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EPAPFR

EUROPEAN PLATFORM FOR THE ACCESS TO PERSONAL AND FAMILIAL RIGHTS

Partner Report
on the questionnaire

Drafted by
(German Institute
for Youth Human Services and Family law - DIJuF-)

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1. INTRODUCTION

Following the completion of the English version of the questionnaire by the project partners at the end of 2018, DIJuF translated the questionnaire into German and drafted a partial questionnaire comprising a general part and a part concerning maintenance obligations in German and English. The aim of the partial questionnaire was – with regard to the length of the main questionnaire and of the tasks taken over by DIJuF within the project- to motivate persons and institutions working exclusively in the field of maintenance obligation to participate in the survey.

The four questionnaires (two complete questionnaires in English and German and two partial questionnaires in English and German) were made available on the DIJuF website at the end of February 2019 under the following links:

https://dijuf.de/epapfr.html

https://dijuf.de/epapfr-en.html.

An invitation to participate in the survey was published in German and English under the rubric "what's new?" ("Aktuelles") of the DIJuF website and in the monthly law journal (Das Jugendamt[1]).

Another call was published only in German on www.jugendhilfeportal.de, which is a German website specialized for information and communication in the field of child social welfare.

This notice could be downloaded under:

https://www.jugendhilfeportal.de/handlungsfelder/andereaufgaben/vormundschaft-beistand/artikel/umfrage-zu-hindernissen-bei-der-umsetzung-europaeischer-familienrechtsinstrumente/

A third general notice was disseminated in German, English and Spanish via the newsletter of the network child support worldwide (https://www.childsupport-worldwide.org/), a network of practitioners and academics working in the field of cross border recovery of child maintenance. This network was created in 2013 by the partners of the EU-funded project "International Child Support in the EU and Worldwide", namely the Hague Conference on Private International Law (https://www.hcch.net/), the University of Aberdeen (http://www.abdn.ac.uk/law), the University of Heidelberg (http://www.ipr.uni-heidelberg.de), NCSEA (www.ncsea.org) and DIJuF. Currently, the newsletter has about 2000 addresses.

Finally, questionnaires were disseminated individually via E-Mail and post mail to about 100 practitioners and institutions involved in the national and international recovery of maintenance and to a few academics. This group consists in particular of lawyers, bailiffs and public bodies involved in the payment and/or reimbursement of child maintenance advance.

The data collection was realized between the end of February 2019 and the end of June 2019.

[1] About 1700 Exemplars, monthly in German language mostly destined to German social services and Universities.

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Following the survey, DIJuF received responses from 25 persons and institutions from 13 different Member States of the EU: Belgium, Denmark, Finland, France, Germany, Greece, Italy (specifically including South Tirol), Latvia, Luxembourg, Poland, Romania, Spain and Sweden.

On July 1st 2019 the results of the survey were discussed during the Technical Committee, which took place in Heidelberg between 10 am and 4 pm. According to DIJuF internal engagement within the EPAPFR-project the discussions exclusively bore on the questions of maintenance obligations, especially of the implementation of the EU-Maintenance Regulation EC n° 4/2009.

In addition to the DIJuF case workers, each specialized in cross border recovery of child maintenance in one or more EU and non-EU countries, the members of the Technical Committee were mostly representatives of public bodies within the meaning of Art. 64 of the Maintenance Regulation. Furthermore a representative of the Latvian Central Authority attended the meeting.

The following report summarises the feedback from the participating institutions or persons. In particular, opinions were given regarding the questions as to which obstacles are encountered when implementing the Maintenance Regulation, how these problems can be remedied and how the future EPAPFR platform could be used as a support instrument.

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2. GENERAL PART

The general part of the questionnaire was completed by almost three quarters of the participants. Because of the special circle of partners reached within the framework of DIJuF activities the focus of the answers given to the general part was on the field of recovery of maintenance obligations. The main findings concerning this part are outlined as follows:

2.1. Lack of education and information of practitioners in the field of international family law

The participants in the survey reported that they were generally well informed about their field of specialization. Furthermore they declared awareness of the relevant sources of information, especially those provided by the EU and the Member States. The tools provided by the EU were considered useful, even if they were not always complete and up-to-date, like for instance the information on maintenance obligations available on the E-Justice portal (https://e-justice.europa.eu/content_maintenance_obligations-355-en.do). Lawyers mentioned that more reference to laws or volumes of case law in the English language (notably implementing acts for EU-Regulations) as well as bundled information on foreign maintenance law and on national enforcement law in English would be useful.

Regarding the continuing education and ongoing information on international family law the participating practitioners mostly declared that they generally relied on law journals, since advanced trainings like those provided by ERA (Academy of European Law, Trier, Germany) are fairly rare.

In spite of the volume of available information mentioned above, the participants all highlighted difficulties they encounter regularly due to a lack of education and knowledge regarding other legal professionals, when they are not used to dealing with cross border family cases in their daily practice. This lack of information often generates important delays in processing the matters, which are often particularly urgent and even sometimes unnecessarily exacerbates the family conflicts. As a result, a **better basic education of legal professionals in the field of private international law** seems to be essential to improve the implementation of European family law instruments.

2.2. Lack of cross border cooperation between practitioners

Excepting some cases of cooperation between a small number of law firms in border areas, the participants underlined their difficulties in finding cooperation partners abroad. The replies received by the lawyers mentioned their need of a **network of lawyers patterned around the**

European Judicial Network or the International Hague Network of Judges. Furthermore a practitioner forum where colleagues from other countries could be asked informally for advice was mentioned as desirable.

Public bodies expressed similar wishes with respect to their special field of activity. As a number of them were represented during the Technical Committee organised by DIJuF on July 1st, 2019 the idea has crystallised of promoting **cooperation between the child maintenance agencies** of the Member States, in order to improve cross-border recovery of maintenance. This can come about through professional exchanges on site or via video conferences, but also possibly – and insofar as it is legally permitted – by establishing cooperation arrangements. The EPAPFR platform could serve as a starting-point and forum in this regard.

2.3. Lack of information and funds to help families confronted with cross border family disputes

Before a practitioner can be involved in a cross border family matter, the concerned persons must find their way to the appropriate adviser. In order to facilitate this process, the EU currently provides guidelines on how to find a lawyer, a notary, a legal translator or a mediator. Particularly concerning lawyers, until now this tool is not complete with respect to the represented Member States. This is not tragic as there are a number of similar tools available at a national level. The main issue mentioned by the participants was the **difficulty for poor families, which often consist of a single parent and one or more minor children to obtain legal advice and/or legal representation free of charge**.

A first step could comprise an indication within the existing tools, that lawyers accept to process family matters on the basis of legal aid. Therefore, as already mentioned they probably will be difficult to find.

As described under 3. (Maintenance) neither the legal aid systems nor the assistance of Central Authorities are sufficient to cover the needs of disadvantaged families, when they need to claim their rights. There is an important need to improve those systems for which the exact aim is to provide effective legal assistance in cases of financial difficulties of the affected persons (see proposals below under 3.3. and 3.4.).

Regarding especially the field of maintenance obligations the responses showed that the majority of EU-Member States have a system of child maintenance advance payments. A number of child maintenance agencies have created quite informative websites in the language of the creditor's place of residence about the assistance they can provide to children. (see for example: http://www.secal.belgium.be/, https://familieretshuset.dk/, https://www.kela.fi/, https://www.pension-alimentaire.caf.fr). In view of the existing services, it seems that a way to improve the recovery of child maintenance could be to extend the child maintenance advance

payments as a tried and tested remedy against child poverty and at the same time make the process of reimbursement of the advanced sums for each state (maintenance agencies) more efficient (see proposals below under 3.8).

2.4. Proposal for structuring the future EPAPFR platform

The responses from the project participants showed that a mere compilation of contact names or internet links is not really helpful, because it is overwhelming. It seems more sensible to have a mix of expert information and advice regarding contacts, arranged by Member States.

The structure of the future platform could be as follows:

Country:

How to obtain a maintenance order?

- Which court is competent?
- Which kind of orders exist?

  Judicial order, enforceable agreement/ authentic instrument (embassies, national authorities such as notary publics, governmental organisations (CAF, Youth Welfare Office, Jugendamt), administrative order
- Who can help me obtain a maintenance order?

  List of lawyers (who could be registered once the platform is set up), NGOs, Central Authorities

How to enforce a maintenance order?

- Information about enforcement system
- Contact details: governmental institutions, list of bailiffs

How to find information about the debtor's whereabouts and financial circumstances?

Can I obtain support from the state in case of non-payment (child maintenance advance payments)?

Where can I find Information on national maintenance law?

- https://e-justice.europa.eu/content_maintenance_claims-47-de
- National websites

Which costs can I expect?

Costs of proceedings / Legal aid

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3. MAINTENANCE

Eight years after Council Regulation No. 4/2009 came into force, which was aimed at making the recovery of maintenance more efficient for creditors, it is still the case that maintenance creditors, advisory agencies and public bodies within the meaning of Art. 64 of the Maintenance Regulation encounter a range of obstacles, which can be categorised into the following sets of issues:

- Costs of recovering maintenance
- Length of proceedings
- Problems related to the proceedings pursuant to Chapter VII (cooperation between Central Authorities)
- Difficulties in connection with obtaining legal aid
- Working with the forms (Annexes I to VI of the Maintenance Regulation)
- Handling by the courts of defensive proceedings against enforcement measures
- Determining the serviceable address, income and other financial circumstances of the maintenance debtors
- Specific problems where maintenance is being recovered by public bodies

3.1. Costs of recovering maintenance

It was reported by some project participants that the anticipated costs of recovering maintenance claims were hard to estimate, given that the income and other financial circumstances of the maintenance debtor and thus the prospects of success of the intended measures often only become known in the course of the proceedings. Here, maintenance creditors are particularly reliant on an accurate estimate of costs, as they lack the financial means of subsistence – namely the maintenance – either entirely or partially.

The question of the costs of recovering maintenance is, however, also a key issue for public bodies. Payment of advance maintenance to children in need is associated with considerable financial expense for national treasuries. To that extent, recourse against maintenance debtors is intended to serve the purpose of reimbursement and not to result in additional cost or to be disproportionate. For this reason, one German child maintenance agency declared: “As soon as costs are incurred, as a precaution no steps are initiated”.

This response shows that it would serve the purpose of efficient implementation of maintenance, firstly to reduce the costs of recovering maintenance even further than already is the case, and secondly to better inform maintenance creditors regarding the anticipated costs, in order that a more accurate cost/benefit analysis can be conducted.

Council Regulation EC No. 4/2009 contains provisions in Art. 46 et seq. intended to assist maintenance creditors to have effective access to the law. Although these provisions are sensible,

it should be noted that numerous financial hurdles nevertheless stand in the way of recovering maintenance because, for example, not all costs of the proceedings are covered by legal aid and because legal aid cannot be claimed in all cases. Within the scope of the EPAPFR project, reports were received regarding the following issues concerning costs:

3.1.1. Gaps in legal aid:

Natural persons have the right within the scope of the Maintenance Regulation, to be granted legal aid to pursue the claim in the requested Member State in accordance with Art. 46 or with Art. 47 of the Maintenance Regulation. According to Art. 46, maintenance creditors benefit from legal aid in pursuing claims for a child under the age of 21 without any check of their financial circumstances, where they instigate the proceedings in question with the aid of the Central Authorities, i.e. under the scope of Chapter VII of the Maintenance Regulation. According to Art. 47, legal aid can either be approved with a means test and in accordance with the law of the country of enforcement or automatically (i.e. without a means test), if legal aid was granted for the proceedings in the country of origin (generally establishment of a maintenance order). With the help of these provisions, the granting of legal aid is achieved in principle in many cases (if not always in a timely manner – see below).

However, the costs covered by legal aid differ significantly from one Member State to the next. For example, **the costs of translation** are generally not covered and can, in disputed cases, become a genuine obstacle for the maintenance creditor (see e.g. in Greece: costs of translation are accepted only where the habitual place of residence is in that country). It is possible in some Member States, in addition to legal aid from the country of enforcement, to apply for costs of translation to be borne by the country of origin (e.g. in Germany: exemption from the obligation to reimbursement pursuant to section 10 (3) of the Foreign Maintenance Act (AUG)). However, this is only possible if the proceedings were initiated with the support/cooperation of the Central Authorities pursuant to Chapter VII of the Maintenance Regulation, and it is subject to rigorous means-testing. Specifically, the release from the obligation for reimbursement requires that the applicant is entitled to zero-instalment legal aid in accordance with the German provisions (sections 114 et seq. of the German Code of Civil Procedure (ZPO)). This means that exemption from the obligation for compensation is only possible in instances of poverty.

Moreover, despite the granting of legal aid, **court costs** are repeatedly incurred, such as for instance the €13 hearing fee (*timbre de plaidoirie*) in France, the fee for issuing extracts from decisions pursuant to Annex I-IV of the Maintenance Regulation in Germany (€15), or in Belgium the costs for registration of proceedings (*droit d'enrôlement*, €20). In relation to enforcement, too, some actions of the enforcing authorities remain subject to charges, despite the granting of legal aid. This is the case, for instance, for chargeable inquiries by French court bailiffs to official

agencies (between €15 and €50) or the costs of enforced entry to a property (several hundred euros for calling out a locksmith), or the costs of a garnishee declaration in Austria (€35).

In some cases, the **costs of expert reports**, e.g. on foreign maintenance law (such as, for example, in Greece) are similarly not covered by legal aid. Where the submission of an expert report is material to the decision, the costs associated with this (which can often be in the mid four-figure range) may in effect prevent the recovery of maintenance.

3.1.2. Difficulties in finding legal assistance on the basis of legal aid

For its part, complaints are often raised by the legal profession that child maintenance matters are barely profitable, particularly if they are cross-border in nature, which is fundamentally synonymous with additional expense regarding the work involved. It claims this is notably the case if the maintenance issue needs to be dealt with on the basis of legal aid. Thus there is a gulf between the maintenance creditor's need for low-cost and efficient proceedings, and the understandable refusal of the legal profession to work at a loss.

3.1.3. Lack of exemption from costs for public bodies

Public bodies do not enjoy any exemption of costs for conducting proceedings abroad. As soon as the proceedings are not free of charge (such as, for instance, enforcement proceedings in Denmark, England & Wales or Sweden), the public bodies making the application must reckon with considerable court costs, solicitors' costs and/or enforcement costs, along with the costs of translation. Which costs are relevant generally depends on the stage in the proceedings at which recovery is sought. The responses from the agencies interviewed as part of the EPAPFR project revealed that most countries only grant advance payments for children if the maintenance creditor is already in possession of a maintenance order (e.g.: Bulgaria, France, Luxembourg, South Tirol, Belgium, Denmark). Some others, though, may make advance payments of child maintenance irrespective of the existence of a maintenance order. This is the case in Germany, Latvia and Sweden. A further group grants advance payments of child maintenance without a maintenance order but only once proceedings to determine maintenance are pending (e.g.: Austria).

In the countries where the public body as the legal successor is required to establish a maintenance order, considerable costs must be reckoned with even at the level of obtaining a maintenance order. Assistance offered via Central Authorities pursuant to Chapter VII cannot be claimed in these circumstances, as Art. 64 of the Maintenance Regulation only relates to the procedure for declaration of enforceability and enforcement. Moreover, the determination of maintenance proceedings, in the absence of privileged place of jurisdiction, must probably be

conducted abroad, pursuant to Art. 3a of the Maintenance Regulation (see below regarding litigation), and generally with a local solicitor being instructed to act. Under these arrangements not only the court and solicitor's costs, but also the costs of translation, run to considerable sums, as the subrogation needs to be proven in the language of the court.

For those countries which grant advance maintenance payments on the condition that maintenance is already subject to an order, cross-border recovery of maintenance is framed at a somewhat lower cost. This is because enforcement proceedings in most countries are either free of charge (e.g.: England & Wales, Denmark, Sweden) or involve manageable costs (e.g.: France, Luxembourg, Belgium, Austria). In some cases, though, the engagement of a solicitor is necessary in order to initiate the enforcement proceedings (Spain, Italy, Portugal). In this eventuality, the costs of representation are generally not proportionate to the level of the claim to be enforced and the risk of costs. This results in child maintenance agencies refraining from recovering the maintenance.

It should be noted that the laws in some countries make provision for collection of debt by the child maintenance agency that involve costs either for the maintenance debtor only (France, Luxembourg) or for the maintenance debtor and the creditor (Belgium). This may be a solution to fund the costs of pursuing the claim. During the Technical Committee, the representatives of the French and Luxembourgian child maintenance agencies confirmed that until now they had had no difficulties recovering the penalties stipulated in their respective national law.

Summary:

- **The objective declared in recital 27, of limiting the formalities for enforcement which generate costs for the maintenance creditor, has not yet been fully achieved.**
- **Harmonisation and expansion of the costs covered by legal aid is necessary.**
- **Better information to public bodies regarding the costs to be anticipated would assist in recovery of maintenance.**
- **National legislatures should frame reimbursement of public bodies in such a way that the possibilities of the Maintenance Regulation can be better exploited.**

3.2. Length of proceedings

A further significant obstacle reported by those taking part in the project was the length of proceedings until maintenance obligations are enforced.

3.2.1. Proceedings for administrative assistance from the Central Authorities

Some Central Authorities take several months, if not years, to provide information – in some cases, in breach of clear stipulations such as Art. 58 of the Maintenance Regulation (this aspect is

treated separately below). This phenomenon is particularly notable in Spain, Greece and Cyprus, but equally to some degree in France and Belgium. In Spain, according to the responses from a number of German youth welfare offices, the situation has come to a complete standstill. Requests for tracing a serviceable address are reportedly no longer being processed, with the result that the German Central Authority is no longer accepting corresponding inquiries from maintenance creditors. It is not apparent whether enforcement requests are still being processed. From the practical experience of the participants to the EPAPFR-Project, it can be reported that there is considerable doubt on that point. If requests are being processed, then this proceeds sluggishly.

3.2.2. National proceedings

Complaints were also received concerning the significant length of national proceedings. Overall, it appears that problems arise only in exceptional cases when it comes to obtaining decisions on declarations of enforceability and enforcement. One such exceptional current case is the lack of functional capability of the Danish enforcement agency Gaeldststyrelsen, which for around five years has been unable to carry out any electronic attachments and is therefore practically paralysed in its function.

Significantly more problematic is the circumstance where debtors defend themselves against the initiated enforcement. Depending on the country of enforcement, this can lead to court proceedings lasting for years. From one of the German participants to the Technical Committee, a case of the attachment of share of an inheritance in Portugal can be reported, where the enforcement proceedings were initiated in 2013 and the maintenance debtor has been disputing the reliability of the enforcement decision as well as the level of the maintenance claim since 2014. Since that time, written pleadings have been exchanged between the solicitors for the parties in question. The respective witnesses were heard in early 2019, after repeated postponements and a request to conduct the hearing via video-conferencing in order to keep the costs of proceedings as low as possible. When a final decision might be established is not yet foreseeable. The child (who is mentally handicapped and has now come of age) received the last maintenance payment in 2007. The child is still entitled to ongoing child maintenance payments and even has special needs, which the mother has covered albeit with significant difficulty, for more than ten years.

In appeal proceedings in France which focussed solely on legal points (applicability of Art. 26 et seq. of the Maintenance Regulation to authentic instruments), a decision was handed down in May 2019, after two years. During this time no maintenance was paid, with the result that the arrears amounted to a sum that can no longer be enforced as a single payment.

The considerable length of proceedings until maintenance is enforced constitutes an unreasonable and one-sided burden on maintenance creditors. Admittedly, the maintenance debtor must be given the opportunity of defence against any claim that abuses the law. Since the claim, which is the subject of these proceedings, represents the direct financial livelihood of the creditor party and delays in the proceedings give the debtor party generous opportunity to remove assets from enforcement, it appears essential that maintenance issues are addressed with a wholly different urgency. This could be achieved, for example, by assigning proceedings under the Maintenance Regulation to the competence of the national family courts and not to the general courts of enforcement.

Summary:

- **Improving the processing times of some Central Authorities is required.**
- **Reducing the processing time for applications for legal aid (e.g. by simplifying the requirements) is required.**
- **Speeding up proceedings against enforcement (e.g. through competence of the family courts) would be helpful.**

3.3. Difficulties related to the proceedings pursuant to Chapter VII (cooperation between Central Authorities)

3.3.1. Obligation to communicate through Central Authorities

The initiation of proceedings pursuant to Chapter VII of the Maintenance Regulation requires applications to be submitted to the Central Authority of the country of origin, before they are forwarded to the requested Central Authority in the country of enforcement, following a check on the formalities (Art. 58 (1)). Moreover, after initiating proceedings the channel of communications via the Central Authorities is to be respected (Art. 55).

From the opinions received from project participants, it was shown that this obligation is not suited to the wide range of different starting situations. **In some cases, support with initiating proceedings in the country of origin is needed, while in some cases support in the country of enforcement would be sufficient.** Thus the question needs to be asked as to whether the aims of the Regulation (recital 31: "to facilitate cross-border recovery of maintenance claims") might not be better achieved with an elective right, i.e. a flexible offer of support, instead of an obligation. In particular, the opinions of the project participants indicated that solicitors dealing with cross-border family matters are often able to work in one or more foreign languages. In these cases, the language barrier is less of an obstacle to conducting cross-border proceedings than the lack of knowledge of the foreign legal system. No assistance is required for making contact or over

communication with the country of enforcement, but solely for initiating and conducting proceedings.

There are reports of good cooperation with the Central Authority of the country of origin from public bodies, that frequently employ staff with less ability in foreign languages and which in a number of countries (e.g.: Belgium, Latvia) are co-located in the same authority as the Central Authority within the meaning of Chapter VII of the Maintenance Regulation. Nevertheless, it follows from the participants reports that more flexibility in the application of the "chapter VII services" would be recommended. According to the above-mentioned recital 31 of the Maintenance Regulation, assistance from the Central Authorities with respect to legal proceedings is intended as an additional source of help, to facilitate cross-border implementation of maintenance. It was not the aim of the legislators to create additional bureaucratic hurdles. However, where applicants or their representatives have good language skills, the preliminary check in the country of origin and the obligation to communicate with the foreign authorities via the Central Authorities after the introduction of proceedings appears to represent such hurdles. This is a fortiori the case if the preliminary check, as in Germany and Austria, is performed by two instances (1. the central district court, 2. the Central Authority). Likewise, the requested authority, which must examine the documents submitted in any case (Art. 58 (3) of the Maintenance Regulation), could direct its concerns/queries to the party making the application. In an individual instance, it was also found that unnecessary costs of translation were generated via the official channel, as correspondence was repeatedly translated regardless of whether or not the applicant could understand letters from abroad.

3.3.2. Inactivity of some Central Authorities

All those taking part in the project lamented the difficulty of communicating with some Central Authorities and realising maintenance in these countries. This primarily concerns Southern European Member States such as, and notably, Italy, Spain, Greece and Cyprus. As mentioned above, specific measure applications are no longer being forwarded to Spain from the German Central Authority and remitted to submitting an enforcement petition. This fails to respect the fact that maintenance creditors have an entitlement to such preparatory measures, which are often decisive in terms of the decision as to whether time-consuming enforcement proceedings should be initiated.

3.3.3. High degree of formalities for some Central Authorities

Additionally, most of those participating in the project emphasised the high degree of formalities for some Central Authorities. They state that requirements regarding the applications were being imposed by the Italian Central Authority which could not be satisfied, such as – for example – that

the extracts of decisions (Annexes I-IV) are to be signed by the judge who issued the maintenance decision. The Polish Central Authority reportedly would not accept any extracts from decisions in which the term “Amtsgericht” (court of first instance) was not translated, even though the original enforcement instrument was attached with the extract from the decision.

3.3.4. Support with extrajudicial negotiations

The question as to whether and, if so, in what form support with extrajudicial negotiations is offered by the Central Authorities elicited various responses from project participants. Several German child maintenance agencies were critical of the fact that the Central Authorities *de facto* did not provide support in extrajudicial recovery of maintenance. The complaint was that they immediately instigated formal steps. Conversely, the Finnish child maintenance agency considers extrajudicial attempts at mediation in the country of enforcement to be a waste of time, because it only makes an application for cross-border enforcement of maintenance once all efforts to find an extrajudicial solution have been exhausted.

In fact, some national codes of procedure only permit enforcement if the debtor has received a request to pay via the extrajudicial route, possibly from the enforcement authority. This often also has the effect that voluntary payments are started, because the enforcement authority of the country of enforcement is “taken more seriously” by the debtor than an authority based abroad. It is possible that express clarification would be desirable in Annex VI as to whether extrajudicial efforts are desirable or not helpful in this matter. If it is specified in law within the country of enforcement, the creditor won’t have any choice other than to accept the requirement of the national enforcement law.

3.3.5. Representation of interests

Criticism was made of the fact that there was **no proper intervention of the Central Authorities to the benefit of the party entitled to receive maintenance in the event of difficulties** arising within the meaning of Art. 50 sec. (1) b) of the Maintenance Regulation (silence of the local authorities, an adverse decision by the requested Central Authority or local enforcement authorities, objections by the maintenance debtor). As a rule applicants must become active themselves in order to drive the proceedings forward. However, without legal representation in the country of origin by a party versed in the law (solicitor, child welfare agency, NGO), maintenance creditors can be quickly overwhelmed. Yet the Member States make an assumption that this advisory and support work is being ensured by the Central Authorities. For this reason, there is hardly any opportunity to arrange to receive advice or be represented free of charge by other bodies. In this respect, it is possible that the situation on the ground does not match the scope of services which the legislator had imagined.

3.3.6. Specific measures (determination of the service address, income and other financial circumstances of the maintenance debtor)

Regardless of the data protection provisions preventing the Central Authorities from forwarding information which they have obtained to the maintenance creditor and thus constituting a significant obstacle to recovering maintenance, it is regrettable that the databases the Central Authorities have recourse to or which sources they use to comply with applications for specific measures are rarely known. Following a failed application pursuant to Art. 51, 53 of the Maintenance Regulation, it is accordingly difficult for the applicant to seek out alternative options, because what has already been tried is not known.

3.3.7. In isolated instances, there is also positive feedback. For example, the Belgian child maintenance agency (Service des Créances Alimentaires) reports on its good collaboration with the French Central Authority. The French child maintenance agency (Agence de Recouvrement des Impayés de Pensions Alimentaires), which has created a centralised service of assistance to children and recovery of child maintenance advance for cross border cases mentioned that the centralisation of knowledge enabled this service to better prepare the applications destined to the French Central Authority, which in light of the reduced personnel resources saves time when controlling the application paperwork.

Summary:

- **Elective right regarding the initiation of proceedings and communication with the Central Authority of the country of origin or of the country of enforcement**
- **Optimising the work of some Central Authorities.**
- **Increased intervention by Central Authorities where problems arise.**
- **Greater transparency regarding specific measures would be helpful.**

3.4. Problems in connection with claiming legal aid:

Children entitled to maintenance are generally reliant on an application for legal aid to assert their claims to maintenance. The legal aid is approved to the extent provided for within the national law of the country in which the application is made. Project participants emphasised that this procedural step can impair the efficient recovery of maintenance claims, particularly by under-age children. The main reasons for this are set out below.

3.4.1. The proceedings for approval of legal aid can take a considerably long time.

Where the application for legal aid and the main application are examined by the same agency, as is the case e.g. in Austria or Sweden, barely any delay arises in most cases from the supplementary application for legal aid.

Conversely, where a separate agency is responsible for approving legal aid and for appointing legal assistance (e.g.: France, Belgium, Spain), it can take several months before the proceedings for approval of legal aid have been concluded and the proceedings on the main matter can commence. The reason for this is often work overload in the authorising agencies, but equally ignorance of the provisions of the Maintenance Regulation on the part of case workers, which can lead to unnecessary queries and rejection decisions.

3.4.2. The conditions for approval are tailored to domestic cases and do not take account of the fact that an applicant who does not satisfy the requirements in the state of enforcement may not be able to meet the costs of proceedings under the legal or financial situation in his or her country of residence.

In some countries, for example, the **income and financial situation of other persons living in the household** are taken into consideration when examining the applicant's means. Such persons are frequently the new spouse of the parent giving care, who is not liable to provide maintenance. *De facto*, however, these persons are rarely prepared to meet the costs of proceedings being conducted by their step-children, especially since they are often already covering the lack of maintenance payments. The result of this is that the maintenance claims are not pursued.

A further set of problems arises from the **differences in living standards** between the applicant's country of residence and the country of application. In countries with a low standard of living, such as Romania, children whose habitual place of residence is in countries with a higher standard of living cannot claim legal aid, because even with social welfare benefits such as child benefit in Germany they exceed the Romanian income limit. Yet the costs of engaging legal advisors or legal representatives are only marginally lower than in the country of origin. In this case, similarly, maintenance is not pursued as it is not financially viable.

Overall, beyond the current provisions of Art. 47 of the Maintenance Regulation, in order to avoid long examination proceedings and evidently undesired outcomes, consideration should be given to whether the law on legal aid needs to be harmonised in such a way that all minors are granted an entitlement to legal aid in asserting their claims to maintenance, as it is already the case for example in Austria. Although automatic entitlement to granting legal aid in the country of enforcement following the granting of legal aid in the country of origin pursuant to Art. 47 (2) of

the Maintenance Regulation has contributed to significantly simplifying certain legal aid procedures, many maintenance creditors who are no less deserving of protection do not fall within the scope of application of this provision. This may be because they are seeking enforcement e.g. on the basis not of a court decision but of an authentic instrument or because the maintenance decision was given as part of other proceedings (divorce) for which no legal aid was granted. Taking into consideration the removal of the expense involved in examination by the legal aid agencies, extending the entitlement of minors to legal aid would not necessarily lead to an increase in costs on the public purse.

Regarding issues concerning legal aid not covering the costs of translation, reference is made to the deliberations set out above regarding the costs of proceedings (3.1.).
Reference is also made to the difficulty outlined above (3.1.2.) in finding legal assistance willing to accept remuneration on the basis of legal aid. The mismatch between the actual workload involved and the complexity of cross-border proceedings on the one hand and the modest remuneration of this work on the other is emphasised. In particular, in some countries (e.g. Greece) it is hard to predict in advance whether the applicant can be granted legal aid at all (due to a significant scope of discretion for the exercise of judgement by the court), with the result that the legal assistance taking on representation in such a case cannot reliably assume that it will receive any remuneration at all.

Summary:

Standardising a claim to legal aid for under-age maintenance creditors would save time, and money and reduce uncertainty.

3.5. Working with the forms

Overall, the forms pursuant to Annexes I-VI of Council Regulation EC No. 4/2009 were rated as easy to find and easy to fill out by those taking part in the project. In individual instances, it was suggested that parts of the form should only open by clicking, where they are relevant in the specific instance and something needs to be entered, in order that the print-out is not so long and does not contain a number of pages where no relevant information has been entered. In individual instances, the courts issuing the orders refuse to issue extracts from decisions in a foreign language. Overall, however, it can be reported that the **forms in Annexes I-VI were well-received and serve to simplify the free movement of maintenance decisions** and consequently the recovery of maintenance.

That said, some difficulties arise in the use of extracts from the decision by the enforcement bodies in the country of enforcement. There are repeated instances of enforcement bodies requesting certified translations of the maintenance orders. Despite standardised forms, it is reported that enforcement agencies often get in touch with numerous queries regarding the

validity and legal force of the maintenance orders, the amount owed and, in the case of legal succession or claims by public bodies, regarding the authority to act as the legal successor.

The Finnish and Latvian child maintenance agencies criticised the fact that ancillary demands such as interest or, in Finland, penalties cannot be claimed across borders because they arise out of national law and not from the maintenance order itself.

Summary:

The following modifications to the forms appear desirable:

- **Including additional information in the extracts from decisions**: Relevant information such as indicating the effective date of the decision and the date upon which it takes legal effect could be included in the extracts from decisions, along with the date of service and the type of service, since these facts otherwise need to be demonstrated through provision of additional documents that maintenance creditors must arrange to translate at their own expense.

- **Indication of the person entitled to maintenance when issuing extracts from a decision to a public body**: In cases of legal succession, information about the person initially entitled to maintenance could be given in the extracts from decisions, in order to give a better understanding of how the subrogation has come about.

- **Creating a standardised calculation form**: To avoid queries and translation costs in cases of indexed maintenance amounts, it would also be possible to create a standardised multilingual calculation form which would be issued by the body issuing the order and would indicate the precise amounts due according to the index. The existence of ancillary claims such as interest or penalties could also be confirmed on the form.

- **Adding a tick-box for "extrajudicial negotiation requested" in Annex VI:** In relation to the discussion above about Central Authority support for extrajudicial settlement of the maintenance dispute, it would also be possible to add a section in Annex VI where an indication can be given as to whether extrajudicial negotiations are sought.

3.6. Defence proceedings by the maintenance debtor

After enforcement measures have been initiated by the party entitled to maintenance, maintenance debtors often engage legal assistance in the country of enforcement to defend against enforcement. They use the appeal procedures customary under their national law and introduce every conceivable objection against the enforcement measure itself, but equally against the claim for maintenance, without regard to whether the objections outlined constitute grounds

for refusal of enforcement within the meaning of Art. 21, 24 of the Maintenance Regulation or grounds for modification within the meaning of Art. 8 of the Maintenance Regulation. The maintenance creditors thereby bear the disadvantages of conducting proceedings and providing evidence abroad. It is not uncommon to encounter incomprehension from the courts if reference is made to the fact that solely the reasons set out in Art. 21 and 24 of the Maintenance Regulation for refusing enforcement or recognition may be examined, but not for example the level of the claim for maintenance.

Summary:

Regarding this point, the Regulation seems relatively clear. Objections to enforcement within the meaning of Art. 21 and 24 of the Maintenance Regulation can be raised in the country of enforcement, while grounds for modification can only be asserted in the habitual place of residence of the respondent (the maintenance creditor) pursuant to Art. 3a. It remains to be seen whether case law will be handed down in the supreme courts on this matter. In this respect, a decision of interest may be taken by the CJEU in response to the submission from the Amtsgericht Köln (court of first instance) of 16.01.2019[2], which we would like to mention even if it was not a topic addressed by the participants of the project.

3.7. Determining the serviceable address, the income and other financial circumstances of the debtor

One of the most common obstacles to enforcing maintenance is the difficulty of determining the serviceable address and the income and other financial circumstances of the maintenance debtor. It is true that the legislature has created a new option for assistance via the introduction of specific measures pursuant to Chapter VII of the Maintenance Regulation. However, it should be noted that the search for information often proves difficult. The following feedback was received from project participants:

The offer of assistance from the Central Authorities is subject to **strict data protection regulations**. As a rule, in cases where the tracing is successful, neither the address nor the income and other financial circumstances of the maintenance debtor can be communicated. Instead, the applicant is requested to submit a formal request pursuant to Art. 56 of the Maintenance Regulation. There is little scope for attempting extrajudicial recovery of maintenance and thus an amicable settlement in the matter.

The option of requesting specific measures is open to public bodies solely for the purposes of enforcement, but not in obtaining a maintenance decision. On this point practice indicates a clear

[2] Decision of the Cologne Amtsgericht of 16.01.2019, ref.: 322 F 210/18, (https://www.justiz.nrw.de/nrwe/ag_koeln/j2019/322_F_210_18_Beschluss_20190116.html)

need for change, as state treasuries are spending considerable sums of money on combating child poverty through advance payments of child maintenance.
Beyond the remit of the Central Authorities, the options for tracing an individual vary from country to country. Where there is a registration system, addresses can be readily determined (Denmark, Sweden, Germany). Where there is no registration system, it is more difficult to proceed systematically. Instead, the challenge is to examine in each individual instance which agency might be able to provide information (e.g. the embassy of the maintenance debtor's state of nationality in his country of residence, social insurance authorities, local authorities).
Project participants are hoping that the future platform will provide a **listing of the options for determining a serviceable address for each Member State**. It would also be desirable to harmonise the systems for tracing (e.g.: minimum harmonisation regarding registration systems).

Summary:

- **The data protection provisions in Chapter VII of the Maintenance Regulation should be relaxed.**
- **Listing of address research options for each Member State**
- **Harmonisation of registration systems is desirable.**

3.8. Specific problems for public bodies (recital 14 of the Maintenance Regulation)

3.8.1. Exchanges and cooperation by national child maintenance agencies

From the answers of the project participants and additional researches conducted by DIJuF it has determined that most European countries have now introduced a system of financial support in the event of loss of maintenance payments. All these systems also envisage that payments, without exception, are arranged as an advance, which in principle is reimbursed by the maintenance debtor. However, the results also show that both the conditions for granting and also the legal basis of recovery vary widely from country to country. The problems reported by project participants with regard to enforcing maintenance correspondingly vary. In some cases, it is conceivable that a change in the Maintenance Regulation could remedy this. However, in some cases national law also hampers recovery abroad (e.g. if the recovery decision is issued in the form of an administrative instrument under public law or if child maintenance advance is granted independently of the existence of an enforceable order).

That said, paying advance child maintenance is a proven means of combatting child poverty[3]. Particularly in international constellations, advance child maintenance payment can assist in

[3]See the German study "Alleinerziehende unter Druck" ("Lone parents under pressure"), published by Bertelsmann Stiftung, p. 45 ff.

bridging the period until maintenance is enforced, which can be considerable (see above). It can also guarantee the regularity of payments, if this is not possible in cross-border situations due to the various intermediary agencies. In the interests of limiting the financial burden on the state, the ability to finance the advance payment of child maintenance should not be let out of sight. One important source of finance is recovery from the defaulting debtor.

From the feedback received from project participants, the following obstacles for the recovery of claims arising from transferred rights occur.

3.8.2. International competence for the establishment of orders after a subrogation (cessio legis)

There continues to be a **lack of clarity over the interpretation of Art. 3b of the Maintenance Regulation.** In the Member States where child maintenance advances are paid without the maintenance claim having been determined or recognised beforehand in an enforceable instrument (Germany, Latvia, Sweden), the question arises as to whether the public bodies are permitted to obtain an enforceable order either at their official seat or in the place of residence of the child entitled to maintenance, i.e. in particular whether public bodies can rely on the privileged jurisdiction of Art. 3b of the Maintenance Regulation in order to secure an enforceable order domestically.

The feedback from the EPAPFR project showed that litigation primarily concerns the practice in Germany. In other countries, the issue is handled pragmatically. For example, the Latvian child maintenance agency itself issues its judgements on recovery and enforces on that basis. As it is not required to make an application to a court, the question of international competence does not arise. In Sweden, essentially no attempt is made to enforce maintenance abroad if no maintenance order benefitting the child entitled to maintenance exists. However, a heightened duty to cooperate on the part of the parent providing the care is requested. Efforts are made to arrange a maintenance order in the name of the child entitled to maintenance to be established.

Clarification by the CJEU (which is expected following the preliminary ruling filed by the German high court in June 2019[4]) or by the legislature when the Regulation is next revised would nevertheless be desirable to establish legal clarity and certainty, as the practical consequences of litigation are considerable for the public bodies and thus the public purse. The applicability of Art. 3b of the Maintenance Regulation to public bodies would possibly also allow countries to extend

[4] BGH, CJUE submission in the preliminary ruling of 05/06/ 2019 – XII ZB 44/19 –, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=30b8e2393fa8491a74a45b5e3ed278ac&nr=97238&pos=19&anz=21

the conditions for granting advance child maintenance payments, if they know that recovery is possible at reasonable expense and effort.

3.8.3. Limited options for securing assistance from the authorities

As outlined above, the instruments available to natural persons are not the same as those available to public bodies. **Specific measures can only be applied for in preparing recognition and/or enforcement measures.** Assistance in establishing a maintenance order in another country is not guaranteed. Placing public bodies in a worse position in this way is not justified. Default by the maintenance debtor, who is unwilling to pay, burdens the public purse considerably. Following the expansion of the group of those entitled to receive advance child maintenance payments in Germany in 2017, the discussion has now turned to the rate of recovery (that is considered too low). It is in the hands of the European legislature, and similarly of the national legislatures, to establish the legal conditions for efficient recovery of maintenance by public bodies, in order that the Community is not required to bear the cost of default by those maintenance debtors who are unwilling to pay.

3.8.4. Creating additional levers

Particularly in Italy, feedback has been that a large number of maintenance debtors are unable to pay. However, it is a recurring issue that the maintenance debtors have “organised” this inability to pay by transferring their assets to third persons or working illegally. In order to prevent such practices for evading enforcement and to generate maintenance payments, further consideration should be given to whether **levers under administrative or criminal law** could be applied through which voluntary payments are secured. It is true that various European countries already make or are about to make provisions for a breach of obligation to pay maintenance to be punished on the basis of criminal law. However, this means is only effective if the criminal authorities also take action to punish the offence. This is not always the case. In order to improve the payment behaviour, further means of coercion need to be introduced. For example, from 01.07.2019 Poland has created a maintenance debtors register. It is also conceivable to have measures such as suspension of passports or driving licences, although consideration will always be needed as to whether that might itself render the maintenance debtor unable to pay.

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Summary:

- **Direct exchange and cooperation between child maintenance agencies are sought (see above 2.2.).**
- **The question of the applicability of Art. 3b of the Maintenance Regulation to public bodies should be clarified by the legislature or by the CJEU.**
- **Public bodies should be placed on a fully equal footing with natural persons with regard to Chapter VII of the Maintenance Regulation.**

Heidelberg, 15 September 2019