THEMIS COMPETITION

International Judicial Cooperation in Civil Matters– European Family Law

Dilemmas in applying Council Regulation No 4/2009 -safeguarding the creditors' rights-

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Chapter I. Introductory remarks

1.1 Territorial and temporal scope

Maintenance obligations under family law are governed by the European Council (EC) Regulation 4/2009, on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters relating to Maintenance Obligations[1]. The Regulation became applicable on 18th June 2011 in the 27 then Member States and displaced the Brussels I Regulation, which had previously applied to such obligations. On 1st July 2013, it also became applicable in Croatia[2].

Regulation no. 4/2009 aims at the abolition of the exequatur procedure for maintenance claims in order to boost the effectiveness of the means by which maintenance creditors safeguard their rights[3]. The Regulation pursues the goal of enabling a creditor to easily obtain, in a Member State, a decision which will be automatically enforceable in another Member State without further formalities[4].

1.2 Substantive Scope

By Article 1(1), the Maintenance Regulation applies to maintenance obligations arising from a family relationship, parentage, marriage or affinity. Recital 11 adds that the term, maintenance obligation, should be interpreted autonomously.

Establishment of family relationships arising from maintenance obligations remain governed by the national laws of Member States, including the rules of private international law thereof (recital 21). This clarification is important in the context of different national regulations on family relationships.

In this regard, another important provision of the Regulation is Article 22, according to which recognition and enforcement of a decision on maintenance under the Regulation shall not in any way imply the recognition of the family relationship, parentage, marriage or affinity underlying the maintenance obligation which gave rise to the decision.

[1] OJ, L 007, 10.01.2009, p.1.
[2] The Act of Croatian Accession, Article 2; [2012] OJ L112.
[3] See Recital 5 of the Regulation, final thesis.
[4] See Recital 9 of the Regulation.

1.3 **Methodology of the paper**

The wellbeing of a family depends on stability. Ever since 1754 BC, the Code of Hammurabi set forth the importance of providing sustenance for children or for a former partner in case of separation[5]. Although Regulation No 4/2009 brings an invaluable contribution to the family law legislative frame as far as safeguarding maintenance rights is concerned, its applicability may rise some difficulties for the national courts.

To begin with, we will approach the necessity of establishing a " hierarchy" between Article 3 letter d from the Regulation and Article 5, when the principle of the child's best interests is at risk. Secondly, we will proceed towards clarifying the issue concerning the terminology used in Article 4 in order to ascertain the options available to spouses regarding the choice of court. Last but not least, we will embark on identifying possible solutions that may be given by the national courts in cases concerning maintenance obligations that derive from family relationships that undergo different legal treatment in the Member States that are not bound by the 2007 Hague Protocol.

In order to draw a complete legal frame, we will analyze the relevant articles of the applicable regulations, as well as the European Court of Justice (hereinafter ECJ) and the European Court of Human Rights (hereinafter ECHR) case-law in the areas related to .

Chapter II. Jurisdiction of the courts from Member States in the field of maintenance obligations. Challenges and solutions.

2.1 The necessity of establishing a " hierarchy" between Article 3(d) from the Regulation and Article 5

2.1.1 Jurisdiction rules established by Article 3

[5] Claude Hermann Walter Johns: BABYLONIAN LAW--The Code of Hammurabi from the Eleventh Edition of the Encyclopedia Britannica, 1910-1911.

Art. 3 of Regulation No. 4/2009 establishes an alternative jurisdiction of the courts of the Member States concerning the processing of applications covering maintenance obligations[6].

According to this article, it has jurisdiction to rule on maintenance obligations in Member States: (a)the court for the place where the defendant is habitually resident, or (b)the court for the place where the creditor is habitually resident, or (c) the court which, according to its own law, 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, or (d) the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility 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.

The concept of habitual residence is an autonomous concept of EU law which must be interpreted uniformly across all Member States. This concept is also used in other international legal instruments, such as Regulation No. 2201/2003[7]. The term is not defined in the Regulations, but the ECJ has interpreted the concept of habitual residence of the child in the context of Regulation No. 2201/2003, in the case of an action related to parental responsibility[8].

May a national court apply the criteria laid down by the ECJ in relation to Regulation No. 2201/2003 in order to determine the habitual residence of the child in a dispute regarding maintenance obligations?

The response is positive because Regulation No. 2201/2003 safeguards the child's best interests also, in accordance with Article 24 of the Charter of Fundamental Rights of the European Union. Thus, the court may use the criteria established by the ECJ in determining the habitual residence of the child and to establish its jurisdiction pursuant to art. 3 of Regulation No. 4/2009.

Pursuant to art. 3 letter d, the jurisdiction of the court which is hearing a request regarding parental responsibility can be extended to the accessory request related to maintenance, only if the jurisdiction rule is not based solely on the nationality of the parties. It is therefore possible that, under that provision, the court determines that it has jurisdiction in

[6] As it was underlined by the ECJ in the Case A v. B, ECJ, C-184/14, Judgment of 16 July 2015, ECLI:EU:C:2015:479.
[7] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338 , 23/12/2003, P.1 – 29.
[8] ECJ, Case C-523/07, A, Judgment of 2 April 2009, ECLI:EU:C:2009:225.

matters of parental responsibility, also assuming jurisdiction in resolving the accessory demand regarding maintenance obligation towards the child.

Regarding article 3, letter c and d of the Regulation, the ECJ gave a judgment in the case of A v. B[9], judgment that is of outmost importance.

The request has been made in proceedings between A and that person's spouse, B, concerning an application relating to maintenance obligations in respect of their two minor children, filed in a Member State other than that in which those children are habitually resident, concurrently with proceedings for the parents' legal separation[10].

The ruling, which is mandatory for the member states, stated that, in the event that a court of a Member State is seized of proceedings involving the separation or dissolution of a marital link between the parents of a minor child and a court of another Member State is seized of proceedings in matters of parental responsibility involving that same child, an application relating to maintenance concerning that child is ancillary only to the proceedings concerning parental responsibility, within the meaning of Article 3(d) of that regulation.

The provisions of Article 3(c) and (d) of Regulation No 4/2009 distinguish, as regards the criteria for attributing jurisdiction set out therein, between legal proceedings depending on whether they concern the rights and obligations of the spouses or the rights and obligations of the parents towards one or more of their children.

According to the interpretation given by European Court of Justice, an application relating to maintenance obligations in respect of minor children concerns the latter type of proceedings, since it entails the imposition on one or other of the parents of the obligation to pay maintenance in respect of their children. By its nature, an application relating to maintenance in respect of minor children is thus intrinsically linked to proceedings concerning matters of parental responsibility.

Considering the interpretation of the article 3 from the Regulation 4/2009 that was given by the European Court of Justice in the case file A v. B, we will try to show that the Court's ruling in the matter of maintenance obligation towards a child practically renders inert article 5 of the same legal provision.

[9] ECJ, C-184/14, A v. B, Judgment of 16 July 2015, ECLI:EU:C:2015:479.
[10] Ibidem, recital 2

In this study, we shall set out the reasons why we think that Article 3 letter d will overcome article 5 of Regulation No 4/2009, which must be interpreted as meaning that, if there is an action filed concerning divorce, parental authority and child maintenance obligations before a national court and the defendant enters an appearance, admitting the jurisdiction of that court, the national court dealing with the main proceedings will settle the competence aspects concerning the maintenance obligation in accordance with the child's best interests. Therefore, the defendant's manifestation of will shall not prevail over the principle of the child's best interest.

2.1.2. Facts

Spouses Adrian Ionescu and Maria Ionescu are Romanian citizens that live in Spain. They have a 12 years old child, Diana, born, raised and having her habitual residence in Spain. Because of the misunderstandings, Mrs. Ionescu leaves Spain and moves back to Romania. Here she files an action, asking for divorce based on Mr. Ionescu's fault, joint custody of the child, fixing the child's residence to the mother and the grant of a monthly allowance for the child.

The defendant enters an appearance before the Romanian Court and files a counterclaim asking custody of Diana and fixing the child's residence in Spain, with the father. He argues that Diana already has her habitual residence in Spain, because she was born, raised, went to school there and has very powerful roots in the Spanish society. He also shows that to give custody to the mother and establish Diana's residence in Romania would raise problems in the matter of the child's social integration.

2.1.3 Analysis of the Romanian court's jurisdiction

Pursuant to the article 3 paragraph 1 letter b of the Regulation no. 2201/2003, mentioned above, jurisdiction regarding divorce shall lie with the Romanian court, owing to the fact that both spouses are Romanian citizens.

General jurisdiction over matters of parental responsibility is conferred by Article 8 paragraph 1, upon the courts of the member state in which the child is habitually resident at the time the court is seized. However, this general rule is subject to the provisions of Articles 9, 10 and 12.

Under the heading 'prorogation of jurisdiction', Article 12(1) confers jurisdiction on the *forum divortii* to decide on parental responsibility for a child of both spouses. Three cumulative conditions must be met: (a) at least one of the spouses has parental responsibility; (b) both spouses have accepted the court's jurisdiction; and (c) jurisdiction is in the best interests of the child.

The terminology used by article 12(1) of the Regulation 2201/2003 seems to be straight forward, because it sets the requirement of an express or unequivocally acceptance[11].

Concerning the condition of acceptance of jurisdiction, we could reasonably assume that the claimant has accepted the Romanian jurisdiction because she was the one to file the action.

The facts are that Mr. Ionescu, the defendant, has filed a counterclaim before the Romanian Court, without contesting the jurisdiction, leads to the conclusion that he, unequivocally, accepted the jurisdiction of the Romanian court.

For the prorogation of jurisdiction set forth by Article 12(1) to occur, a third condition must be met, respectively the child's best interests. We assess that even if both parts accept unequivocally the Romanian court's jurisdiction, considering the child's best interests, the court must deem this best interest on its own.

The grounds of jurisdiction in matters of parental responsibility established in the Regulation 2201/2003 are shaped in the light of the best interests of the child, in particular on the criterion of proximity[12]. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence[13], except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility[14].

As far as we are concerned, the legal procedures concerning the parental authority would evolve very slowly if the Romanian court is to hear the case notwithstanding that the child lives in Spain. Gathering and assessing evidence can not be done in front of the Romanian court

[11] Regarding this notion, ECJ decided in the Gogova Case, C-215/15, p. 41

[12] Recital 12, Council Regulation (EC) No 2201/2003 of 27 November 2003, OJ L 338 , 23/12/2003, P.1 – 29

[13] ECJ, Case C-523/07, A, Judgment of 2 April 2009, ECLI:EU:C:2009:225 'The concept of 'habitual residence' under Article 8(1) of Regulation No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.'

[14] Council Regulation (EC) No2201/2003 of 27 November 2003**, *Recital 12.***

directly but through letter rogatory . Consequently, hearing the child, conducting a social inquiry will be carried out by the Spanish courts, which would extend the procedure. By comparison, the Spanish court is the one better placed to hear the claim concerning the parental authority in order to meet the superior interest of the child.

Because of this fact and taking into account that the Romanian court needs to hear her at first hand or to ask the social services from the child's habitual residence to evaluate different aspects concerning her wellbeing, we agree that the child's best interests required by Article 12 (1) are not fulfilled in front of the Romanian court.

In conclusion, the Romanian court must declare of its own motion that it has no jurisdiction and shall not rule in the matter concerning the parental responsibility brought before it. Furthermore, due to the fact that the cumulative conditions stipulated by Article 12 (1) are not fulfilled, the claim regarding parental responsibility will be evaluated by the competent court established through the general rule, respectively the court of the Member State where the child is habitually resident[15].

Applying the criteria given by the ECJ, we shall find that, as the defendant argued, the child was born and raised in Spain, went to school there and has a very powerful roots in the Spanish society. By comparison, she is connected with Romania only through citizenship. Therefore, we shall conclude that the child's habitual residence is in Spain, not in Romania and the Spanish courts have jurisdiction in the matter of parental responsibility.

2.1.4 The solution regarding the maintenance obligation

In the matter of maintenance obligation towards the child, the provisions from article 3 letter d of the Regulation no. 4/2001 mentioned above are to be applied. This article was analyzed by the European Court of Justice as mentioned above, in the Case of A v. B.

As a result, the ECJ stated that the court with jurisdiction to entertain proceedings concerning parental responsibility, is in the best position to evaluate in concreto the issues involved in the application relating to child maintenance, to set the amount of that maintenance intended to contribute to the child's maintenance and education costs, by adapting it, according to (i) the type of custody (either joint or sole) ordered, (ii) access rights and the duration of those

[15]For the analysis of the habitual residence of the child- ECJ, Case C-523/07, A, Judgment of 2 April 2009, ECLI:EU:C:2009:225

rights and (iii) other factual elements relating to the exercise of parental responsibility brought before it[16].

The interest of maintenance creditors is therefore also guaranteed, in that, the minor child will easily be able to obtain a decision relating to his maintenance claim from the court with the best knowledge of the key elements for assessing his claim.

Ultimately, the reasoning underlines that, in interpreting the rules on jurisdiction laid down by Article 3(c) and (d) of Regulation No 4/2009, the best interest of the child prevails. This argument is fortified by the fact that the implementation of Regulation No 4/2009 must occur in accordance with Article 24(2) of the Charter of Fundamental Rights of the European Union[17], which states that, in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

Therefore, the court that is to hear the application on parental responsibility shall also rule on the subject of maintenance concerning that child.

In the light of ECJ's arguments, in the situation presented, the Spanish court having jurisdiction to rule on the claim regarding parental responsibility must rule on the claim regarding maintenance obligations, also.

2.1.5 Jurisdiction based on the appearance of the defendant

Under Article 5 from the Regulation 4/2009, a national court before which a defendant enters an appearance shall have jurisdiction to state.

What is the desirable solution in order to respect the purpose of the Regulation 4/2009?

Could the Romanian court analyze on its own article 3 letter d and article 5 and deliver a new meaning to the judicial solution given by the ECJ, reasoning that this case differs from A v. B and, as such, apply art. 5 and declare that it has jurisdiction to rule on the matter of maintenance obligation towards the child? Could the Romanian court establish a hierarchy between Article 3(d) and Article 5, in the light of the solution given in the Case Av. B? We consider the response to this question to be affirmative, because of the following arguments.

Normally, under article 5, the Romanian court should establish its own jurisdiction to rule in the matter of maintenance obligation of the defendant towards his minor child. The main

[16] Idem, Case A v. B.
[17] *OJ C 326, 26.10.2012, p. 391–407.*

argument is that the defendant entered a counterclaim and did not contest the Romanian jurisdiction.

To give effect to this legal provision would mean to disregard the essential arguments comprised in the judgment given by the ECJ in the Case A v. B.

From this stand point, the appearance of the defendant in accordance with art. 5 of regulation, in this specific situations, should not determine the Romanian court to declare itself competent in the matter of maintenance obligations.

According to our analysis, the national courts should bear in mind the judgment given in the case A v B, and thus, not to take into account the will of the defendant.

Consequently, the Romanian court must declare of its own motion that it has no jurisdiction and shall not rule in the matter concerning the maintenance obligation of defendant towards his child, because, by its nature, an application relating to maintenance in respect of minor children is intrinsically linked to proceedings concerning matters of parental responsibility.[18]

2.2 Choosing jurisdiction

Regulation No 4/2009 brings a well-defined system that helps simplifying and accelerating the settlement of cross-border disputes concerning, inter alia, maintenance claims.

European intervention in this area is explicitly linked to the free movement of persons within the EU, both through the placing of the competence in Title IV EC on the incidences of free movement of persons and by the linking of the competence to the creation of an open judicial space within which people can move without inhibitions of status.[19]. In order to be able to reach these certain objectives in matters concerning the maintenance obligations, we think there should be a discussion concerning art 4 from the Council Regulation.

Art 4 regulates the possibility for parties to determine the competence of the courts, giving them the legal framework in which they can choose which court will have the jurisdiction to decide over their maintenance obligation dispute.

[18] Case A v. B, cited above, p. 40.

[19] As part of the achievement of an area of freedom, security and justice. See Tampere European Council Presidency Conclusions, 15 16 October 1999.

For the purpose of this explanation, is important to underline that art 4 letter a and b gives the aptitude of choosing between more courts to ,,parties'' . A change in terminology is made at art. 4 letter c, which doesn't use ,,parties" anymore but chooses to use ,,spouses'' or ,,former spouses''[20].

In letters a and b of Article 4 the choice is made by the parties involved in the legal dispute regarding a maintenance obligation, but the options they can choose between are limited by this article. In the maintenance obligation field, as well as the divorce field, the reason why there has to be a limitation in the courts jurisdictions is inherit in the differences between the divorce laws in force in the various member states and between their choice of law rules for divorce. For instance, if Ireland does not accept the idea that a marriage better be dissolved if one of the spouses (or even both of them) so desires, it is likely to object to a choice of a more liberal forum by spouses who have a substantial connection with Ireland[21]. This reasoning also exists in the limitation of the jurisdiction in cases regarding maintenance obligation.

The choices are limited between a court or the courts of a Member State in which one of the parties is habitually resident or a court or the courts of a Member State of which one of the parties has the nationality;

The criteria are the habitual residence and nationality.

At letter c from Article 4 we see that the option to choose from multiple courts is given this time to spouses of former spouses.

The options given to spouses are between the court which have jurisdiction to settle their dispute in matrimonial matters[22] or a court or the courts of the Member State which was the Member State of the spouses' last common habitual residence for a period of at least one year.

The legal issue here is the interpretation in the change of terminology from ``parties'' to ``spouses''. Was it intended to be interpreted that all parties (a term that would exclude spouses) can choose between the courts enlisted at letter a and b, and spouses are limited to the courts enlisted at letter c? Or was the intention here to let any party (including spouses) to be able to

[20] for the purpose of simplifying, wherever we are using the term ‚spouses' we are also referring to ‚former spouse'

[21] Th.M. de Boer (2002). Jurisdiction and Enforcement in International Family Law: A Labyrinth of European and International Legislation. Netherlands International Law Review, 49, pp. 307-351 doi:10.1017/S0165070X00000565, chapter 5.5

[22] As they are reglemented in Chapter II from the COUNCIL REGULATION (EC) No 2201/2003

choose the courts from letters a and b, and, on top of that, to give spouses more choices (choices which are not available to other parties, except them).

To be able to make the right interpretation, we propose the following method: analyzing both possible interpretations, by looking at the legal consequences that will result and contrast those results with the objectives of the Regulation.

The first interpretation would mean that the spouses won't be able to choose a court form a country from where one of them is a habitual resident or has its nationality (letters a and b from Article 4).

This is clearly a limitation, but can this limitation have some usefulness? We should have a look at pt. 9, which states that the creditor should be able to obtain easily a decision. This doesn't mean that there can't be any restrictions and everything should be looked at in the light of the easiness, but if we were to have any restrictions (especially those who are derived from the interpretation of the regulations) they should be justified and put into accordance with the purpose of this regulation. As we see here, there are no clear benefits that would result in restraining the competence from certain courts in cases where spouses would have an interest. We must remember that these norms are there to allow parties to come to an agreement which is limited in terms of court competence only by this regulation. In our opinion there is no reason for example to deny the right of the spouses to agree upon the competence of the courts of a Member State in which one of the parties is habitually resident. While not seeing any good reason to deny that right, we think it's evidently in accordance with pt. 9 to give a better efficiency to the spouses' agreement.

Also, at pt. 11 we can see illustrated another principle from which we can observe one of the elements that composes the spirit of this regulation, the equality of treatment for all maintenance creditors. The first interpretation of Article 4 would clearly bring an element of discrimination by distinguishing on one side between ``parties'' and ``spouses'' on the other. The equality of treatment should not mean the unity of treatment. In cases which have fundamental differences or significant difference between them, if different rules apply which are sustain by a solid reasons which are in accordance with the general principles, no one will bat an eye. The equality principle shouldn't by all means be looked at as the ,,one size fits all'' principle. This principle simply stated that in cases where the parties are agreeing (and there is no need of excluding the term spouses from the sphere of the term parties) their agreement

should be valid. Do we think there is a major need to differentiate in the forms of treatment we impose to spouses and those which are imposed to other parties? Being in an area in which the family and the rights next to this value are protected, we can see no reason for a double standard.

Pct. 19 from this regulation aims at giving autonomy of parties by giving them the power to choose between courts that can be tied with them by specific connecting factors. As we can see even in the objectives, the term parties is used without also using the term spouses, and there is no reason to think this regulation should want to give autonomy to parties, but not to spouses.

Also, this interpretation would not be in accordance with the objectives of this regulation as they are stated in pt. 45, in which the interpretation should be given in a sense that would illustrate a series of measures to ensure the effective recovery of maintenance claims in cross-border situations and thus to facilitate the free movement of persons within the European Union.

In our opinion, the second interpretation is correct. Putting parties on the same level with the term spouses and former spouses will also grant equality in the treatment, because this interpretation will show that parties is the big category and spouses is a subcategory, and given their specific characteristics, are given some more options of courts to solve the dispute due to their specific position.

This interpretation is also in accordance with pt. 19 where the equality is given taking in consideration the specific connecting factors. It can't be seen as a positive discrimination towards other parties, because what it does is to emphasize directly some of this ``specific connecting factors". It is clear that spouses are connected with the courts that are able to decide on matters regarding their matrimonial affairs (as they are presented in Regulation No 2201/2003). It also recognises the strong connection with the place where the spouses had their last common habitual residence for a period of at least one year. Being given these options to choose from and only equates with offering an efficient and concrete possibility to protect their maintenance rights. The effectiveness stated at pt. 45 is obtained by offering to art 4 letter c this interpretation.

2.3 Difficulties that may arise as a consequence of different national provisions on family relationships

2.3.1 Facts

Mr. A, a Romanian citizen who domiciled in the UK, and his spouse, Mr. B, a UK citizen, fulfilled their dreams of having a child and legally adopted baby-girl C. After a period of time, Mr. A and Mr. B parted ways with all the legal consequences that followed. Thus, by applying the Council Regulation No 4/2009, the competent UK court pronounced a decision that set the onus of maintenance allowance in favour of C on Mr. A and gave the two parents joint custody over the child, who remained in UK. Mr. A returned to Romania and ceased paying the monthly maintenance allowance after a couple of months. As a result, Mr. B, representing his child, addressed the Romanian competent court in order to obtain the recognition and enforcement of the UK decision. But the Romanian legal system does not recognise civil partnerships, nor adoption by same-sex couples.

2.3.2 Questions

In this chain of events, could the Romanian court refuse to recognise the decision as this recognition is manifestly contrary to the national public policy? Could Article 22 from the afore mentioned Regulation which states that " enforcement of a decision on maintenance under this Regulation shall not in any way imply the recognition of the family relationship, parentage, marriage or affinity underlying the maintenance obligation which gave rise to the decision" be applied in this case? What are the legal grounds on which the Romanian court could fundament its decision, whether the decision is the refusal of recognition or its enforcement?

2.3.3 Analysis of the applicable legal provisions

Considering the fact that the Council Regulation No 4/2009 applies between all Member States of the European Union, including the United Kingdom[23], the Romanian court would have to render a judgment based on its provisions, respectively the second section which regulates the decisions given in a Member State not bound by the 2007 Hague Protocol, as the United Kingdom and Denmark are not bound by this Protocol.

Although article 23 point 1 states that" a decision given in a Member State not bound by the 2007 Hague Protocol shall be recognised in the other Member States without any special

[23] Commission Decision 2009/451/EC of 8 June 2009, OJ L 149, 12.06.2009, p. 73

procedure being required", the next article reveals the grounds of refusal of recognition, among which it is found the public policy motive[24].

The phrase public policy has been inserted in a various number of international and EU legal instruments, including regulations in the family law matter. It was argued that despite the lack of substantive harmonization, what counts as "public policy concerns" should be a European concept, controlled and defined by European values[25]. Where public policy survives, the judicial authorities of an 'objecting' State may refuse the recognition and enforcement of foreign judgments, especially if the state in question has strong objections to the recognition of different family patterns, which may ultimately lead to an obstacle to their possible movement from one state to another. This raises the question of whether the concept of public policy, as determined by national law and aiming primarily at the preservation of certain family models, is compatible with a growing Europeanisation of the public policy exception, which focuses on safeguarding individual rights and on the prohibition of discrimination[26].

Despite the fact that it is an international and European concept, the mechanism of public policy is defined at a national level. It is the national court that would have to decide whether the recognition of a certain decision is "manifestly contrary to public policy".

According to Article 277 of the Romanian Civil Code[27], same-sex marriages are prohibited. The same article provides that the Romanian legal system does not recognise same-sex marriages and civil partnerships concluded or contracted abroad, regardless of the citizenship of the person being part of such a legal structure.

Considering the fact that same-sex marriage and civil partnerships are not only prohibited in Romania, but they are also not recognised, even if they are concluded or contracted abroad, it is our opinion that a Romanian court could pertinently argue that the recognition of a maintenance decision, based on a family relationship as the mentioned above, is manifestly

[24] Article 24 Grounds of refusal of recognition "A decision shall not be recognised: (a) if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought...."

[25] EVALUATING EUROPEAN VALUES: THE EU'S APPROACH TO EUROPEAN PRIVATE INTERNATIONAL LAW, Ruth Lamont, 5 J. Priv. Int'l L. 371 2009

[26] The recovery of maintenance in the EU and worldwide, Edited by: Paul Beaumont, Burkhard Hess, Lara Walker, Stefanie Spancken, Hart Publishing, page 481

[27] ''(1) Same-sex marriage is prohibited. (2) Same-sex marriages concluded or contracted abroad, either by Romanian or foreign citizens, are not recognised in Romania. (3) Civil partnerships between persons of the opposite sex or same sex, concluded or contracted abroad, either by Romanian or foreign citizens, are not recognised in Romania. (4) Legal provisions on free movement of citizens in Romania, for citizens from EU Member States and from the European Economic Area, remain applicable.'

contrary to the national public policy. Moreover, seeing that Romania is a rather conservative country in regards to same-sex relationships, this type of decision would be viewed as legal and in accordance with the CJUE and ECtHR case law, the European courts having a cautious approach regarding these sensitive matters[28].

Although article 22 from the Regulation provides that the recognition and enforcement of a decision on maintenance rendered according to its provisions shall not in any way imply the recognition of the family relationship, parentage, marriage or affinity underlying the maintenance obligation which gave rise to the decision, this rule of law is not applicable when it comes to a decision given in a Member State not bound by the 2007 Hague Protocol, as it results from the layout of the articles, the mentioned article being included only in the Section that regulates decisions given in a Member State bound by the 2007 Hague Protocol.

2.3.4 Desirable solution

Given the fact that the solution about to be pronounced affects the child, the court should take into consideration Article 24 paragraph 2 of the Charter of Fundamental Rights of European Union[29] entitled The rights of the child[30]. Also, the ECtHR stated that: "the community as a whole has an interest in maintaining a coherent system of family law which places the best interests of the child at the forefront"[31].

The best interests of the child must be the guiding consideration in the application and interpretation of EU legislation. In this regard, the words of the Committee on the Rights of the Child attached to the office of the UN High Commissioner for Human Rights (OHCHR) are particularly relevant. That committee points out that '(the best interests of the child) constitute a

[28] ECHR, Case of Schalk and Kops v. Austria, Application no.30141/04, Judgment of 24 June 2010 , p. 62 'In that connection, the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society (see B. and L. v. the United Kingdom, cited above, § 36).'

[29] Proclaimed on 6 December 2000 by the European Parliament, the Council of Ministers and the European Commission. Published in OJ 2012, C 326, p. 391.

[30] "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration".

[31] ECtHR, April 22th 1997, X. Y. and Z v. United Kingdom, Application n. 21830/93, p 47

standard, an objective, an approach, a guiding notion, that must clarify, inhabit and permeate all the internal norms, policies and decisions, as well as the budgets relating to children.[32]

In the light of this principle, recognised on international and European level, should the national court reconsider the term of public policy? Could this principle be regarded as being itself a public policy principle?

We believe that in any situations similar to the one described, whether it concerns children of same-sex couples or of registered partners, children born after in-vitro fertilisation or by a surrogate mother, second-parent adoption or step-parent adoption, the principle of the child's best interests should prevail over the fact that the national legal system does not recognise or prohibits the relationship child-parent underlying the maintenance obligation. This landmark principle should prevail over various external circumstances as it is the case of public order or tradition.

Moreover, in order to ensure the efficient recovery of a maintenance obligation, minimize the costs of proceedings and to prevent delaying actions, the national court should not deny the recognition of the decisions given in a Member State not bound by the 2007 Hague Protocol, as it infringes the principle of the child's best interests.

2.3.5 Requesting maintenance

If, in the situation mentioned above, Mr. B, as legal representative of C, would request the Romanian court to give a decision by which to compel Mr. A to pay a maintenance allowance, independent of an action in matrimonial matters or parental responsibility, what would the national court's response be?

Article 14 of the European Convention on Human Rights and Article 21 of the Charter of Fundamental Rights of the European Union regulate the prohibition of discrimination. The afore mentioned legal provision is violated if there is a difference in treatment of persons in relevantly similar situations, difference which has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[33] Moreover, the national legal system establishes the principle of „equality before the law of the children born out of wedlock

[32] Opinion of Mr. Advocate General Bot delivered on 16 April 2015 in Case A v. B, Case C-184/14, ECLI:EU:C:2015:244, par. 35

[33] ECHR, CASE OF X AND OTHERS v. AUSTRIA, Application no. 19010/07, Judgment of 19 February 2013, par. 98.

to the children born in wedlock or adopted", provided by Article 48 (3) of the Constitution and reaffirmed by Article 260 of the Romanian Civil Code. To sum up, the national court would violate Article 14 if it would not grant maintenance allowance as the difference in treatment of a child adopted by a different-sex couple and the child adopted by a same-sex couple would have no reasonable justification.

Interpreting the national legal provisions in the light of the European body of law, the national court could decide that, in order to ensure that the principles of equality and of the child's best interests are respected, a child is entitled to maintenance from his or her parents, regardless of the fact that he/she is adopted or a natural child, from a same-sex or a different-sex marriage. What is essential in this case is the bond between a parent and his child.

Considering the fact that denying a child his right to maintenance for a reason independent of his will and creating him an unfavourable situation for the mere fact that he or she was adopted by a same-sex couple, and not a different-sex couple, would be a profoundly immoral solution if there is a possibility to act otherwise. We should bear in mind that a judge should render justice, not mechanically apply legal provisions to the facts given, especially in the present legal context where the European and international law meet the national law and intertwine with it.

2.3.6 Recognition and enforcement of a decision regarding maintenance obligation between spouses

Facts:

After being heard by an English court, Mr. B, an English citizen, obtained a decision that obliged Mr. B, his former spouse and a Romanian citizen, with his habitual residence in Romania, to a regular payment, as maintenance obligation. For the enforcement of this decision in Romania, Mr. A would have to follow the 'exequatur' proceedings. Will the Romanian court enforce this decision?

When the national court is not bound by a fundamental principle, as strong as the principle of the child's best interest, could it proceed to the recognition and enforcement of the decision?

The rules of judicial cooperation in civil matters are based on the presumption of the equal value, competence and standing of the legal and judicial systems of the individual Member States and of the judgments of their courts and so on the principle of mutual trust in each other's courts and legal systems. The mutual recognition of the orders of courts of the Member States is at the center of this principle which also embraces the idea of the practice of cross-border collaboration between individual courts and court authorities[34].

An equally important principle is the principle of non-discrimination[35] based on sex or sexual orientation. As the ECtHR held in the *Case X and others v. Austria*[36], just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, particularly convincing and weighty reasons. Where a difference in treatment is based on sex or sexual orientation, the State's margin of appreciation is narrow. Differences based solely on considerations of sexual orientation are unacceptable under the Convention.

In the light of this principles, the enforcement of a decision regarding maintenance obligations should not be appreciated as manifestly contrary to the public policy of Romania, although this state does not recognise the family relationships on which the obligations are based.

The landscape of family relationships is extremely various and the refusal of recognition on grounds of public policy is weakening the principle of mutual trust, not being in harmony with the objectives of the European Union. The area of freedom, security and justice without internal frontiers envisioned by the EU would become illusory in the absence of mutual recognition in matters regarding maintenance obligations.

In conclusion, the national court should recognise and enforce the decision given in a Member State not bound by the 2007 Hague Protocol under the stipulation of Regulation No 4/2009, although the creditor is an adult entitled to maintenance as a consequence of a same-sex marriage or legal partnership. The national court would be able to admit the request by fundamenting its decision on the European principles of mutual trust and recognition and the

[34] Judicial cooperation in civil matters. A guide for legal practitioners in the European Union, p. 5.
[35] Statued by Article 14 of the European Convention on Human Rights and Article 21 of the Charter of Fundamental Rights of the European Union.
[36] Cited above, par. 99.

interpretation of the national legal provisions in the light of the wording and purpose of the European Union legal frame in order to attain the result which it pursues.

Chapter III Conclusion

Regulation No 4/2009 represents an important step towards strengthening the area of freedom, security and justice represented by the European Union, by effectively solving problems related to maintenance obligations in cross-border disputes. However, its application by the national courts does not lack certain challenges that may arise, as we have emphasized within the bounds of our paper, challenges that should be dealt with in the light of the provisions of EU law and case-law.

The Regulation applies in the Member States for almost 5 years and the national courts have already initiated preliminary ruling proceedings[37], the ECJ giving three decisions in interpreting the provisions of the Regulation, while other requests are pending. Furthermore, according Article 74 of the Regulation, by five years from the date of application the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation, including an evaluation of the functioning of the procedure for recognition, declaration of enforceability and enforcement applicable to decisions given in a Member State not bound by the 2007 Hague Protocol.

Bearing in mind that the Comission report shall be accompanied by proposals for adaptation, if necessary[38], we believe that certain clarifications are to be made, in light of the arguments exposed in our paper. Firstly, it should be established if an application relating to maintenance in respect of minor children must always be heard alongside the application concerning matters of parental responsibility. Secondly, the terminology used in Article 4 of the Regulation should be made clear. Last but not least, it should be expressely stipulated that that the recognition and enforcement of a decision on maintenance rendered in a Member State not bound by the 2007 Hague Protocol shall not in any way imply the recognition of the family relationship, parentage, marriage or affinity underlying the maintenance obligation which gave rise to the decision.

[37] To be seen: http://eur-lex.europa.eu/legal-content/EN/LKD/?uri=CELEX:32009R0004&qid=1461034626353 (Accessed 9th April 2016).
[38] Article 74 of the Regulation, final thesis.