maintenance obligations arising from civil partnerships. Latvia therefore considers it essential for the public policy exception to apply in full, irrespective of whether it is the law of a third State or of another Member State which applies. At present, Latvian law does not allow foreign law to be applied to maintenance obligations or for the parties to be able to agree on the law applicable. If provisions resulting in application of a foreign law are to appear in the Regulation, there must also be provision for restrictions on the application of that law.

LUXEMBOURG

The Luxembourg delegation supports the inclusion in the Community Regulation of a specific chapter on the applicable law. Discussions on this chapter will have to be coordinated with those at the Hague Conference.

THE NETHERLANDS

As stated in its preliminary remarks, the Dutch delegation questions the need to include a chapter on applicable law in the future Regulation. At the present stage efforts should be aimed at developing an international instrument on the subject which might become an additional protocol to the Hague Convention. Mutual recognition of maintenance orders within the EU has already been achieved. EU Member States apply the Brussels 1 regime which provides for recognition and enforcement of maintenance orders irrespective of the law applied to the maintenance obligation.

The Netherlands is a party to the 1973 Hague Convention on the Law applicable to Maintenance Obligations. On the whole this Convention functions well. With regard to one of its elements in particular– the law applicable to (ex)-spousal maintenance - this delegation considers that the Convention needs a revision. The preparation of a worldwide Hague convention offers a welcome opportunity to prepare such a revision.

In spite of its disagreement with the chapter as a whole, the delegation of the Netherlands would make the following comments on the substance.

AUSTRIA

Chapter III on applicable law was the most disputed in the oral discussions as well. It concerns not only the "how" but also the "whether" of the matter. In particular the reaction of the United Kingdom showed how difficult the rules of private international law may be perceived to be in the context of the European Union. In addition, a further consideration strongly argues against the inclusion of a Chapter on applicable law. The Hague Convention which is supposed to be signed next year is of course also concerned with applicable law and accordingly creates Hague Convention uniform conflict-of-law rules. A harmonisation of law is urgently needed precisely in the field of private international law and should not be blocked by two different instruments. Only a single set of uniform conflict-of-law rules can allow international maintenance relations to function. Unquestionably, the universal instrument is to be preferred in this context to the European one. It is difficult to see why in addition to this there should be any need for condensed Community rules in the area of private international law.

Conflict-of-law is in fact a complex group of rules of a highly technical character and should not be subtle and "sophisticated", but as clear and simple as possible, if it is desired to provide for even a modicum of predictability in the applicable legislation. The problem, which lies in the necessary additional costs for the ascertainment of foreign law and in the uncertainties which invariably arise wherever magistrates are unable to apply legislation with which they are familiar, should in any case tend to lead to an **emphasis on *lex fori***. The chapter on applicable law is however by its nature also dependent on the jurisdictions which are available. It would be desirable to have a link primarily with the law of the country of residence of the creditor, but this is the law of the forum state only where provision is made in principle for an active jurisdiction in maintenance matters. Both are, in the case of "inter-generational maintenance" (i.e. the child-parent relationship in the broadest sense) and in that of maintenance within the family bond (siblings) more easily enforceable than in divorce maintenance (maintenance of a spouse living separately can almost be ignored here). Since, however, the state of residence of the creditor may, in the nature of things, change, and since a restriction is difficult to imagine if only because of the free movement of persons, even an active jurisdiction can also at times result in surprises. Admittedly it will hardly ever be likely that a child entitled to maintenance will change its place of residence in order to assert a maintenance claim, but certainly in the case of divorced spouses in particular, things may be quite different.

The chapter starts with a somewhat unnecessary Article limiting scope (Article 12) which is also particularly infelicitously expressed in the German version.

The **cascade-type link** primarily to the legislation of the habitual place of residence of the creditor and secondarily to the *lex fori* is a conceivable link – on the one hand, preferable to the present Hague statutes on maintenance, but on the other, more a desirable result of the next Hague Conference than serious competition to it in the text of the regulation.

It would not be quite true, at least in theory, to say that most obligations are thereby dealt with in accordance with the *lex fori*: on the one hand the creditor can also invoke the default jurisdiction (which it would be difficult to refuse), on the other, the use of the *lex fori* according to the text of the regulation depends on the creditor being unable to obtain maintenance under the law of his habitual country of residence or on the creditor asking for application of the law of the forum state. If the latter condition is one which arbitrarily favours one party, the former appears even less appropriate.

In the first place, it adds **substantive judgments** to conflict-of-law rules, because it is result-oriented; secondly it means that the applicability of one jurisdiction depends on the content of the (ultimately inapplicable) second jurisdiction, with the result that when processed by the forum state the ascertainment of two jurisdictions is required.

Moreover, the criterion seems to be insufficiently refined. If the country of residence accords only a very small maintenance amount which is barely sufficient for needs, it would seem hard to accept the provision of such a pittance as an obstacle to the application of a more generous jurisdiction.

Finally, in addition to the reasons hitherto, further practical considerations militate against Article 13(3). If the application of a particular jurisdiction depends on whether it has a sufficiently close connection to the case **in view of the overall circumstances**, this means that nothing less than the **entire life story of both parties** in the maintenance obligation is germane to the question of which law is applicable. An expenditure of time and trouble which would be better avoided in ascertaining the jurisdiction to be applied.

The Article on **choice of law** (Article 14) is not completely wide of the mark from the Austrian point of view. In particular the subjection clause meets a practical need, principally because it prevents the citing at a later stage of proceedings – like a rabbit pulled out of a hat – of a jurisdiction the advantages of which one party has only discovered relatively late, and the consequent hampering of considerable parts of the procedure with this "emergency brake".

Restricting the choice of law, ostensibly as a protection but in reality to the disadvantage of minor children and "vulnerable adults", is highly problematic. It has already become apparent in oral discussions that the concept of vulnerable adults is not entirely felicitous; several delegations took "vulnerable" to mean "incapable of looking after themselves". One cannot seriously believe that the rule of the choice of law is only intended to apply to implementing the maintenance claims of persons who are not vulnerable; however aside from this the whole could obviously be expressed more clearly.

As already with regard to prorogation jurisdiction there is nothing in Austria's view that argues for a restriction on the choice of law. If the minor – or person who for whatever reason is not fully competent – is represented by a legal practitioner who can issue legally binding statements on his behalf, the (over-)protective exclusion from choice of laws becomes not protection, but **discrimination against handicapped persons**. The restriction should therefore be dropped.

Article 15 is extremely ingenious and interesting, but only at first glance a satisfactory substitute for a public policy clause. There will of course be cases in which it may be left to the debtor to decide whether or not he is prepared to accept the application of a jurisdiction. If however the cases meant are really those in which the application of that jurisdiction "contravenes the fundamental bases of the national legal system", this **cannot** seriously be left to a **request by one of the parties**. In particular, if it is found that from the point of view of one national legal system excessive outcomes from another Member State may not be upheld, this cannot be made to depend on an act by one of the parties (declaration of the debtor that the obligation is not acceptable) but only on an official finding. It would thus appear more honest to **forego public policy completely**.

Article 16 concerning public institutions is more irritating than enlightening, because they are otherwise hardly the target group of the Regulation.

Article 17(2) imposes the obligation "whatever the contents of the applicable law" to take into account the needs of the creditor and the resources of the debtor. As indicated above (paragraph 4 ff.), Austrian law complies with this requirement, which in its substance is to be welcomed. Within this however, despite the fairly slick packaging, is a provision which cannot exist side by side with "the contents of the applicable law", but instead replaces it and consequently is only interpretable as substantive family law. However, the enactment of **uniform substantive family law** is a legislative area where there is not the slightest **basis for Community competence**!

There are many problems with Articles 18, 19 and 20 in that they concern the **application of the law of a non-Member State**. Here the institutional boundary of EU legislation may have been overstepped. Comments in an EU Regulation on the law of non-member States should be avoided at all costs. A discriminatory treatment of the question of renvoi in Article 19, depending on whether referral is to the law of a Member State or to that of a non-Member State, is at the very least unattractive. In the case of Article 20, a more elegant wording might be possible. It is perfectly acceptable for Member States to forego the application of public policy between themselves. However, wording it in such a way that public policy may only be invoked vis-à-vis non-Member States would appear to be an institutionally problematic and – towards non-Member States at least – discourteous legislative technique.

Article 21 on States with more than one legal system is also worded as if it were desired to impose Community law on a Member State for the application of its internal conflict-of-laws legislation vis-à-vis Member States. It is not for the Austrian delegation to pursue the question of how far this was responsible for the United Kingdom's failure to opt in – but whatever the case may be, the Article was not well worded!

PORTUGAL

On the chapter concerning applicable law, the Portuguese position is to question the inclusion of this Chapter in the Regulation, given that a set of equivalent rules is being negotiated in the context of the Hague Conference. Parallel rules should be avoided in these areas: the aim must be to achieve the greatest possible uniformity of rules in the greatest number of countries, so we recommend restraint in adopting any new texts. If this Regulation does include rules on applicable law, we should be striving towards harmony and consistency between the two future instruments.

FINLAND

Decisions with regard to this chapter should be left until the content of the coming Hague instrument on applicable law is clear.

By and large we support the general ideas behind the provisions of this chapter. However, some more thought should be devoted to formulation of those ideas. In many cases the formulations in the Hague Draft (Prel. Doc. No 22, Jube 2006) are preferable to those in the proposed Regulation.

E.g. Article 17.1. (e) seems to be in contradiction with Article 16. The contradiction disappears, if (e) is written as Article H f) in the Hague Draft.

The proposed Regulation has no applicable law rule with regard to the period for which arrears may be enforced (cf. Article 27.3 in the Tentative Draft for the Hague Convention; work. doc. 98). Such rule may be needed.

UNITED KINGDOM

We suggest that the Chapter on applicable law needs to be amended to apply only the lex fori principle. We recognise, however, that this might not find universal acceptance. In the event that lex fori is not agreed by everyone, the applicable law rules should be taken out of the Regulation and contained in the optional protocol to the new Hague Convention. Developing applicable law rules ahead of conclusions in the Hague on the same issue seems premature and we suggest the proposal at least defers decisions on these rules until completion of the Hague. On substance, we do not see a need for rules to introduce foreign laws on maintenance cases. Lex fori works well, is quick, cheap and provides legal certainty. The UK has no experience of using foreign laws in such cases and our common law system means such rules would place a heavier burden on our system than it would for others. A consequence of this approach could be greater delay, expense and uncertainty which would be particularly unwelcome for the vulnerable clients involved in such cases.

ARTICLE 12

BELGIUM

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".

CZECH REPUBLIC

We suggest replacing the words " the law applicable to any of the relationships" with the words "the existence of relationships".

GERMANY

Article 12 provides that the rules regarding the law applicable to maintenance obligations as contained in Chapter III do not affect the question of which law determines the family relationship that gives rise to the maintenance obligations (cf. definition of the scope of application in Article 1(1)). Thus, the primary focus here is on clarifying the scope of application. This formulation is not consistent either with the language of Article 2 of the Hague Convention or with that of Article A paragraph 2 of the draft Convention. Germany suggests that the wording be adapted to conform to that of Article A paragraph 2 of the draft Convention.

ITALY

We particularly commend the clear statement that the provisions of the Chapter determine only the law applicable to maintenance obligations and not to the relationships referred to in Article 1.

LUXEMBOURG

We support the wording proposed by the French delegation at the meeting on 16 March 2006, viz., that "The provisions of this Chapter shall determine only the law applicable to maintenance obligations and shall not prejudice the law applicable to the determination of the existence of one of the relationships referred to in Article 1".

THE NETHERLANDS

The delegation of the Netherlands agrees with this provision which was taken from article 2 of the 1973 Hague Convention. See also the comments on article 2 of the Draft Regulation.

ROMANIA

Romania supports the aim of Chapter II, acknowledging the need of having common provisions on applicable law to maintenance obligations. Also, Romania welcomes the fact that the scope of this Chapter refers only to maintenance obligations and its provisions shall not prejudice the law applicable to any of the relationships referred to in Article 1.

ARTICLE 13

BELGIUM

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."*

CZECH REPUBLIC

Overall we support a cascade of connecting factors, in line with the *favor creditoris* principle. In view of the restrictions laid down for maintenance obligations between spouses or ex-spouses and in respect of adults (Article 15), as well as current developments in the draft Hague Convention, we ought to give thought to a modification whereby paragraph 1 (law of the place in which the creditor is habitually resident) would be the general rule for all types of maintenance obligation, with the other aspects of the cascade (law of the forum and common nationality) applicable only to cases involving maintenance obligations towards children.

Paragraph 1 ought to deal with situations involving a change in the place in which the creditor is habitually resident. The law of the new country of habitual residence ought to apply to decisions from the moment at which the place of habitual residence changes (see draft Hague Convention and its predecessor from 1973).

We are somewhat reluctant to allow the creditor unilaterally to choose the law applicable under paragraph 2(b), since this does not honour the principle of equality between the parties. If our aim is to give precedence to the application of the law of the forum in cases in which the creditor opts to sue for maintenance in the country in which the debtor is habitually resident, we should take explicit action accordingly rather than leaving the decision to the creditor. That said, at the same time it should be laid down that where the law of the forum does not provide maintenance to the creditor, the law of the country in which the creditor is habitually resident applies. In principle, then, this would merely involve switching the first two connecting factors around. Were this rule to cover only maintenance obligations towards children, it is likely that applying the law of the forum would suffice in a number of cases.

GERMANY

Article 13 is the fundamental rule regarding connecting factors for maintenance obligations. Paragraph 1 states that such matters shall be governed by the law of the country in whose territory the creditor is habitually resident. This provision is sensible. It is consistent with the rule laid down in Article C paragraph 1, first sentence, of the draft Convention.

Paragraph 2 regulates the application of the *lex fori* (law of the forum) for cases where the creditor is unable to obtain maintenance from the debtor pursuant to the law of his/her place of residence (a), or where the creditor elects the law of the forum and this is the law which applies at the place of habitual residence of the debtor (b).

We have no reservations on the rule in (a). It is consistent with the rule in Article C paragraph 2 of the draft Convention.

However, we do have reservations on the rule in (b), because it unduly favours the creditor with respect to the debtor. It may be assumed that the creditor will choose the law of the forum only if this leads to a more beneficial result for him/her. No objection may be made to this to the effect that, pursuant to (b), the law of the forum may be "selected" only if this is the law of the habitual residence of the debtor. This restriction is not convincing because the most important aspect for the creditor should be that he/she is placed in a position at his/her habitual residence where he/she can receive appropriate maintenance, so that the assertion of his/her maintenance claim should be primarily based on the legal situation at his/her habitual residence. But the "possibility of selection" – which is limited to the law of the forum – could lead to the proceedings becoming more expensive specifically for the creditor, who – if the case is handled conscientiously – must seek legal advice regarding the state in which he/she may expect the most beneficial conditions for his/her maintenance claim.
These reservations apply equally to the rule in Article C paragraph 2a of the draft Convention – upon which, however, no consensus has yet been reached.

Article 13(3) is a catch-all provision for those cases in which the creditor is unable to assert a claim for maintenance either under paragraph 1 or paragraph 2. In those cases, the law of the country to which there is a close connection pursuant to the overall circumstances, in particular that of the country of common nationality of the creditor and the debtor, is to apply. This approach is sensible, but the formulation is difficult to understand. The formulation of Article C paragraph 3 of the draft Convention seems preferable.

At present – and in contrast to Article C of the draft Convention – Article 13 does not provide for any rule to cover the creditor changing his/her habitual residence. Germany suggests that a corresponding change be made to conform to Article C paragraph 1, second sentence, of the draft Convention.

GREECE

In principle we believe that there should be a balance between the creditor and the debtor, but without ignoring the interests of a creditor who needs special protection. We agree with paragraphs 1 and 2, but we have reservations on paragraph 3 on the grounds that the rules in it tip the balance in favour of the creditor. Likewise, the meaning of a close connection with a country, as referred to in paragraph 3, is in our view unclear.

ITALY

Since the maintenance creditor may ask for the law of the debtor's country of residence to apply (paragraph 2(b)), if that law is more favourable, rather than that of the creditor's own country of residence (paragraph 1), it could be explicitly provided that the law of the forum or that of the country with which the maintenance obligation has a close connection may be applied if the maintenance creditor so requests. This would ensure that the weaker party was afforded equal protection and would avoid potential problems of interpretation when verifying whether the necessary condition for applying the two laws mentioned in this Article was met, i.e. that the creditor is unable to obtain maintenance under the other designated applicable laws.

LUXEMBOURG

Ideally, the general rule should operate as follows:

– application of the law of the country of habitual residence of the maintenance creditor;
– failing that, if the creditor is unable to obtain maintenance from the debtor by virtue of this law, application of the law of the forum;
– failing that, if the creditor is unable to obtain maintenance from the debtor by virtue of the law of the forum, application of the law of the country of common nationality of the creditor and the debtor, provided that it appears from the circumstances as a whole that there is a close connection between the maintenance obligation and that country.

It would also be useful to lay down a rule to cover the eventuality that the creditor may change his habitual residence, along the lines of Article 4(2) of the Hague Convention of 2 October 1973 on the law applicable to maintenance obligations.

Luxembourg has reservations on the idea that the maintenance creditor might unilaterally choose the law applicable, subject to certain conditions.

MALTA

Malta agrees with sub-article 1.
With regard to sub-article 2, provided that the scope of application of the Regulation is narrow as indicated by Malta in its comments regarding Article 1, Malta is prepared to accept that the law of the forum should be the law applicable in the event that the creditor is unable to obtain maintenance by virtue of the law of habitual residence, or when the creditor so requests that the applicable law is to be the law of the territory of the debtor's habitual residence. Malta, however, raises the point that this sub-article does not specify when such request can be made and under which specific conditions. So this should be clarified in the second draft of the Proposal.

Malta is not particularly in favour of the wording used with regard to sub-article 3. Firstly, Malta is of the opinion that the concept of 'common nationality' does not automatically mean 'close connection'. Secondly, the notion of 'close connection' itself is not too clear and can lead to various interpretations. Re-drafting to this effect is, therefore, being proposed.

THE NETHERLANDS

General remark: the proposed article was inspired by the cascade contained in articles 4 to 6 of the 1973 Hague Convention.While such a system, with a strong *favor creditoris*, is fine for child maintenance, including maintenance for "older" children, it is not suitable for other types of maintenance obligations. It is therefore proposed to limit the last two steps of the cascade proposed in article 13 to child maintenance.

Paragraph 1: The basic rule contained in article 13, first paragraph, is acceptable als a general rule for *all types of maintenance obligations*. It should, however, be completed with a rule which addresses the issue of "conflit mobile". Cf. article C, .paragraph 2, of the Hague working draft on Applicable law dated 18 November, 2006.

Paragraphs 2 and 3:
See the general remark under a. It would be better to make a separate article containing special rules with respect to children. See article D of the Hague Working Draft dated 18 November, 2006. The reversal of the second and third steps of the cascade of the 1973 Convention is welcomed. Most probably, the application of the *lex fori* will yield a positive result in nearly all cases of child maintenance. Only in exceptional cases it might be necessary, in the last resort, to apply the law of the common nationality. This connecting factor will be useful in particular in the case of maintenance obligations of parents to their children older than 18. It is therefore recommended to keep this third step.

The proposal to allow a unilateral choice by the creditor of the *lex fori* of the debtor's habitual residence raises concerns. It would overemphasize the *favor creditoris*. The *favor* element can be reduced by providing that if a court in the State of the debtor's habitual residence is seized by the creditor, the *lex fori* applies automatically (cf. the reserve provided for in article 15 of the 1973 Hague Convention, which reserve was made by the Netherlands and a large number of other States parties). This solution, apart from allowing courts to apply their own law, has further advantages. It is in line with the creditor's option, under Brussels 1, between seizing the courts of his habitual residence or the courts of the debtor's habitual residence. It takes into account the development of administrative systems for the recovery of child maintenance in several areas of the world (Norway, Australia, certain states of the US; in the Netherlands the introduction of such a system is being considered). Administrative systems apply the *lex fori* by definition. The solution also takes into account the prevailing regime of applicable law in common law jurisdictions.

If a unilateral choice were accepted nevertheless, the formal requirements for making such a choice would have to be laid down in the Regulation.

Paragraph 3 : The delegation of the Netherlands is not in favour of the use of the "close connection" criterion in this paragraph. It prefers the application of the law of the common nationality, irrespective whether it is the "effective" nationality.

(Article 13a -) Special rule for maintenance obligations between spouses and ex-spouses?

In the discussions held so far it has become clear that the *favor creditoris* element in the cascade of article 13 does not yield acceptable results in cases of spousal maintenance. However, the creditor does deserve a certain protection. Therefore, this delegation is of the opinion that the main rule as contained in article 13 provides the most appropriate connecting factor for this type of maintenance, it being understood that a rule regulating the "*conflit mobile"* should be included. The spouses' former habitual residence should not be the principal connecting factor because it does not take into account a possible change of habitual residence of the creditor or of the debtor. The *perpetuatio juris* is seen as one serious drawback of article 8 of the 1973 Convention, which should be avoided in a future instrument.

Basically this delegation considers it unnecessary to provide for an escape clause for spousal maintenance. In particular, this delegation shares other delegations' objections against the proposed article 15, second paragraph, which should be deleted. If an escape clause is to be introduced, this delegation can accept article E of the Hague Working Draft of 18 November, 2006, which reads as follows:

Notwithstanding article C, maintenance obligations between spouses or ex-spouses are governed by the law of the State of their last common habitual residence if it appears from the circumstances as a whole that these maintenance obligations are manifestly more connected with this State and provided that one of the spouses or ex-spouses still resides there.

The rule thus defined would be appropriate for both spouses and ex-spouses. The Regulation should allow a for a broad interpretation of the term "spouses".

POLAND

Article 13

This Article should also deal with the eventuality that the creditor may change his habitual residence in the course of proceedings which have already commenced.

Article 13(3)

The meaning of the phrase "the law of the country with which the maintenance obligation has a close connection shall apply" is not clear to us. There is no way of knowing what close connections are concerned, what they might consist of or what the criteria for establishing the existence of such close connections might be.

PORTUGAL

Overall we agree with the mechanism this Article proposes. On paragraph 3, we consider the introduction of the *common nationality* connection appropriate. However, we must add that the criterion for applying *the law of the country with which the maintenance obligation has a close connection* does not contribute to legal certainty and security, which are especially important here as the procedures concerned are supposed to be simpler and quicker. In fact, since the *closer connection* criterion is an undefined concept which is devoid of substance for the person who has to interpret the rule, it would be more sensible to opt to make the criterion specific by express identification of the objective and subjective factors that can embody that close connection. The legislator can thus specify, as with common nationality, the factors it deems important in considering the close connections of the maintenance obligation with another country.

ROMANIA

We also agree with the rules set out in the proposal for Article 13. However, we note that Article 13 does not provide a rule for determining the applicable law in case of changing the residence, as contained in the Hague Convention of 1973.

SLOVENIA

In general we agree with the proposal. We have some doubts about point 2b, because one-sided request from the claimant is not proportionate towards the debtor.

SLOVAKIA

The Slovak Republic supports the cascading approach of this Article.

Slovakia considers as fundamental the criterion for determining the applicable law in paragraph 1 of this Article. We think it is necessary to resolve the question of whether, if the creditor's habitual residence changes, the applicable law changes by the same token and if so, from what point in time.

We wonder whether paragraph 2(a) is not designed too much for the benefit of the creditor and whether it secures to an equal degree the position of the creditor and the presumed debtor in the case.

Slovakia recommends that paragraph 2(b) specify a time limit until which the creditor may request that the applicable law be designated pursuant to this Article. We believe such designation should take place not later than the time of institution of proceedings (or at the first hearing in the case, if proceedings are instituted *ex officio*).

We also recommend adding to this paragraph that the creditor should request application of the law of the forum in writing or orally for entry in the register.

SWEDEN

As with the provisions of the 1973 Hague Convention, this article takes the form of a succession of alternatives, i.e. it specifies a number of different laws which may in turn be applicable. That arrangement gives the creditor considerable scope to opt for the most favourable law. In Sweden's view, the provision should replaced by a more qualified general rule, not affording the same favourable basis for all types of maintenance.

ARTICLE 14

BELGIUM

(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.

CZECH REPUBLIC

All in all we support choice of law. We propose simplifying point b)(ii), to read as follows: "the law of the country on whose territory at least one of the parties is habitually resident". Under point b)(iii) we suggest removing the reference to a relation which has similar effects to marriage under the law applicable to it. It will be for each Member State to decide whether maintenance arrangements between same-sex couples or registered partners should be subject to the same rules as those applicable to spouses. Such a solution could avoid reservations being raised by Member States for which this is a sensitive issue.

We would also like to add a new paragraph containing an escape clause for cases in which the choice of law would patently result in an unfair outcome. This would solve the problem of a potential change in circumstances arising between the conclusion of a choice-of-law agreement and the emergence of the dispute.

GERMANY

Article 14 allows a – restricted – choice of law in maintenance cases. Pursuant to Article 14(a), the creditor and the debtor may, at the time the court is seised, designate the law of the forum as the applicable law. It is unclear what is meant by this formulation, e.g. whether an agreement must exist between the creditor and the debtor regarding the application of the law of the forum. In this regard, the wording of Article E of the draft Convention seems to be clearer and thus preferable. However, an assessment would still be necessary as to whether maintenance obligations in respect of children below the age of 18 or vulnerable adults should be excluded from that rule as is proposed for the choice-of-law possibility pursuant to (b).

Article 14(b) extends the choice-of-law possibility of creditors and debtors by including the law of their common nationality (subparagraph (i)) and the law of the country of their common habitual residence or the country on whose territory the creditor or the debtor is habitually resident at the time of designation (subparagraph (ii)). Subparagraph (iii) provides that it is also permissible to choose the law applicable to their property relations at the time of designation. This agreement as to choice of law must be made in writing. Maintenance obligations in respect of children below the age of 18 and vulnerable adults are expressly excepted from the rule.

We have no reservations on limiting the choice of law, particularly as the restriction on the category of persons concerned is appropriate. The essential point is that the formal requirements are complied with when a choice of law is made.

GREECE

We agree with subparagraph (a). As regards subparagraph (b) we think that it should be made clear that the phrase "at any time" means agreement in advance, as the wording is unclear and misleading. We disagree with the exception in subparagraph (b) since minors and vulnerable adults are always represented by guardians and given that the latter take decisions on much more significant matters in relation to those persons, it makes no sense for them not to be able to agree on the law applicable in the case of maintenance.

ITALY

We would suggest that the law of the forum be chosen "expressly" and that the words "or otherwise in an unequivocal manner", whose interpretation is potentially uncertain, should be deleted.

We agree with the distinction made between the choice of the law of the forum for the purpose of the proceedings and the choice of law applicable to the maintenance obligations. However, we would suggest placing a time limit on the choice of law agreed by the parties so as to avoid uncertainty. The ultimate deadline could be the lodging of the claim.

The definition of "vulnerable adult" (according to the text a person "who, by reason of an impairment or insufficiency of his or her personal faculties, is not in a position to protect his or her interests") needs to be clarified. The task of defining a "vulnerable adult" could be referred to national legal systems and the rule applied once Member States had provided the definition.

LATVIA

See comments under Chapter IV.

LUXEMBOURG

The idea of opening up choice of law to the parties in the field of maintenance obligations should be approached with the utmost caution.

Article 14(a): we understand the parties would only be able to choose the law to a limited extent, since the choice would be made at the time the court was seised, its effects would be limited to the specific proceedings involved, and it would cover the law of the authority seised. Nevertheless, these factors are not in themselves a guarantee that the legal representatives of minors or vulnerable adults will choose the law entirely in their superior interests. We do not believe that this option should be made available to these weak parties. As for other situations, the court to which the dispute is referred must make sure, in the presence of the parties, that their choice was made with a proper awareness of all the factors concerned in order to avert the potential risk of pressure being brought to bear on the weak party at the very time the proceedings are being instituted, hence at a sensitive point in the proceedings.

Article 14(b): here, the choice can be made at any time and is not restricted to "the purpose of these proceedings". This may have advantages in terms of legal certainty. However, it may carry a risk for a maintenance creditor who is easily influenced or ill informed. If the law chosen is very restrictive on the subject of maintenance, the creditor could be deprived of his/her claim, or find it much reduced. The Luxembourg delegation is therefore reluctant to accept choice of law under (b). However, if a large majority of our 26 partners wish this point to be included in the proposal for a Regulation, we should like to see the following restrictions:

– minors and vulnerable adults should be excluded;
– the subject of the choice should be kept to the absolute minimum;
– introduction of an escape clause such as envisaged in the report by the Working Group on Applicable Law of the Hague Conference (preliminary document No 22), whereby *the law chosen shall not apply where the application of that law would lead to manifestly unfair or unreasonable consequences.*

MALTA

In principle, Malta agrees with having this Article since it gives to the parties the option of choosing the applicable law themselves.

Malta has no issues with regard to paragraph (a), except for a remark about a grammatical error in the English text: the word 'for' after the word 'forum' in the second line should be deleted.

With regard to paragraph (b), Malta is not convinced that children below the age of 18 and vulnerable adults should be excluded from the application of this paragraph. The reason is that in any case they would be represented by curators who are appointed to act in their best interests. Malta, therefore, proposes an amendment in this paragraph to this effect.

Moreover, the wording 'at any time agree' at the beginning of the paragraph is not ideal. Does this means that at any stage of the proceedings the parties may change the applicable law? What if proceedings have reached a very advanced stage? Malta, therefore, proposes that specific parameters and time frames are designated up till when the parties may reach such an agreement.

In so far as paragraph (b) (ii) and (iii) are concerned, Malta prefers marriage relationships to property relationships. Therefore, it prefers having sub-paragraph (ii) rather than (iii). Moreover and without prejudice to what has been said, if sub-paragraph (iii) is to be retained in the text, Malta objects to the words "in a relation which has similar effects under the law applicable to it" for the reasons indicated in our comments to Article 1.

THE NETHERLANDS

This delegation favours the introduction of a joint designation by the parties, with a view to imminent proceedings, of the *lex fori* as the law applicable to their maintenance obligations. Case law of the Dutch Supreme Court has already established such a practice under the 1973 Hague Convention in the case of maintenance obligations between ex-spouses.

However, as the parties cannot contract out of child maintenance under substantive law, a choice of applicable law should not be permitted in respect of child maintenance. The same applies to vulnerable adults as defined in the 2000 Hague Convention on the Protection of Adults. This delegation is not convinced by the argument that children and vulnerable adults usually have a legal representative and that the issue is one of capacity. The restriction provided for in paragraph b should also apply to the choice provided for in paragraph a.

Paragraph a.

- This delegation agrees with the possibility of a joint designation of the *lex fori* for the purposes of a maintenance proceeding. It considers it appropriate that such designation can be made also pending the proceeding. This is common practice in the Netherlands. Often it is only at that stage that the parties realize that it is preferable for them to make such a choice.

- The Regulation should specify that if the choice is made before the court is seized, the agreement should be in writing and should state that the choice is made with a view to imminent proceedings. It should therefore be made shortly before the court is seized. It would be appropriate to provide that it shall not be made earlier than six months before the court is seized. Cf. the comments by this delegation on the choice of court, under article 4, c.

Paragraph b:

This paragraph provides for a joint choice of applicable law which can be made at any time. The principle of such a choice is supported by the delegation of the Netherlands, as it favours out-of-court arrangements between the parties. However, having regard to case law in many Member States with respect to maintenance agreements, including Dutch case law, this delegation considers that the parties cannot under all circumstances be bound by a choice which they may have made many years before, for example in a marriage contract. The concerns are the same as those put forward with respect to the choice of forum. One solution might be to add an escape clause. Reference is made to the proposal in the Hague Working Draft dated 18 November, 2006, article H2.

The article should specify that a joint choice of the applicable law should be in writing and signed by both parties. Cf. the Commission proposal on the law applicable to divorce.

As far as the choices offered in paragraph b are concerned, the following comments are made:

- the choice of the law of either party's nationality is acceptable;
- the words "of their common habitual residence" in the proposal sub ii are superfluous and should be deleted;
- this delegation can agree with the possible choice of the law applicable to the property regime provided that this law has been designated by the parties. If it has not been designated, it may be too difficult to determine. The words "under the law applicable to it" should be deleted. Cf. the comments on articles 1 and 12.
- this delegation can accept the addition of the choice of the law applicable to the divorce, as suggested at The Hague, if this law has been designated by the parties.

POLAND

Article 14(a)

The term "in an unequivocal manner" is vague and carries a risk of arbitrary interpretation. The reference to "the time the court is seised" is also unclear.

Article 14(b)

Written agreement is required only in point (b); a contrario, it must be concluded that in other situations the creditor and the debtor may choose the law orally, although this runs counter to the requirement that the law should be designated expressly or otherwise in an unequivocal manner.

Poland is opposed to the provision whereby children under 18 or adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests, may not choose the law applicable. Neither children under 18 nor vulnerable adults act on their own, but through their statutory or legal representatives (person with parental responsibility or guardian), so there seems no reason to exclude them from the group of persons with the rights laid down in Article 14(b).

Article 14(b)(ii)

If the creditor and the debtor choose the law of the country of their common habitual residence, does the case still retain its cross-border character and, therefore, can they still avail themselves of the provisions of the Regulation?

Article 14(b)(iii)

The chosen formulation "the law applicable to their property relations at the time of designation" is lacking in precision and does not unequivocally indicate the law applicable.

PORTUGAL

Portugal agrees that it is necessary to treat the autonomy of the parties' choice as important, provided that certain conditions are met; in particular, that the choice of the parties falls within the framework of legal systems with a significant connection, that real equality between those involved is maintained, with the weaker party being protected, and in particular that the higher interest of minors is safeguarded. We have the following comments to make in this context:

- On point (a), it would be preferable to make an exception for the choice of law where creditors who are minors or vulnerable adults are concerned, as in indent (b);
- On point (b), where it says that the parties may agree on applicable law "at any time", this allows the parties to choose in a prenuptial agreement a law to govern maintenance obligations that would not allow the spouses to obtain maintenance. In Portuguese law, the right to maintenance is unwaivable and inalienable, and this indent raises the possibility of waiving maintenance through choice of law (fraudulent evasion of the law), for which reason it will not be possible to accept agreements incorporating a waiver of maintenance;
- Finally, point (b) (iii) raises the following problem: the law applicable to property relations "at the time of designation" cannot be chosen at any time because it would not then even be possible to know what law would be applicable to property relations between the spouses. For instance, how can two spouses choose at any time, to govern maintenance obligations, the law applicable to their property relations when they do not know what law that will be? The rules on conflict of laws for matrimonial arrangements are not yet harmonised, so it is inconceivable that it could be known at the outset what law will be applicable to a given case.

ROMANIA

As far as Article 14 is concerned, we take the view that its scope should not include maintenance due to children or vulnerable adults.

SLOVENIA

Regarding point a we would propose the exclusion of its applicability to children and vulnerable adults. The interests of a child can be even more harmed if the chosen law (the law of the forum) provides for less rights or for a less optimal maintenance calculation than the law that should be applied according to general rules of Article 13. Furthermore we propose to substitute the wording "for the purpose of these proceedings" with "for the purpose of this procedure". The present wording namely implies that the agreement is valid also for all future procedures.

We support point b, but we would like the term vulnerable adults to be further clarified (a possible solution would be the inclusion of the term among the definitions in Article 2 or at least a further clarification in the recitals). The word personal faculty is namely not very clear.

SLOVAKIA

The Slovak Republic agrees in principle with and supports the text of Article 14.

We support the position in paragraph (a) of this Article that the parties should agree expressly on the applicable law. The expression "or otherwise in an unequivocal manner" seems to us overly equivocal and could lead to the conclusion that even an implied form of agreement is admissible. The designation of applicable law on the basis of an implied statement of preference could, however, be problematic, or could lead to further delays to proceedings and even further questioning of the legal basis for decision (e.g. of the part that has already been executed).

However, we think that paragraph (b) of this Article gives too much leeway in allowing agreement on the applicable law at any time, as in the proposed text of the Regulation. In family relationships, for reasons of efficiency and speed of proceedings in particular, the parties should agree on the applicable law either no later than at the point when proceedings are instituted or immediately after proceedings are instituted at the competent court (at the latest at the first hearing in the case, if proceedings are instituted *ex officio*).

ARTICLE 15

BELGIUM

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.

CZECH REPUBLIC

Applying this provision would prove simpler if maintenance obligations stemming from the relationships referred to therein was governed solely by the law of the country in which the creditor is habitually resident, rather than by the cascade set out in Article 13 as a general rule. The exception allowed for under paragraph 2 is too broad, and its extent might usefully be restricted, for instance, to the law of the country of the spouses' last common habitual residence.

The Working Party ought to give further consideration as to whether or not we wish to rule out the possibility of invoking the exception in cases of maintenance obligations stemming from relationships between persons related collaterally or by affinity where the creditor is a child. As we see it, the current wording of the proposal does not allow for an exception to be made in such cases.

It would also be worthwhile dealing with the connection with choice-of-law agreements under Article 14. In our view, adoption of the aforementioned escape clause in Article 14 would necessitate ruling out application of Article 15 in respect of choice-of-law agreements.

DENMARK

See Article 1

GERMANY

Article 15(1) deals with the question of the law pursuant to which the debtor may oppose maintenance claims. Maintenance obligations in respect of children, spouses and ex-spouses and vulnerable adults are excluded from this rule. Pursuant to paragraph 1, the relevant law is that of their common nationality or that of the country in which the debtor is habitually resident.

We have reservations on including the law of the common nationality as, pursuant to the draft Convention, maintenance claims are in principle connected to the law of the country of habitual residence of the creditor, so that the reference to the law of common nationality in paragraph 1 could lead to conflicting assessments.

Pursuant to Article 15(2), in the case of maintenance obligations between spouses or ex-spouses, the debtor may also oppose a maintenance claim under the law of the country with which the marriage has the closest connection. This provision is a special rule with regard to spousal maintenance which is not appropriate. There are two main reasons that militate against this rule:

Firstly, it is legally problematic because it leads to considerable legal uncertainty, since it is often questionable which legal system is designated as applicable under this formulation. Secondly, maintenance obligations between spouses and ex-spouses should in principle be connected to the habitual residence of the creditor, as there is no recognisable need for special treatment of maintenance between spouses and ex-spouses as compared with other maintenance obligations. Furthermore, particularly in the case of divorce after many years of marriage, it is doubtful whether a connection to the law applicable at the time of the marriage would still lead to appropriate results.

Therefore, the rule on maintenance for spouses and ex-spouses in Article 15(2) should be dispensed with. Protection of debtors could also be secured in Article 13. For example, Article 13(3) could be expanded to include a second sentence relating specifically to maintenance for spouses and ex-spouses which dispenses with the connection to the law of common nationality and to the law of the country with the closest connection, in order thereby to enhance the foreseeability and predictability of potential maintenance obligations for the debtor by reducing the number of connecting factors.

GREECE

We agree with the basic idea as it will reverse the injustices which may be created by the basic rules in Article 13. We consider that maintenance obligations towards ascendants should also be excluded from the rules in this Article. We consider that the definition of vulnerable adult in Article 14 is clear and we agree that vulnerable adults should be excluded from Article 15. In paragraph 2, the term "closest connection" needs to be clarified as otherwise problems of interpretation will be created.

LATVIA

See comments under Chapter IV.

LUXEMBOURG

Article 15(1): this paragraph forms an essential counterbalance to the broad scope of the future instrument and to the general rule (Article 13), which favours the maintenance creditor. We support the wording of the initial Commission proposal.

Article 15(2): this provision should be deleted. The specific case of maintenance obligations between spouses and ex-spouses should be governed by the general rule in Article 13 together with a provision on change of residence (in this connection, see our comments on Article 13). We do not believe that an escape clause is essential.

MALTA

In principle, Malta does not object that this Article allows the debtor to oppose to the claims of the creditor with certain exceptions and only on specific grounds. Malta agrees that children, vulnerable adults, spouses and ex-spouses are excluded from the application of Article 15 (1). In this way there is a reasonable balance between the rights granted to the debtor and the protection of the rights of the most vulnerable categories to whom maintenance is owed.

In this context, however, Malta prefers to have a clearer definition of 'vulnerable adults'. Malta is also of the opinion that there should be an indication as to whether the term 'children' covers only minor children. Malta is also hesitant about focusing on the law of common nationality as a basis for opposition of a maintenance claim. Malta prefers to have stronger links based on habitual residence.

Malta has some difficulty with Article 15(2); it is of the opinion that since this sub-article is referring to one of the commonest forms of maintenance obligations, that is, between spouses and ex-spouses, there should be better safeguards especially for the creditor. The concept of 'closest connection' is too vague and may give rise to legal uncertainty. Malta, therefore, needs a clear definition of this concept.

One problem Malta envisages with regard to this Article is to what extent can this Article be applied if example in the case of spouses, they would already have agreed on the applicable law.

THE NETHERLANDS

The provisions in article 15 should be moved so as to come after the special rule for spouses and ex-spouses and before article 14.

Paragraph 1.

In the view of the delegation of the Netherlands there is no place for an exception like the one proposed in article 15, paragraph 1, where it concerns maintenance obligations of parents towards children or vulnerable adults or spousal maintenance.

There would be scope for such an exception where it concerns maintenance obligations towards children arising from relationships other than parent-child relationships and maintenance obligations between adult persons related collaterally or by affinity (cf. article 7 of the 1973 Hague Convention). For these categories this delegation could go along with the proposal in article F of the Hague Working Draft of 18 November, 2006, which reads:

In the case of maintenance obligations other than those arising from a parent-child relationship towards a child and those referred to in article E, the debtor may contest a claim from the creditor on the ground that there is no such obligation under the law of the habitual residence of the debtor nor under the law of the common nationality of the parties, if there is one.

The delegation of the Netherlands questions the need to provide for an exception to the main rule where maintenance obligations of children towards relatives in the ascending line are concerned. If such an exception is needed, this delegation would accept that the exception in article E in the Hague Working Draft of 18 November, 2006, also applies to this category.

Paragraph 2: For the reasons set out above, under article 13a, it is suggested to delete article 15, second paragraph.

POLAND

The exclusion of

- children
- vulnerable adults
- spouses and ex-spouses

is not logical in relation to Article 14.

Article 14(a) refers to children under the age of 18, while Article 15 does not set any age limit – thus obviously giving rise to a risk of interpretation. Article 14(b)(iii) refers both to marriage and to a relation which has similar effects under the law applicable to it. Article 15 does not draw this distinction.

It is still unclear what would happen if the parties availed themselves of their right to choose a law under Article 14 - could the debtor then argue that there was no maintenance obligation, under Article 15?

Article 15(2)

Poland would like to point out that this provision is not consistent with Article 14 and that the reference to "the law of the country with which the marriage has the closest connection" is not clear.

PORTUGAL

Portugal agrees with the basic idea of this Article and with the connecting element "common nationality." However, it would argue that the term "vulnerable adults" needs defining, and it also considers the criterion of "the law of the country with the closest connection" too vague here. We suggest that this criterion be clarified with examples (for instance, most recent habitual common residence).

ROMANIA

With regard to this provision, we take the view that:

- Article 15(1) should include the “cascade” rules in the following order: 1) the habitual residence and 2) the common nationality.
- Article 15(2) should include the “cascade” rules in the following order: 1) the last common residence, 2) the common nationality and 3) the law of the closest connection.

See also Article 1

SLOVENIA

In general we support the proposal; however, we have two comments:

- the scope of the provision should be more clearly defined and
- the term the closest connection in the second paragraph is too broad.

SLOVAKIA

Slovakia see this as an extremely useful Article, which introduces a balance between the positions of the debtor and of the creditor.

Slovakia would consider it advisable, to clarify this provision and make its application more intelligible, to add to the text of both paragraphs (or as a new paragraph 3), that if the debtor raises a reasonable objection under this Article (with the competent court deciding that it is reasonable) the court will close the proceedings.

SWEDEN

This provision does not apply to child maintenance, which is all very well in the case of maintenance due from parents. As worded, however, the exception also excludes maintenance obligations for more distant relatives of a child. In such cases, too, the debtor should be able to object that there is no such obligation under the law of the country of which both parties are nationals or, failing that, in which the debtor is habitually resident.

Sweden also has its doubts about the exception in the case of vulnerable adults. If two distant relatives claim maintenance and one of them is vulnerable, e.g. suffering from dementia, the proposal would give that one special treatment. Being vulnerable, however, does not necessarily mean that a person is in greater need.

It is also open to question what is meant by the phrase"... there is no such obligation under the law of ...". Does non-application obtain only where there is no entitlement at all to maintenance in a similar situation under the debtor's law, or where maintenance is not payable in a particular case. Under Swedish law, for instance, maintenance is not normally payable to a spouse. As there is some provision for such maintenance, however, a Swedish debtor might not be able to plead non-application under Article 15 in such a case.

ARTICLE 16

GERMANY

Article 16 provides that the right of a public body to seek reimbursement of benefits from the debtor shall be governed by the law to which that body is subject. We support this provision, which is consistent with Article G of the draft Convention.

GREECE

Re Articles 16, 17 and 18: We agree with the rules proposed.

MALTA

Malta fully agrees with this provision since on a national level its Department of Social Security often provides social assistance to persons who are not given maintenance payments due to them according to law. Maltese law grants the right to the department to recoup the sums paid from the debtor who by law or by a Court Order was the one who should have paid maintenance. Therefore, the provision in this Regulation is protecting the right of such public body to recoup the sums paid even at EU level so Malta would like to support it.

ROMANIA

We support the provision that a public body has the right to seek reimbursement from the debtor and that the law applicable be the law to which that public body is subject.

We also take the view that a limitation on the period for which arrears may be enforced should be included in this Article, along the lines of Articole 27(3) from the draft Hague Convention.

SLOVENIA

We are of the opinion that Articles G in H(f) of the draft of the Hague Convention are better, therefore they should substitute the current wording of Article 16.

SWEDEN

Sweden is in favour of this article. It should nevertheless be pointed out that the proposal deals with public bodies' entitlement to reimbursement only as regards choice of applicable law. Insofar as this comes within the legal basis in Article 65 of the EC Treaty, the Regulation should also cover recognition and enforcement of public claims for reimbursement.

ARTICLE 17

BELGIUM

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.

CZECH REPUBLIC

The wording of paragraph 1(e) should be modified to clarify the connection with Article 16. We suggest the following formulation: "the extent of the debtor's maintenance obligation where a public body has invoked a retroactive claim for benefits paid to the creditor instead of maintenance".

Although we generally support the rule contained in paragraph 2, we would prefer to see it moved to Article 20 (Public policy).

DENMARK

Paragraph 2

It is not necessarily to achieve the purposes of the regulation to state in article 17 (2), that the needs of the creditor and the resources of the debtor shall always be taken into account in determining the amount of maintenance.

National law may in certain situations - and for good reasons - disregard the needs of the creditor or the resources of the debtor in determining the amount of maintenance.

Example: According to Danish law a spouse is not entitled to maintenance after having remarried, but according to article 17 (2) such a rule must be disregarded.

GERMANY

Article 17 specifies the issues which are determined by the law deemed to be applicable. Paragraph 1 of Article 17 is substantially consistent with the rule in Article H of the draft Convention. This rule is appropriate. However, the question of whether it might be expedient to supplement Article 17(1) in line with Article H(d) of the draft Convention should be considered. Article H(d) relates to the question of who is entitled to institute maintenance proceedings. The question of whether third parties, e.g. public welfare offices, legal guardians, etc. are entitled to institute proceedings for maintenance should thus be covered. Purely procedural questions, such as the right of audience, are excepted in this respect.

Article 17(2) states that independently of the applicable law, the needs of the creditor and the resources of the debtor must be taken into account. This is, at its core, a rule of substantive law for which the competence of the EU is questionable. This rule should therefore be dispensed with, especially as the idea behind the rule – which is actually a sensible one – could be included within the public policy clause.

GREECE

See Article 16.

ITALY

We suggest clarifying the relationship between this Article and Article 12. This could be done as follows:

"establishment of the relationship required in order to give rise to the creditor's right shall not produce any effect beyond the proceedings relating to the maintenance obligation".

The Italian delegation objects to paragraph 2, whereby "whatever the contents of the applicable law, the needs of the creditor and the resources of the debtor shall be taken into account in determining the amount of maintenance". This is a substantive provision, unconnected with the identification of the applicable law and is a matter for that law to determine.

MALTA

In principle, Malta does not object to this Article, however, in the second draft of the Regulation Malta would appreciate a clarification of the 'indexation' process. Also, although Malta has no objection to paragraph (d) as such, Malta would like to point out that the proposed Regulation does not regulate time limits and limitation periods.

Malta also agrees with paragraph (2), it is of the opinion that this is a valid clause since there should be a balance between the needs of the creditor and the resources of the debtor.

THE NETHERLANDS

Paragraph 1, sub c: the issue of indexation deserves further consideration. The Supreme Court in the Netherlands has held that the Dutch rules on indexation apply if Dutch law governs the maintenance obligation. As indexation depends on the standard of living in the country where the creditor lives, the question arises whether it is preferable that the issue of indexation should always be governed by the law of the creditor's habitual residence, irrespective of the law which applies otherwise.

POLAND

Article 17(1)

Poland is in favour of possibly deleting points (b) and (d). It is not clear how point (e) fits in with Article 16. Poland also suggests deleting point (e).

Article 17(2)

The needs of the creditor have to be taken into account in determining the amount of maintenance, but these must be **justified** subsistence needs. As regards the resources of the debtor, we need to ask whether these are resources actually available to the debtor or perhaps resources which could be available to him if he exercised due care, i.e. his realistic earnings potential. The earnings potential of a debtor required to pay maintenance cannot be equated with his actual earnings; it also includes earnings which he is in a position to achieve, but fails to achieve for no good reason.

ROMANIA

We note that Article 17 complies with the provisions of Article 10 of the 1973 Hague Convention, as well as with those of Article G of the draft Protocol to the draft Hague Convention.

We also agree to the provision of article 17(2) and we take the view that this kind of information should also be subject to the request of information mentioned in the article 44(1).

SLOVAKIA

In Slovakia's view the criteria for determining the amount of maintenance should be made more precise. We therefore propose, in paragraph 2, adding the word "legitimate" before the words "needs of the creditor", and replacing the words "resources of the debtor" with the words "capacities, means and assets of the debtor". This narrowing is necessary inasmuch as we consider this criterion fundamental for the provision of maintenance. In practice, a situation may occur in which, for instance, the debtor has no assets but owns property, from which, however, he receives no income. He can, however, sell it and pay maintenance out of the amount received from the sale.

The court will take account of these circumstances in the proceedings. The court should take account of the capacities, means and assets of the debtor even if the latter gives up gainful employment or financial benefit (such as an inheritance) for no significant reason; similarly in the case of unreasonable financial risks for which he is responsible (for instance, bank debts).

The Cases most frequently encountered in the courts in practice involve determining maintenance obligations for parents in respect of their minor children. Legitimate needs may vary according to the circumstances of each individual case. They depend principally on the age and health of the child and on his physical and mental maturity. Also on his preparation for future employment and overall fitness for social life. Maintenance for the child thus serves not only to fulfil all his material needs (food, clothing etc.), but also other legitimate needs important for the child's upbringing and development (education and cultural, sporting and recreational needs). However, in order to prevent abuse and applications for unreasonable amounts of maintenance, those needs must be demonstrated to the court, which will assess their legitimacy. We therefore consider it important that this criterion be added to Article 17.

SWEDEN

Subparagraph (e) refers to "the right of a public body which has provided benefits for a creditor to obtain reimbursement of those benefits". This point is in fact covered by a special choice-of-law clause in Article 16; it is therefore confusing for it to come under the general provision on the scope of the applicable law in Article 17. In the corresponding Article 10(3) of the 1973 Hague Convention, the law applicable to maintenance covers only "the extent of the obligation of a maintenance debtor, where a public body seeks reimbursement of benefits provided for a creditor". Such a wording would make it clearer that *whether* a public body may actually seek reimbursement is to be determined under the law governing that public body, whereas *the amount* of any reimbursement is to be determined under the law applicable to maintenance.

ARTICLE 18

GERMANY

Article 18 provides that, pursuant to this Regulation, the law of a non-Member State may also be applied if it is designated under the provisions of the Regulation. We support this sensible rule. The decisive factor in determining the applicable law is that the legal system which is best suited to deciding the case should be applied. Depending on the factual circumstances, this might be the legal system of a state that is not an EU Member, for instance when the creditor is habitually resident in a third state but the debtor lives in an EU Member State.

GREECE

See Article 16.

ITALY

We support the rule of universal application, already incorporated into the proposals for Regulations on the law applicable to contractual obligations and to non-contractual obligations (Rome I and Rome II). Member States' private international law is thus made common, which is more consistent with the aim of civil judicial cooperation to enable the unimpeded circulation of judicial decisions.

MALTA

Malta calls for a reconsideration of whether we should have this Article in the proposed Regulation since Malta is of the opinion that it goes beyond the scope of Article 65 of the EC Treaty.

THE NETHERLANDS

The Dutch delegation would stress the need to establish one set of rules on applicable law with a universal scope of application. It already expressed its strong preference for the establishment of such rules at a global level rather than at a regional level.

ROMANIA

Romania is in favor of this provision.

ARTICLE 19

BELGIUM

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

CZECH REPUBLIC

We oppose differentiating between the laws of Member States and those of third countries in cases of renvoi. There ought to be a single approach to this issue, with renvoi routinely excluded.

GERMANY

For reasons of simplification, the complicated "phase rule" in Article 19 should be dispensed with; instead, the wording of Article K of the draft Convention should be taken over, which provides that references are generally to be understood as substantive-law references.

GREECE

We disagree with paragraph 2 as it will create problems for those applying the law. In particular, the judge hearing the case should not have the pressure of *renvoi*.

LATVIA

See comments under Chapter III.

MALTA

Malta can accept to have paragraph (1) in the text, however, it has difficulties with paragraph (2). With regard to the latter, Malta does not believe that a judge should be burdened with a situation where he has to investigate if the Private International Law of another State excludes *renvoi*. Malta, therefore, proposes that paragraph (2) is deleted.

THE NETHERLANDS

The Dutch delegation objects against the proposed exception in paragraph 2. This rule is inconsistent with the total exclusion of *renvoi* which is enshrined in most modern international instruments, including the existing Hague Convention. It could lead to paradoxical results. Moreover, it would complicate judicial practice, as it would compel parties, their lawyers and the courts to make investigations into foreign systems of private international law, including non-codified systems.

PORTUGAL

We disagree with paragraph 2 of this Article; our view is that renvoi should simply be ruled out. The system proposed simply means an increased workload for the magistrate responsible for the case, without any associated benefits.

ROMANIA

We consider that Article 19(2) be deleted.

SWEDEN

In Sweden's view, the *renvoi* clause in paragraph 2 should be deleted.

Let us imagine that a grandchild under 18 years of age, habitually resident in a non-member country, brings proceedings in a Member State whose domestic law does not impose any maintenance obligation for grandchildren and, under the general rule in Article 13(1), bases those proceedings on the law of the country in which he is habitually resident. If that non-member country's private international law stipulates the application of the law of the country of which both parties are nationals and this results in the application of the law of any country other than that in which the grandchild is habitually resident, the law of the forum will apply and the child in question will not receive any maintenance. That outcome is hard to justify.

The situation is further complicated in the case of countries party to the 1956 and 1973 Hague Conventions, which lay down a succession of alternatives. The 1973 Convention refers the creditor in turn to the law of the country of: (a) his habitual residence, (b) his common nationality with the debtor, or (c) the forum. It could be said here that "the private international law rules of that State designate the law of another country", albeit as a second alternative.

Should the creditor, under Article 13(3) of the Regulation, claim maintenance under the law of the country of which both parties are nationals and that country be party to the 1973 Hague Convention, which gives the creditor's habitual residence as the first alternative, it is open to question whether or not that country's private international law rules designate the law of another country.

ARTICLE 20

CZECH REPUBLIC

We have not yet adopted a definitive stance on refusing public policy in respect of the law of a Member State. This is a political issue and the response thereto will depend on the final scope of the Regulation. In general terms, however, we approve of the trend towards restricting the use of public policy in Member States' legislation on grounds of mutual trust.

GERMANY

Article 20 deals with public policy. Such a clause makes sense, especially since considerable differences in assessment exist even within Europe, particularly in the area of family law. For this reason, the public policy clause should not be limited by the second sentence to the law of non-Member States. Germany thus suggests that the second sentence of Article 20 be deleted without replacement.

GREECE

We consider that there should be the possibility of asserting reasons of public policy because of the differences there are between the laws of the Member States. Certainly the mechanisms in Article 15 provide a considerable degree of protection for debtors as regards claims by certain creditors, but we believe that it does not cover all cases. The abolition of the possibility of asserting reasons of public policy between Member States is an attractive idea, but it should not happen before their laws have been harmonised.

ITALY

We have an open mind on removing the exception of incompatibility with the public policy of the forum in the Community context (i.e. when the designated law is that of a Member State). However, we think that this issue should be dealt with later in the context of an examination of the situation regarding the harmonisation of laws, an examination in greater depth than the outcome of the consultation in the Presidency questionnaire. The rule could be kept if the Regulation's scope were narrower, e.g. confined to maintenance obligations to minors.

LATVIA

See comments under Chapter III.

LITHUANIA

Lithuania considers that the public policy provision should also be applicable in cases where the law of a Member State applies.

LUXEMBOURG

The public policy clause should be retained both in relation to the laws of third countries and between EU Member States.

MALTA

Malta only agrees with the first sentence of this provision. Malta is of the opinion that it is highly important for Malta that it may be able to refuse the application of a provision of the law if such application is manifestly incompatible with its public policy.

However, Malta strongly disagrees with the Commission's proposal to eliminate the public policy barrier between the Member States themselves. Malta is aware of the need to have trust between Member States as suggested by the Commission, however, it Malta believes that the field of maintenance obligations is a very sensitive one whereby there are some fundamental variations in the legal systems even of Member States which may not be acceptable for Malta on a public policy level. Malta, therefore, insists on retaining the right to invoke the public policy issue, if necessary even between Member States. For this reason Malta proposes the deletion of the second sentence of this Article.

THE NETHERLANDS

The Dutch delegation is of the opinion that the Regulation should contain a public policy clause allowing the court, in exceptional circumstances, to discard the application of the law designated, even if this is the law of a Member State, if such application were to lead to results which are manifestly incompatible with fundamental principles of its own legal order.

PORTUGAL

There is no competence in the EU for harmonising substantive law, so it must remain legitimate to apply the public policy exception. Since it is very difficult to give an exhaustive definition of maintenance obligations and bearing in mind that Article 1 of this proposal lays down that the Regulation shall apply to all family relations and similar relations, it is advisable to keep this exception. The existence of this exception does not mean a lack of recognition and mutual trust between Member States; however, and as a consequence of the abolition of the *exequatur* procedure, we would simply want to ensure that a mechanism exists which makes it possible to respect the diversity of legal systems within the various Member States. The existence of this provision does not imply that Member States would cease to use public policy as the extreme exception which it is.

ROMANIA

We fully agree with the first sentence of Article 20.

As far as the second sentence is concerned, we take the view that this would be acceptable only insofar as it refers to the maintenance due for children under 18.

SLOVENIA

We agree with the Belgian delegation, that the second sentence of the Article 20 is limited to children. We believe that such a provision would ease the recovery of a maintenance obligation and simplify the creditor's life.

SLOVAKIA

The Slovak Republic proposes deleting the second sentence of Article 20, because it is not appropriate, given the nature of the legal relations which the Regulation concerns, to restrict the application of public policy provisions.

Slovakia also proposes including this provision in the proposal for a Regulation systematically, so that it also applies to jurisdiction and to the enforcement of the decision, and thus not only to the application of the law.

SWEDEN

Sweden is opposed to the elimination of the possibility of invoking public policy as between Member States.

It is by no means clear that there is greater legal similarity between EU Member States than in comparison with many other countries in the world. For Sweden, the very broad, extensive maintenance obligation towards an ex-spouse which applies in some Member States might conflict with public policy. In some cases, too, a Member State's law may still distinguish between legitimate and illegitimate children. It would also probably conflict with Swedish public policy for the level of maintenance to be affected by any infidelity by one party.

It may lastly be appropriate to invoke public policy where there is no objection to the substance of a foreign law, only to the result of applying it in a particular case.

ARTICLE 21

GERMANY

Article 21 is a special provision for states that do not have a uniform legal system in their territory. It states that the law applicable in the respective territorial unit is to be applied. We support this sensible rule.

MALTA

Malta agrees with this proposed Article.

ROMANIA

We agree with the wording of this Article.

SWEDEN

It is open to question whether there is any legal basis for this article, since it deals with purely domestic situations (a similar clause is to be found in the Commission proposal for the Rome I Regulation). The provision can be contrasted with, for instance, Article 17 of the 1973 Hague Convention on the Law Applicable to Maintenance Obligations and Article 19 of the Rome Convention, which exclude domestic situations concerned solely with choosing the law of one particular territorial unit.

CHAPTER IV
COMMON PROCEDURAL RULES

DENMARK

The delegation doubts that the proposed common procedual rules will be very effective, especially when an application for review by the defendant means authomatically suspendsion of all measures of enforcement - and such authomatically suspendsion is needed in the proposed system.

Espicially, articles 23-24 should not allow for a decision to be made, if the defendant has not been served the documents instituting the proceedings. However, the service of documents should be regulated by national law.

GERMANY

The provisions contained in this Chapter are intended to be applicable to maintenance proceedings of all types, that is to say regardless of whether the proceedings relate to a cross-border case concerning more than one Member State or to a purely national case. They would thus lead to complete harmonisation of the Member States' legal systems in one area of civil procedure law.

Germany is opposed to this approach, which would constitute far-reaching interference with the domestic law of the Member States. We cannot see any reason for establishing, for example, an EU-wide uniform set of rules for the procedure for service of documents in purely national cases. On the contrary, it would cause difficulties for practitioners if there were separate rules on, for example, service of documents and review of decisions, which applied solely to maintenance proceedings.

Nor are rules relating to the court proceedings leading to the decision necessary in the case of unconditional recognition of maintenance decisions (Article 25). This is clear from a comparison with the future Regulation creating a European order for payment procedure: pursuant to Article 19 of that Regulation, the European order for payment is directly enforceable in all EU Member States, although only minimum standards for service are established in Articles 13 to 15 of that Regulation.

The same is true for the European Enforcement Order for uncontested claims; in this case, too, only minimum standards have been laid down (Articles 13 to 15 of the Regulation creating a European Enforcement Order for uncontested claims). Despite that, it has never been argued that these instruments contain deficiencies in terms of the rule of law.

The Chapter would therefore appear to require some redrafting. We have the following comments on the individual provisions:

ESTONIA

Articles 22 - 24

The Estonian delegation is not convinced of the need for the provisions of Chapter IV. The questions of the legal basis and proportionality also require further analysis. The provisions of Regulations Nos 805/2004 and 1348/2000 are sufficient.

FRANCE

Delete Articles 22 and 23. See general comments.

LATVIA

Latvia in principle recognises the need to introduce common procedural rules in certain areas, so that the need for a declaration of enforceability *(exequatur)* can be dispensed with. However, Latvia cannot accept that these common procedural rules should also affect national proceedings. Here it is important to be consistent with the instruments already adopted or being adopted in this area and with Community competence under Article 65 of the TEC.

As regards **Article 22,** Latvia does not agree that documents instituting proceedings for maintenance should have to be personally served on the addressee. That could entail additional costs, and would not accord with service of documents concerning possible connected claims, relating for example to child custody, divorce or parental responsibility, which are often heard in one and the same proceedings. In introducing common procedural rules for service of documents it is essential to ensure consistency with instruments already adopted (Regulation 805/2004) or being adopted which dispense with exequatur for certain types of claim.

Latvia could support the aims of **Article 24**, i.e. to introduce the possibility of review of a decision taken where the defendant did not enter an appearance, did not receive the documents instituting the proceedings or did not receive them in time, or was prevented from contesting the decision by *force majeure*. However, it is essential to ensure that Article 24 is consistent with Article 19 of Regulation 805/2004, particularly as regards the point that review must be provided for in national law. In addition, the possibility of review should include the possibility of extension of the deadline for appeal. Accordingly it is unnecessary to stipulate that the decision must be reviewed specifically by the court of the State of origin. Latvia also considers that Article 24(3) should be deleted. Stipulating that an application for review suspends all enforcement measures taken could be an incentive to making such applications precisely with that end in view. As regards the effects of an application on enforcement of the decision, the provisions of the Regulation should in Latvia's view be similar to those of Article 23 of Regulation 805/2004, or the matter should be resolved in Article 33 of the proposal.

AUSTRIA

Judging by its verbal comments in particular, the Commission wants **procedural harmonisation** here. Such harmonisation is certainly well-intentioned and could even be appropriate. However, it is not covered by the Community's **legislative powers**. We cannot agree with setting minimum, harmonised procedural standards which are not restricted to cross-border cases, in other words a single body of law on civil procedure including national cases too, no matter how much we might support the content of some individual provisions.

However, even from a purely procedural point of view, Article 22 is very inappropriate. In order to make sure from the outset that a maintenance decision can later be enforced in any other Member State we would have to restrict ourselves to only a few of the methods of service permitted under both the European Regulation on service and the Regulation on a European enforcement order for uncontested claims. There is absolutely no reason for this. Even if we share the opinion of the Commission representatives that the methods of service listed in Article 22(1) are the "most reliable", we have to concede that that is not the only possible opinion, and that there are those who think that other methods of service are equally valid. In any case, other methods of service corresponding to the Regulation on service and the Regulation on a European enforcement order also produce the required effects. The Commission wants to offer an effective instrument for the enforcement of maintenance claims between Member States – and for this it deserves all credit. At the same time it restricts the admissible methods of service so much that every debtor who wishes to frustrate the enforcement of a maintenance claim at European level can achieve that simply by failing to collect the document from the post (!). Not even service through a lawyer is included here. It is difficult to see how this provision contributes to appropriate and effective enforcement of maintenance claims. Consequently, **all possible methods of service** should be regarded as **equally valid.**

In fact, there is no other way. The approach of choosing the "most reliable" service options *ex ante* and subsequently failing to check that due process is observed by means of proper service and a reasonable period of notice before a court appearance is inappropriate in practice. Day-to-day experience shows that proof of service – even if obtained in the most meticulous way possible – does not always reflect the actual situation as regards receipt. Parties may remain abroad for lengthy periods, notifications may go astray, people may fall ill or have accidents before service can be effected. It is hardly possible to rule out all these contingencies where service is concerned. There is therefore a need for a **subsequent right of appeal.** This shows, however, that, even if exequatur is abolished, some checking of enforceability is still indispensable – both nationally and at European level.

The theoretically logical but actually impracticable attempt to look at all this only from the *ex ante* point of view leads in **Article 24** to a **formulation** which, if complied with, would virtually encourage a denial of due process. The possibility that a decision may be given, even though it has not been shown that the document instituting the proceedings has effectively been received and where *force majeure* has prevented the claim being contested, is completely **unacceptable.** No one who cares about a minimum degree of fair treatment and the reputation of the courts can seriously want to require a court, in a case where clear *force majeure* has prevented a claim being contested, to take a decision despite that failure to contest. Clearly, the drafters' idea – again completely borne out by experience – was that it could after all happen that a decision was given despite those circumstances; however, this would certainly not mean that it was given in full knowledge of the circumstances, but precisely because those circumstances were unknown to the court. The only way to formulate this provision is to give the party who was deprived of a hearing in this way (not intentionally, but in practice) a subsequent right of appeal. Anything else would not be procedural law but mere arbitrariness at the expense of a person who has not yet by any means been found to have a maintenance obligation of the level claimed. This amounts to a failure to give any protection to someone who may still be deserving of it.

However, Article 24(3) is an overreaction in the opposite direction. It is really going too far to suspend all the measures for enforcement taken in a Member State whenever there is any allegation of "problems with service". If this means that the realisation of rights or of objects seized must be suspended, then that – at least if the allegations are even slightly plausible – is quite in order. If, however, seizure were to be cancelled over any allegation of improper service or insufficient notice for a court appearance, it is not difficult to foresee how easily recalcitrant debtors could torpedo the whole procedure. It would therefore be preferable to have a **suspension threshold**, in relation both to the reason (substantiation of the infringement of court procedure) and to the scope (maintenance of protective measures alone until the matter of observance of court procedures has been settled).

PORTUGAL

We agree that there is a need for accompanying measures allowing for the abolition of *exequatur*.

ARTICLE 22

BELGIUM

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?

CZECH REPUBLIC

The harmonisation of the rules on the service of documents is a political issue. If the exequatur procedure were to be abolished, measures would have to be adopted to enhance mutual trust in domestic procedure. However, the scope of the Regulation, which is limited to cross-border disputes, presents a problem. The fact is that the events outside the domestic sphere might not come into play until it comes to enforcing the decision in another Member State, and thus there would be no guarantee that the procedure had adhered to the rules laid down in the Regulation. One possible solution might be to borrow the minimum rules from the EEO Regulation, which are already enforced in procedures in which the defendant does not invoke his or her right to contest the proceedings.

GERMANY

Re paragraph 1: It is questionable whether provisions governing service of documents are at all necessary in this Regulation. An instrument containing comprehensive rules governing cross-border service of documents already exists in the form of the Service Regulation. It would therefore seem obvious to make reference to this tried and tested instrument.

As already mentioned, in the interest of ensuring that proceedings take a smooth course, we must avoid creating separate provisions on service of documents just for maintenance proceedings. This would not only cause confusion for practitioners, but would also create inconsistencies, since the question would then arise as to the objective reason why the service of, for example, the statement of claim in a maintenance case, is subject to different or stricter rules than it would be in other proceedings.

Germany would therefore strongly urge that, should it not be decided to make reference to the Service Regulation, Article 22 include all forms of service of documents which are provided for in the Regulation creating a European Enforcement Order for uncontested claims (Articles 13 to 15) and in the future Regulation creating a European order for payment procedure (also Articles 13 to 15). This is of particular significance for substitute methods of service, which play an extremely important role in practice. In this way, coherence with other legal instruments concerning judicial cooperation in civil matters would also be maintained.

Re paragraph 2: Germany is opposed to the introduction of a minimum time limit for the defendant to enter an appearance. The question of whether and within what period of time a person is required to respond to the service of a document instituting proceedings is a matter for domestic procedural law. The Member States already have satisfactory solutions in this context. A rule at European level would therefore appear to be unnecessary.

Nor is a uniform minimum time limit necessary in the case of unconditional recognition of maintenance decisions (Article 25), as is made clear by a comparison with the Regulation creating a European Enforcement Order for uncontested claims. The Chapter of the latter Regulation concerning minimum standards in the court proceedings leading to the decision (Articles 12 to 19) likewise does not contain any rigid minimum time limit, but merely the obligation to inform the defendant of the time limit which exists under domestic law (Article 17).

Re paragraph 3: Germany considers that all the information to be supplied by Member States should be brought together in the one place in the Regulation.

IRELAND

Articles 22 and 24

Comment: Paragraph 1 of Article 22 corresponds to Article 13 of the EEO and the Payment Order Regulations. However, there is no provision equivalent to the associated Article 14 (Service without proof of receipt). Its absence introduces a lack of coherence with other instruments in this field, and this omission cannot be justified for a number of reasons. Firstly, in the maintenance context, insistence on service with proof of receipt is impractical. The sums sought may not always be vast, the cost of personal service may be disproportionate, and the person against whom maintenance is claimed may have an interest in evading personal service. Secondly, as matters now stand, the EEO Regulation deals specifically with service of documents in connection with maintenance matters, in a situation where all intermediate measures have been abolished. The Regulation only came into force in October 2005 and its impact has yet to be assessed. Thirdly, given that there is a review provision in Article 24, there is no reason not to allow methods of service which other instruments acknowledge as being characterised "by a very high degree of likelihood that the document served has reached its addressee".

As indicated in our opening comments, we feel it is vital that the arrangements for service of documents should reflect those contained in Instruments which are already in force, whether by incorporating specific provisions or by making reference to such provisions.

ITALY

We are against introducing specific time limits for the defendant to prepare his defence, such as the one proposed here of 30 days following the day of receipt of the document served. This is an aspect of procedural rules which is a matter for national law, as is the case in Regulation (EC) No 2201/2003 (Article 18) and Regulation (EC) No 805/2004 (Article 19).

LATVIA

See comments under Chapter IV

LUXEMBOURG

The adoption of minimum harmonised rules on the service of decisions is a concomitant to the abolition of exequatur.

Nevertheless, the list of methods of service allowed in Article 22 is far too restrictive. Practice shows that personal service is not always feasible. Failure to allow other methods of service could make it difficult for the maintenance creditor to obtain a quick decision in the Member State of origin.

We advocate adopting the arrangements used for the European Enforcement Order, i.e. providing for the same methods of service (i.e. Articles 13 and 14 of Regulation No 805/2004), as this negotiating exercise has already taken place.

MALTA

In Malta's opinion Article 22 and Article 24 are alternative Articles. Article 24 is sufficient to protect the defendants' rights. Ironically Article 22 contains more stringent requirements for service than in Article 13 of the Service of Documents Regulation itself. We should not introduce new rules of service of documents in every Regulation. So in Malta's opinion Article 22 may be deleted.

THE NETHERLANDS

The draft provisions on the service of documents were borrowed from the European Enforcement Order, in particular its article 13. Maintenance would be excluded from the scope of the EEO. The proposal raises a number of issues.

Can provisions establishing criteria for the delivery of a certificate regarding a decision be suitably transposed to situations in which documents are to be served when proceedings are initiated? If the criteria proposed in article 22 are not met, the claim will not be admitted. On the other hand, non-compliance with the criteria is no ground for refusing the enforcement of the decision. In view of this, the Dutch delegation questions the need for specific requirements regarding the service of documents.

It is unclear why only part of the provisions on service of documents were copied from the EEO.

The proposed rules are to apply when an order given in Member State A is to be enforced in Member State B. No account is taken of the fact that the Commission proposal contains jurisdiction rules with a universal scope of application. It should state what rules apply to the service of documents to a defendant who resides in a third State.

A large proportion of maintenance claims are lodged within the framework of divorce proceedings or other proceedings relating to personal status. It is unclear whether the requirements of article 22 apply to such combined claims. What rules apply if the defendant in divorce proceedings lodges a maintenance claim in the course of such proceedings?

The proposed rules are intended to apply in internal cases as well as in cross-border cases. The delegation of the Netherlands observes that Brussels 1 and other international instruments in which the proper service of documents is a criterion for recognition and/or enforcement in another State, do not require that there should be uniform rules for the service of documents in internal situations. The proposal is, in this respect, disproportionate to the Regulation's objective. Any new rules should be limited to cross-border situations.

The proposed rules would have an impact on article 9. Article 9 should stay as it is. This is a further reason not to depart from the general regime for the service of documents.

The Dutch delegation's conclusion is that the disadvantages of the proposal outweigh the advantages. Legal professionals would be confronted with a complicated set of specific rules in one area, where such rules do not apply in related areas. The preferred solution would be the following:

Internal regimes for the service of documents should be left untouched;

cross-frontier service of documents should be governed by the Service Regulation or, as the case may be, by the 1965 Hague Convention on the Service of Documents.

The exclusion of maintenance from the scope of the European Enforcement Order is supported;

One technical remark: article 22, second paragraph should be amended so as to take into account the refusal to receive a document.

POLAND

Article 22(1)(b)

Poland does not see any clear difference between points (a) and (b).

Article 22(1)(c)

The acknowledgment of receipt should be signed by the defendant in the same way as in point (b), but it should be returned by the post office, not by the defendant.

Article 22(1)(d)

Under this provision, the addressee must sign and return the acknowledgement of receipt. This gives rise to the following doubts:

- by what means is the acknowledgement to be sent: electronically or by normal mail?

- the date of receipt is to appear on the acknowledgement: but what will that date of receipt be, the actual date on which the fax or e-mail was sent, or the date on which the fax or e-mail was read? in that case, how is the true date to be checked?
- what should the acknowledgement look like?

Article 22(2)

The wording "the defendant shall have at least 30 days" suggests that the deadline can be extended by national legislation.

Article 22(3)

This provision does not specify how the Commission is to make the information provided available to the public or whether there are to be any penalties should any of the Member States fail to comply with their obligations in time.

PORTUGAL

As a preliminary remark, the translation of paragraph 1 of this Article seems to be incorrect: the Portuguese version says that "A citação ou notificação... pode igualmente ser efectuada pelos seguintes meios", whereas the English version says that "In proceedings before a court... shall be served on the defendant by one of the following methods". The English version does not include the term "igualmente" [= "also", "likewise"], which changes the sense of the sentence.

Paragraph 2 of this Article mentions a period of time, without specifying how it is to be counted. We suggest the adoption in this case of the approach taken in the proposal for a Regulation on the European order for payment, which refers in its twenty-eighth recital to Council Regulation (EEC, Euratom) No 1182/71 of 3 June 1971, determining the rules applicable to periods, dates and time limits.

ROMANIA

We agree with the idea of this Article, the purpose of which is to unify the procedural rules, as a guarantee in exchange of the abolition of the exequatur. However, we believe that the wording is too restrictive. Under these circumstances, we suggest to follow the same lines as in Articles 13 and 14 of Regulation no. 805/2004.

SLOVENIA

We do not support the Commission's proposal on Article 22, because we are of the opinion that it violates the principle of proportionality and refers also to national cases and not only to cross border ones.

The rules of the regulations on the service of documents should not apply for the service of documents of purely domestic cases (within the territory of the same Member State).

Furthermore, we are of the opinion that the aim of the Article can be achieved by a softer measure, namely with the system of minimum standards. Such a system with a certificate that a judgement complies with the standards provided in the regulation would also enable to use the regulation at the enforcement stage where the procedure was conducted in one Member State, but the assets of the debtor are located in another Member State.

FINLAND

The list of possible methods for service of documents should be enlarged in such a way that also the methods mentioned in Articles 14 and 15 in the Regulation 805/2004 (European enforcement order) were applicable.

SWEDEN

It is questionable whether service needs to be regulated here, in other words whether it is proportionate to do so. Reference could instead be made to the Regulation on service of documents, with Member States otherwise allowed to choose which methods of service to accept. It should be pointed out here that, even if their legislation on the matter differs, all Member States are bound by the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Assuming methods of service are to be dealt with in the Regulation, the proposal broadly matches Article 13 of Regulation (EC) No 805/2004 on the European enforcement order. However, there is no provision corresponding to Article 14 of that Regulation, viz. service without proof of receipt. In Sweden's view, the article should in that event more closely follow the provisions on service in the Regulation on the European enforcement order. Parallels with those service rules are under discussion in a number of other contexts.

The common position adopted on 20 June 2006 concerning a European order for payment includes an Article 13 on service with proof of receipt and an Article 14 on service without proof of receipt, i.e. provisions parallel to those for the European enforcement order.

The political agreement reached on 5 and 6 October 2006 concerning a European small claims procedure involves an Article 11 which, besides allowing service by post with an acknowledgement of receipt, also makes reference to Articles 13 and 14 of the Regulation on the European enforcement order.

ARTICLE 23

BELGIUM

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

CZECH REPUBLIC

The wording of this provision will depend on Article 22, or rather on whether or not the rules on the service of documents are harmonised. The current wording does not make the connection with Article 24 fully clear.

GERMANY

Rules governing the consequences for the proceedings where there is uncertainty as to whether service has been successfully effected appear problematic. Firstly, this is a further instance – as in Article 22 (2) – of a true procedural provision for which the basis of competence has not been clarified. Secondly, it is also in fact unnecessary, since the procedural rules of the Member States already provide for sufficient mechanisms in such cases.

Furthermore, it seems unclear when Article 23 would be applicable. According to the wording of the Article, on the one hand it would depend on whether the defendant has been able to receive the document, "or", on the other hand, on whether all necessary steps have been taken to this end. It would therefore seem preferable to adopt the wording of Article 19 of the Service Regulation, since this is clearer.

GREECE

Serious reservations.

MALTA

Malta is of the opinion that this Article is not very well drafted. The purpose of this proposed Regulation is to reconcile the interests of the creditor and the debtor. Malta is of the opinion there should not be a situation where the debtor deliberately disappears and hence putting the interest of the claimant in jeopardy. It, therefore, believes that this Article should show more clearly that all necessary steps have been taken.

In view of the fact that one is dealing with maintenance claims whereby eg. spouses, children and family members are in need, Malta would appreciate a clarification as to whether it is absolutely necessary that proceedings are stayed by the Court. Malta does not agree that proceedings are stayed and it proposes that the new text will reflect this suggestion.

THE NETHERLANDS

The Dutch delegation recommends that the first paragraph should be aligned to article 18 of the Brussels IIbis Regulation.

POLAND

Paragraph 1

An addition should be made to this paragraph to indicate that the defendant's failure to appear for the hearing is unjustified and thus that the defendant fails to enter an appearance "without justification". Vague expressions such as "all necessary steps have been taken to this end" should be avoided.

ROMANIA

We agree with the aims of Article 23. As a technical point, we suggest that the title be changed and the Article renamed as "*Defendant not entering an appearance*", the same way as Article 19 of Regulation 1348/2000, on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

ARTICLE 24

BELGIUM

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.

CZECH REPUBLIC

This provision presents a problem for us. If the aim here is harmonisation of the appeal process, it cannot be applied solely to some aspects, while leaving others to be governed by domestic law. Furthermore, harmonisation would lead to a situation in which the rules governing appeals in disputes with a cross-border aspect would differ from those applied to domestic cases. Here, too, we believe that the adoption of a minimum standard along the lines of Article 19 of the EEO Regulation would be more appropriate. Another option would be to move this provision to Article 33, which would deal with the impact on the enforcement procedure in the state of enforcement of an appeal lodged in the state of origin on precisely specified grounds.

In our opinion, the current wording of paragraph 3 is not fully compatible with Article 33.

GERMANY

Re paragraphs 1 and 2: Rules on the possibility of a review already exist in, for example, the Regulation creating a European Enforcement Order for uncontested claims and the future Regulation creating a European order for payment procedure, and we endorse the principle of their inclusion. However, they must be limited to what is necessary and must be appropriate to the system.

As far as the present proposal is concerned, however, the relationship to Article 23 seems unclear. Article 23 already stipulates what should happen if the defendant does not enter an appearance and if doubts exist as to whether service was effected successfully. It is therefore unclear how Article 24 (1) (a) is to be understood. One possible interpretation is that it serves to clarify the fact that a decision may also be given where doubts exist regarding service. However, it would also conceivably mean that the possibility of a review exists even where doubts as to the receipt of the document by the defendant remain, in spite of the existence of proof of service.

Detailed rules relating to the beginning and end of the time limit for applying for a review, as laid down in paragraph 2, are also unacceptable. This problematic issue was already the subject of intense discussion during the negotiations on the Regulation creating a European order for payment procedure.

Germany is therefore in favour of adopting paragraphs 1 and 2 of Article 20 of the future Regulation creating a European order for payment procedure in general terms, in place of paragraphs 1 and 2 of Article 24 of the present proposal.

Re paragraph 3: The automatic suspension of all enforcement measures appears to conflict with Article 33(b), according to which following an application for review measures can be suspended only by judicial order, and at the discretion of the court.

GREECE

Paragraph 2 is unclear and creates problems of interpretation. Serious reservations as regards paragraph 3.

FRANCE

Drafting suggestions

Article 24

Decision and review

1. Where the defendant has not entered an appearance and

   (a) it has not been shown that the defendant has effectively received the document instituting the proceedings or an equivalent document or

   (b) where the defendant was prevented from contesting the maintenance claim by reason of *force majeure*, or due to extraordinary circumstances without any fault on his or her part,

   a decision may be given but the defendant shall have the right to apply for a review of the decision before ~~the~~ a court in the State of origin.

2. The time limit to apply for a review shall run from the day the decision is notified to the defendant, who ~~is notified of the decision and~~ is entitled ~~able~~ to react ~~and at the latest from the day the defendant is informed of the decision by the competent authority of the Member State of enforcement~~. This time limit shall not be less than 20 days.

3. An application for review shall suspend all the measures for enforcement taken in a Member State.

Explanations:

- *first point: the case can be reviewed by another court in the State of origin (such as an appeal court) where the appeal is admissible, as under French civil procedure;*
- *second point: see general comments.*

IRELAND

Although we have proposed that Article 24 be replaced by the relevant Article from the EEO and Payment Order Regulations, for the sake of completeness our comments on the text proposed are as follows – it is not appropriate for the Court to give a judgment when it knows that the defendant cannot defend the case for reasons of *force majuere.* The normal practice would almost certainly be to defer the hearing until another day, notwithstanding the fact that the defendant had not formally entered an appearance.

It is not clear if a specific time limit for review is envisaged, other than not being less than 20 days from date of notification, etc. In both the EEO and the Payment Order the review period is potentially open-ended, and we would be very opposed to any proposals to prescribe an outermost limit in this particular case.
See Also Article 22.

ITALY

As with Article 22, we have reservations about specifying a time limit of 20 days to apply for a review of the decision. This aspect of procedural rules should be referred to national law, as was the case in Regulation (EC) No 805/2004 (Article 19). This approach is more in keeping with the general principles of proportionality and subsidiarity.

LATVIA

See comments under Chapter IV

LITHUANIA

Article 24(3) of the proposal for a Regulation provides that an application for review of the decision taken with respect to the defendant suspends all the measures for enforcement taken in a Member State. Consideration should be given to whether a separate provision, which allows enforcement of the decision not to be suspended once maintenance has become urgent and where suspension would have extremely serious consequences for the creditor, should be added to this rule.

LUXEMBOURG

It would be better to keep to the system used for the European Enforcement Order. We do not see any need to depart from the even-handed arrangements made in that Community instrument.

MALTA

Malta supports the basic principles behind this Article. It gives legal guarantees to the defendant since he may ask for a review in exceptional cases.

With regard to sub-article 2, Malta is of the opinion that the revised text should clarify when the 20 day period starts to run.

THE NETHERLANDS

This article purports to introduce review proceedings in both internal and cross-border cases. Neither article 19 of the EEO nor article 34, paragraph 1, of the Brussels 1 Regulation obliges Member States to provide for such review proceedings. Such review is possible in the Netherlands under the Act implementing the EEO. However, it is not possible in internal maintenance law or in other areas of family law. The Dutch delegation is not in favour of the proposed provision. There are adequate guarantees for a fair trial. In cross-border cases such guarantees are contained in the Service Regulation and the Service Convention.

Like article 22, this article is problematic in cases where maintenance claims are made in the context of other proceedings.

One technical remark: in paragraph 1, sub a, the words “or refused to receive” should be inserted after “received”.

POLAND

Article 24(1)(a) and (b)

In the circumstances described in Article 24(1), no decision should be given at all, bearing in mind that:

a) where it is uncertain whether or not the defendant has received the writ, there is always a probability that he may not have received it. If the Regulation then states that maintenance decisions are automatically to be recognised and declared enforceable, it thereby allows the recognition, and as a consequence the enforcement, of a decision which the defendant may be completely unaware of. The defendant's application for review of the decision will as a general rule merely serve to prolong the whole proceedings. To ensure certainty of legal transactions, no decision should be given; instead the document initiating proceedings should be served in such as way as to be 100% sure that the defendant has received it. It should also be borne in mind that if there is a probability that the defendant did not receive the document initiating the proceedings, then the decision itself may not be served on him either, thus raising the problem of the legal validity of such a decision.

b) The situation described in (b) is obscure: what is meant by the statement that the defendant was prevented from contesting the maintenance claim by reason of force majeure, or due to extraordinary circumstances without any fault on his or her part?

Article 24(2)

The expression "from the day the defendant is notified of the decision and is able to react" allows for the eventuality that the defendant may not be notified of the decision, so that it will not become final and capable of enforcement.

Article 24(3)

However, the Article does not specify:

- who is to inform the enforcement body that a request for a review of the decision has been made (defendant, court of origin);

- the date from which enforcement is to be suspended;
- who is to bear the costs of partial enforcement proceedings where enforcement measures have been taken, but it subsequently turns out that enforcement proceedings should not have taken place at all?

PORTUGAL

Regarding the final clause of paragraph 1, which states that the defendant has the right to apply for a review before the court of origin, it should rather be said that the defendant has the right to apply for a review before the competent court of the Member State of origin, since in many cases the court competent to reassess the situation may not be the court of origin.

We also believe that it will be necessary to clarify how the provision in paragraph 3 of this Article interacts with Article 33 (refusal or suspension of enforcement).

ROMANIA

We agree with the aim of Article 24, since the text offers the minimum guaranties to the debtor. However, we take the view that the relation with Article 33 should be further clarified.

SLOVENIA

We agree with the aim of the Article; however in order to ensure legal certainty a maximum time limit should be set (for example 5 years).

SLOVAKIA

On paragraph 1(a): - In the case of normal uncertified delivery of the document instituting the proceedings, the Slovak Republic has reservations concerning the continuation of proceedings and the issuing of a decision.
In the Slovak Republic such a step would not merely constitute a procedural defect in the proceedings but would also deprive the affected party of the possibility of taking his case to court.

This constitutes grounds for applying an exceptional remedy, which if successful could establish the state as responsible for unlawful action by the public authorities. Slovakia proposes, with regard to paragraph 1(a), that it be a prerequisite for the issuing of a decision, where despite due procedure the documents have not been delivered, that the court should be shown not merely the legal relationship on which the creditor's claim is based (i.e. the relevant family relationship - e.g. the debtor's paternity), but also that the defendant does in fact reside at the place of delivery.

In Slovakia's view, the positions of the creditor and the debtor are not treated in a balanced fashion in this provision.

We consider the 20-day time limit to apply for a review in this Article to be sufficient only where the debtor has duly received the decision in a language he understands

FINLAND

The proposed system, where a decision may be given even though it has not been shown that the defendant has been appropriately served is, in our view, very strange and problematic from the point of view of fair trial. It would also complicate things by adding the number of proceedings. Therefore we suggest this to be deleted.

As regards the details, the word “notified” in paragraph 2 is unclear. Does it mean something less than service of documents? If yes, that would be very difficult to accept.

SWEDEN

One implication of this article is that the defendant may have a decision given against him without having taken service. Sweden questions this, not least because Article 22 does not in fact allow service without proof of receipt, i.e. in the way possible under Article 14 of the Regulation on the European enforcement order.

CHAPTER V
ENFORCEABILITY OF THE DECISION

LATVIA

Latvia agrees that the *exequatur* requirement must be waived in matters relating to maintenance obligations. However, we feel that alongside the possibility of direct enforcement without *exequatur* it is important to maintain the possibility of applying for the recognition of decisions, as Regulation No 805/2004 and the new Brussels II Regulation have provided.

Article 26: Latvia does not agree with the express provision that a decision is directly enforceable irrespective of whether or not national law allows an appeal. Under Latvian law a court may at the request of one of the parties declare a decision directly enforceable (irrespective of the fact that a challenge is possible) in specific, legally defined circumstances, including cases concerning the collection of maintenance payments for children. We believe that a decision's enforceability should continue to be governed by national law. Otherwise the situation could arise where a decision could be served for enforcement in another Member State but not in the Member State in which the decision was given.

AUSTRIA

Insofar as Chapter V **dispenses with a separate exequatur procedure,** it is to be welcomed unreservedly. The way in which it is designed and worded, however, is less welcome. The fact that the Austrian delegation takes no great pleasure in decisions which are not yet final being enforceable is of no great consequence. Even though in Austrian domestic law the relationship between rule and exception is exactly the opposite, i.e. such a decision cannot as a rule be enforced unless the court so orders, we could of course live with a reversal of the rule if the other Member States were in agreement. However, the rules proposed should arguably not result in a situation in which **enforceability could not even be postponed by order of a judge.**

A question of principle which we have to clarify is **how negative decisions are to be handled.** If the claim for maintenance is deemed unfounded, then (leaving aside the matter of costs, which is not the most crucial aspect), this does not constitute a decision susceptible of enforcement but only one susceptible of recognition, i.e. a purely declaratory decision. Admittedly, at first sight it seems that treating negative and positive decisions in the same way has much to recommend it, but this does not seem to be an immutable rule. In this of all areas it would be possible to differentiate; it is after all primarily a matter of implementing maintenance claims and not of avoiding being exposed to a claim again in another country. But even if *ipso jure* recognition is introduced for negative decisions in the same way as positive ones, we should not forget that maintenance claims, in contrast to claims arising, for example, from a contract governed by the law on obligations, are subject to constant change because of the *rebus sic stantibus* clause. What last month may have been an unjustified claim bordering on impertinence may this month constitute a maintenance obligation. This means that the recognition of the judgment cannot produce **any permanent blocking effect.** To that extent the person from whom maintenance was claimed (unjustifiably at the time of the decision) gains considerably less from the *ipso jure* recognition of negative decisions than the maintenance creditor does from the *ipso jure* enforceability of a positive decision which cannot be delayed by an exequatur procedure.

Conclusion: the question of **whether negative decisions trigger the same recognition mechanisms** as positive decisions needs further thought.

ARTICLE 25

BELGIUM

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.

CZECH REPUBLIC

If an agreement is reached on minimum procedural rules and the harmonisation of conflicting laws whereby the state of origin undertakes to ensure fair proceedings and the defendant may, under certain circumstances, contest some types of maintenance obligation (such as those between persons related collaterally or by affinity), we are prepared to give our full support to abolishing the exequatur procedure.

GERMANY

This provision establishes the unconditional recognition of all decisions relating to maintenance obligations which have been given in a Member State. It covers two aspects, namely: (1) the exclusion of objections relating to the court proceedings leading to the decision, and (2) the exclusion of the objection that the claim determined violates the public policy of the Member State of enforcement.

Germany welcomes the approach adopted in Article 25 of further simplifying the recognition of maintenance decisions. However, the two aspects referred to above should nevertheless be given further detailed consideration:

(1) Germany is of the opinion that, in the interests of the debtor, not only must minimum standards exist for the court proceedings leading to the decision, but compliance with these standards must also be ensured. There are several different ways of achieving this. One way would be, for example, by means of a certificate corresponding to that stipulated in Article 41(2) of the Brussels IIa Regulation. This would be issued by a judge in the Member State of origin, who would at that juncture re-examine in detail whether the defendant's rights had been protected.

(2) The harmonisation of the law applicable to maintenance obligations will not prevent a creditor from trying to have a Member State enforce a decision that violates public policy according to that State's standards. But ultimately this is in fact an intended consequence of Article 25, which – in conjunction with Article 20, second sentence – is intended to accord but little weight to national values.

Whether to go down this road is first and foremost a political question, the answer to which will also depend on the substantive scope of the Regulation (see above, Article 1 comment a). What is remarkable, however, is that the abolition of the exequatur procedure is the subject of discussion in an area where traditions in the Member States differ widely. It would seem more natural to gain experience first in other areas, where there is a greater degree of agreement.

In any event, a rule on recognition and declaration of enforceability should be adapted to the particular features of maintenance orders. It sometimes happens, for example, that a maintenance order does not state a specific sum but makes reference to an index or a certain proportion of the debtor's income. The question then arises as to how these orders can be made compatible for enforcement in another Member State.

ESTONIA

The Estonian delegation is in favour of abolishing the *exequatur* procedure provided that all other important issues are resolved. In the interests of clarity there should be a reference in Article 25 to Article 33, which lays down the bases for refusal of enforcement or suspension of the enforcement procedure.

GREECE

We agree with the abolition of *exequatur*. Reservations if the scope is very wide and there has been no harmonisation of the rules of law in the Member States.

IRELAND

Drafting suggestion:
A ~~decision~~ *judgment* given in a Member State that is enforceable in that Member State shall be recognised and ~~enforceable~~ *enforced* in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition.

Comment: In the interest of coherence with other instruments such as the EEO and Payment Order, which contain provisions along the lines of that at Article 25, we suggest that "enforceable" be replaced by "enforced".

ITALY

Italy supports the principle of the abolition of *exequatur* embodied in this Article.

LATVIA

See comments under Chapter V

LUXEMBOURG

With the removal of exequatur, it is essential to ensure that the decision of the Member State of origin definitely fixes the amount of the maintenance claim; otherwise it is impossible for the competent authorities in the Member State of enforcement to take immediate action.

One way of solving this problem would be to specify in the definition of «decision» in Article 2, that it is a decision given in matters of maintenance obligations, setting a specified maintenance claim.

MALTA

In principle, Malta supports the abolition of *exequatur*, however, Malta is not in a position to support such abolition in all types of maintenance obligations. Keeping in mind the wide variations in types of maintenance accepted in Member States, Malta will surely have a problem with recognising judgements of certain types of maintenance, such as arising from persons related by affinity, cohabiting or same sex partners etc. that may be accepted in some Member States but not in Malta.

Malta, therefore, proposes an amendment to this Article to reflect this position.

THE NETHERLANDS

The Dutch delegation has no objection in principle against the enforceability of decisions by operation of law, i.e. without exequatur proceedings in the Member State of enforcement. There is, however, one important issue.

Article 25 provides that a decision which is enforceable in Member State A, where it was rendered, shall be *recognized* and enforceable in Member State B.

As under the Brussels IIbis Regulation, there is an issue of recognition of a decision in Member State B, as distinct from the issue of enforceability. A decision which denies a maintenance claim or reduces the obligation to zero is not enforceable in Member State A where it was rendered. It should, however, be recognized in Member State B. The party (usually the debtor) who has obtained such a decision, may need to obtain from a court in Member State B a declaratory order stating that the decision is recognized. The other party may have an interest in obtaining a decision on non-recognition of such a negative decision. The Dutch delegation would therefore suggest that such a proceeding should be provided for in this Regulation. See article 21, third paragraph, of the Brussels IIbis Regulation.

POLAND

Automatically giving decisions by the courts of any Member State legal effect throughout the territory of the EU is going too far. Council Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims (hereinafter EEO) does away with the need for separate proceedings to obtain a declaration of enforceability for a maintenance decision given by a court in another Member State where that decision has been certified as an EEO in the state of issue. Furthermore, in contested proceedings, judicial review should be available to the debtor as, bearing in mind optional jurisdiction, he will normally be obliged to engage in proceedings in the creditor's state of residence, i.e. from his point of view, foreign proceedings. Provision for such review is made in Council Regulation (EC) No 44/2001 (hereinafter: "Brussels I"), but is limited to a list of specific grounds and may not take place until the appeal stage.

ROMANIA

We agree with the abolition of exequatur and the provision in Article 25. We note that in such cases the applicable law to enforcement is the law of the Member State of enforcement. In these circumstances, we believe that the the decision of the Member State of origin should definitely fix the amount of the maintenance claim. We express concerns regarding the orders establishing the maintenance in percentages or fractions.

SWEDEN

Sweden fully supports the elimination of the need for a declaration of enforceability in the case of child maintenance. It is open to question, however, whether the time is really ripe to do so for other maintenance decisions.

ARTICLE 26

BELGIUM

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.

CZECH REPUBLIC

If, under domestic law, decisions regarding maintenance are not provisionally enforceable in one Member State, it would in our view be difficult to justify their having to be so in the other Member States.

Furthermore, we are not fully clear as to how Articles 25 and 26 relate to one another. Article 25 states that only those decisions given in the Member State of origin that are enforceable in that Member State will be recognised and enforceable in the other Member States. In our view, if domestic law stipulates that a decision only becomes enforceable once the appeal deadline has elapsed, this may bring Articles 25 and 26 into conflict, since under Article 26 a decision is enforceable, notwithstanding any appeal provided for by national law. The meaning of this provision would be clearer if Article 26 established that an appeal lodged under national law had no suspensory effect.

GERMANY

According to Article 26, any decision given in a Member State is enforceable by operation of law notwithstanding any appeal provided for by national law. It should not be possible for a security to be imposed.

Germany considers this rule to be problematic and advocates its deletion. It is not certain that the EU is competent to enact such a rule. Particularly in enforcement proceedings, where clarity and reliability are especially important, legal uncertainty as to whether or not a judge may order a security to be imposed would prevail for years to come. This is true both if the provision is to apply to purely national cases and if it is to apply only to cross-border cases, since the question of the conditions necessary for a creditor to enforce a judgment which has not yet obtained final and binding force does not affect the free circulation of maintenance orders.

In terms of substance, too, such a sweeping ban on the imposition of a security seems inappropriate. The imposition of a security involves weighing the creditor's interest in being able to enforce a decision immediately without further ado against that of the debtor in having monies paid reimbursed should the decision be set aside at a later date. Experience has shown that, in practice, where a claim for recovery of wrongfully paid maintenance fails, this is usually as a result of the (alleged) creditor's inability to pay, or as a result of the genuine debtor's inability to pay (where the wrongfully paid maintenance is claimed from the genuine debtor by means of an action for subrogation).

The current version would place the debtor's rights at an excessive disadvantage. The creditor necessarily has a particular interest in enforcement without the imposition of a security. It therefore seems appropriate for the imposition of a security to be dispensed with only if this is necessary for fulfilment of urgent needs of the creditor.

The conflict of interests described above can be allowed for by setting a time limit. In particular, the ban on the imposition of a security could conceivably be restricted to judgments concerning claims relating to the period following the filing of the action, i.e. maintenance currently accruing.

If, however, the judgment relates to unpaid maintenance arrears for a period which predates the filing of the action by more than three months, the needs of the creditor are no longer "urgent", so that a general ban on the imposition of a security by virtue of the Regulation is no longer relevant; rather, this then becomes a matter for national procedural law. The proposed period of three months is close to the limit of what can be expected of a (presumed) debtor.

In any event, the heading should be "Provisional enforceability" (instead of "enforcement") since the Article does not relate to actual enforcement measures.

ESTONIA

The Estonian delegation does not support Article 26. The laws of the majority of the Member States provide for immediate enforcement of judicial decisions relating to maintenance either on the basis of a court order or automatically. In this respect, the Member States' laws offer greater flexibility.

GREECE

We disagree with the provision proposed. We suggest that the judge should decide whether a decision is to be provisionally enforced.

FRANCE

Drafting suggestions

Article 26

Provisional enforcement

A decision given and enforceable in a Member State shall be enforceable by operation of law notwithstanding any appeal provided for by national law in the other Member States. A security shall not be imposed.

Explanations: see general comments.

IRELAND

Drafting suggestion:

A ~~decision~~ *judgment* given in a Member State shall be enforceable by operation of law notwithstanding any appeal provided for by national law. ~~A security shall not be imposed.~~

Comment: We understand this provision as envisaging that a judgment is immediately enforceable in all MS notwithstanding the fact or possibility of an appeal, but that, in the context of an appeal being made, the Court would have discretion to stay enforcement. Assuming this interpretation is correct, the provision is one which we can accept. We suggest that the reference to security be deleted, as this matter should be dealt with exclusively within the confines of Article 30.

ITALY

The Italian delegation objects to regulation of this aspect, which should be dealt with by national law in accordance with the legal basis for the proposal (Article 65 of the Treaty) and the principles of proportionality and subsidiarity. The coordination of this provision with Article 25 could be worded as follows:

"A decision given in a Member State shall be enforceable even if it is challenged, where provision is made for its enforceability in the Member State of origin."

Article 26 would thus make it clear that the enforceability of the decision in the legal system of the Member State of origin may not be excluded when the decision circulates outside that State. This would strengthen the principle of abolishing *exequatur* and be in accordance with the principles of proportionality and subsidiarity. Moreover, there would be no conflict with Article 27, which provides that the enforcement procedure is to be governed by the law of the Member State of enforcement: the "enforceability" of a decision is information on the nature of that decision and not on its actual enforcement.

LATVIA

See comments under Chapter V.

LUXEMBOURG

Provisional enforcement of all decisions by operation of law is too rigid a concept. The rule might prove unsuitable, depending on the case. It would therefore be more prudent to qualify the principle. The judge should retain his discretionary powers.

MALTA

Malta welcomes this measure since it safeguards the maintenance creditor from any abusive appeals lodged by the debtor. Maltese law has a provision on the same lines stating that maintenance obligations are provisionally enforceable within twenty four hours. Malta can, therefore, go along with this provision.

One concern Malta raises relates to the possibility that the maintenance decision given by the court of first instance is altered on appeal to the extent that some or all of the maintenance paid in the meantime would have to be refunded to the debtor. Malta proposes that the revised text is amended to include a provision to cater for such situations.

One suggestion Malta proposes is to establish a time frame within which the decision given by the court of first instance can become provisionally enforceable. As stated above, in Malta such decisions are provisionally enforceable within 24 hours. Malta proposes a similar provision to be included in the text.

In the light of the previous paragraph, Malta consequently proposes that the title of this Article is changed to 'provisional enforceability'.

THE NETHERLANDS

The provision is understood to mean that the mere lodging of an appeal against the maintenance order does not entail automatic suspension of the enforceability. This should be without prejudice to the debtor's right to request the suspension of the enforceability. This should be clarified in the text. Such suspension should be a ground for suspension of the actual enforcement in the requested State. See the comments on article 33.

POLAND

Article 26 must make absolutely clear that in order for a decision given in one Member State to be able to be enforced in another Member State, it must be enforceable in the state of origin. As currently worded, Article 26 can be interpreted to mean that a decision can be enforced in a Member State irrespective of whether it is final and enforceable in the state of origin.

ROMANIA

We do not agree with the wording of this Article, although Romanian law provides for provisionally enforcement of decision of maintenance. However, we expect some difficulties to arise in such a provision operating in cross-border cases (e.g. in cases where an appeal is admitted against a decision which is not final or in case of the dissolution of the enforcement order – in both cases, the reimbursement of the maintenance amount already enforced must be effected. Thus, legal uncertainty may arise.)

SLOVENIA

In general we support the Commission's proposal, but we believe that such a stipulation is not appropriate in every case. Therefore we support the Commission's explanation that the provision presents a presumption and that a court of origin can reject it. In this manner a new reason should be added in Article 33, i.e. “the court of origin rejects the provisional enforcement of the decision”. Furthermore, it should be stated clearly that the provision refers only to cross border cases.

SLOVAKIA

Slovakia believes the appropriate title for Article 26 would be "Provisional enforceability", not "Provisional enforcement", since this Article has been placed in Chapter V, "Enforceability of decisions",

Slovakia has no substantive comments on Article 26, but believes that its relationship to Article 24(3) needs to be established. The basis for provisional enforceability should be the existence of serious circumstances, as a result of which enforceability must take precedence even over validity, because non-enforcement would seriously prejudice the parties and late enforcement could have serious negative consequences.

In the first sentence we recommend replacing the term "appeal" with another, more general expression such as "remedy".

FINLAND

We support the basic idea behind the article. There may, however, be cases where it is better not to enforce a decision until it is final. We, therefore, suggest that the court, where the appeal is pending, would have a power to deny the enforcement until the decision is final.

SWEDEN

In order for this article to apply, the decision should have to be provisionally enforceable in the Member State in which it was given. Otherwise, in cross-border cases, decisions might be treated differently from in domestic cases. One solution might be to model the provision on Article 41(1) of the Brussels II Regulation.

CHAPTER VI
ENFORCEMENT

LATIVA

On the whole Latvia agrees on the need for the rules laid down in Chapter VI and supports the principle confirmed in Article 27 that the rules on enforcement - unless otherwise provided for in the Regulation - will continue to be governed by national law.

Article 28 in our view should be more detailed. Firstly, the documents to be produced should be specified, and also the language into which they have to be translated if a person wishes to seek the enforcement of a decision given in one Member State in another Member State. Secondly, a clear distinction must be drawn between those rules and (1) situations where a person wishes to avail himself of one of the options under Article 33 to suspend or refuse enforcement, and (2) other situations provided for in the draft Regulation (e.g. when an order is served on a bank or employer in the Member State of enforcement to make direct monthly payments or to temporarily freeze a bank account).
Moreover, Latvia cannot go along with the provision of this Article that the Member State of enforcement is not entitled to require a translation. All essential translation issues should be solved by the time enforcement commences and the Member State of enforcement should not have to translate essential documents.

Latvia does not see the need for **Article 32(2)** or for the alternative option of incorporating these provisions into Article 33. They will in any event be covered by Member States' national law, in accordance with Article 27.

In our view, **Article 33** needs to be thoroughly reworked; as currently drafted it is insufficiently clear on a number of points.

Firstly, the list of grounds for suspending or refusing enforcement should be non-exhaustive. There is no need to list in detail all the possible grounds for limiting or refusing enforcement; only the measures that are really essential to ensure the debtor's and creditor's rights and interests are necessary. Latvia's national law allows suspension of enforcement in a number of cases, e.g. if the creditor or the debt collector dies, if the decision underlying the service of the relevant enforcement document is quashed, if the debtor is declared incapable, and so on. The Regulation as it stands does not mention these grounds but would have to include them if the list were exhaustive.

Secondly, Article 33 needs to be clarified in order to spell out whether the decision to refuse or suspend enforcement is subject to the jurisdiction of the courts or the enforcement authorities, and whether the matter is governed by Member States' domestic law.

Thirdly, we consider that the current grounds for suspension or refusal of enforcement under Article 33 need to be clarified. Latvia has objections to points (a) and (d); we think that the existence of new circumstances or the extinction of the right to obtain the enforcement of the decision can only be determined in the Member State where the decision was given.

Latvia has problems with **Articles 34 and 35**, which in our view fail to take account of the enforcement authorities' responsibility for conducting the enforcement process. Under the proposed Regulation, oversight and control of the enforcement procedure is in the hands of private bodies and may prove virtually impossible to carry out if the debtor has more than one employer or source of income and if his money is kept in several banks. These provisions also fail to take a number of other aspects into account: e.g. the possibility that the debtor may voluntarily comply with the decision, and the enforcement authorities' powers to check that the attachment of the debtor's assets does not contravene national law on the nature and the proportion of a debtor's assets that may be so attached.

Latvia does not agree with **Article 36**; we consider that meeting maintenance claims and the question of the order in which they are collected should be governed by national law in accordance with Article 27.

AUSTRIA

Here again the general point should be made that certain of the authors' proposed sets of rules certainly seem useful, and at least effective. However, from the institutional angle, it remains doubtful whether these provisions fall within the **competence of the Community legislator**, even though it is clear from Article 27 that the entire Chapter applies solely to cross-border enforcement. The provisions vary greatly in the degree of detail of the rules laid down and in the justification of their content.

For example, Article 28 again suddenly seems to suggest that recognition may be applied for independently.

The reference to "an extract" from the decision to be enforced "established ... using the standard form" is ill-advised. The talks held must surely have made it quite clear that there is no support for dual submission of the decision, in the form of an **extract** and of the original text, and that some States indeed vigorously **oppose** such a solution. The authors' intentions here are entirely laudable: to streamline the proceedings by dispensing with unnecessary documentation, authentication and translation. However, it would be unthinkable to ask a court (in Austria compulsory enforcement is a matter solely for the courts) or executing authority in a Member State to enforce a decision on the basis of an original which has not been translated or ultimately even without production of the original.

In the talks, brief mention has already been made of the so-called simplified approval procedure which exists in Austrian law. In substance, under that procedure **production (and examination) of the decision are provisionally waived** and the proceedings are based on the facts adduced by the creditor bringing the case, **provided that the debtor does not dispute** them. The penalty for misrepresenting the facts is then relatively severe. Long experience of this procedure has shown it to work extremely well in practice and there have been very few cases of abuse.

Perhaps these concepts could be transposed to the sphere of international enforcement of maintenance orders. It would not then be a matter of an "extract" from the decision, but of **reproduction of the substance of the decision in the standard form** and production of the full original only on demand (if the debtor disputes the existence of such a decision) or, at least provisionally, acceptance of the original without a translation. In either case, the Commission's aim of accelerating and simplifying the proceedings would be achievable. Austria's experience of the use of automatic data processing could conceivably play a part in applications for execution as its experience of automated payment orders contributed to the Regulation creating a European order for payment procedure.

Articles 30 and 31 remove totally superfluous formal constraints and are to be welcomed; Article 29 on legal aid is unexceptionable.

The basic premise of Article 32 is also laudable and an absolutely necessary accompaniment to dispensing with the exequatur procedure. Clearly, a single European enforcement area can come into being only if **substantive review** by the executing court is **prohibited**.

But here too the peculiarities of maintenance claims are a factor. Such claims can constantly change, as regards the grounds for the claim, or, more commonly, the amount of the claims as a result of the change-in-circumstances clause. This means that amendment of a decision is not just compatible with the ban on substantive review but, by virtue of the underlying premise (**acceptance of the settled will of the other State**), is virtually mandatory. The purpose of the change-in-circumstances clause is not to review and alter the intention behind the original maintenance order, but to help that **settled will again to prevail** when circumstances significantly change, by **adapting to those new circumstances**. Such amendments should therefore be seen not as reviewing, but as continuing the settled will of the original court, and as such they should not be ruled out by the ban on substantive review.

Furthermore, Article 32(2) is a rather ill-judged, or at least rather ill-placed provision, which wrongly and unhelpfully brackets together **debt and liability, which should be kept separate**. Observance of restrictions on execution applicable under the national law of the State of enforcement does not in any way alter the debt covered by the order but enforces payment of it as far as the framework allows. Clearly, applying the national subsistence level or other restrictions on execution (no execution of an attachment at night, moratorium in the event of a natural disaster, etc.) does not entail any review or amendment of a decision that would be incompatible with a single enforcement area. The justification for this point should be set out **much more fully and carefully**, unless it is after all the national law (on compulsory enforcement) of the State of enforcement which is to apply, as Article 27 would already suggest.

Article 33 on **refusal or suspension of enforcement** is a virtually indispensable **key component of the enforcement chapter**. However, it requires careful revision. The current wording is much too broad, but at the same time leaves out some necessary decisions.

The Austrian delegation considers that subparagraph (a) ought to be omitted. But, again, it must be precisely established whether changes in circumstances which have occurred since the decision was issued are being asserted, or substantive elements that could have been brought forward much earlier, notably before the order was issued, are only now being disputed or brought into play. Every effort should be made to rule out the latter possibility. New facts cannot be adduced before another State. **Changes in circumstances** can, however, be **asserted** before a court in the State of enforcement; however, that should not be dealt with at the enforcement stage, but should be **clarified in the rules on jurisdiction**, either by awarding exclusive competence to the State of origin or by appropriate extensions of competence.

At any rate, a clear, unambiguous and easy to implement Article 33 would be highly desirable. The nature of the article shows that the removal of exequatur, which has been deemed politically desirable, cannot be absolute, with nothing put in its place. Specific conditions to establish that an order is enforceable must, even in national cases, be fulfilled and their fulfilment must be verifiable. The rule of law demands it. In that light, dispensing with exequatur is revealed as primarily a procedural concept, signifying only that these vital checks are to be made subsequently, as part of the enforcement proceedings themselves, not in a separate exequatur procedure which precedes the attachment stage, thereby (further) delaying enforcement. This should not be taken as criticism of the political drive to dispense with exequatur, merely as informed commentary. The removal of a separate additional procedure or procedural steps is in itself very valuable and an aid to effective enforcement of maintenance claims. It must nevertheless be emphasised that not all substantive examinations can be waived, particularly not those which would also be required at the execution stage in national proceedings. The question of the line between effective implementation of the law and the necessary legal protection of the person from whom maintenance is claimed cannot always simply be resolved by applying a formula. To sum up, we therefore **support the basic premise of Article 33** but would like it to be appropriately and carefully **recast.**

Our position on Articles 34 and 35 is less nuanced. Both orders for monthly direct payments by the court of a State other than the State of enforcement and the freezing of bank accounts are measures to be rejected out of hand. With the simplified enforcement of decisions of other States in the State of enforcement, it seems **unnecessary for enforcement orders to be sent by the State of origin to the State of enforcement**.

In addition, we must be clear that such payments pose an **unreasonable dilemma** for employers and banks. Grasping the problem is already difficult enough, but the standard form, however simple it may be for the specialist, could prove impossibly complicated for small credit institutions and, particularly, for small businesses. In addition, the **ranking** of claims is extremely difficult to establish when attachment orders against the same debtor are available to a number of sovereign creditors.

As far the employer or the bank holding the account is concerned, it is asking too much to expect them to decide which of a number of orders, from various countries, they are to act upon. Arbitrariness, confusion and legal uncertainty would be unavoidable. For these reasons we would bring to your attention, and fully endorse, the negative opinions of the Austrian Economic Chamber, the Austrian employers' associations and the Austrian credit sector on this issue. "**One State, one enforcement authority**" must continue to be the rule.

The same remarks basically apply to Article 35 also. Further, that Article seems to be conceived as a kind of means of **reprisal**, a coercive measure to force maintenance debtors (and the maintenance obligation has not yet been established with any degree of reliability or finality at the point when it becomes possible to freeze an account under Article 35) to make payments, rather than as an appropriate and reasonable (i.e. complying with the principle of proportionality) preparation for enforcement. What is more, freezing the account immediately places the debtor in the position of being unable to pay, the debtor's financial difficulties increase and the situation is not resolved but exacerbated.

It is in fact really of secondary importance that the provision is not exactly successful from a technical point of view either. It is not clear what the **grounds** would be for such freezing of an account, nor the grounds on which the account holder's objection, for which provision is made, should be allowed. It all somewhat gives the impression of harassment organised on the basis of "shoot first, ask questions later", but far removed from any romantic notions of the Wild West.

Article 36, concerning the **ranking of maintenance claims** should, according to the Commission's commentary, be interpreted in such a way that the cross-border reference from Article 27 applies and the order of precedence would also have to apply vis-à-vis domestic maintenance claims. Apart from the fact that this is still difficult to put into practice, it is also **grossly irrelevant**. On the one hand, when the right of lien, law of property and credit protection law function, there is no need at all to grant a privileged rank to maintenance arrears which accrued earlier. Only current maintenance claims have a certain need of preferential treatment under the right of execution. However, in that case too, **giving preferential treatment to a maintenance claim from another Member State** can only be **justified vis-à-vis ordinary creditors, but not vis-à-vis creditors from the debtor State who are likewise dependent on maintenance** (or, more precisely: children in the home country who would have to wait in line behind children in foreign countries).

Therefore, there remain only the following **alternatives** to the text of Article 36 – which should be rejected in its current form:

leaving the granting of preferential treatment subject to the law of the State of enforcement;
objectively limiting the granting of preferential treatment (especially only to current maintenance and only vis-à-vis other creditors of maintenance pensions or periodical payments as damages, who are not equally worthy of protection) or
merely emphasising that the Member States must ensure some kind of preferential treatment for current maintenance (even if this were the content of a Directive rather than of a Regulation, it seems to be the most appropriate possibility).

To sum up, the chapter on enforcement could be shortened considerably; the only subjects to **remain** should be the ban on "révision au fond" (review as to substance), a definition of the grounds on which execution may be refused, a cautious reference to some kind of preferential treatment for current maintenance and a clear signal that the enforcement law of the State of enforcement otherwise applies. The Community should not legislate on any more than that (and there is much in the draft that it would not be allowed to legislate on).

ARTICLE 27

GERMANY

Germany welcomes the fact that the enforcement of decisions is in principle to be governed by the law of the Member State of enforcement. This ensures quick and effective enforcement, since the enforcement agencies are familiar with the relevant rules.

GREECE

We agree with the provision proposed.

IRELAND

Drafting suggestion:
Without prejudice to the provisions ~~Subject to the provisions~~ of this Regulation, the procedure for the enforcement of decisions issued in another Member State shall be governed by the law of the Member State of enforcement. *A judgment given under this Regulation shall be enforced under the same conditions as a judgment handed down in the Member State of enforcement.*

Comment: In the interest of coherence with other instruments such as the EEO and Payment Order Regulations, which cover the enforcement of foreign judgments, we suggest the amendments made in the text above.

MALTA

Malta agrees with this proposed Article.

THE NETHERLANDS

Articles 27 and 28 -

These articles should be redrafted so as to clearly express that they concern cross-border cases only.

Dutch procedural law does not provide for enforcement proceedings (as distinct from exequatur proceedings) to be conducted by the party seeking enforcement of a Dutch or foreign decision. Enforceable decisions can be directly enforced through the intermediary of a bailiff. It is up to the party against whom enforcement is effected to seize the court of the State of enforcement with a request to stop the enforcement (so-called enforcement dispute). The Dutch delegation considers that if the Commission proposal is intended to introduce a proceeding to be conducted by the party seeking enforcement, this would be tantamount to reintroducing exequatur proceedings. There is no reason why the rules for enforcement in cross-border cases should differ from the rules governing enforcement in internal cases.

In order to clarify the meaning of these articles, the term "enforcement proceedings" should be replaced by a term which better reflects the situation in a number of member States, e.g. "proceedings pertaining to enforcement".

The competent authority for the enforcement under article 28 could be the bailiff or, as the case may be, the central authority itself. It is felt useful that the competent authorities for issuing the extract and the competent authorities for enforcing the orders should be notified to the Commission and that the list of such authorities should be published.

Article 28 also refers to the party which applies for recognition. As explained in the comments on article 25, the issue of negative decisions should be addressed. It should be possible to obtain an extract of a negative decision.

Special attention should be given to the form of the extract. If no translation of the decision itself is required, the extract should state all the details which are relevant for the enforcement.

POLAND

The phrase "subject to the provisions of this Regulation" should be deleted from this Article.

ARTICLE 28

BELGIUM

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.

CZECH REPUBLIC

In our view, this provision ought to cover both chapters V and VI, since it sets out the documents which must be submitted in applying for recognition as well as enforcement.

We do not object to an extract in principle, provided that the decision in full is submitted with it. Further detailed discussion on the content of the extract is required. In our opinion the extract ought also to serve as confirmation that the decision is enforceable in the state of origin and, also where appropriate, that the minimum procedural rules have been observed. In that case the court of origin ought to issue the extract.

In addition, the extract might provide a solution to language arrangements, if it had to be translated into the state of enforcement's official language or another language that it accepts. A translation of the decision ought not to be required as a matter of course, but the body entrusted with enforcement ought to be able to demand one. The question of who should cover the translation costs ought to be allied with the question of legal aid and with the assistance of central authorities in accordance with Chapter VIII.

DENMARK

Paragraph 2

The translation is often necessary for the protection of the rights of the debtor. Therefor, the costs of translating the decision should be paid by the person or authority asking for recognition or enforcement.

On the other hand, translation costs should be reduces as much as possible. Therefor. the Danish delegation might accept starting a case on recognition or enforcement based only on the extract - without a translation of the decision - provided that a translation may be obtained, if it is nessesarily for handling the case.

The Danish delegation prefers the question of enforcement be dealt with by national law, provided that foreign cases are handled the same way as national cases.

GERMANY

Article 28 stipulates that compulsory enforcement should be carried out on the basis of an extract established using a standard form and that no translation of the decision can be required.

Germany is of the opinion that it would be problematic to base enforcement solely on an extract. Rather, the enforcement agencies must be aware of the entire decision. Firstly, a standard form cannot take account of all the different types of decisions which exist in the Member States; and secondly it is certainly the case that, sometimes, knowledge of the grounds for the decision may be decisive for enforcement, for example regarding the question of whether the case is one of particular urgency.

It therefore appears that a translation continues to be absolutely necessary. Consideration also needs to be given in this context to the fact that a large number of people – some of whom may have no legal training or foreign language skills – are involved in enforcement proceedings. It would be detrimental to legal certainty if they were able to work only with an extract rather than the complete decision.

A further argument in favour of translation is the fact that in Germany attachment of earned income or account balances is undertaken directly by the employer or the financial institution where the account is held. At least as far as employers are concerned, it must be pointed out that they do not have the necessary resources in order to obtain reliable knowledge of the content and validity of the decision of the court of origin. Since the third-party debtor is particularly vulnerable, however, insofar as the risk of a burden being imposed twice is concerned, it is not possible to dispense with a translation of the decision of the court of origin. It must be borne in mind that not all employers are large international concerns; rather, more often than not they are small businesses, often family-run and with only a small number of employees. They do not usually possess the necessary foreign language resources, nor do they have the means of obtaining the information they require in any other way.

Furthermore, the court also requires a translation in cases where the debtor applies for a review pursuant to Article 33. Without knowing the court of origin's grounds for the decision, the court seised cannot establish e.g. whether the facts adduced are new within the meaning of Article 33(a) or whether the debtor has, within the meaning of Article 33(c), in fact already satisfied the debt to which the decision relates.

It was not therefore without good reason that in the negotiations for a new Hague Convention on the international recovery of child support most EU Member States opposed allowing an extract to be sufficient for enforcement.

ESTONIA

The Estonian delegation does not support Article 28, which completely does away with the requirement to translate documents. Consideration could be given to a solution whereby translation of certain documents only is required.

GREECE

During the discussion on this provision we had expressed the view that there should be a full translation of the decision. However, following the explanations of the European Commission we agree with the provision proposed.

FRANCE

Drafting suggestions

Article 28

Documents

A party applying in a Member State for the recognition or enforcement of a decision given in another Member State shall produce a copy of the decision which satisfies the conditions necessary to establish its authenticity, as well as an extract established by the competent authority using the standard form in Annex I to this Regulation.

No translation shall be required by the competent authorities of the Member State of enforcement, unless the decision was translated at the time of its service in accordance with Regulation (EC) No 1348/2000 of 29 May 2000.

Explanations: see general comments.

IRELAND

Drafting suggestion:

A party applying in a Member State for the recognition or enforcement of a ~~decision~~ *judgment* given in another Member State ~~shall produce a copy of the decision which satisfies the conditions necessary to establish its authenticity, as well as an extract established by the competent authority using the standard form in Annex I to this Regulation.~~
~~No translation shall be required by the competent authorities of the Member State of enforcement.~~ *shall be required to provide the competent enforcement authorities of the Member State of enforcement with:*

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and
(b) a copy of the Maintenance Enforcement Order certificate which satisfies the conditions necessary to establish its authenticity; and where necessary,

(c) a transcription of the Maintenance Enforcement Order certificate or a translation thereof into the official language of the Member State of enforcement or, if there are several official languages in that Member State, the official language or one of the official languages of court proceedings of the place where enforcement is sought, in conformity with the law of that Member State, or into another language that the Member State of enforcement has indicated it can accept. Each Member State may indicate the official language or languages of the institutions of the European Community other than its own which it can accept for the completion of the certificate.

Comment: We support the provision for use of a standard form - a "Maintenance Enforcement Order Certificate" or "extract". To ensure coherence with instruments such as the EEO Regulation, we suggest that the text of Article 20 of that Regulation be used in this instance. Furthermore, in exceptional circumstances, it may be necessary to allow for the provision of a translated judgment.

ITALY

Italy opposes the innovation introduced by this provision, i.e. that the competent authorities of the Member State of enforcement may not require a translation of the decision to be enforced. This provision is superfluous to the objectives of the proposal and could moreover hinder a decision's circulation.

LATVIA

See comments under Chapter VI.

LITHUANIA

It appears from the proposal for a Regulation that one of the objectives is that decisions given in a Member State relating to maintenance obligations would have to be recognised and enforceable in all the other Member States without any additional procedures being necessary (recital 18). The Explanatory Memorandum for the proposal states that "Once the decision was given, measures have to be taken to give that decision the same force that it has in the Member State of origin, without any further formality. Thus the objective consisting in removing the 'intermediate measures' will be achieved." (first paragraph of section 1.2.1). For these reasons the provision that it is suggested be added in Article 28 of the proposal for a Regulation is not entirely clear (bearing in mind the recitals and the Explanatory Memorandum), in that this provision is about a party applying in a Member State for the recognition of a decision given in another Member State (especially given the legal construction of the provision "... recognition or enforcement ...").

LUXEMBOURG

Simply producing an extract from a foreign decision on a standard form is not sufficient for enforcement purposes. A translation of the decision into a language understood by the enforcement authorities is required for them to be able to take account of all the reasons for the foreign decision.

MALTA

Malta agrees with the principle proposed by the Commission as stated in paragraph 1 of this Article that the person applying for recognition and enforcement of a decision, whether creditor or debtor, has to produce two documents – the authenticated decision and the extract of the decision established by the competent authority.

However, Malta feels that first and foremost one has to identify who will be the competent authority that will fill in the form in Annex I.

Also, Malta has strong concerns about the Commission's proposal in the second paragraph that no translation will be required by the competent authorities of the Member State of enforcement. Malta believes that this will give rise to language problems in understanding the documents in question. Malta, therefore, proposes an amendment in the text to the effects that documents are translated, where necessary, in the official language of the Member State of Enforcement or, if there are several languages in that Member State, one of the official languages of the place where the enforcement is sought.

THE NETHERLANDS

See Article 27

POLAND

Annex No 1 –it is not clear what is meant in point 5.2 of the Annex, i.e. in connection with the term "Amount to be entirely paid in one sum" (*Zahlungshäufigkeit - periodicity of payment*). The German version of point 5.2.2. refers to an interim payment (*Abschlagzahlung*), while the Polish version still refers to an amount to be paid in one go (*Einmalzahlung* or *Amount to be partially paid in one sum*).

PORTUGAL

Portugal considers it essential that the enforcing State be given the option of requiring that documents be translated. While the form may suffice in some cases, in others it will not be practical to proceed to enforcement with the documents not translated - e.g. without a translation of the court of origin's decision it will not be possible to consult the conditions of refusal or suspension of enforcement provided for in Article 33.

ROMANIA

We agree with the extract mentioned in Article 28(1), which will reduce the costs of translation.

As far as Article 28(2) is concerned, however, we believe that translation is necessary, at least for the extract of the maintenance decision. However, we believe that a full translation of the decision would ensure the defense of the debtor and protect his rights.

We also take the view that the costs of the translations of the decision (or at least of the extract) should be covered by the requesting state. Where necessary, the requested state should be entitled to require for a translation of the decision.

Also, if there is no certified translator in the requesting state for the official language of the requested state, we believe than the requesting state should sent the decision/extract translated in a language that the authorities of the requested state understand.

For continuity reasons, we consider appropriate for the decision of divorce/establishing the paternity or/and the previous decision to increase/reduce the alimony to be translated and sent to the requested state, at least in extract.

SLOVENIA

We support the use of extracts; however the competent authority of a Member State should be entitle to require a translation of a judgement where necessary.

SLOVAKIA

Slovakia believes that the extract of the decision established by the competent authority of the Member State of origin on the form in Annex I should be translated into the official language of the Member State of enforcement. The Article as it stands does not solve the problem. We consider it very important, because the decision itself is absolutely not required to be translated into the language of the state of enforcement, nor is any higher verification or any such formal procedure performed. The extract in question, however, will have to be sufficiently detailed so as to cover all the essential elements of the decision sufficiently. In our view the court that issues the decision should be the competent authority for the issuing of such an extract. We do not consider it appropriate to entrust its drafting to a different state organisation, because the decision concerned would have to be sent to that organisation and again this would have the effect of delaying proceedings.

Slovakia does not agree with the second paragraph of this Article and proposes deleting it from the proposal for a Regulation.

ARTICLE 29

BELGIUM

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.

CZECH REPUBLIC

In general terms we have no basic objections to this Article. That said, its final wording ought to be in line with its counterpart provision in the new Hague Convention. We can well envisage separate arrangements for the enforcement of decisions on maintenance towards children, where legal aid in the country of enforcement would be provided automatically.

GERMANY

Germany welcomes the approach of granting the creditor legal aid in the procedure for enforcement as well, since only in this way will creditors in needy circumstances be able to assert their claims effectively.

This necessity has, however, already been recognised in Article 9 of the Legal Aid Directive, which contains comprehensive rules governing legal aid in enforcement proceedings. The question therefore arises as to whether a separate rule is at all necessary in the present proposal. It appears sufficient to have a clarifying reference here stating that the creditor shall be granted legal aid in accordance with the Legal Aid Directive.

The current wording of Article 29 does not, however, seem appropriate. Firstly, it is difficult to see why the granting of legal aid in the proceedings leading to the decision should automatically also apply in respect of the procedure for enforcement; account needs to be taken in this context of the fact that enforcement based on a maintenance order is continued over a very long period of time, during which a person's financial circumstances can change. Secondly, it is not clear why the creditor should always benefit from the most favourable treatment even if he/she received only partial legal aid in the Member State of origin; there is no reason why he/she should be placed in a more favourable position in the procedure for enforcement – and what is more, for this to happen automatically.

GREECE

We agree with the provisions proposed.

IRELAND

We have concerns that the long-term nature of enforcement of a maintenance judgment is not reflected in this provision. The possibly changing financial position of the parties over the enforcement period is not taken into account. Furthermore, a party who had benefited from a degree of legal aid in the MS of origin should not necessarily benefit from the most favourable legal aid or exemption from costs available in the MS of enforcement – a proportionate amount would be appropriate, and provision should be made to allow the MS of enforcement to seek a review of the legal aid arrangements.

LUXEMBOURG

Our position on this provision will depend on the course of negotiations in the Hague, where there are still many questions unresolved, in particular the precise modalities for legal aid in relation to applications for child support, and the treatment of public bodies. It is therefore premature as yet to state our views on Article 29 of the Community Regulation.

MALTA

In principle, Malta supports the idea of providing legal aid where necessary in maintenance claims, however, it has doubts as to whether we need a specific provision in this Regulation in the first place since Article 9 of the Council Directive on Legal Aid itself covers the same matter. So in Malta's opinion the Commission should not repeat principles that are already established in another Community instrument. Malta, therefore, prefers to have this Article deleted.

THE NETHERLANDS

Legal aid will not be required at the enforcement stage to the extent that the creditor is not required to conduct enforcement proceedings before the court of the Member State of enforcement. (See the comments on article 25). However, legal aid has to be provided if a dispute regarding the enforcement or (non)-recognition is brought before these courts by the debtor.

The Regulation should take into account the important progress that was made in the negotiations at The Hague on the issue of legal aid. The standard to be set in the Regulation should not be lower than the standard to be agreed upon in the future Convention.

The provision was borrowed from Brussels 1. The Brussels 1 Regulation is to be replaced by this Regulation. By contrast, the Legal Aid Directive is not to be replaced. In light of this, the Dutch delegation wonders what the added value of this provision is.

ROMANIA

Articles 29 – 31

We agree with the provisions proposed. However, as far as legal aid is concerned, we would prefer that the creditor be subject to a "means or merits" test as provided in the draft Hague Convention.

FINLAND

The contents of this article cannot be decided, before we know the results from the Hague. From Finnish point of view this article is too restrictive. In Finland maintenance is very often established in administrative proceedings, where the applicant does not need legal aid because the proceedings are free. According to the article, such applicants would not be entitled to legal aid in enforcement proceedings, which would be quite unfair.

SWEDEN

Sweden agrees with the idea that anyone who has received legal aid in the original proceedings should also receive it in enforcement proceedings. However, some interpretative difficulties can be anticipated. The applicant's situation may have changed in the course of time. It is also open to question what happens if the applicant has received limited legal aid, of say EUR 100, in the original proceedings. Should that entitle the applicant to full legal aid in the country of enforcement? The provision could also be said to disadvantage applicants from countries with administrative systems under which they do not incur any costs and thus do not need and will not have received any legal aid.

In Sweden's view, too, it is crucially important to take account of Article 13 of the proposed Hague Convention. If enforcement costs are to be eliminated in the case of children in that context, it is only reasonable to do likewise in this proposed Regulation.

ARTICLE 30

GERMANY

Articles 30 and 31

These two provisions correspond to Articles 51 and 56 of the Brussels I Regulation. They facilitate the recovery of maintenance and are therefore to be welcomed. However, in Article 31 of the German version, the term "*Legalisation*" should be used instead of the term "*Beglaubigung*".

GREECE

We agree with the provisions proposed.

IRELAND

Drafting suggestion:

No security, bond or deposit, however described, shall be required of a party who in a Member State applies for enforcement of a decision given in another Member State on the ground that he or she is a foreign national or that he or she is not domiciled or resident in the State in which enforcement is sought. *The party seeking enforcement shall not be required to have: a) an authorised representative; or b) a postal address in the Member State of enforcement, other than agents with competence for the enforcement procedure, for the enforcement of a judgment delivered in the European Small Claims procedure in another Member State*

Comment: We suggest that this Article be amended to include a provision similar to that in A18A2a of the Small Claims Regulation, as in italics above. As well as ensuring coherence with other instruments, this is a provision which has implications for costs, in that the parties are not obliged to seek fresh legal representation in the MS of enforcement.

MALTA

Malta agrees with this proposed Article.

ROUMANIA

See Article 29.

ARTICLE 31

GERMANY

See Artilce 30.

GREECE

We agree with the provisions proposed.

MALTA

Malta agrees with this proposed Article.

ROUMANIA

See Article 29.

ARTICLE 32

BELGIUM

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.

CZECH REPUBLIC

Re paragraph 2: we agree with the principle laid down in this provision. However, we feel it would be better to make it into a separate Article or incorporate it into Article 33. If the proposal is worded such that the grounds for halting or suspending enforcement laid down in Article 33 are not exclusive, the provision could be deleted entirely, since it can be assumed that such a principle is recognised in all domestic legislation.

DENMARK

See Article 28.

GERMANY

Re paragraph 1: The exclusion of the possibility of a review as to the substance of a decision during the enforcement procedure is based on models established in various different legal instruments of judicial cooperation in civil matters and is also consistent with Article 25.

Re paragraph 2: Germany is of the opinion that the rule on compliance with exemption thresholds for attachment is not necessary since this is already implicit in the reference to the national law of enforcement (Article 27). This paragraph should therefore be deleted. However, it would also be conceivable for the observance of exemption thresholds for attachment to be formulated as a general principle elsewhere in the text. Furthermore, the restriction should be mandatory and not merely at the discretion of the competent authority in the Member State of enforcement.

ESTONIA

Article 32(2) and Article 33

Estonia does not support exhaustive regulation of the grounds for refusal to begin or suspension of the enforcement procedure. A compromise could lie in minimum harmonisation.
The structure of Article 33 could be amended so that the grounds for suspension and for refusal/termination of enforcement are set out in separate paragraphs. Article 32(2) should be moved to Article 33.
It is not clear which grounds are applied *ex officio* and which are applied only at the request of one of the parties. It is also unclear who will decide on the refusal or suspension. In Estonia, the enforcement procedure is carried out by bailiffs, who are not part of the court system. Competence for taking decisions in certain areas lies with the bailiff, in others with the court. The Regulation should not change the national rules for division of competence between bailiffs and courts.

GREECE

We consider that paragraph 2 is redundant and should be deleted.

FRANCE

Drafting suggestions

Article 32

No review as to the substance of a decision

1. Under no circumstances may a decision given in a Member State be reviewed as to its substance in another Member State during the enforcement procedure.

2. However, the competent authority of the Member State of enforcement may decide, at its own initiative, to limit the enforcement of the decision of the court of origin to a part of the maintenance claim if the complete enforcement would ~~have an impact on a part of~~ infringe a procedural rule protecting the debtor ~~assets which is not attachable~~ according to the law of the Member State of enforcement.

Explanations: all the rules protecting the debtor under the law of the Member State of enforcement must be applied, not simply the rules concerning the non-attachable part of the assets.

IRELAND

Drafting suggestion:

1. Under no circumstances may a ~~decision~~ *judgment* given in a Member State be reviewed as to its substance in another Member State during the enforcement procedure.
2. ~~However, the competent authority of the Member State of enforcement may decide, at its own initiative, to limit the enforcement of the decision of the court of origin to a part of the maintenance claim if the complete enforcement would have an impact on a part of the debtor assets which is not attachable according to the law of the Member State of enforcement.~~

Comment: the relationship between this Article and Article 33 needs to be clarified. While paragraph 2 concerns a matter appropriate to national law and should, therefore, be deleted, cognisance needs to be taken of the type of situations which it is designed to address when setting the provisions of Article 33.

ITALY

Whereas paragraph 1 reproduces provisions of earlier Regulations (Article 45 of Regulation (EC) No 44/2001, Article 26 of Regulation (EC) No 2201/2003 and Article 21 of Regulation (EC) No 805/2004), paragraph 2 is a new provision which encroaches on the area that the Regulation itself has reserved to national law: under Article 27 the procedure for the enforcement of decisions is governed by the law of the Member State of enforcement.

LATVIA

See comments under Chapter VI.

LITHUANIA

Lithuania considers that problems could arise in implementing Article 32(2) of the Regulation, which states that "the competent authority of the Member State of enforcement may decide, at its own initiative, to limit the enforcement of the decision of the court of origin to a part of the maintenance claim". Lithuania is of the opinion that this provision that it is suggested be added in Article 32(2) of the proposal for a Regulation is questionable, as decisions handed down by courts are binding and must be enforced. In any case, Lithuania considers that only a court could decide to limit enforcement of the decision of the court of origin to part of the maintenance claim (in this case, the court of the Member State of enforcement). The legal situation regarding the part of the court decision that it is decided will not be enforced, on the basis of and under the terms of the above provision, should also be regulated appropriately (in other words, how the creditor could demand the debtor to fulfil these parts of the decision, etc.).

LUXEMBOURG

As already stated at the Committee meeting, Luxembourg views the clarification given in Article 32(2) with great satisfaction. It would fit in better in Article 33.

MALTA

Malta agrees with this proposed Article.

THE NETHERLANDS

The word “enforcement procedure” is to be replaced by “proceedings pertaining to the enforcement” so as to take into account the situation in the Netherlands and in a number of other Member States. See the comment on article 28.

The second paragraph should be reworded so as to make it clear that the prohibition of the review as to the substance is without prejudice to the right of the authorities of the Member State of enforcement to apply the local rules on the inalienability of a certain proportion of the debtor’s assets.

POLAND

Article 32 constitutes too great an interference in national enforcement proceedings. Article 32 does not take account of the situation where even partial enforcement of the decision would encroach upon a non-attachable part of the debtor's assets; partial limitation of enforcement of the decision is allowed only if complete enforcement would have an impact on a part of the debtor assets which is not attachable.

PORTUGAL

We see the reference made in paragraph 2 of this Article to the possibility of the enforcing State's safeguarding the unattachability of a part of the debtor's assets as very important. However, we can agree to move this principle to Article 33 (refusal or suspension of enforcement), as suggested by other delegations when this Article was discussed.

ROMANIA

We welcome the provision of Article 32(2), which we believe to be very important for the protection of the debtor.

SLOVAKIA

Regarding paragraph 2 of this Article, we propose that if the Member State of enforcement protects the non-unattachable assets of the debtor, it should be stipulated in this provision as an obligation, and not an option, that the competent authority do this. We therefore think the word "may" should be replaced by the word "must". Apart from that, Slovakia supports and very much welcomes this Article.

ARTICLE 33

BELGIUM

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.

CZECH REPUBLIC

We are somewhat reluctant to support an exhaustive list of grounds for halting or suspending enforcement, since domestic law provides for a series of other practical cases in which enforcement of a decision has to be halted or suspended. If the list is intended to be exhaustive, further grounds must be added thereto. For instance, if the debtor wins the appeal case in the state of origin and the decision is rescinded, it follows that enforcement must also be halted.

Re point a):

We are not entirely clear as to what is meant in this provision by "new" or "unknown" circumstances. This rule has not yet appeared in other Community legislation involving direct enforceability (such as the EEO Regulation and the European Payment Order Regulation). If it is supposed to refer to the circumstances relating to the debtor's personal and property assets when the decision is enforced, this ought to be spelt out more precisely in the text. However, if the Commission is alluding to new circumstances concerning the facts of the case which would impact upon the decision in that case, it would be preferable for them to be invoked by the debtor during an appeal process or in an application for the decision to be changed, but not during the enforcement procedure.

Re point e):

In view of the definition of a decision as set out in Article 2(3), this provision will have to be modified as well, to allow also for irreconcilability with decisions issued in third countries.

DENMARK

See Article 28.

GERMANY

Article 33 should be redrafted since it gives rise to a number of fundamental problems and problems concerning the detail. In general it is questionable whether the apparent aim of full harmonisation and definitive determination of the objections which are to be permissible in the enforcement procedure, is appropriate. Whilst it would serve the objective of preventing a review of the substance of the decision "by the back door", Member States' interpretation of the division of competence between the initial court proceedings leading to the decision and enforcement proceedings do, however, differ widely.

This is then also reflected in the type of objections which are still admissible in the procedure for enforcement. In addition, a clearer differentiation must be made between suspension of enforcement (= temporary measure which applies only until a certain issue has been clarified) and refusal of enforcement (= final rejection).

The fundamental problem referred to above relating to the different understanding of legal remedies in the enforcement procedure seems to suggest, in Germany's view, that Article 33 should be dispensed with completely and that these issues should be left up to the national legal systems, since they have already developed practicable solutions for them. Alternatively, Article 33 could be limited to establishing minimum standards.

We have the following comments in respect of the individual constellations:

- (a): The regulation does not make a clear enough distinction between new circumstances which do not affect the lawfulness of the decision (for example, a situation of unemployment which has occurred since the decision became final and binding), and circumstances which already existed in the past but were unknown to the court of origin. As far as the first case is concerned, the aim is to have the order modified, something which is not directly related to enforcement; in this respect, the Member States' bodies of procedural rules provide for appropriate procedures (in Germany: action for modification of an order pursuant to section 323 of the Code of Civil Procedure), so there is no need for a rule to be included in the Regulation. In the second case, the objection should only be admissible if the debtor was unable to submit the circumstances at an earlier point in time through no fault of his/her own.
- (b): The current rule conflicts with Article 24(3), pursuant to which the measures for enforcement are suspended by operation of law and not suspended only through court decision. The fundamental principle behind (b) is, however, to be welcomed. Article 33(b) should therefore apply not only in the event of a review pursuant to Article 24, but also in respect of other legal remedies as provided for by the law of the place of the court of origin.

- (c): The satisfaction of the debt constitutes a special case under (a) and, as described above, should therefore be treated in a differentiated manner. The consequences that follow in the event that a debtor has already satisfied his or her debt, and the ways in which the debtor can assert this, are established in national procedural law and law of enforcement. If the debtor satisfies the debt while the proceedings are still ongoing, he/she can submit this circumstance as an objection and no judgment will be passed against him/her. If the debtor does not satisfy his/her debt until the decision becomes final and binding, in Germany, for example, a note will be made on the enforcement order that partial satisfaction has been made; once the debtor has satisfied the debt in full he/she becomes entitled to demand surrender of the order, which means that further attempts at enforcement by the creditor are ruled out. It therefore seems unnecessary to establish a separate European legal remedy.
- (d): This rule is appropriate; however, it is unclear whether prescription and limitation vis-à-vis enforcement are governed by the law of the court of origin or that of the Member State of enforcement. This could be clarified either at this point in the text or in Article 17 (1)(d).
- (e): The fundamental principle of this rule is to be welcomed. However, the scope of application should be restricted to decisions given in Member States. It is not clear that the EU has competence to establish rules governing the question of what should happen in the event of a conflict with a decision from a non-Member State.

Furthermore, Germany considers it necessary to include two further points in Article 33, if it is decided to retain this Article at all.

- It is currently unclear whether the decision on suspension or refusal of enforcement is to be made in the Member State of origin or the Member State of enforcement. This point must be clarified here. It is conceivable that the different types of objection could also be assigned to different courts.
- It seems to make sense to establish a rule according to which the debtor can assert in proceedings under Article 33 that the court of origin suspended enforcement. A provision to this effect could be added under (f).

ESTONIA

See Article 32

GREECE

In subparagraph (a), if the relevant circumstances are related to the substance, we consider that they should be asserted in the State of origin and that this should constitute grounds for the court to grant suspension of enforcement. We also consider that the list of cases should be exhaustive, that the two cases which the European Commission is proposing to add under (f) and (g) are not necessary and that a distinction should be made between cases of refusal and cases of suspension.

FRANCE

Drafting suggestions

Article 33

Refusal or suspension of enforcement

The partial or total refusal or suspension of the enforcement of the decision of the court of origin may at the request of the debtor be granted only in the following cases:

~~(a) the debtor asserts new circumstances or circumstances which were unknown to the court of origin when its decision was given;~~

(a~~b~~) the debtor has applied for the review of the decision of the court of origin in accordance with Article 24 and no new decision has yet been given;

(b~~c~~) the debtor has already satisfied his or her debt or the debt has been extinguished pursuant to an insolvency decision given in the Member State of enforcement or which fulfils the conditions necessary for its recognition in the Member State of enforcement;

(c~~d~~) the claim is totally or partially extinguished by the effect of prescription or the limitation of actions under the law of the State of origin;

(d~~e~~) the decision of the court of origin is irreconcilable with a decision given in the Member State of enforcement or which fulfils the conditions necessary for its recognition in the Member State of enforcement.

Explanations:

- *First point: the proposed amendment to Article 26 enables point (a) to be deleted: it will be possible for the decision's enforceability to be suspended by the competent court of the State of origin, in accordance with the law of that State.*
- *Second point: insolvency proceedings (bankruptcy, over-indebtedness, etc.), which may lead to the extinction of the debt, must be taken into account in cases where enforcement of the decision is refused.*
- *Third point: clarification as to the law applicable to the barring of enforcement would be advisable.*

IRELAND

We consider that sub-paragraph (a) should be deleted as assertion of new circumstances or circumstances which were previously unknown should not be grounds for refusal or suspension of enforcement. Rather, the debtor should commence new proceedings. Furthermore, the court of enforcement would not be competent to assess the changed circumstances.

ITALY

The Article does not mention which court has jurisdiction to refuse or suspend enforcement in the cases listed.

We would propose specifying that where the debtor asserts new circumstances or circumstances which were unknown to the court of origin when the decision was taken, this should be the court of the Member State of origin (in accordance with its domestic procedural law) because this amounts to a review of the decision as to substance. In the other cases listed, including that of an application for review under Article 24 that is pending, jurisdiction could lie with the court of the State of enforcement, which is in line with Article 23 of Regulation (EC) No 805/2004.

Re point (d): Italy would like it specified that decisions regarding prescription/limitations on actions be taken in accordance with the applicable law (consistent with Article 17).

LATVIA

See comments under Chapter VI.

LITHUANIA

Article 33 of the Regulation provides that at the request of the debtor the enforcement of the decision may be refused in part or in its entirety or may be suspended in certain cases – for example, if the debtor asserts new circumstances or circumstances which were unknown to the court of origin when its decision was given. This raises doubts as to how this provision is to be implemented – how can it be established whether the debtor has asserted new circumstances and whether these were genuinely unknown to the court of origin if the enforcement decision is submitted in the original language, as a translation is not required?

It should be noted that it is not clear from the wording of the provision just who should be informed of new circumstances which come to light – the authority enforcing the decision or the court of origin that handed down the decision. Another case of when the decision to enforce may be refused is if the claim is totally or partially extinguished by the effect of prescription or the limitation of actions. It should be noted that in this case as well use can be made of this possibility only at the debtor's request. However, it is not clear what course of action should be taken if the case is extinguished by the effect of prescription but the debtor does not ask for enforcement to be suspended or dismissed. Furthermore, it is not clear from the wording of this article who is given the right to suspend or refuse to enforce the decision in part or in its entirety – the court, the bailiff or another authority. It is also unclear whether an appeal can be laid against refusal to suspend / not to suspend enforcement.

LUXEMBOURG

Mere *renvoi* to national law to determine the reasons for refusal or suspension of enforcement would make for different outcomes depending on the country where enforcement is sought. A minimum harmonisation approach therefore seems necessary.

The reason for refusal in (a) should be deleted: it would not be acceptable for the debtor to be able to assert new circumstances to the competent authorities of the Member State of enforcement. This would tend to favour review of the substance of the decision of the court of origin. Should new circumstances arise, the debtor should turn to the court of origin. Any other arrangement would be contrary to the idea underlying Article 14 of the world convention, which we should like to see imported into the Community Regulation.

MALTA

Malta welcomes this proposed Article, however, it has some misgivings about certain paragraphs.

With regard to paragraph (a) the current wording does not specify before which court (that is, court of origin or court of enforcement) should the new circumstances be brought. So an amendment to this effect should be made to the text.

With regard to paragraph (d), Malta proposes an amendment to the effect that it is made clear in the text as to which law governs prescription.

Malta generally prefers an exhaustive list.

As an alternative, Malta would also favour the option of deleting this Article altogether and leaving matters up to national law.

THE NETHERLANDS

a) The Dutch delegation endorses the idea of a closed list of grounds for refusing or suspending the enforcement. The proposed provisions were examined in the light of present practice in the Netherlands (no enforcement proceedings to be conducted by the creditor).

b) Ground sub a: new circumstances. One example of such a ground is that the creditor (ex-spouse) has remarried. The proposal is unacceptable for the Dutch delegation. Why should the debtor be allowed to put forward new circumstances at the stage of enforcement? The court would thus be compelled to proceed to a review as to the substance. If there are new circumstances the debtor should seize the courts of the State of origin. In light of this, the Dutch delegation considers that the ground sub a should be deleted. See the comment on the ground sub b.

c) Ground sub b (application for review): the reference to article 24 in the English version should be replaced by a reference to article 28. It should be recalled that this delegation is not in favour of the introduction of review proceedings. This delegation does, however, suggest that the ground sub b should be reformulated. The fact that the debtor has lodged an appeal or has applied for a modification before the courts of the State of origin should be a ground for suspension or refusal of the enforcement. See also the comment on article 28.

d) Ground sub d (extinction) The word "claim "should be replaced by "right to obtain enforcement" or a similar wording.

e) Ground sub e (incompatible decisions): having regard to the words: "fulfils the conditions necessary for its recognition" the Dutch delegation considers that the ground should also include negative decisions.

f) The competent authorities should be notified to the Commission and the list should be published.

POLAND

Article 33(a), (b), (c) and (d)

Point (a) should be deleted. It is highly probable that a debtor who wishes to delay paying maintenance will always cite new circumstances. In addition the content of point (a) seems to be perfectly well covered by point (b).

As regards point (c), while allowing the debtor to cite the fact that he has already paid the debt, the question of payment for enforcement proceedings needs to be settled at the same time. If enforcement proceedings have been commenced unlawfully, i.e. where the debtor paid the debt before enforcement commenced, which of the parties is to bear the cost of the enforcement proceedings?

As regards point (d), it would seem that the authors' intention was to enable the debtor to apply for enforcement to be refused where enforcement of a decision is time-barred in the country of origin, rather than where the right to obtain enforcement of a decision has been extinguished by the effect of prescription (at least in the Polish language version). In the case of point (d), the Polish version is completely different from the English.

PORTUGAL

We agree with the idea of an exhaustive list to avoid national law listing too many circumstances in which enforcement could be refused or suspended, which could prejudice the recovery of maintenance.

As for the content of the Article, we would argue for the separation of the cases of rejection of enforcement from those of suspension, with a view to greater clarity. With regard to the individual points:

- concerning (a), we consider its scope very hard to define, and believe that it may lead to the risk of an analysis of the merits of the decision;
- concerning (d), the text will need to clarify what type of prescription is concerned here and which will in fact be the applicable law;
- concerning (e), and for the sake of better understanding of this point and greater coherence between Community instruments, we suggest the adoption of a wording similar to that of the proposal for a Regulation on the European order for payment, the proposal for a Regulation establishing a European small claims procedure and the Regulation on the European enforcement order.

ROMANIA

We are in favor of a minimum harmonization of the grounds for suspension and refusal of enforcement, which we believe shoud form distinct sets.
As far as Article 33(1)(a) is concerned, we believe that this should be deleted, because the debtor could invoke this ground during the ordinary appeal procedure.

SLOVENIA

In general, we could support the proposal.

However we have three remarks:

- Point a: point a is not acceptable; because it enables that an appeal is granted by the facts which refer to the period before the judgement is issued. A party can appeal for those reasons using other legal redresses (appeal, review), but she/he can not use it during the enforcement stage. However, we can agree that a party can appeal because of the new facts which came into existence after the decision had become enforceable, or prior to the enforceability of the decision but at the time the debtor was not able to assert it in the proceedings where the executive instrument was issued;
- Point e: point e should include cases, where a new decision was issued due to the new circumstances;
- We support the Commission's proposal to include point f, which would refer to judge's decision rejecting the presumption of provisional enforcement.

SLOVAKIA

Slovakia agrees in general that the list of circumstances making it possible to refuse or suspend enforcement should not be exhaustive. Member States may also recognise other serious circumstances, not mentioned here, which cannot be listed exhaustively. We therefore propose adding in conclusion a new point (f): "for other reasons meriting consideration case by case".

Regarding paragraph 1(a) - Slovakia agrees with this in principle, but proposes making it more precise by adding that the new circumstances not known when the decision was given may be circumstances or items of evidence, which the party, through no fault of his own, was unable to use during the original proceedings, insofar as they may lead to a fairer decision in the case for him. In other words, these new items of evidence or circumstances may have existed at the time of the original proceedings, but the debtor was unaware of them, and did not fail to fulfil his obligations to declare facts and produce evidence. We propose adding the expression "new evidence" alongside "new circumstances" in the wording of this paragraph.

Regarding paragraph 1(e) - Slovakia thinks this must relate only to an earlier decision and proposes adding the word "earlier" to this paragraph. Otherwise legal certainty could not be guaranteed for the parties in the proceedings.

FINLAND

Letter a) should be removed. If the debtor could at the stage of enforcement appeal to new circumstances, that would destroy the whole system.

It may be very difficult to formulate an exhaustive list on grounds of refusal or suspension. It may, for instance, be wise in some situations to give the debtor some “free months” during which the wage withholding is not used, in order not to destroy his or her economy. This is normally also in the interests of the creditor. So, some flexibility is needed.

SWEDEN

This article involves harmonisation of grounds for refusing enforcement and thus represents a significant departure from the principle that decisions are to be enforced in accordance with the law of the country of enforcement.

Assertion of new circumstances should not constitute grounds for refusal of enforcement. It should rather give rise to review in the country of origin. In Sweden's view, therefore, subparagraph (a) should be deleted.

ARTICLE 34

BELGIUM

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.

CZECH REPUBLIC

Articles 34 and 35

Along with the vast majority of Member States, we have serious doubts about these measures, and would therefore suggest that both articles be deleted from the proposal.

DENMARK

Decisions on monthly payments and freezing of bank accounts should be made only by the authorities in the state of the employer or of the bank.

As monthly payments and freezing of bank accounts are very effective means of enforcement maintenance, the delegation proposes, that the regulation contains an obligation for all member states to provide for such means of enforcement in national law.

GERMANY

Re Articles 34 to 36 generally

It would appear that the proposed measures for improving compulsory enforcement, which aim toward partial harmonisation of enforcement law among Member States, will fail to achieve their objective. In a study on enforcement law in the Member States, which was commissioned by the European Commission, Prof. Dr. Hess (University of Heidelberg) shows that no field of law varies so greatly from one Member State to another as that of enforcement law.

Thus for the proposed measures to achieve their goal of at least partial harmonisation, it would have been necessary at least to conduct comprehensive consultations with national experts in enforcement law. It therefore seems premature and inappropriate to include such provisions within a regulation that is intended to apply only to certain claims.

In a departure from the principle of territoriality, the Commission is attempting – by its own admission for the first time – to establish provisions with respect to cross-border enforcement. The principle of territoriality that flows from the sovereignty of every State implies that compulsory measures carried out by State authorities – and enforcement measures constitute such compulsory measures – are and remain limited to the territory of the respective State. Even if departures from the principle of territoriality were to be accepted in principle, it is doubtful whether the proposed exceptions to this principle set forth in the proposed Regulation would be truly expedient and lead to improvements in practice.

The "Study on making more efficient the enforcement of judicial decisions within the European Union", which was commissioned by the Commission, revealed significant differences among the Member States with respect to enforcement law. For this reason, a regulation would not appear to be the appropriate legal instrument to unify this field of law. A directive could take national particularities into account much more effectively.

The proposed provisions relate to the matter of direct payments, namely those types of direct payments – from earnings and bank accounts – that occur most frequently in practice. In this respect, the chosen objects of enforcement are suited in principle to lead to the satisfaction of the creditor.

However, Articles 34 to 36 of the proposed Regulation do not generally take into account the scenario in which an insolvency proceeding has commenced with respect to the debtor's assets, or commences after compulsory enforcement measures have been initiated. At any rate, pursuant to German law, the commencement of insolvency proceedings with respect to the debtor's assets has effects on the admissibility and effectiveness of compulsory enforcement measures.

Article 34

Pursuant to the proposed Article 34, the court of origin may, at the request of the creditor, issue an order for monthly direct payment to be attached from the debtor's earnings or bank balance. The order for monthly direct payment is to be enforced, like the maintenance decision itself, in accordance with Articles 25 and 26. Paragraphs 2 and 6 contain further details.

As the representative of the European Commission explained at the meeting on 28 September 2006, this rule is not meant to govern cross-border attachment comprehensively but rather only in part. To the extent that Article 34 does not regulate a particular question, reference is to be made to the national legal provisions of the Member State in which the attachment occurs.

Germany is in favour of deleting this provision, because it raises considerable problems of both a fundamental and detailed nature.

- The greatest shortcoming of the proposed Article 34 is that it does not address the issue of how the debtor can be protected from attachment. An examination of the provision set out in paragraph 5, first sentence, which states that "the addressee of an order for monthly direct payment shall proceed with the first direct payment" as from receipt of such order, leads to the conclusion that exemption thresholds have not been taken into consideration at all.
  This gives rise to significant concerns of a constitutional nature, since even defaulting debtors must possess sufficient residual means to lead a dignified life. In addition, protection from attachment is meant to prevent the debtor from requiring assistance as a consequence of the attachment measures. The general public should not be encumbered with expenditure for social service benefits for debtors who have become indigent as a result of attachment measures, i.e. taxpayers should not have to pay for private financial liabilities.

- The proposed cross-border attachment of earnings may ultimately endanger the debtor's employment, an outcome that can hardly be in the creditor's interest. Experience in national cases of wage attachment has already shown that the efforts demanded of employers in connection with wage attachment often serve to place the debtor's job at risk. The increased level of effort and risk faced by employers in connection with the proposed cross-border monthly direct payments is likely to exacerbate this danger.

- The same also applies to the attachment of bank accounts. In about 60 % of cases, the attachment of a bank account in purely national cases results in the termination of the current account agreement because the attachment causes the account to be blocked, so that regular transactions can no longer be conducted. The credit institute can no longer be reasonably expected to manage the account and is therefore entitled to terminate the contractual relationship. Bearing in mind that a current account is a prerequisite for conducting non-cash payment transactions, it would be difficult to gain support for European rules on the cross-border attachment of bank accounts that worsen the situation for debtors.

- The "monthly direct payments" scheme cannot be implemented in the German legal sphere. First of all, pursuant to German enforcement law, an attachment is not "enforced". Rather, the enforcing court issues a so-called transfer order – in practice, usually together with an attachment order – according to which the attached outstanding debt is transferred to the creditor in accordance with his choice for collection or, in lieu of payment, at nominal value (section 835(1) of the German Code of Civil Procedure, ZPO). Pursuant to section 836 of the Code of Civil Procedure, such transfer has the effect of replacing the formal declarations of the debtor, upon which the right to collect the debt depends pursuant to the provisions of civil law.

In any event, the attachment and transfer orders do not have the effect of constituting an instrument for the creditor that is enforceable against a third-party debtor. If the third-party debtor does not recognise the attached and transferred debt, the creditor must, if necessary, take legal action against the third party-debtor to assert the claim. An attachment order that is automatically enforceable against a third party that is completely uninvolved in the proceedings would seriously interfere with that party's rights and would therefore not be acceptable.

- An additional deficiency of the proposed Article is the fact that the third-party debtor's obligation to provide information, as set forth in paragraph 5, second sentence, is insufficiently regulated. The third-party debtor should, in all cases, be required to inform the creditor as to whether the attachment was "successful" or "unsuccessful"..

- The debtor's duty to provide information as set forth in paragraph 6, pursuant to which the debtor is required to inform the creditor and the court of origin of any change of employer or bank account, appears to be very far-reaching. First, the question can be asked as to why such a duty to provide information does not arise until attachment is to be made and not beforehand at the time court action is sought. Is the successful execution of an attachment a prerequisite for such duty, or does this duty apply even if the attachment proves unsuccessful? Moreover, the question remains open as to what sanctions follow from the failure to comply with the duty to provide information. German enforcement law does not contain any provisions which could be applied by way of supplementation.

- In the English version, Article 34(4)(a) refers to an "account", i.e. a bank account. According to the German and French versions, however, only current accounts are to be covered.

ESTONIA

Article 34 and 35.

The Estonian delegation has fundamental objections to Articles 34 and 35, which do not take account of the fact that in several Member States, including Estonia, bailiffs do not form part of the court system. In Estonia, claim seizures are arranged by bailiffs, not by the court.

The effect of Article 34 would be that Estonia would have to create an entirely new type of court procedure in order to implement it, as such arrangements are made by the bailiff, not the court. In view of the need to reduce court workloads, we cannot support Articles 34 and 35 as set out in the proposal. The enforcement of maintenance claims would be better improved through administrative cooperation provisions and not by reorganising the enforcement system of a Member State.

Articles 34 and 35 regulate only seizure orders. However, enforcement proceedings involve more than that. The complaints of the debtor and third parties as well as other issues must be dealt with in connection with seizure. Under the Regulation, enforcement proceedings carried out in one Member State would be directed by a court in another Member State on the basis of the law of the State in which the enforcement was carried out (Article 27). We are not convinced that an enforcement measure would be effective where, for example, an Estonian court had to freeze an account in a German bank. As a general rule, Estonian courts do not deal with the enforcement procedure and are not sufficiently acquainted with the procedural law of other Member States. Articles 34 and 35 do not guarantee the necessary protection for debtors and third parties. In view of the above, the Estonian delegation considers that the enforcement procedure should be carried out by an institution with the corresponding competence of the country of enforcement in accordance with the law of the country of enforcement.

GREECE

We do not agree with an enforcement measure being taken in the State of origin. The order for payment should be decided, if it is necessary, in the State of enforcement. Potential infringement of the principle of proportionality, given that the proposed measures must be necessary. There is provision in Greece for attachment of a proportion of earnings, but this happens in cases of non-compliance by the debtor, and is thus an exceptional measure, carried out via a court officer.

FRANCE

Delete this Article (See general comments).

IRELAND

As the Commission has now published its Green Paper entitled Improving the efficiency of the enforcement of judgments in the EU: the attachment of bank accounts, we suggest that the most appropriate course of action is to deal with the enforcement of maintenance orders by means of any Instrument which flows from that process. However, should the inclusion of such a provision in this Regulation be generally agreed, we can support the thrust behind the current text, but we are conscious that there may be difficulties in implementing the provision.

ITALY

Italy is against providing for unified procedures. If the Regulation applies to cross-border cases only, this could lead to discrimination regarding domestic situations, and if not restricted to cross-border cases, the provision is without legal basis and is contrary to the principles of proportionality and subsidiarity.

LATVIA

See comments under Chapter VI.

LITHUANIA

Article 34 of the Regulation provides that at the request of the creditor the court of origin may give an order for monthly direct payment which is to be addressed to the debtor's employer or bank in which the debtor has a bank account. Analysis of this provision reveals that it is unclear whether this order for monthly direct payment can be enforced only by these individuals and whether this order can be addressed to these individuals only. Article 27 of the Regulation states that "the procedure for the enforcement of decisions issued in another Member State shall be governed by the law of the Member State of enforcement."

It should be noted that legislation currently in force in Lithuania does not permit the recovering party itself to present the enforcement document to the debtor's employer. Were the creditor given the right to address the employer directly for recovery the debtor's right to protect himself from an unscrupulous creditor would have to be ensured, for example if the creditor presented the document to the employer for enforcement after prescription. This would raise the question as to with whom, under what legal procedure and against whose action the debtor would be entitled to lodge a complaint.

Article 34(5) of the Regulation provides that on receipt of the order for monthly direct payment the addressee is obliged to pay the required amount immediately; however, it is not stated who (debtor, creditor, the person making the transfer) is to cover the bank transfer charges, which are not negligible for transfers to another Member State. It should be noted that Article 34(6) of the Regulation states that the debtor is required to inform the creditor and the court of origin of any change of employer or bank account, but there is no provision on what the consequence will be, in terms of liability, if the debtor fails to fulfil this obligation.

LUXEMBOURG

Articles 34 and 35

We have serious objections to these two provisions. They carry the risk that immediate recourse to coercive measures will become the norm (once a maintenance decision has been obtained, or even while maintenance proceedings are still going on), which would not be conducive to the promotion of amicable solutions.

As regards orders for monthly direct payment, the proposed approach tends to stress the compulsory aspects of enforcement, which can often be counter-productive in the field of family law. A maintenance obligation is enforced regularly over the long term. A decision on the subject will be more easily accepted if it is not imposed by instant enforcement action. With these enacting terms, compulsory enforcement is no longer seen as a measure of last resort.

As regards enforcement proper of the decision, the Commission wishes to save the maintenance creditor from becoming lost in the complexities of 27 national enforcement systems. This is a legitimate concern, but can be addressed if administrative cooperation works properly: the creditor can apply to the central authorities, which will assist him at every stage of the procedure. Cooperation of this type is more effective than partial regulation of an enforcement measure which will be difficult to incorporate into national systems for compulsory enforcement.

The order for temporary freezing of a bank account constitutes a sort of attachment while proceedings are still going on. This measure would lead to a proliferation of procedural acts during the proceedings and would be particularly prejudicial to efforts to resolve disputes through mediation. This is therefore a premature device which might, moreover, be abused in the case of combined decisions (on both the proprietary effects of the divorce and the maintenance obligations): thus, one of the spouses might use the risk of non-execution of a maintenance obligation as a pretext to have assets frozen as a protective measure, with the sole aim of ensuring compulsory enforcement of any subsequent decision granting material benefits on account of the dissolution of the marriage.

MALTA

Although Malta appreciates the efforts of the Commission to protect the creditor in every way possible, it is not in a position to support this Article for several reasons. First of all there is no mention in the Article that that the Order for payment would go through the Central Authority, but it will go straight to the employer/bank according to the proposal which is not acceptable to Malta. The Commission is asking the Member States to give up their sovereign powers in this area.

There is also no mention in the draft Regulation about what kind of monitoring of the employer will there be. What if he does not understand something or makes mistakes? Will he have to get in touch with the foreign court himself? What about the language problem?

Neither is there a possibility in this Article for the debtor to oppose such order by claiming that he needs part of the sum for his basic needs.

Another problem is that in the case of bank accounts, these may be closed and the creditor is not paid anyway. So is this really the most effective means of protecting the creditor?

So if this Article is to be retained in the text, Malta proposes that it is redrafted to reflect these issues and to more effective and practical means to ensure payment to the maintenance creditor.

THE NETHERLANDS

The delegation of the Netherlands has serious objections against the proposal in its present form. The disadvantages outweigh the advantages. Adequate means of enforcement of foreign maintenance decisions are already available under national law in the Netherlands. It is considered that such measures can be left to the authorities of the Member State of enforcement.

The courts of the Member State of origin would have a discretion to give an order. The sole criterion proposed is that the "request of the creditor is not manifestly unfounded". It is understood that the order can be given even before a decision as to the substance of the maintenance claim has been given. How will the debtor's interests be taken into account?

The order is addressed directly to the debtor's employer or bank in another Member State. The court may order that the amount due is to be paid directly to the creditor. The Dutch delegation is of the opinion that such a measure, if it is to meet standards of fairness, would require an important adjustment of the Member States' laws and regulations regarding attachment and enforcement. It would work only if a comprehensive set of rules were put in place, replacing the internal regimes which in themselves constitute a well-balanced combination of rules. In particular, uniform rules would have to be established for the relationship between the monthly claim and other creditors' claims on the debtor's income and other assets. What would be the effect of the debtor's insolvency on the order? What would happen if, following insolvency, a list of admitted claims has to be drawn up?

This delegation considers that these issues can be more appropriately discussed within the context of the deliberations on the Green Papers on aspects of enforcement. There is no need to anticipate this debate.

The following comments are made by the Dutch delegation on the text:

a. The Regulation should specify that an order for monthly payment can only be made at the same time as a decision on the substance of the maintenance obligation or afterwards.
b. The draft form states that the debtor is to be given an opportunity to oppose the enforcement of the order. This should be stated in the Regulation itself.

POLAND

Enforcement proceedings involve the direct exercise of state compulsion, as an expression of state sovereignty. The way to facilitate cross-border enforcement of maintenance is to build up cooperation between central authorities and to make full use of the potential offered by existing Community instruments.

We should like to see development of a system based on commitment and mutual assistance by central authorities.

Paragraph 2 stands in contradiction with paragraph 4 and is moreover unclear. According to the current wording of paragraph 2, a decision ordering the payment of maintenance in the case must be made first of all. This decision must be duly served in accordance with Article 22. Only when the court is sure that due service has been effected can it give an order for monthly direct payment. In conjunction with paragraph 4, the question then arises of who, in the situation provided for in paragraph 2, is to be served with the decision itself: the employer/bank or the debtor. Paragraph 4 states that the debtor is only to be served with the decision itself after the employer/bank has been notified of the order for monthly direct payment, but according to paragraph 2 that order could not have been issued at the time of the previous service of the decision itself (on whom, unfortunately, is as yet unknown).

Paragraph 4 provides that the employer/bank is to be notified of the order for monthly direct payment and that it is to be enforced in the same way as a normal decision. This means that the form containing the substance of the order is to be served without translation. Service in this way can only prolong the process of enforcement, or even prevent it from going ahead. In addition, the form provides that if it is impossible to proceed with the direct payments, the employer should inform the court of origin accordingly. By what means is this notification to be made and, above all, in what language?

Paragraph 5 consolidates the position of the employer/bank as the competent enforcement authority. Pursuant to Article 32(2), the competent authority may limit enforcement where partial enforcement of the decision could have an impact on a part of the debtor's assets which is not attachable. Who then is to certify whether this is the case? An ordinary employer is not required to possess any information regarding "an impact on a part of the debtor assets which is not attachable". Furthermore, does Article 33 on refusal or suspension of enforcement apply to direct payment orders as well? Surely an employer or bank cannot have such wide-ranging authority, which would come within the powers reserved solely for the competent enforcement authority strictu sensu.

Paragraph 6 does not provide for any penalties and makes no mention of any negative legal consequences should the debtor fail to notify any changes of employer or bank account.

PORTUGAL

With regard to this Article, we have serious doubts about its legal basis and proportionality, as well as the possibility raised here of a foreign court exercising its jurisdiction in another state without any kind of supervision. We believe that this payment order should have to go through a court (or other competent body) in the country where it is enforced. It is essential that the enforcing Member State should be notified of this order, otherwise it will not be possible to guarantee either the non-attachability of certain assets or the rights of other creditors.

We also wish to emphasise that there are many practical problems regarding the way this provision would operate, e.g. how the employer can apply an order which he may not understand (there is no translation), who is to supervise the enforcement by the employer, and how it can be ensured that the debtor keeps the creditor informed of changes of employer or bank.

Finally, this question should not be covered in this instrument but in a different context such as in the green paper on attachment of bank balances.

ROMANIA

Articles 34 and 35

We believe that the orders for direct monthly payments and for freezing bank accounts are very effective in the stage of the enforcement. However, we believe that they should be decided, alternatively at least, by the court of the state of enforcement, if he debtor does not agree with the payment. Such orders given by the court of another Member State, if enforced, might lead to discrimination vis-a-vis the domestic cases in certain situations.
We also suggest that a provision regarding the costs of money transfer, money conversion or other banking commissions incurred should be expressly assimilated to the enforcement costs and be charged to the debtor.

SLOVENIA

In principal, we could support the proposal; however a further/thorough consideration should be given whether these matters should be dealt with in a separate document.

Furthermore, we have a few technical remarks:

- the proposal should stipulate the language of the Order addressed to the debtor's employer or the bank in another Member State;
- the proposal should take into consideration other maintenance creditors;
- the proposal should provide the right of an appeal (not only Annexe);
- the proposal does not encourage the debtor to pay voluntarily the maintenance obligation.

SLOVAKIA

Articles 34 and 35

As presently worded, Slovakia cannot support the inclusion of these Articles in the proposal for a Regulation.

Article 34

If this measure must remain in the proposal for a Regulation, Slovakia would make the following comments on it:

Slovakia does not favour orders for monthly direct payment issued by the court of the state of origin being transferred between Member States without restriction.

The cooperation of an authority of the Member State of enforcement is not envisaged when the order for monthly direct payment is issued. According to Article 32, that authority may decide to reduce the amount paid from the debtor's account, and under Article 24(2) may inform the debtor of the decision made. In practice, in the proposal for a Regulation as it stands, the authority of the Member State of enforcement would probably not take any action, since the order to pay the sum under Article 34 is not sent to it. In this case, it seems inappropriate to us for the court of the state of origin to administer and supervise the enforcement of the decision in its entirety.

The order for monthly payments should, according to this Article, be sent only to the employer and the debtor. We think it is important that the order for payment be sent also to the competent authority of the Member State of enforcement, which could duly supervise the implementation of the court decision on maintenance.

Slovakia also thinks it important to deal with the question as to the language in which the order should be delivered to the employer and that in which the employer and the debtor should communicate with the court of the state of origin. We think that at this point there should be some mention of sanctions if the employer does not make the payments in accordance with the order, or if the employer and debtor do not communicate with the court of the state of origin as specified in Article 34(5) and (6) of the proposal for a Regulation.

FINLAND

Articles 34 and 35

We find these articles problematic in many respects. Their application may lead to a situation where the debtor or his/her dependants do not have enough money for their daily living. The articles may also cause other problems to the debtor or to the banks. Furthermore, these provisions are difficult to reconcile with national enforcement provisions that contain certain safeguards for the debtor. Therefore we suggest that these articles be deleted. These issues could be better handled within the general EU-instrument on enforcement of judgments or they might be left subject to national law.

SWEDEN

This article represents a significant exception to Article 27, under which decisions are to be enforced in accordance with the law of the country of enforcement.

The reason for the article may be that in some Member States it is not possible, or very difficult, to have earnings attached, at any rate for maintenance claims. Sweden can in principle agree to the minimum-level harmonisation involved in requiring Member States to introduce such a possibility in cross-border cases, but not in this particular form.

In Sweden's view, the article encroaches on the sovereignty of the country of enforcement. It is likely to cause more problems than it solves. A court will doubtless have great difficulty in forming an overall picture of a number of claims against the same debtor. Member States also have different rules on non-attachable "protected assets".

In Sweden's view, the article should be deleted.

ARTICLE 35

BELGIUM

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.

CZECH REPUBLIC

See Article 34

DENMARK

See Article 34

GERMANY

See Article 34

Article 35 should also be deleted due to fundamental considerations.

It should be pointed out here that, particularly with respect to the temporary freezing of a bank account, the Commission's approach does not seem to make sense. On 24 October 2006, the Commission adopted a Green Paper on the temporary attachment of bank accounts. The Green Paper is meant to stimulate an extensive consultation process on this topic.
Thus the Commission itself considers it necessary for the Member States to engage in a consultation process on this issue. In this context, the question arises as to why the Commission is already planning to establish rules in this area when it is still in the early stages of forming an opinion on the matter. The strong impression arises that this provision in the proposed Regulation is meant to establish a *fait accompli*, so to speak.

Because this provision treads new ground, it should first be further discussed and developed by enforcement law experts from the Member States. During this process, specific requirements for the enforcement of maintenance claims could be taken into consideration. To incorporate such a provision in the current proposal, however, seems premature. For this reason, there will be no discussion of more detailed questions here.

ESTONIA

See Article 34

GREECE

While we sympathise with the European Commission's good intentions, we believe that this measure is disproportionate and will create particular problems in the affairs of the debtor. It would be better for the issue to be examined in the context of the Green Paper which was circulated on the subject.

FRANCE

Delete this Article (See general comments).

IRELAND

We have a number of concerns about this Article which, in our view, is a step too far. Steps such as this are not generally associated with family law, and, to implement it, the Regulation would need to spell out the types of proof required to demonstrate the risk of flight or insolvency. Even if agreed it would also be difficult to implement, given that IBANs and bank account numbers are not generally publicly available. In any event, there is a timeline problem in paragraph 6, as the period between the court making a decision and a bank becoming aware of it may be a number of days – during that period the account will be frozen but the bank will not have any legal authority for so doing.

ITALY

As in our comment on Article 34, we are against providing for unified procedures because they have no legal basis and are incompatible with the principles of proportionality and subsidiarity.

LATVIA

See comments under Chapter VI.

LITHUANIA

Article 35(4) of the proposal states that "The creditor and the debtor shall be notified of the decision of the court by postal service attested by an acknowledgement of receipt, once the order has acquired the effect described in paragraph 3(b)", ie the temporary freezing of a bank account. However, this article does not state that the bank is obliged to inform the court of the fact that the account has been frozen. It is therefore not clear by what means the court will be apprised of the fact that the bank has frozen all banking operations.

In Article 35(6) it is not clear as from when the eight-day deadline starts.

LUXEMBOURG

See Article 34.

MALTA

In Malta's opinion this measure goes a long way and Malta has some misgivings about it. The fact that according to the Commission proposal it is optional is not satisfactory enough. The intention of the Commission is good but these measures need to be accompanied by more adequate safeguards.

The content of this Article raises several questions, such as how would the court determine if the amount seized is the actual and correct figure? When do the 8 days start to run? What is the link with the enforcement stage?

Malta's overall comment is in favour of leaving such matters to national law but if this Article is retained it should certainly be modified.

THE NETHERLANDS

The Dutch delegation's comments on article 34 apply likewise to article 35. Reference is also made to the opinion by the Economic and Social Council, which questions the proportionality of such a measure. The subject should be dealt with within the context of the Commission's Green Paper on the Attachment of Bank Accounts.

The radical nature of such a measure should be stressed. It might seriously affect the debtor's financial position as well as the position of the debtor's other creditors. The attachment would be valid also against such other creditors. It would therefore require additional rules, e.g. regarding the ranking of creditors.

POLAND

Article 35(1) and (6) and Form IV

The inclusion of orders for the temporary freezing of bank accounts in the draft Regulation constitutes interference with national provisions on enforcement proceedings and even with proceedings in the case itself. After all, a freezing order may be made long before the court hears the substance of the case. Form IV – given the content of the form it would seem that it should be completed in full in the language of the state of enforcement too, if only in view of point 5 of the form, in which the creditor is to explain the reasons for the serious risk that the debtor will not fulfil his obligations.

Paragraph 1 should provide that the creditor must properly **substantiate** the circumstances justifying the need for an order temporarily freezing a bank account. This should be a pre-condition for allowing the creditor to make the application.

Paragraph 4 states that the court is to notify the creditor and the debtor of the temporary freezing order as soon as the order has had the effect of prohibiting any movement on the bank account. However, the Article does not say how the court of origin is to establish this fact. Is the bank to notify the court of origin that the account has been frozen, and if so by what means and in what language?

As regards paragraph 6, it is not possible for the temporary freezing order to cease to have effect as soon as the court so decides; this will not happen until the bank has been properly notified.
Paragraph 6 states that the temporary freezing order will cease to have effect if the court has not given a decision within 8 days. However, it does not specify when this 8-day period is to start.
There is no provision as to how the bank is to find out whether the court has failed to rule within 8 days.

PORTUGAL

Portugal notes the same difficulties here as in the preceding Article. Portugal does not agree with the thinking underlying this Article nor with the idea of this measure not going through any body in the state of enforcement. It considers this measure too radical for all maintenance debts. Finally, as stated above, this is a horizontal matter, and should be covered in the context of the green paper on the attachment of bank accounts.

ROMANIA

See Article 34

SLOVENIA

In principal, we could support the proposal; however a further/thorough consideration should be given whether these matters should be dealt with in a separate document.

Furthermore, we have a few technical remarks:

- the provision should state clearly when the 8-day delay begins;
- the proposal should stipulate how the amount is calculated and to what extent the needs of the creditor and financial ability of the debtor are taken into consideration;
- the proposal should take into consideration also other creditors.

SLOVAKIA

See also Article 34

Slovakia believes that Article 35 concerns only provisional or protective measures which, if regulated in the proposal for a Regulation, for reasons of logical sequence, belong in Chapter II after Article 10 (or in Article 10 itself).

Slovakia would draw attention to the fact (inasmuch as it concerns only the temporary freezing of a bank account) that this order ceases to have effect immediately the court issues a decision on the substance. In practice this could result in the debtor being alerted in this way that the creditor knows about his account. If the freezing of the bank account does not lead to an order for assets to be withdrawn from the account, it is important to address the question of whether it is necessary to leave this Article in the Regulation. If so, it seems to us necessary to amend the opening of the second sentence of paragraph 6 so that the order in question is made in the decision on the substance itself. Otherwise, when an objective decision is issued which *ipso jure* has the effect of cancelling the order, an opportunity arises for the debtor to obstruct or thwart the enforcement of the decision.

Paragraph 5 and 6 - For both paragraphs, Slovakia recommends following the words "within 8 days" with the words "of delivery". Particularly in the case of a request from the debtor to set aside the order, it seem to us unclear from what time the court has 8 days to decide and at what moment the order ceases to have effect if the court has not decided. In the first sentence of paragraph 6, we would therefore suggest adapting the formulation to "if the court has not given its decision within 8 days of receipt of the request of the debtor."

FINLAND

See Article 34

SWEDEN

In Sweden's view, this article should be deleted. An order to freeze a debtor's bank account is very intrusive. For our reasons, see the comments on Article 34. Sweden also has considerable doubts about the article's implications, particularly as regards legal safeguards. Closer consideration should be given to the scope for the debtor to invoke liability for damages in the event of a wrongly issued order.

ARTICLE 36

BELGIUM

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

CZECH REPUBLIC

Our domestic law is such that giving preference to maintenance claims in enforcing decisions is not unfamiliar to us. That said, we cannot support the current wording of the Article if it is designed to apply to cross-border cases alone, since this would amount to a completely unwarranted bias in favour of cross-border claims to the detriment of domestic maintenance claims. While we agree with the underlying rationale behind this provision, we believe that its impact must be taken into account and thought given to adopting more suitable wording.

DENMARK

The ranking of maintenance claims should be left to national law. However, the regulation should state that international claim on maintenance should be ranked as national claims.

During the negotiations the Commission stated that article 36 only aplies to “foreign” claims. This raises 2 technical questions:
1) According to the wording, the scope of the article is not limited to “foreign” claims.
2) It is necessary to determing when a claim is “foreign” - if the decision was made in another state or if the creditor lives in anohter state.

GERMANY

See also Article 34.

Pursuant to Article 36, maintenance claims are to be paid in preference to all other debts of a debtor, including debts arising from expenses of the enforcement of maintenance decisions. This provision cannot be reconciled with the basic principles of German enforcement law. German enforcement law does not rank claims in order of precedence. Rather, German enforcement law adheres to the so-called priority principle. The creditor who first secures an attachment of the assets in question is to receive full satisfaction from the property seized for him or her before another creditor may seek satisfaction from the attached property. Pursuant to German enforcement law, maintenance creditors enjoy a privileged status to the extent that they have greater access than other creditors to the maintenance debtor's earnings and other income. Accordingly, the general limitations on attachment (section 850c Code of Civil Procedure), which seek to reserve the means necessary to secure the subsistence of the debtor and his/her family and to provide an incentive to remain employed, specifically do not apply to the enforcement of maintenance claims. In the latter case, the enforcing court determines the amount that the debtor is allowed to keep (cf. section 850d(1) Code of Civil Procedure for greater detail). However, German enforcement law grants this privileged status not only to maintenance creditors. Creditors of pensions payable because of bodily injury or ill health are of equivalent status owing to the similarly urgent situation (section 850d(3) Code of Civil Procedure). The granting of priority to maintenance creditors and other creditors of equivalent status applies, however, only to those cases that do not involve arrears that become due more than one year prior to the issuing of the attachment order (section 850d(1), fourth sentence, Code of Civil Procedure).

Similar systems exist in other Member States with respect to maintenance claims. For these Member States, an inflexible determination that gives priority to maintenance claims would constitute a considerable interference within established and proven structures.

Moreover, the following should be pointed out with respect to Article 36:

- The Article contains no text limiting the provision to cross-border matters, but rather would establish the priority of maintenance claims even in purely national cases. It is questionable whether the EU would have regulatory competence here. Particularly in the field of enforcement law, which strongly depends on clarity and reliability, the resulting years of legal uncertainty would be highly disadvantageous for all parties involved.
- The inflexible prioritisation of maintenance claims would considerably reduce the creditworthiness of debtors, because banks would be concerned that they could no longer enforce their claims for repayment. The consequence of this increased risk would be higher interest rates, precisely for families.
- Article 36 does not address cases in which enforcement is undertaken against the debtor's assets due to multiple maintenance claims. The ranking of maintenance claims in so-called cases of deficiency (i.e., when the debtor cannot satisfy all maintenance claims) currently in force in substantive maintenance law should also be observed in enforcement law (cf. section 850d(2) Code of Civil Procedure).

For these reasons, Germany is in favour of deleting this article. At the very least, however, both possibilities for prioritising respective maintenance claims should be allowed as equally viable solutions within a particular enforcement system, i.e., prioritisation according to rank or prioritisation according to extended possibilities for enforcement.

ESTONIA

The Estonian delegation considers that Article 36 should be deleted. The ranking of maintenance claims in the enforcement procedure should continue to be regulated by the laws of the Member States. We are not convinced that regulation of this subject is a matter for Community competence under the Treaty. Article 36 discriminates against maintenance claimants living in the country of enforcement as opposed to those living abroad.

GREECE

We agree in principle with the spirit of the provision, but it requires more work. Let there be priority for maintenance claims, but not on an absolute basis. We would regard the provision more positively if it were restricted to children. We also have problems with the final section, as it basically works to the detriment of the creditor.

FRANCE

Drafting suggestions

Article 36

Ranking of maintenance claims

Maintenance claims shall be paid in preference to all the other debts of a debtor~~, including the debts arising from expenses of the enforcement of maintenance decisions~~.

Explanations: special consideration must always be given to expenses, in the common interest of creditors. Failing this, the authorities responsible for enforcement will refuse to recover the amounts due.

IRELAND

This Article presents some difficulties as in the first case debts owed to the Revenue Commissioners, the body charged with tax collection, takes absolute precedence over debts owed to other creditors under Irish law. Furthermore, the proposal is discriminatory as maintenance orders arising out of purely domestic judgments would not have precedence in the manner proposed.

ITALY

We are against giving preference to maintenance claims and to ranking them: this measure is without legal basis and superfluous to the Regulation for the reasons given in our comments on Article 34.

LATVIA

See comments under Chapter VI.

LITHUANIA

Lithuania does not agree with Article 36 of the proposal as, on the one hand, it would be detrimental to the interests of other creditors, whose claims under national law should take priority, and, on the other, as this provision would be applied in international cases and would discriminate against persons who come under the provisions of national law as compared with those persons who have recourse to the provisions of this Regulation in cross-border cases.

LUXEMBOURG

Our in-house consultations are not yet complete. Nevertheless, in view of the Community's competences, we should already like to point out at this stage that rules on the ranking of civil claims must not interfere with Member States' provisions of public law.

MALTA

Malta has some difficulties with this Article. It is not in a position to guarantee priority to maintenance claims in all cases because there are other privileged creditors according to our law that have prior ranking such as revenue claims by the State. Moreover, Malta does not agree with the Commissions' proposal that maintenance claims in cross-border cases take priority of domestic maintenance claims. That would be outright discrimination and totally unacceptable.

Also the fact that this Article is applying to all types of maintenance claims raises again the problem that there could be maintenance claims that are not even acceptable according to Maltese law and there would have to be priority given, which is again unacceptable for Malta.

Malta also remarks that there is no reference to possible ranking between types of maintenance themselves.

THE NETHERLANDS

Having regard to the powerful means available under Dutch national law for the enforcement of maintenance claims, this delegation questions the proportionality of this proposal. The question of the ranking of maintenance debts in Dutch law was looked into in the preparatory work preceding the launching of a reform of internal Dutch maintenance law. It was decided not to touch upon the existing rules regarding ranking, which provide that maintenance debts are privileged to a certain extent, but are subordinate to tax debts. The proposal would affect national law regarding direct taxation. There is no Community competence in this area.

It would be paradoxical if a Regulation were to amend the ranking of maintenance obligations in cross-border cases only. The proposal would compel national legislators to align the national law to the Community provision.

PORTUGAL

We have a fundamental reservation regarding this rule. It is a substantive rule, which should not appear in a Community Regulation. Furthermore, we may add that the ranking of claims goes beyond the scope of the Regulation.

ROMANIA

Our view on the matter is that a relative preference of maintenance claims towards other claims is preferable to the absolute one included in the text. Secondly, we suggest that priority be given to maintenance claims due to children, against those due to other members of the family.

Further, we suggest inserting an Article, similar to Article 28 of the draft Hague Convention, regarding the non-discrimination between cross-border and domestic cases as far as enforcement methods are concerned.

SLOVENIA

Slovenia does not agree with the proposal, because the proposed provision violates the principle of equality with regard to the national maintenance creditors. Furthermore we are of the opinion that also other claims could have an essential meaning for the creditors and be placed on the same footing as maintenance claims (damages for loss of enjoyment of life or loss or impairment of capacity to work). Therefore we can not agree that maintenance obligations have absolute priority.

FINLAND

We cannot support the idea that international maintenance claims are paid in preference to all other debts. We are especially concerned about the situations where a security is given for a debt. These debts should be paid before other claims.

SWEDEN

In Sweden's view, this article should be deleted.

Maintenance claims are likely to rank high in most Member States. The need for the article is thus open to question. Some other types of claim may in some circumstances rank higher under national law, for various reasons. One example might be claims for damages for personal injury.

Matters of ranking or precedence of claims are governed by national law and play a very important part in arranging practicable, predictable systems for providing security. It should also be noted that there are some Member States in which maintenance claims never become time-barred. The article does not specify any precedence as between different maintenance claims. It may thus mean that cross-border maintenance claims are treated more favourably than domestic maintenance claims, which would be unacceptable.

CHAPTER VII.
AUTHENTIC INSTRUMENTS AND AGREEMENTS

BELGIUM

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.

CZECH REPUBLIC

Re agreements between the parties:

In principle we do not object to the recognition and enforcement of non-domestic agreements between the parties, on condition that they are deemed to be enforceable orders under the law of the other Member State. We have yet to formulate our final position on this issue. It would be worthwhile establishing a definite overview of the conditions under which such agreements can be enforced and their status vis-à-vis court decisions.

LATVIA

Latvia basically agrees with Chapter VII of the draft Regulation but wishes to raise certain specific problems regarding the system for automatic enforcement of private agreements in another Member State. Latvia does not believe that there is at present a system which would provide the Member State of enforcement with a secure basis for automatic enforcement, e.g. a system for determining a contract's authenticity. Moreover, the thrust of the proposal for a Regulation is to waive the legalisation procedures, which will make it difficult for the State of enforcement to satisfy itself that a party's signature is genuine. Latvia therefore would like a system providing the State of enforcement with sufficient guarantees that a private agreement can actually be enforced.

LUXEMBOURG

Unconditional recognition of agreements between parties poses problems in the context of maintenance obligations. It would be better to keep to the provisions of Brussels I, whereby enforcement of such an agreement can be refused if it is manifestly contrary to public policy in the Member State of enforcement.

AUSTRIA

The Austrian delegation recognises the efforts made to relieve the strain on the courts and other authorities responsible for enforcing maintenance and to **promote mutually agreed solutions**. Any arrangement that failed to treat authentic instruments that cast a maintenance settlement in the form of an enforcement order as equivalent to judgments would be a terribly foolish act.

However, as far as **agreements purely under private law** are concerned, it is imperative that further **precautions** be taken. An agreement which is merely signed is not subject either to an adequate **examination of the content** (safeguarding of the child's welfare in the maintenance agreement) or to sufficient **checking of authenticity**. Austria is quite prepared to place the same reciprocal **trust** in all decisions and agreements from all States drawn up by and/or before authenticating persons within the Community framework. Austria has confidence in every court in the Member States and every authority dealing with maintenance cases. However, we can hardly expect every divorced or abandoned spouse residing in a Member State to be trusted not to foist obligations on his or her ex.

However, precisely in connection with private agreements, attention will also have to be paid in particular to the preclusive effect. Can it be the case that a **private agreement** which contains a waiver of the maintenance right (wholly or in part) is given **automatic recognition**? In this case much potential for conflict would be eliminated if agreement could be reached, at least in the case of authentic instruments and agreements, that only the granting part is to be enforced without exequatur, out of an agreement in which there is a (partial) waiver, but no direct effect of acknowledgement follows therefrom.

On the whole, with all these problems, preference should be given to waiving the effect of agreements purely under private law, combined with a careful, **broad definition of authentic instruments** encompassing all desirable cases of agreements which came about with official assistance and have therefore been adequately checked.

SLOVENIA

Slovenia is not familiar with authentic instruments or private agreements as provided for in Chapter VII. Therefore we have some doubts about the protection of the child's best interests.

Nevertheless, we could support the authentic instruments. Regarding the private agreements, we are of the opinion, that safety measures should be included in order to ensure compliance with the child's best interests.

ARTICLE 37

CZECH REPUBLIC

In view of the definition of an authentic instrument in Article 2(4), this provision – rightly in our view – applies only to authentic instruments issued in a Member State. However, the meaning of the Article to that effect could be made more precise, so as to avoid misinterpretations. One solution might be to move the definition from Article 2 to somewhere in the region of Articles 37 and 38.

Article 58 of the Brussels I Regulation deals with the enforceability of court settlements separately. This proposal for a Regulation does not contain an equivalent provision. The question, therefore, is whether or not, for recognition and enforcement purposes, a court settlement can be considered a decision or authentic instrument. If not, a separate provision on the enforcement of court settlements ought to be adopted.

GERMANY

Germany welcomes provisions on the recognition and enforceability of authentic instruments. Other types of maintenance orders apart from court decisions also play a considerable role in practice. The broad definition of the term "authentic instrument" in Article 2(4) of the proposed regulation already takes this fact into account. Like the Brussels I Regulation, however, the proposal should explicitly mention court settlements, which are also very important and which are referred to only indirectly with the phrase "agreements between the parties" in the current wording of Article 37.

In terms of content as well, Germany is in favour of orienting Article 37 more closely toward Articles 57 and 58 of the Brussels I Regulation. In particular, the unconditional recognition of agreements between the parties along the lines of Article 25 should be rejected. Instead, the limited examination of public policy as set forth in Article 57(1) of the Brussels I Regulation offers a preferable solution.

If the choice is made to establish the unconditional recognition of all maintenance decisions pursuant to Article 25, this could be justified with the argument that the applicable laws have been harmonised, or at least that minimum rules exist with respect to court proceedings leading to a decision and that trust exists among Member States regarding the fair conduct of proceedings. It may be said that, taken together, these aspects make it less likely that a decision will contravene the public policy of a Member State.

However, these safeguards do not exist with respect to authentic instruments, particularly agreements between the parties. For this reason, it remains appropriate and necessary to conduct at least a limited examination of compatibility with public policy. The equivalence between judgments and authentic instruments as laid down in the Brussels I Regulation (cf. Article 34(1) on the one hand and Article 57(1), second sentence, on the other) cannot be transferred to the present proposal due to the latter's unconditional recognition of decisions.

ESTONIA

Articles 37 and 38

The Estonian delegation supports the regulation of enforcement of public documents. The problem of the reliability of private agreements must be dealt with. The extract referred to in Article 38(1) is not sufficient for that purpose as the content of the agreement is not checked when the extract is made.

GREECE

Re Articles 37 and 38: In principle we agree with the provisions proposed

IRELAND

Drafting suggestion: Authentic instruments registered and enforceable in a Member State and agreements between the parties that are enforceable in a Member State shall be recognised and ~~enforceable~~ *enforced* as ~~decisions~~ *judgments* in accordance with Article 25.

Comment: We understand "agreements between the parties" to mean, for instance, a private separation agreement which is enforceable as a contract under Irish law. We are open to having such agreements recognised and enforced under this Regulation.

"Enforced" replaces "enforceable" to ensure coherence with the suggested amendment to Article 25.

MALTA

In principle, Malta agrees with the objectives of this Article, however, it proposes a definition of 'agreements' for clarification purposes.

THE NETHERLANDS

Articles 37 and 38

The Dutch delegation considers that it should be made clear that reference is made to instruments and agreements that are enforceable in the Member State where they were made. See also the comment under b.

This delegation observes that like article 25, article 37 provides that specific titles shall be recognised. It would recommend that in respect of valid authentic instruments and agreements in which a right to maintenance is renounced, it should be possible also to obtain an extract as provided for in article 38, first paragraph. This delegation has taken note of the observations made in the meeting of 16 November and the suggestion to discard negative decisions and agreements from the scope of the Regulation. It considers that the issue is too important to be neglected.

This delegation questions article 38, second paragraph. The reference to article 35 should, in any case, be deleted as that article relates to court proceedings as to the substance.

POLAND

There is a need to specify which agreements are covered - i.e., only judicial agreements or also extrajudicial agreements. To be enforceable, extrajudicial agreements would need to be confirmed by the competent authorities of the state of origin. Are such agreements (confirmed agreements and agreements which have already been declared enforceable in the state of origin) not authentic instruments, and as such should there not be a separate procedure for recognition or declaration of enforceability?

PORTUGAL

This Article makes these instruments enforceable on the same terms as court decisions. We have some reservations about making the "agreements" enforceable. First of all, because under Portuguese law the right to maintenance is inalienable, i.e. it cannot be waived or assigned, for which reason we have some doubts as regards the possibility of enforcing these agreements without it being possible to control their content. Secondly, because this document contains no definition of agreements, which may be any document signed by the parties, with no guarantee of legitimacy or authenticity. Thirdly, because this proposal, besides abolishing the *exequatur* procedure, introduces certain novel features in terms of enforcement, about which we are hesitant insofar as they concern enforcement of private agreements (e.g. possibility of a decision ordering the withholding of the salary of a person owing maintenance, and the possibility of a decision ordering the temporary freezing of a bank account, without any special procedures other than a request from the creditor which has to comply with a standard form - see Articles 35 and 34). Lastly, we are also doubtful about allowing the central authorities, on the basis of a mere agreement between the parties, to provide all the information covered in Article 44.

ROMANIA

Articles 37 and 38

We agree with the provisions set out in Articles 37 and 38 because they encourage the recourse to mediation. Also, court settlements should be taken into consideration in this context. We also believe that a definition of such settlements, to be included in Article 2, would be appropriate.

We also suggest inserting an article along the lines of Article 25 of the draft Hague Convention.

SWEDEN

Sweden is in favour of this article. See the comments on Article 38.

ARTICLE 38

CZECH REPUBLIC

Paragraph 1

The second sentence places responsibility for issuing an extract with the authorities in the Member State in which the authentic instrument or agreement between the parties is enforceable. In our view, for reasons of logic and bearing in mind the counterpart provision in Article 57(3) of the Brussels I Regulation, responsibility ought to be shifted to the state in which the authentic instrument has been drawn up. The extract should contain an explicit confirmation that the authentic instrument is enforceable in the Member State concerned.

Paragraph 2

In view of our position on Articles 34 and 35, we propose deleting this paragraph.

DENMARK

Several member states have asked for additional safeguards for recognition and enforcement of private agreements. The Danish delegation might accept such safeguards as proposed by the Canadian delegation for the draft Hague maintenance convention.

On the question om fraud, please note that article 38 calls for an agreement, and if the agreement has been falsified, it is not an agreement; thus, there is no need for regulation of this situation. (Article 33 does not mention refusal of enforcement if the creditor asks for enforcement of a false decision, which is possible, as the creditor need not make the application through the central authority of the state, where the creditor lives).

GERMANY

The reference to Chapter VI is consistent and appropriate. However, the formulation "as appropriate" is too imprecise. For example, it leaves open the question as to whether and through which procedure one of the involved parties may obtain a full review of the validity of an agreement, beyond its compatibility with public policy. The provision laid down in Article 32(1), pursuant to which no review as to the substance of a decision is permitted, may point against such a possibility. However, this possibility cannot be ruled out.

Moreover, the reservations expressed with respect to Article 28 also apply to authentic instruments. These are even less formalised than decisions. It is precisely for this reason that a complete translation of such instruments is necessary.

FRANCE

Drafting suggestions

Article 38

Enforcement of authentic instruments and agreements

1. Provisions of Chapter VI shall apply as appropriate to the recognition and enforcement of authentic instruments and agreements between the parties that are enforceable. The competent authority of a Member State in which an authentic instrument or an agreement between the parties is enforceable shall issue, at the request of any interested party, an extract of act using the standard form in Annex II of this Regulation.

~~2. A creditor who wishes for making use of provisions of Articles 34 and 35 may seise the court for the place where he or she is habitually resident.~~

2. Enforcement may be refused or suspended pursuant to Article 33:

(a) if it is manifestly contrary to public policy in the Member State of enforcement;

(b) if the private agreement was obtained by fraud or has been falsified.

Explanations:

- *First point: see Note.*
- *Second point: safeguards should be adopted concerning the enforcement of authentic instruments and private agreements, taking as a basis the solutions envisaged for the draft Hague Convention.*

IRELAND

Drafting suggestion:

1. Provisions of Chapter VI shall apply as appropriate to the recognition and enforcement of authentic instruments and agreements between the parties that are enforceable *in the Member State in which they were drawn up or reached.* The competent authority of a Member State in which an authentic instrument or an agreement between the parties is enforceable shall issue, at the request of any interested party, ~~an extract of act~~ *a Maintenance Enforcement Order Certificate (Authentic Instrument/Private Agreement)* using the standard form in Annex II of this Regulation.
2. A creditor who wishes ~~for making use of~~ *to avail of* the provisions of Articles 34 and 35 may seise the court for the place where he or she is habitually resident.

Comment: In the interests of coherence with Article 37 we suggest that reference be made to the fact that Authentic Instruments and private agreements have to be enforceable in the Member State in which they were drawn up or reached. We also suggest that "extract of act" be renamed "European Maintenance Order Certificate (Authentic Instrument /Private Agreement)"

POLAND

Article 38(1) and (2)

Poland does not see any need for Article 38 to be included in the Regulation.

Paragraph 1 - from the term "*w razie konieczności*" [English - if necessary, as the need arises] it is unclear what necessity is being referred to (the English version in the Commission proposal "as appropriate" is different from the Polish).

It is not clear who is to draw up the extract from the agreement if it was made without any official involvement. However, if an authority was involved (for example, for the purposes of confirmation) then in that case the agreement would already have the status of an authentic instrument.

Paragraph 2 should be deleted. The creditor is always at liberty to seise the court of his residence under Article 3(1) of the draft Regulation (on general jurisdiction).

THE NETHERLANDS

See also Article 37.

ROMANIA

See Article 37.

SWEDEN

Sweden is in favour of this article. It is very important for agreements to be covered. There are many countries in which maintenance obligations are commonly laid down in agreements. In such cases it would not be acceptable to compel the parties to engage in judicial proceedings which may be both costly and time-consuming. Other, simpler, quicker and cheaper methods, such as agreements, should instead be encouraged.

For those Member States which have doubts about purely private agreements, the procedure proposed in paragraph 1 should be sufficient to ensure the requisite legal certainty.

CHAPTER VIII
COOPERATION

BELGIUM

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.

CZECH REPUBLIC

General remarks on this chapter:

We feel it would be useful to adopt specific rules governing administrative cooperation in the recovery of maintenance claims, above all if information on debtors is to be exchanged. The recovery of maintenance claims is often made impossible precisely because of the lack of such information (notably the addresses of debtors' actual residences). Any rule ought to cover only those provisions which can go further than international agreements, and the Hague Convention in particular, in enhancing cooperation among administrative bodies in the relations between Member States. The Regulation ought to act solely as an umbrella measure to facilitate cooperation among Member States at a higher level than the Hague Convention could achieve. The relationship to the Convention must be clearly spelt out in the Regulation. The provisions in the Regulation relating specifically to cooperation must not conflict with the provisions of the Hague Convention.

Our stance on the individual articles has yet to be finalised and will depend on the final form of Hague Convention.

GERMANY

Germany welcomes the establishment of a system of state authorities to support creditors in asserting their claims. Despite the considerable progress that has been made in judicial cooperation, for example through the Brussels I Regulation and the Legal Aid Directive, considerable practical obstacles remain with respect to conducting proceedings or enforcing a judgment in another Member State. A defaulting debtor should not benefit from these difficulties.

Therefore it is appropriate for state authorities to provide assistance. In future deliberations, several aspects should be borne in mind:

- coherence with the new Hague Convention: cooperation between authorities pursuant to the present proposal and the future Hague Convention should be essentially identical in order to avoid unnecessary administrative burdens.
- a balanced role for the central authorities: the central authorities are to be tasked with representing the creditor on the one hand, but are to have investigative powers on the other. This dual function affords them a very strong position in maintenance proceedings. Therefore attention must be paid to the protection of the debtor as well.
- the responsibilities of central authorities in the Member State of the creditor on the one hand, and of the debtor on the other, should be clearly defined to prevent uncertainties with respect to jurisdiction as well as the duplication of work.
- it should be clearly determined who should be given access to which information under what conditions.

ESTONIA

Articles 39 - 47

The provisions on cooperation depend on the scope of the Regulation as well as the content of the future Hague Convention. It is difficult to adopt a final position on cooperation issues before the negotiations on the Hague Convention have been concluded. The Estonian delegation considers the provisions of Chapter VII to be overly centred on the creditor. Central authorities should remain neutral and assist both creditors and debtors.

GREECE

In our view the approach should be comprehensive, even if the rules of The Hague Convention are repeated.

FRANCE

The French delegation has entered a reservation on this chapter (see comments in the Note).

ITALY

Articles 39 to 45 – The Italian delegation is against laying down specific rules governing administrative cooperation; such rules should be general and refer to the detailed procedures laid down in national legal systems, as is consistent with the principles of proportionality and subsidiarity.

We would make similar comments with regard to the collection, storage and erasure of personal or sensitive data.

LATVIA

Latvia agrees in principle with the need for Chapter VIII, which lays down rules on cooperation and the designation of central authorities.

We agree in part with the cooperation tasks assigned to the central authorities, i.e. to the extent that **Article 41** requires the central authorities to provide extensive information to counterpart national central authorities and assist individuals involved in cross-border proceedings relating to maintenance obligations.

Article 41(1)(a) should in our view be expanded to include provision for exchanging information on the progress of the enforcement procedure. This would be helpful.

Latvia does not agree with **Article 41(2),** which provides for central authorities to represent the rights of maintenance creditors in the Member State where maintenance proceedings are under way. We believe that another way should be found for assisting maintenance creditors, namely by simplifying individuals' access to justice, something which legal aid provision in the country concerned will ensure. Moreover, providing assistance of the type proposed could lead to significant discrimination in national proceedings.

Latvia has some problems with **Article 42,** the point of which is not clear.

We think that the type of assistance that the creditor is entitled to request from the central authorities under Article 41 needs to be more clearly specified; depending on the requests for assistance covered, it will be possible to judge in which circumstance a person could more usefully apply to the court examining the case, and in which circumstances he should seek the assistance of the central authorities.

We are in favour of the central authorities providing assistance with maintenance proceedings on the basis of specifically formulated requests from individuals, e.g. for help with sending and serving essential documents relating to the enforcement of the decision in another Member State and for information on progress with enforcement of the decision, on procedure, on cases before the courts and on earlier decisions and legislation and the possibilities that these offer the debtor and the creditor.

We have no objection to the general principle underlying Article 42 that the assistance provided by the central authorities to individuals and other national central authorities should be free of charge. However, we consider that if the Regulation is to provide for wide-ranging cooperation and assistance tasks which the Member States cannot afford to provide free, it should be possible to charge for them.

Latvia agrees with the obligation on Member State under **Article 44(1)(a)** to do their utmost to locate the debtor and that they should not seek to recover the costs incurred in doing so.

Latvia does not agree with **Article 44(1)(b) and (c) or with Article 44(2),** i.e. that the central authorities should have to provide information on the debtor's income (amount and sources) and the debtor's assets.

We also have difficulties with **Article 45(3)**, whereby, after the decision imposing the maintenance payments has been handed down and up to the moment when enforcement commences, the creditor, by applying to the court of his place of residence, will continue to be able to obtain information via the central authorities on the debtor's situation and so to ascertain whether or not the decision can be enforced in the Member State concerned.

In Latvia's view information on the debtor's income and sources of income and the extent of his assets should only be obtainable (a) up until the decision is given, using the procedures for obtaining information under 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, and (b) during the enforcement of the decision by the competent enforcement authorities or persons.

We consider it more appropriate that the creditor should apply to the court of the State that handed down the decision rather than, as proposed, that he should always apply to the court of his Member State of residence even if the latter court was not involvedin the decision.

Latvia could basically agree with the aim of **Articles 46 and 47**, which is to safeguard the debtor's interests and to protect personal data by informing the debtor as to which particulars (location, income) have been passed on to other Member States' authorities in accordance with the provisions of this Regulation.

LUXEMBOURG

This chapter gives rise to the following considerations:

It is important that the Regulation should take on board the most important administrative cooperation provisions in the draft Hague convention. It would thus be clarified that assistance provided by the central authorities may also work in favour of the maintenance debtor.

Since a central authority may intervene at the request of either party and its primary aim must also be to facilitate the conclusion of agreements, particularly through recourse to mediation, we find it hard to imagine how the central authority can at the same time represent the creditor (particularly when the creditor is requesting the central authority's assistance following an initial request by the opposing party, the debtor). It would thus be more prudent to settle this question according to the national law of each Member State.

Article 44 gives central authorities direct investigative powers. This goes beyond the conventional understanding of administrative cooperation in a private law context and raises problems in itself. Moreover, extending the central authorities' role in this way means making cooperation more complicated (Articles 45 to 47) in the interests of data protection. These drawbacks make us sceptical about all these enacting terms. Without prejudice to the foregoing, if it proves useful to pursue this course (which we do not believe) careful attention will need to be paid to the treatment of debtors' rights. In addition, in any event, access to information and to files would have to comply with Member States' national legislation, which may differ considerably from one country to another.

THE NETHERLANDS

General remarks

The emphasis in the negotiations at The Hague is on finding remedies to the shortcomings of administrative co-operation under the existing international instruments. The outcome so far is that the future convention contains clear and detailed provisions on what an applicant may expect from central authorities.

The proposed chapter on co-operation in the Draft Regulation provides that the central authority shall represent the creditor in all steps needed to obtain a maintenance decision or to effectively recover maintenance. It should be made sure, in one way or another, that such steps are to include as a minimum all the steps provided for in the future Hague Convention. See the comment on Article 39.

The chapter lays down that the creditor can benefit from services by the central authorities. By contrast, the draft convention provides that such services are also to be rendered to debtors seeking a modification of a maintenance order. The Dutch delegation would point out that such services should also be available within the European Union, in particular in view of the intended insertion of a provision on modification jurisdiction.

This delegation is of the opinion that a chapter on co-operation has added value only to the extent that it imposes additional and/or more stringent obligations on Member States as regards administrative co-operation than the Hague instrument will do. Member States have committed themselves to the negotiations at The Hague. The purpose of the Brussels negotiations can only be to establish whether it is possible to go beyond the standards to be laid down in the Convention.

AUSTRIA

Cooperation between the individual central authorities may be more intensive within the Community than outside it. This was in fact also explained orally. On the other hand, it could be the case that the narrower substantive provisions – for example, dispensing with exequatur or translations, the homogeneity of legal aid on the basis of the Legal Aid Directive and the European Judicial Network – will lead to the tasks of the central authorities liaising between the Member States becoming more insignificant than those between a Member State and third States. As the tasks of the central authority include an essential coordination function, they may perhaps even be superfluous in some sectors within the Community. Although giving too much emphasis to the tasks of the **central authority** in dealing with judgments initially sounds like closer homogeneity, this could also prove to be a fallacy. Indeed, the other civil procedure instruments under European law are moving away from centralisation. If a central authority is no longer needed for mutual legal assistance and notifications, but **direct contact between the courts** is permitted, the central authority may sometimes be superfluous in the area of international cooperation as well.

However, there will of course be tasks which the central authorities must also perform vis-à-vis another Member State, and this is also welcomed by Austria.

In the case of general tasks, consideration still needs to be given to precisely what role the EJN will play here and in what institutional framework.

Cooperation in specific cases elicits no objections from Austria insofar as this concerns Article 41(1). The obligations referred to therein to provide information are also made sufficiently flexible by the introductory sentence. The Austrian central authority itself only performs coordination tasks. It can of course provide advice, but not draw up a report or make an attempt to reach a settlement. The old tradition here is that the parties contact the district courts of their place of residence, where relevant reports are drawn up. The central authority assists here with advice, expertise and forms for online completion, but does not take action itself.

As far as **representation** is concerned, this is even less the case. Representation by the central authority is, in Austria, **quite inconceivable from an organisational point of view**. The central authority is – as in many, but of course not all, other Member States – located within the Federal Ministry of Justice. Under the public service regulations this is superior to the courts, but in the successive stages of appeal it is of course neither superior nor subordinate on account of the separation between justice and administration. The relationship is not compatible with the idea that the central authority itself acts as representative of a party in legal proceedings. For people seeking justice, however, this involves no drawbacks of any kind. The central authority forwards incoming files to the competent court, where the clerk of the court ensures representation by a court official in the case of an attempt by common consent to reach a settlement; however, where an attempt at an agreed solution fails, a **lawyer** is appointed at no cost to the claimant under the legal aid system, to perform the **representation tasks under** the **central authority's general supervision**. In that respect there are no problems even if both the creditor and the debtor apply for assistance. Since the central authority has no decision-making competence or power of direct representation of its own, there are no problems of conflicting interests.

All this has proved its worth and should not be changed if not strictly necessary. The only obstacle which Article 41(2) poses is the unconditional wording ("shall be represented by the central authority …"), which was presumably not intended at all. It should be stipulated here, **as in the introductory sentence in the first paragraph**, that the central authorities shall take, "acting directly or through public authorities or other bodies, …all appropriate steps" to ensure representation of the parties.

Article 42 presents more of a problem. Even the title "Working method" conjures up a technical idyll which is in complete contradiction to the content of the provision. The obligation for the creditor to lodge the application himself is problematic, given the considerations set out with regard to Article 41 (representation). The distinction between "free of charge" in paragraph 3 and the reference in paragraph 5 to bearing costs is not easy to comprehend and is probably superfluous. The provision concerning reimbursement of **costs** in paragraph 4 is highly problematic, as it may again run counter to the interests of creditors and represent an unexpected financial burden.

At least in the German version, the wording that the claims for costs do not apply to a creditor "who, in the Member State in which he or she is habitually resident, fulfils the conditions to benefit from legal aid" must also, if interpreted literally, be construed to mean that a body in the State of enforcement (the central authority or the local court) would have to decide whether a party is entitled to legal aid under a different law of procedure (that of his State of residence). If that were intended, it would mean no more and no less than the **application of foreign procedural law**. This should be opposed for dogmatic, theoretical, but also purely practical considerations. The application of foreign procedural law is most unusual and would be extremely harmful. According to the Commission's oral comments it is only intended to mean that, in this area too, "continuity of legal aid" should apply. There is of course no objection to already granting legal aid in the home country for prosecution abroad, which should then also be recognised by the Member State of enforcement, however, this kind of provision should be clear from the text of the Regulation and not merely from oral comments.

There is no objection to the obligation to hold meetings (Article 43), although whether it is again imperative for such meetings to take place in the institutional **context of the EJN** needs further consideration.

Article 44 concerning access to information is an essential area in which the central authorities can do more than merely engage in cooperation between courts, particularly in terms of the **preparation of proceedings**. Prior to recognition proceedings it may be worthwhile for reasons of procedural efficiency to carry out preliminary inquiries as to whether it is worth making a claim at all; on the one hand, the enforcement of maintenance could be dispensed with for the time being if only because the impecunious debtor turns out not to have a job; on the other hand, it could as a result turn out that the presumed place of residence in the potential State of enforcement does not in reality exist. Both may naturally also apply at the stage following the decision but prior to initiation of enforcement proceedings. In both areas coordination of the central authorities can serve a useful purpose. The debtor is not pestered by pointless applications, while the creditor can spare himself (herself) pointless applications, the time (and sometimes money) spent on them, and hopes (which are later disappointed). The burden on the courts is eased. All this is a win-win-win situation and should therefore be pursued, irrespective of problems of data protection law, which can surely be overcome with associated measures.

The objective clearly emerging from Article 44, of **exchanging data only to the extent absolutely necessary** and ensuring that this provision is not used as a legal basis for creating new databases, is also most welcome. However, the Article is not (yet) successful from a technical point of view or linguistically transparent.

The aims should therefore be **placed at the beginning**, i.e.:

restriction of data transfers to those which are essential for determining whether court proceedings (recognition or enforcement stage) should be initiated;

use only of data files which are already available under the national legal system concerned;

no creation of new databases.

More specifically, it should merely be pointed out that, as the oral discussion showed, different confidentiality levels apply to data within the individual Member States. In the case of social security systems and tax secrecy on the one hand, and banking secrecy on the other, **different confidentiality levels** apply. Under Austrian law, data from tax files and social security systems can certainly be accessed relatively easily, where child or parental maintenance is concerned, whereas bank data are difficult to obtain because of the existence of banking secrecy in that respect.

It should also be stressed that some of the data listed are **not very useful** in providing legally relevant information.

It should be stressed once again that a vehicle registration authority can in fact only trace the registered owner. However, practical experience in Austria suggest that a vehicle is either still in the possession of another person (instalment purchase transaction, leasing) or is in practice no longer realisable, but already fairly worthless.

As far as information held by the central banks is concerned, this does not in any case happen in Austria, but the mere existence of bank account details has per se no **evidential value**. The account may hold high capital assets or sums below the subsistence minimum, or (unfortunately, frequently in cases in which enforcement of maintenance is necessary) be heavily overdrawn.

On the other hand, the wording used in (b) on social security and (d) on land registers again seems too narrow. A **pledge registry**, which basically does not list property, may also be very useful as a source of intelligence (mortgaged fixed assets of a self-employed person). The reference to **social security**, including "social security contributions" is, in Austria's view, expressed a little inappropriately. The essential point is whether **contributions** accrue from sickness and pension insurance. This is the sign of an **honest employment relationship**, from which satisfaction may meaningfully be sought by way of wage and salary payments. The registration of contributions is therefore far more important as a source of useful information than social security in the narrow sense, which concerns emergency support or unemployment benefit, and not items which could seriously be used for enforcement purposes.

However, the further procedure in Articles 45 and 46 sounds very bureaucratic. We urgently request that the procedure be simplified. On the other hand, the obligation to erase data is not very convincing, as these data are in any case used in the court proceedings, so that the **destruction** of the original source of intelligence degenerates into sheer **formalism**. The fact that the central authorities do not keep the data does not mean that they are impossible to obtain. The data are used in court and must also remain documented in the court records. It is completely out of the question that "sensitive data" on income and financial circumstances should be recorded but that the decision on assessment of the amount of maintenance should not disclose the ability to pay and the substantiating documents which were taken as the basis thereof.

If it is merely a question of finding out addresses, destruction is also the destruction of resources, as the address would possibly have to be ascertained once again at the time of the next notification. A general erasure instruction cannot realistically satisfy the requirement that a debtor might on one occasion have a justified interest in the creditor or his legal representative not learning his address.

Reference is made just in passing to a typing error in the German version of Article 46(2) ("Unerhaltsforderungen" instead of "Unterhaltsforderungen“).

Article 47 is – in the form proposed here – quite unacceptable. The Austrian delegation proceeds from the understanding of data protection in Austrian law and reaches the conclusion that the person protected of course has a **right to be informed**. However, such a right to be informed is not satisfied ex officio in every case under Austrian law, but **only at the request** of the protected person. Moreover, only a right to be informed on request is enforceable. For someone who disappears and whose address can finally be found, a right to be informed ex officio under data protection law is nothing other than an incitement to disappear again and, for that reason alone, highly inappropriate. The deadlines referred to make little difference to this.

To sum up, the chapter on data protection therefore requires **thorough revision and simplification**, without the objectives which it pursues in principle being called into question.

FINLAND

Articles 39 - 44

It should be clearly stated in the text that the provisions of the Regulation concerning cooperation are supplementary to the Hague Convention. The cooperation functions among the EU central authorities should be at least as comprehensive as they are in the coming Hague Convention.

In addition, the principle that the central authority is obliged to give assistance to the debtor as well should be expressly stated in the Regulation.

ARTICLE 39

BELGIUM

Paragraph 3

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

GERMANY

Germany welcomes this provision and makes the following proposals:

- It should be clarified what is meant in paragraph 1 by the specification of functional jurisdiction. Specifically, it should be clarified whether Member States should have the possibility to name different authorities for different types of maintenance claims. Such fragmentation would not make much sense, however.

- thus far it emerges only indirectly from paragraph 3(b) that Member States may designate admissible languages. This should be expressed more clearly. Furthermore, all information requirements should be outlined in one article.

MALTA

Malta acknowledges the value of this Article, cooperation through Central Authorities is essential to facilitate the recovery of maintenance claims.

Malta, therefore, agrees with this proposed Article.

THE NETHERLANDS

Reference is made to the above general remarks. It would be useful to insert a clause stating that the tasks and responsibilities under this chapter are complementary to the tasks and responsibilities regarding administrative co-operation arising from any instruments to which the Member States are or will be bound.

ROMANIA

We agree with the wording of this proposed Article, which we deem very important for the effective recovery of maintenance.

SWEDEN

This chapter is far too vague in laying down the manner in which central authorities are to cooperate and the tasks involved in administrative cooperation. That is in fact one of the problems with cooperation at present. The current basis for cooperation between central authorities is the 1956 New York Convention on the Recovery Abroad of Maintenance. That Convention is differently interpreted by European countries. There is no consensus within the EU on the extent of the assistance to be provided.

The proposal appears to be building on the proposed new Hague Convention on recovery of maintenance. It is debatable whether it is legislatively appropriate for that text, serving as a basis for worldwide cooperation, also to be taken as a basis for this Regulation, which is supposed to be a self-contained system not needing to be read in conjunction with anything else. The new Regulation should therefore spell out in far more detail what cooperation is to involve.

ARTICLE 40

BELGIUM

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.

GERMANY

Germany welcomes an approach that utilises existing structures for communication between the Member States. However, it should be made clear that the cooperation referred to in this Article does not involve specific individual cases.

GREECE

Re Articles 40 and 41: In principle we agree with the rules proposed. We suggest that in Article 41(2)(a) the phrase "or which is to be seised" be added after "the court seised".

MALTA

Malta favours this Article and agrees that the proposed information is passed through the Central Authorities of Member States via the European Judicial Network.

POLAND

Article 40 does not give any indication as to whom the central authorities are to communicate information on national laws and procedures.

ROMANIA

We agree with this proposed article and with the transfer of information through the central authority and EJN.

ARTICLE 41

BELGIUM

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.

CZECH REPUBLIC

Paragraph 1(b) should be consistent with the draft Hague Convention and not be confined to assistance for creditors.

The obligation incumbent on the central authority under paragraph 2(a) to represent the creditor should only apply in cases where the procedure takes place in a court in a Member State other than that in which the creditor is habitually resident.

As for whether central authorities should be required to represent creditors themselves or whether they should be able to appoint another body for that purpose, we would be inclined to favour the first option, bearing in mind our practical experience hitherto. Nonetheless, we understand that such a system would be unacceptable to certain Member States.

DENMARK

Paragraph (2)

The delegation cannot accept an obligation on the central authority to represent the creditor; the administrative system on Denmark for both establishing a maintenance decision and for enforcing such a decision does not permit this.

Instead, the delegation proposes, that the central authority has an obligation to provide for legal representation for the creditor - and in cases on changing a decision perhaps also for the debtor - if it is necessary. However, in the Danish administrative system, representation is not necessary because the authorities have to make sure that all necessary pieces of information is gathered and that the decision is made in accordance with the law.

GERMANY

Germany welcomes the concept of merging the functions of the central authorities at one point. However, some of the formulations appear to be insufficiently precise and complete. This is particularly true with respect to the phrase "to achieve the purposes of this Regulation" in paragraph 1. This is insufficiently clear with respect to the tasks of the central authorities on the one hand, and insufficiently precise with respect to the defined purpose under data protection law on the other.

Germany therefore makes the following proposals:

- it should be specified that the tasks of the central authorities include not only facilitating amicable agreements (paragraph 1(c)) but also, and in particular, filing complaints and undertaking the enforcement of decisions. The provisions on representation in paragraph 2 are insufficient in this respect, because they establish merely the authority, but not the obligation, to act on behalf of the creditor.

- tasks should be clearly allocated either to the central authority in the Member State in which the creditor is habitually resident or to the central authority in the Member State in which the debtor is habitually resident. The current formulation leaves room for differences of opinion as to which of the two central authorities is responsible for a settlement attempt or bringing proceedings. Articles 4 and 6 of the UN Convention on the Recovery Abroad of Maintenance could serve as a model for the formulation of this provision.

- individual passages should be supplemented and made more precise to better fulfil data protection requirements. This includes for example: a more exact specification of the authorities that may be included in cooperation as indicated in paragraph 1, first sentence; a specification of the expression "situation of the creditor" in paragraph (1)(a)(i); a specification of the scope of information referred to in paragraph 1(b); and a more exact description of the purpose of collecting and transmitting data and the limitation thereof to that which is necessary for fulfilling such purpose.

The provisions on representation in paragraph 2 are to be welcomed. The broad scope eliminates doubts as to the extent of the authority's powers. Germany suggests that it be expressly mentioned that the central authorities are authorized to accept payments.

ESTONIA

The Estonian delegation considers that the Member States should have greater freedom to decide on the way in which assistance is to be provided. Paragraph 1(b) and (c) could be deleted.
Paragraph 2 should ensure that the central authority is neutral, bearing in mind its obligation to assist both creditors and debtors. Paragraph 2 should be reworded to indicate that the function of the central authority is to provide assistance in arranging representation.

GREECE

See Article 40

IRELAND

We understand this provision as applying, *inter alia*, to cases where the creditor's jurisdiction is seised. The provisions of the Article are of some concern to us, in that firstly there may be a conflict of interest for those central authorities which are required by national law to act in a neutral fashion *vis a vis* the parties. Secondly, for the avoidance of doubt, the text needs to specify that the collection and exchange of information shall be undertaken in accordance with national law – in Ireland, information such as that envisaged is generally provided only to a Court by the relevant public bodies.

LATVIA

See comments under Chapter VIII.

MALTA

In Malta the Central Authority provides assistance both to creditors and debtors, in view of this, Malta might, therefore, have a problem to put this Article into effect.

Moreover, Malta proposes that sub-article 1 should have minimal content and be limited to first sentence only. As for the rest it should be up to the Member State concerned to determine the role of the Central Authority and not the Regulation.

Without prejudice to the above, with regard to sub-article 1(b) Malta fails to see its added value and proposes deletion thereof. As for sub-article 1(c), Malta believes that this should be deleted from the text because it is putting unnecessary burden and responsibility on the Central Authority.

Malta also has a problem with regard to sub-Article 2, since its Central Authority provides only assistance to parties but not representation. Malta prefers that the issue of representation is left up to the Member States. Malta, therefore, proposes the deletion of this sub-article.

THE NETHERLANDS

Paragraph 1, sub c, is understood by this delegation as saying that the central authority is not required to mediate itself, but may refer the parties to professional mediation.

Paragraph 2:

The provision is understood by the Dutch delegation so as to allow, but not compel a Member State to provide that the central authority can represent the applicant in judicial proceedings. Existing national legislation implementing the New York Convention already provides for such representation, whether the applicant is the creditor or the debtor. The proposed provision should be extended so as to cover the debtor's representation.

The provision sub a should be clarified so as to express that services are available already at the stage where judicial proceedings are being contemplated but where the court has not yet been seized.

POLAND

Article 41(1) and (2)

Article 41(1): we have concerns about use of the formulation "*w szczególnych przypadkach*", which corresponds to the English "on specific cases", but limits cooperation between central authorities to specific (i.e. complicated, difficult cases). The German version is better "*in konkreten Fällen*".

Article 41(1)(a): the proposal to place such a wide range of duties on the central authorities is too vague and thus creates the risk that these provisions will either not be implemented or will give rise to abuse.

Article 41(1)(c): this provision gives the central authority procedural means which are the reserve of the courts.

Article 41(2)(a): the translation is incorrect and illogical. Article 41(2) should be amended to make the question of representation subject to national law.
If Article 41(2) is to be kept, then a provision should be included on compulsory appointment of the central authority as proxy together with the right to appoint a substitute.

PORTUGAL

Portugal believes as regards paragraph 2 of this Article that it would be helpful to specify that the representation may be carried out by other bodies than the central authority alone, i.e. that the representation may be delegated.

ROMANIA

Regarding the cooperation on specific cases, we take the view that assistance should be granted both to creditors and debtors. It should be clearly stated in the text that the central authority must be neutral and cope with the situations when the debtor also is entitled to assistance.

As regards the representation of the creditor, we suggest to include the possibility for the central authority to delegate this function to public authorities or other bodies or persons, as the draft Hague Convention provides, thus facilitating the appointment of a lawyer. Also mediation or ADR systems should be available at all stages of the procedure (before the court is seized, during the proceeding before court and during the enforcement phase) and the transmitting central authority should communicate (as in Article 4(3) of the New York Convention) that the central authority of the state of origin may recommend the creditor for benefitting of judicial assistance and legal aid.

SLOVENIA

In general, we support the Commission's proposal, but we have some further remarks:

- to some extent also the debtor as an applicant should be entitled to the help of the central authorities
- point b of the first paragraph is to general;
- point c of the first paragraph should be changed in order to refer to all ADR, not only to mediation;
- for clarity reasons, the proposal should clearly stipulate that a central authorities can hire a lawyer or a mediator.

SLOVAKIA

Slovakia fully supports the proposed wording of Article 41.

Slovakia would like to direct attention to the mediation mentioned in Article 41; Slovakia considers this the most effective method of resolving disputes. Slovakia maintains that mediation can be carried out directly at the central authority by qualified professionals, or with a mediator which the central authority asks to perform the mediation. We see both approaches as equally useful.

Slovakia welcomes the text of paragraph 2, since such an authorised central authority will not be able simply to "forward" communications to the competent institutions without informing the requesting central authority about the state of proceedings after passing the request on to another authority. This paragraph could ensure the involvement of the central authority in individual cases until the case is concluded.

SWEDEN

The second subparagraph of paragraph 2 seems to require the central authorities in both the country of origin and the country addressed to be prepared to represent a creditor in securing a maintenance award as well. However, it is not equally clear whether the central authorities have a duty to assist in securing an award where they do not actively represent the creditor. It should be made clear generally that the central authorities have the same duties in securing an award as in recovering maintenance.

Information under paragraph 1(a)(i) may be confidential and it should be made clear, either in this article or in the articles referred to, that the confidentiality rules of the country in which the information is held are to apply. Information raises complex issues. One of the Regulation's main aims should be to have information, even if confidential, supplied in such a way that maintenance can be awarded and recovered. At the same time, it must be possible to protect certain information. For instance, a spouse living at a secret address because of violence or threats by the other spouse should not be in any danger of having details of the address disclosed to the other party.

ARTICLE 42

BELGIUM

Paragraph 1

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

CZECH REPUBLIC

Paragraph 1

In paragraph 1 the reference to applications under Article 41 ought to include an exemption for applications to obtain information under Article 41(1)(a), which are subject to the separate arrangements set out in Article 45. We have yet to take a firm stance with regard to direct applications, the pros and cons of which ought to be weighed up.

We have no reservations with regard to paragraph 2.

Paragraph 4

We are prepared to support automatic free legal aid for the recovery of maintenance obligations towards children. We do not, however, agree with the second sentence, since domestic arrangements governing the granting of free legal aid would cause considerable difficulties with regard to assessing entitlement thereto.

GERMANY

It is unclear which central authority is being referred to in paragraph 1. Presumably this means the authority in the Member State in which the debtor habitually resides. The key point here is that the provision allows the creditor to contact this authority directly. While this may increase efficiency and accelerate the processing of an application, there is also a danger of communication problems and the uncoordinated duplication of work.

The provision on costs laid down in paragraph 4 is to be welcomed in principle. However, this provision should be revised in accordance with the following two points:

- first, the costs covered by paragraph 4 need to be specified (e.g. lawyer's fees only, or court fees as well). Germany proposes that the consultations on Article 13 of the new Hague Convention be used as a guide.

- second, it raises problems of practical application, because the central authority that has assumed representation would have to review the legal aid provisions of another Member State. It therefore seems reasonable to supplement this paragraph with a provision stating that this task will be assumed by the central authority of the Member State in which the creditor habitually resides.

ESTONIA

The second sentence of Article 42(1) should be omitted. It is sufficient that the creditor has the opportunity of applying to the central authority. Involving courts in this matter is neither justified nor necessary in view of their heavy workload.
Estonia is in favour of the principle that central authorities should not charge for their services. In matters relating to legal aid (paragraphs 3 and 4), the principles of the Legal Aid Directive (Directive 2003/8/EC) should apply.

GREECE

In paragraph 2, replace "all available information" with "all necessary information". We have no problem with free legal aid if it is to be confined to children, otherwise we have serious reservations as it will impose a substantial burden on the central authorities. The first part of paragraph 4 is unclear.

IRELAND

We are of the view that a party seeking assistance should only seek assistance from the central authority of the Member State on whose territory he or she is habitually resident, or a court office in that Member State, and that those bodies should pass the request to the appropriate central authority. This would result in a more efficient procedure in the long term, and would also ensure coherence with the Service of Documents Regulation which provides for authority to authority contact only.

We suggest that a person who would not benefit from full legal aid in the Member State of habitual residence should not necessarily be covered by the provision of paragraph 4 – this ties in with our comments on Article 29.

LATVIA

See comments under Chapter VIII.

MALTA

With regard to sub-article 1, Malta does not understand the added value of the option of either going directly to court or through the Central Authority. It is unnecessary to regulate this and things should rather be left in the hands of the person concerned.

With regard to sub-article 4, Malta would like to know who is going to decide whether a person is eligible for legal aid.

With regard to costs, Malta agrees that services of the Central Authority should be free of charge as long as these are limited to assistance only.

THE NETHERLANDS

Paragraph 1:

Services by the central authorities should also be available to debtors.

The Dutch delegation is not in favour of the proposal to allow an applicant to address himself either to the central authority in the Member State of his own habitual residence or in the State of the other party's habitual residence. The central authority of the applicant's habitual residence is in the best position to complete the forms and collect the required documentation for a request. Moreover, there is no point in adopting a working method that differs from the method adopted in the future Hague Convention.

This delegation fails to see the advantage of a system allowing an applicant also to address himself to a court. The court administration should not be required to perform this task.

Paragraph 3: Under legal aid schemes in the Netherlands, provision has been made for the financing of mediation, but mediation is not free of charge in all cases.

Paragraph 4: Significant progress was made at The Hague with respect to the legal aid issue. This should be taken into account in drafting this paragraph. If representation is to be free of charge as regards child maintenance, there little point in requiring a contribution for representation in other types of maintenance proceedings, which represent a tiny proportion of cases handled by central authorities anyway. A system of charging costs generates costs and requires extra work.

POLAND

Article 42(1) and (4)

Article 42(1): the creditor should not be allowed to apply directly to the central authority of the debtor's state. The indirect procedure enables the forwarding authority to carry out preliminary checks on the application from the formal point of view and from the point of view of the creditor's good faith. As a rule, the creditor is not able to prepare an application without guidance from the forwarding authority. A creditor making a direct application would be obliged to bear the costs of translation himself, even if he qualifies for legal aid in his state of residence (arguing *a contrario* from Article 45(5)). Article 42(1) and Article 45 are inconsistent with each other. Article 45 rules out the possibility of the creditor applying directly for the information referred to in Article 44.

The requirement for the court to ensure "execution" of the creditor's request should be removed. The court of the creditor's residence has no ability to influence the action of the authorities of another state, including the execution of a request.

Article 40(4): the creditor should be informed of the amount of these costs before the start of the proceedings and should agree to pay them.

PORTUGAL

We suggest that in the Portuguese version the expression "pedido de assistência ao abrigo do artigo 41º" [application for assistance under Article 41] be replaced by the expression "pedido de cooperação" [application for cooperation] to avoid confusion with applications for legal aid.

ROMANIA

Articles 42 and 43

We agree with the provision proposed and trust that regular meetings will prove useful

SLOVAKIA

Second sentence of paragraph 1 - We think the text of the second sentence of Article 42(1) is excessive, since it regulates the relations of Member States' courts with their own central authorities in the transmission of requests, and this provision could thus generate unnecessary work for the courts. It must be pointed out that the court cannot provide applicants with the information provided to it by the central authority under the proposed Regulation, and also that the communication between courts and central authorities will itself lead to unwanted delays. A better solution is possible, such that if individual Member States want to provide a creditor with this service through the courts, they should deal with the issue internally. We therefore recommend deleting the second sentence of Article 42(1).

SWEDEN

In addition to the points made under Article 41, the provision should include some kind of requirement for a receiving central authority also to reply within a certain time, or at least a general requirement for effective, expeditious processing.

ARTICLE 43

GERMANY

Germany believes that regular meetings of central authorities' representatives for the exchange of experiences would be very useful. However, it does not seem necessary to include a provision to this effect in the Regulation. In addition, the modalities of such meetings (frequency, convening procedures) should be left up to the authorities and not be tied to those of the European Judicial Network.

IRELAND

We suggest that this Article shall apply with effect from the date on which the Regulation comes into force, and that an appropriate amendment be made to paragraph 2 of Article 53.

ROMANIA

See Article 42

ARTICLE 44

BELGIUM

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.

CZECH REPUBLIC

Articles 44 to 47

We support making provision for obligations on the part of the Member States to ascertain and divulge information regarding debtors in order to recover maintenance obligations. A lack of information relating to the debtor's place of residence and assets will hinder the recovery of maintenance obligations, even if the exequatur procedure has been abolished.

Further detailed discussions are required on the arrangements for exchanging information.

Member States ought to ensure that the central authorities enjoy access to the listed registers.

Re Article 44(2): In our view, there is no need to consult all the listed registers. For instance, if it is found that the debtor has sufficient funds in his or her bank accounts to recover maintenance obligations or that he or she owns property of a sufficient value, there is no need to ascertain information regarding other property. An exception to this could be made in cases in which the defendant is unwilling to provide details of his or her assets to help establish the amount of the maintenance obligation. Domestic law will also have to be taken into account, as it affects central authorities' access to information in the listed registers.

GERMANY

Germany welcomes an approach that defines the powers of the central authorities more precisely than does, for example, the UN Convention on the Recovery Abroad of Maintenance. In this context, the following aspects should be taken into consideration:

- in order to minimize administrative burdens, the investigative activities of central authorities should extend only so far as is necessary to compensate for the weaker position of the creditor due to the fact that he or she resides in a different Member State than does the debtor.
- the *ex officio* investigation of facts sits uneasily with the central authority's role in civil proceedings and with its task of facilitating a mutually agreed resolution.
- interference with the debtor's rights should be as minimal as possible. Data protection standards should be taken into account.

Germany therefore makes the following proposals with respect to Article 44:

- the text should specify who should be given access to the information.
- investigations by the central authority to ascertain information must be the last resort. On the one hand, the creditor should therefore demonstrate that he or she has made every reasonable effort to obtain the relevant information. On the other hand, the central authority should be required to first ask the debtor for information.

- the scope of the data to be collected should be specified: an investigation is permissible only insofar as it is necessary for fulfilment of the maintenance obligation. Therefore it is not necessary, for example, to ascertain information on the debtor's financial circumstances as a whole if it becomes evident that his or her earnings already suffice. For this reason, it does not seem appropriate even to ascertain such facts that serve no other purpose than to facilitate the recovery of maintenance.

The designation of authorities that are to provide information, as laid down in paragraph 2, appears problematic. The Member States should regulate this issue independently since their administrative structures vary significantly.

ESTONIA

Articles 44 and 45

As regards Articles 44 and 45, the connection with Regulation No 1206/2001 is somewhat unclear. There should be a clearer connection between Article 45(3) and Article 44(1). The requirement of court consent could be dropped from Article 45(3) if a court decision has already been made in respect of a debtor. In such cases the central authority could decide whether or not a request for information was necessary.
The Regulation should ensure that only necessary information is forwarded. For example, if the debtor's current income is sufficient to enforce a maintenance claim, information concerning his other assets need not be submitted.

The Legal Aid Directive (Directive 2003/8/EC) should apply in respect of translation costs and the final sentence of Article 45(5) should be deleted.

GREECE

In the first paragraph, we propose that the phrase "shall give access" be replaced by "shall have access". Paragraph 2 should be deleted as it is redundant. We have a problem with paragraphs 1(d) and 2(f) on grounds of bank secrecy. In our view, information on social security in relation to the debtor is unnecessary for maintenance and therefore if paragraph 2 is retained we propose that subparagraph (b) be deleted. Likewise, other information on other assets should only be required if the income is insufficient to cover the maintenance.

IRELAND

We have some hesitations about this Article which we see as far too ambitious. It would also be difficult for Ireland to implement effectively. The type of information gathering envisaged in this Article is alien to our legal system – under our national law, where details of a person's assets are required that person will be brought before a Court for examination. Information on taxes and social security would normally be treated as confidential by the relevant bodies and generally would be furnished only on direction of a Judge. Other information may be available for a fee, e.g., registration of vehicles. Bank account numbers are not held in any public record, and Ireland does not have a population register. As with Article 41, we are of the view that the provisions of this Article may bring about a conflict of interest for some central authorities.

LATVIA

See comments under Chapter VIII.

LITHUANIA

Article 44(1) of the proposal for a Regulation provides that the central authorities shall give access to information. Lithuania suggests that an additional provision should be put into the proposal which specifically states who may be given access to information, what the scope of the information is, and what the conditions will be for information to be given about the debtor.

Article 44 of the proposal for a Regulation does not state how information will be supplied. Lithuania therefore suggests that an additional provision be inserted into the proposal on how information is to be supplied and received, with due consideration for safeguard measures.

MALTA

Malta proposes a re-drafting of sub-article 1 in order to reflect the idea that the Central Authority will use the sources of information available to them based on national law.

In line with the proposal of the Data Protection Supervisor in Council Document 9624/06 dated 19 May 2006), Malta agrees that the list in sub-article 2 should be exhaustive and so the words "at least" should be removed from the text.

THE NETHERLANDS

The Dutch delegation accepts the objectives of the provision of information as defined in the first paragraph.

This delegation questions the purport of the first paragraph. First of all, central authorities, when dealing with an application for the recovery of maintenance, should themselves have direct access to important data which have already been collected by other public bodies in their State, e.g. from the population register, civil status records, the land registers, the registration of motor vehicles and the tax administration. This is already the case in the Netherlands. In order to obtain information, the central authority may also need the help of the office of the public prosecutor. However, the means available to the public prosecutor should not be overestimated.

In the second place, the central authorities should be allowed to exchange such data with other central authorities. This will help them to assess the chances of success of proceedings or enforcement measures which are being contemplated.

The list in the second paragraph should not be a closed list.

ROMANIA

We suggest drafting an Article along the lines of Article 22, unifying the procedure in the field of service of document, to facilitate and unify the provision regarding the taking of evidence, with particular emphasis on the information on the income of the debtor.

SLOVENIA

Articles 44, 45, 46 and 47

Our experts for data protection are of the opinion that provisions are very well orientated and that in this phase we can support the proposal. However, we have one remark: the last sentence of Article 46 should be deleted.

SLOVAKIA

Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data recognises possible exceptions to the general principle of restricting the scope of processing of personal data. It would be advisable not to leave the regulating of possible exceptions from that Directive in the context of the present proposal for a Regulation to individual internal systems, but rather to deal with this aspect directly in the Regulation, which would ensure a uniform application of the Regulation in all Member States.

In the first sentence of paragraph 1, we propose replacing the words "The central authorities shall give access" with "The Member States shall give access".

However, we take a very positive view of the Article as a whole, because the investigation of the debtor's situation will make the recovery of maintenance easier and facilitate the work of the central authorities after the request for recovery of maintenance claims has been sent.

SWEDEN

While it is to be welcomed that central authorities are required to assist one another in obtaining important information to facilitate recovery, it must be made clear that the confidentiality rules of the country in which the information is held are to apply. The same confidentiality issues arise here as for Article 41.

There is reason to question the legal basis for paragraph 3. What records are kept in a Member States would seem to be a matter for national law.

ARTICLE 45

BELGIUM

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.

GERMANY

Re Articles 45 and 46 generally

The concept behind these provisions appears to require clarification.

On the one hand, one can infer from Article 45(1) that creditors enjoy an "isolated" right of access to information concerning debtors, which right creditors can also then use if they wish to conduct subsequent legal action themselves, i.e., without the support of the central authorities. This would be welcome, since it would mean that creditors need to call on only some of the services offered by the central authorities, which in turn would reduce the authorities' workload.

On the other hand, however, Article 46 appears to proceed from the assumption that the creditor should not receive the information at all. Rather, the creditor's rights appear to be limited to obtaining a disclosure of information *vis-à-vis the court* (otherwise the phrase "without disclosing it to the creditor" in paragraph 2 would be superfluous). If this is the case, then the application procedure laid down in Article 45(1) and (3) is unnecessarily complicated. It would make more sense to create a provision that authorises the court dealing with a maintenance case to obtain the information directly – either of its own motion or upon application by the creditor in the proceedings.

Article 45

If one proceeds from the understanding, as described above, that Article 45 grants the creditor an individual right of access to information concerning the debtor, then special protective measures are required that prevent the creditor from abusing his or her right to information or receiving too much information.

Germany therefore makes the following proposals:

- the preconditions under which the creditor receives information should be clarified. Thus far, paragraph 1 provides only that a court will examine whether a request "is consistent with the conditions" laid down in the Regulation. It remains unclear exactly what these conditions are. In general, information is to be provided only under the conditions outlined above in the discussion of Article 44, in particular with due regard for necessity and proportionality.
- the creditor should be required to submit his or her application directly to the central authority. Only the central authority can assess whether the preconditions for obtaining information about the debtor have been met or whether the submission of the application constitutes an abuse. In contrast, the court of the place where the creditor habitually resides is not involved in the matter and would therefore be confronted with an application pertaining to a case unknown to that court.
- the gradation of the entitlement to request information laid down in paragraph 3 does take into account the principle of proportionality but could cause problems in practice. For example, the income of a debtor may also be of relevance in court proceedings leading to a decision. Therefore it is questionable whether this differentiation is reasonable.

ESTONIA

See Article 44

GREECE

We disagree with paragraph 3 as in Greece this information is essential for proceedings to be initiated. If the income of the debtor is not determined in the proceedings, the maintenance claim proceedings are rejected as of an undefined nature. In Greece, a creditor claiming maintenance has the right to information from the tax office on the income and other assets of the debtor (lifting of tax secrecy). The mediation of the court as provided for in paragraph 1 is complicated and time-consuming. It will also place a substantial burden on the courts, which, in Greece at least, will be a serious problem. It would be better for the creditor to seise the central authority directly.

IRELAND

We welcome the court oversight of requests for transmission of information. As indicated in our comments on Article 44, much of the information referred to is not publicly available in Ireland, so we would have practical difficulties in complying with the thrust of this Article.

In keeping with our comments on Articles 42 and 29, we suggest that a person who would not benefit from full legal aid in the Member State of habitual residence should not necessarily be covered by the provision of paragraph 4.

LATVIA

See comments under Chapter VIII.

THE NETHERLANDS

First and second paragraphs:

The proposed procedure, which would oblige an applicant to address himself to a court in his country, which court is to assess the consistency of the request for information with chapter 8 before such a request is channelled to the requesting central authority, is unrealistic and unworkable. In current practice, the Dutch central authority, when seized with a request from an applicant in the Netherlands for recovery abroad under the New York Convention, will itself, through its counterpart abroad, seek information it needs from the other party. If and to the extent the debtor does not provide the information, the central authority abroad will obtain information from other sources which can be accessed. There is no evidence that the purpose for which the information is sought, has ever been disregarded by central authorities.

The proposal takes no account of the fact that the central authority can represent the foreign applicant in court proceedings and needs the information about the party who is in its jurisdiction. It would be counterproductive if the foreign applicant were required to conduct court proceedings in his own country in order to enable the central authority in the requested State to have access to data to which it has access anyway under local law.

It should be possible to obtain information for a debtor in the same way as for a creditor.

Third paragraph:

The Dutch delegation is of the opinion that there is no good reason why data from the tax records should be available at all times and information from sources such as the population register or the motor vehicle registration only when there is a maintenance order. The information referred to in article 44 is important if the chances of success of proceedings have to be assessed.

PORTUGAL

The Portuguese version of paragraph 1 of this Article appears to be incorrect, since it states that the central authorities shall send the application. The French and English versions, on the other hand, refer to the application being sent by the court (in English) or by the judicial authority (in French).

ROMANIA

Articles 45 and 46

We consider useful to provide for the possibility of obtaining all the information at any moment (especially that regarding the monthly income of the debtor), even though we acknowledge that there is a special Regulation applicable in this matter (Regulation no. 1206/2001).

We strongly support the provisions of Article 45(5) regarding the costs of translation.

As a preliminary remark, we believe that these Articles provide good balance between the access to information of the creditor and the protection of the debtor. However, further consultation with our internal experts on the matter is necessary in order to formulate a definitive view.

SLOVENIA

See Article 44.

SLOVAKIA

Paragraph 1 - We recommend deleting the phrase "through the court for the place where he or she is habitually resident" (this point is analogous to the recommendation to delete the second sentence of Article 42(1)). We find the system for requesting information (supposing the place where the debtor is habitually resident has to be ascertained) through the courts to be over-complicated and a burden on the courts.

FINLAND

Articles 45-47

Due to the data protection provisions the cooperation rules are very complex and cumbrous to apply in practice. These provisions should be more flexible.

In article 46 the orders to erase the information are too strict and incompatible with our national legislation concerning duty to store information. We suggest that a provision like ”the information shall be erased or archived when it is no longer necessary to store it for the purposes for which they were transmitted” be included in article 46 instead of the current versions.

SWEDEN

It is open to question whether it should first be necessary to apply to a court for assessment of whether an application is complete. In any event, it should be for each Member State to decide for itself whether that is necessary. It should also be possible to request information on the debtor's financial circumstances when bringing proceedings for a maintenance award in the country of origin. A creditor's right to bring proceedings in the country in which he is habitually resident would otherwise be of limited value.

ARTICLE 46

BELGIUM

See Article 45

CZECH REPUBLIC

The central authorities themselves ought to be able to make use of the information and request it if they are representing the creditor.

GERMANY

See also Article 45

In contrast, if one proceeds from the understanding, as described above, that ultimately only the court seized of the matter should receive the information, it does not seem appropriate to transmit the information back to the court that has forwarded the application pursuant to Article 45(1). After all, this is not necessarily one and the same court (cf. the various jurisdictions that arise under Article 3(a) to (d)).

It should be pointed out that the creditor will also become aware of information forwarded directly to the competent court in this manner, because in such proceedings the creditor has the right to make a statement as to the facts under discussion.

The establishing of a set time period for storage specifically of information transmitted, as laid down in paragraph 3, will lead to problems in practice. Such information would then have to be administered separately from the other court files. Moreover, the maximum time period of one year seems too short.

GREECE

In our view the transmission of information referred to in paragraph 1 should be to the court which is responsible for the maintenance claim. The last sentence of paragraph 3 should be deleted.

IRELAND

We would prefer that information would not be passed to the creditor – rather, it should only be transmitted from one court or authority to another. Such information handling would respect the views of the party whose details are being managed. It would also go some way to alleviating the concerns of the public bodies which hold this information in the normal course of events, that information supplied to them in confidence would continue to be treated as such

LATVIA

See comments under Chapter VIII.

MALTA

Malta has some difficulty with regard to sub-article 1, if the Central Authority has received information but is then obliged to destroy it immediately after having forwarded it to the court, what will happen if the Central Authority would need the same information some time later? This would add unnecessary work on the Central Authority. Malta, therefore, proposes that the information is kept by the Central Authority as long as the case is still pending.

With regard to sub-article 3, Malta agrees with the suggestion of the Data Protection Supervisor to delete the last sentence.

THE NETHERLANDS

Paragraph 1:

The information may be needed by the requesting central authority in order to assess whether it will ask for steps to be taken abroad, and subsequently by the central authority (and possibly the courts) in the requested State. In the view of the delegation of the Netherlands, in this case, transmitting the information obtained to the court in the requesting State serves no purpose. This court has already agreed with the request for information. Transmitting the data to this court is useful only if this court is, or is to be seized with an application for maintenance. In the Netherlands the court is seized by the central authority itself. It is therefore the central authority itself that uses the information obtained from abroad.

The Data Protection Supervisor in his oral explanation stressed the cyclical nature of maintenance dossiers. He observed that it should be possible to store data which may be required in subsequent proceedings.

Paragraph 2:

This paragraph refers to data transmitted. However, in the end the data may have to be used by the transmitting central authority. As pointed out, the (transmitting) central authority may have to represent the foreign applicant in court proceedings and have to use the data itself. Moreover, in many Member States the (transmitting) central authorities have themselves the power to take enforcement measures and may need the data for that purpose. It would be counterproductive if the (transmitting) central authority were to transmit data to a court and to wait for the court to send them back before it can enforce an order.

See also the comment on paragraph 1 with respect to the storage of data.

Paragraph 3: See the comments on the previous paragraph.

POLAND

There are no rules to cover the situation where the central authority collects information, but does not use it. Does this information also have to be erased as well?

ROMANIA

See Article 45

SLOVENIA

See Article 44

SLOVAKIA

Slovakia understands the Commission's wish to protect personal data, but wonders how practical this provision is and thinks that the authority that obtains the protected data should be able to keep it for longer, until the maintenance is recovered in full, and not destroy the data straight away.

FINLAND

See Article 45.

SWEDEN

Issues concerning treatment of confidential information are crucially important, as pointed out for earlier articles. It is not acceptable to require that information be erased. In Sweden's case, with a constitutional principle of public access and a requirement for authorities to keep documents, it would be very difficult to comply with the article. The provision is also questionable in practical terms. In such cases it is not uncommon for the parties to come back with new or revised demands. It would then facilitate processing and reduce costs if the information from a previous case was still available.

ARTICLE 47

CZECH REPUBLIC

This provision ought to be worded in such a way that the successful recovery of maintenance obligations is not jeopardised as a result.

GERMANY

Germany welcomes an obligation to notify the debtor. However, as described above, it would be preferable to question the debtor prior to the procurement and transmission of information. In general, the notification of the debtor should be effected immediately.

The 60-day period for which notification may be postponed (paragraph 3) may prove in practice to be too short.

GREECE

In principle we agree with the arrangement proposed. We have some doubts about the imposition of the 60-day time limit.

IRELAND

We have some concerns about this Article which may have adverse implications for the operations of public bodies charged with tax collection, and we suggest that (a) and (b) should be deleted.

LATVIA

See comments under Chapter VIII.

MALTA

Malta does not fully agree with this Article. Does it mean that the Central Authority would have to inform the debtor every time the information is gathered even if it is not used? Malta does not think that this approach would be feasible.

Malta is also of the opinion that the 60 day period may not be enough to start a case in court so the time period should be longer.

THE NETHERLANDS

The Dutch delegation considers that the proposed procedure is cumbersome and that there is a risk of misuse of information by the party to whom information has been transmitted. The requirement of information to the debtor can be met by sending him a letter at the beginning of the procedure, stating that the powers of central authorities include the power to collect information which is relevant for the recovery of maintenance and the remedies available to the debtor. The same should apply if information about the creditor has been collected.

ROMANIA

We agree with the provision proposed, although we acknowledge that, for the central authority this would prove a difficult task doubled by the time limit of 60 days.

SLOVENIA

See Article 44.

FINLAND

See Article 45.

CHAPTER IX
GENERAL AND FINAL PROVISIONS

AUSTRIA

It would of course be preferable to discuss these rather technical provisions at the end of the deliberations, but it is already clear that the **link to** the **enforcement order and** the **order for payment procedure** must be made and that the relationship with the Brussels I Regulation and with the internal court provisions for notification and legal assistance could be better coordinated.

The relationship with other instruments is dealt with in Article 49 in such a way that Austria has no objections in principle. Bilateral treaties with Member States which must absolutely be retained alongside the new Regulation on maintenance should not be recognised in Austria's opinion. However, it would perhaps be useful here to obtain a **statement from all the Member States** on which individual treaties they wish to retain. Generally speaking, it seems useful to allow individual agreements where **even closer cooperation** is possible (as would appear to be the case in particular with the Scandinavian treaty), but otherwise to leave individual law out of account.

Consideration should be given to whether the coordinating committee within the meaning of Articles 50 and 51 is most appropriate from an institutional point of view, without giving rise to a **debate on comitology**.

There are essentially no complaints about the transitional provisions of Article 52, although the German **translation** "in Empfang genommene öffentliche Urkunden" (of "to documents formally drawn up") is again particularly unfortunate. It should read something like "aufgenommen bzw. registriert" ("adopted and/or registered").

Closing remarks:
The Austrian delegation is aware that these comments have become rather lengthier than was planned. The fact that they could not be made more concise, contain no specific drafting suggestions and cannot claim to be exhaustive has to do with the severe time pressure in which they had to be drawn up. However, work on the text of the draft Regulation is not over with the end of the first reading, but only just beginning. Further oral and written contributions to the collective drafting of a lean Community instrument which is highly effective and acceptable to all are therefore still to come.

ARTICLE 48

CZECH REPUBLIC

The Regulation's relations with other Community instruments will depend on the final form of the proposal. Consequently, we are reserving judgment on this Article for the time being.

GERMANY

Germany proposes that the Regulations named here be explicitly amended rather than simply stating that the present proposal is to take precedence. The current method leads to legal uncertainty, because questions as to how far such precedence extends may arise in practice.

ESTONIA

Article 48 is dependent upon Articles 22 and 23 of the proposal, which the Estonian delegation does not support in their current form.

FRANCE

Drafting suggestions

Article 48

Relations with other Community instruments

1. In matters relating to maintenance obligations, this Regulation shall replace Regulation (EC) No 44/2001, except for Article 22(5) thereof, and Regulation (EC) No 805/2004.

~~2. Article 19 of Regulation (EC) n° 1348/2000 shall not apply in matters relating to maintenance obligations.~~

3. ~~Subject to paragraph 2,~~This Regulation shall not affect the application of Regulation (EC) No 1348/2000 and of Regulation (EC) No 1206/2001.

Explanations:

- *First point: see explanations under Article 3: jurisdiction concerning enforcement must continue to be governed by the Brussels I Regulation.*
- *Second point: see Note.*

THE NETHERLANDS

a. The Dutch delegation agrees with the provisions contained in paragraph 1.

b. As far par 2 is concerned, reference is made to the comments on article 22, in particular the delegation's conclusion with regard to the provisions on service.

c. The relationship with the Legal Aid Directive has to be looked into in more detail. See the comment on article 29.

ROMANIA

Articles 48 – 53

We agree with the provision proposed.

Romania supports the Swedish delegation's proposal regarding the entry into force of Article 43.

It would be useful to allow individual agreements which provide for the recovery of maintenance more effectively than the present Regulation. Also, a list of Treaties which shall no longer be applied should be included in an Annex, following the model of Regulation no. 44/2001.

Also the Regulation should include text on the relations with the amended Regulation 1348/2000, the future Hague Convention, the future regulation on payment order and the instrument establishing a small claims procedure.

SWEDEN

The effect of this provision is that the Brussels I Regulation and the Regulation on uncontested claims are not to apply to maintenance. The Regulations on service of documents and on taking of evidence are unaffected, save as regards their provisions in the event of the defendant not entering an appearance.

In Sweden's view, the relationship with other Community legislation needs to be considered more closely. Under the proposed wording of this article, some decisions at present certifiable as European enforcement orders will cease to be so. It is open to question whether that is not to be regarded as a step backwards in the trend towards general elimination of the need for a declaration of enforceability.

ARTICLE 49

CZECH REPUBLIC

The relations with the future Hague Convention ought to be spelt out clearly here.

We suggest inserting a new provision to deal with the relationship between the Regulation and international agreements concluded between the Member States on the one hand and third countries on the other. To this end, it might be worth drawing on Articles 28 and 29 and the opening provision of Article 32 of the common position of the Council on the adoption of a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II").

GERMANY

The relationship between the Regulation and relevant international conventions remains to be clarified.

ESTONIA

Article 49 compromises the fulfilment of agreements entered into with third countries. A solution should be found in this Article that is consistent with international law and would not compel the Member States to be in breach of their obligations toward third countries.

MALTA

Malta does not agree with this Article since Malta prefers to allow the possibility to Member States to retain any bilateral agreements they may have with third countries.

THE NETHERLANDS

See the preliminary remarks by the Dutch delegation. As the Commission has already admitted, this article needs refinement**.** The Regulation should, in any case, be without prejudice to the obligations regarding administrative co-operation to be provided for in the future Hague Convention.

PORTUGAL

Portugal is a party to other international instruments on this subject and wishes to continue to be able to negotiate agreements with third countries in this area. That being the case, it will be necessary to assess the implications that this Article will have in terms of the Union's external competences, since the rule to be enshrined here could have the undesirable result of prohibiting Member States from modifying their bilateral agreements on such subjects.

FINLAND

According to the Nordic Convention on enforcement of maintenance obligations of 1962 a decision made in a Nordic state is recognised and enforceable as such in another Nordic state. The possibility to apply the Nordic Convention between Finland and Sweden besides the Regulation should be ensured.

SWEDEN

It is important to Sweden that Nordic legislation based on the 1962 Nordic Convention on recovery of maintenance, which is far-reaching and works well, should remain applicable. Between Nordic countries, for instance, there is no need for a declaration of enforceability. In Sweden's view, therefore, it should be made possible to continue applying that legislation.

ARTICLE 50

CZECH REPUBLIC

Any decision on how to amend the Annexes to the Regulation will depend on their content.

GERMANY

Articles 50 and 51

According to the reference in Article 50 in conjunction with Article 51(2), Annexes will be amended by the Commission after consultation with the Member States (advisory procedure). This does not give due consideration to the important function played by the forms in the implementation of the Regulation. For this reason, the regulatory procedure laid down in Article 5 of Decision 1999/468/EC should apply with respect to amendments to the forms.

ARTICLE 51

CZECH REPUBLIC

See Article 50

GERMANY

See Article 50

ARTICLE 52

GERMANY

The time limitation on the scope of application in paragraph 1 seems too general, even when the exceptions laid down in paragraph 2 are taken into consideration. The objective of a transitional provision must be to safeguard the involved parties' confidence in the continuance of the legal situation, to the extent that this is legitimate. Thus it would be reasonable to minimise the Regulation's effects to those proceedings which have already been initiated; accordingly, provisions such as paragraph 2(a) are to be welcomed.

On the other hand, it does not make sense to completely rule out the Regulation's applicability to agreements concluded before its entry into force. This would lead, for example, to cases in which creditors would be unable to enlist the services of central authorities to assert their claims pursuant to Chapter VIII (paragraph 2(c) would not cover such cases, because proceedings would already have to be in progress – although it remains unclear what proceedings these might be). In addition, in such cases the creditor might not have access to the jurisdiction of the Member State in which he or she habitually resides (Article 3(b)). However, there does not appear to be any sense in which the debtor's confidence needs to be protected.

FRANCE

Drafting suggestions

Article 52
Transitional provision

1. The provisions of this Regulation shall only apply to proceedings instituted, to documents formally drawn up or registered as authentic instruments and to agreements concluded after its entry into application.

2. However:(a) Articles 12 to 21 on applicable law shall apply to proceedings pending at the date of the entry into application of this Regulation if all the parties so agree expressly or otherwise in an unequivocal manner;

(b) Articles 27 to 32 and 36 on enforcement shall apply to decisions and authentic instruments which have been declared enforceable in accordance with Regulation (EC) No 44/2001 or which have been certified as European Enforcement Orders in accordance with Regulation (EC) No 805/2004 by the date of the entry into application of this Regulation;

(c) Articles 39 to 47 on cooperation shall apply to proceedings pending at the date of the entry into application of this Regulation.

Explanations: the Brussels I Regulation contains specific rules on exequatur and the Regulation creating a European enforcement order contains specific rules on refusal of enforcement: these provisions are sufficient and justify removing the application of Article 33. Articles 34 and 35 should be deleted (see Note).

IRELAND

Given that we have difficulties in principle with the applicable law provisions envisaged in Chapter III, we also have difficulties with a). In any event this proposal appears to be cumbersome and impractical.

PORTUGAL

The rule enshrined in paragraph 1 of this Article needs correction in the Portuguese version: the use of the adverb "já" [already] contradicts the adverb "posteriormente" [after], the latter being the appropriate word to describe the temporal relation intended by the legislator between the entry into force of the Regulation and the institution of proceedings. We therefore propose that "já" be deleted.

As regards the second part of the sentence, referring to actos autênticos recebidos [authentic instruments received], it appears that the intention here is to indicate that the drafting and registration of such documents have temporal significance, so we suggest that, with a view to greater legislative precision, the concepts defined in Article 2(4) of the proposal (authentic instruments drawn up or registered) be used.

ARTICLE 53

GERMANY

The terms "enter into force" and "apply" should be clarified. There should be sufficient time between the entry into force and the application of the Regulation to allow Member States to take the necessary measures to ensure smooth implementation. In any case, a period of 12 months would appear to be too short to accomplish this.

IRELAND

Drafting suggestion:

1. This Regulation shall enter into force on 1 January 2008.
2. This Regulation shall apply from 1 January 2009, with the exception of Articles 22 (3), 39, *43* and 45 (5) which shall apply from the entry into force.

Comment: The dates proposed are overly optimistic and should not be set until the negotiation process is much further advanced. The amendment to paragraph 2 reflects our comments on Article 43.

SWEDEN

Sweden would suggest that Article 43, on meetings, should also be applicable from the earlier date, that of the Regulation's entry into force, as this will allow the Commission to convene a meeting of central authorities before the other articles become applicable.

If the Regulation as adopted turns out to be broadly in line with the proposal, highly complex supplementary provisions will be required. Sweden will therefore need at least a year between the Regulation's adoption and its entry into force and another year before it becomes applicable (except for Articles 22, 39, 43 and 45).

ANNEX V

LITHUANIA

Pursuant to Article 6(1)(c) of Directive 95/46/EC, personal data must be relevant in terms of the subject, purpose and scope for which they are collected and (or) further processed. Lithuania considers that point 4 of Annex V to the proposal for a Regulation, which provides for data to be collected on a previous employer, address of family members, and a photograph, are superfluous personal data.