JUDGMENT OF THE COURT (Sixth Chamber)

7 June 2018 ([\*](http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130dabdc61172f4694fc8b6cceba5fa19eda5.e34KaxiLc3eQc40LaxqMbN4Pb3iSe0?text=&docid=202635&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=347155" \l "Footnote*))

(Reference for a preliminary ruling — Judicial cooperation in civil matters — 2007 Hague Protocol — Law applicable to maintenance obligations — Article 4(2) — Change in the habitual residence of the creditor — Possibility of the retroactive application of the law of the State of the creditor’s new habitual residence, that law coinciding with the law of the forum — Scope of the terms ‘if the creditor is unable … to obtain maintenance from the debtor’ — Situation where the creditor does not satisfy a formal legislative condition)

In Case C‑83/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 25 January 2017, received at the Court on 15 February 2017, in the proceedings

**KP**

v

**LO**

THE COURT (Sixth Chamber),

composed of C.G. Fernlund (Rapporteur), President of the Chamber, J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of

–        the German Government, by T. Henze, M. Hellmann and J. Mentgen, acting as Agents,

–        the European Commission, by M. Wilderspin and M. Heller, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 January 2018,

gives the following

Judgment

1        This request for a preliminary ruling concerns the interpretation of Article 4(2) of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, approved on behalf of the European Community by Council Decision 2009/941/EC of 30 November 2009 (OJ 2009 L 331, p. 17, ‘the Hague Protocol’).

2        The request has been made in proceedings between KP, a minor child, and his father, LO, concerning maintenance claims.

 Legal context

 **Regulation (EC) No 4/2009**

3        Article 3 of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ 2009 L 7, p. 1) lays down general provisions on jurisdiction in the Member States concerning maintenance obligations.

4        Article 15 of that regulation provides that the law applicable to maintenance obligations is to be determined in accordance with the Hague Protocol in the Member States bound by that instrument.

 **The Hague Protocol**

5        Article 3 of the Hague Protocol, entitled ‘General rule on applicable law’, is worded as follows:

‘1.      Maintenance obligations shall be governed by the law of the State of the habitual residence of the creditor, save where [the Hague Protocol] provides otherwise.

2.      In the case of a change in the habitual residence of the creditor, the law of the State of the new habitual residence shall apply as from the moment when the change occurs.’

6        Article 4 of that Protocol, entitled ‘Special rules favouring certain creditors’, provides:

‘1.      The following provisions shall apply in the case of maintenance obligations of:

(a)      parents towards their children;

...

2.      If the creditor is unable, by virtue of the law referred to in Article 3, to obtain maintenance from the debtor, the law of the forum shall apply.

3.      Notwithstanding Article 3, if the creditor has seized the competent authority of the State where the debtor has his habitual residence, the law of the forum shall apply. However, if the creditor is unable, by virtue of this law, to obtain maintenance from the debtor, the law of the State of the habitual residence of the creditor shall apply.

4.      If the creditor is unable, by virtue of the laws referred to in Article 3 and paragraphs 2 and 3 of this Article, to obtain maintenance from the debtor, the law of the State of their common nationality, if there is one, shall apply.’

 **German law**

7        Paragraph 1613 of the Bürgerliches Gesetzbuch (Civil Code; ‘the BGB’), entitled ‘Maintenance for the past’, provides:

‘1.      For the past, the person entitled may claim performance or damages for non-performance only from the date on which the debtor, for the purpose of asserting the maintenance claim, was requested to provide information on his income and his assets, on which the debtor was in default or on which the maintenance claim became pending at court. ...

2.      The person entitled may demand performance for the past without the restriction of subsection (1)

1.      by reason of an irregular exceptionally high need (special need); …

2.      for the period in which he

(a)      for legal reasons or

(b)      for factual reasons which fall into the area of responsibility of the person liable for maintenance,

was prevented from asserting the maintenance claim.’

 **Austrian law**

8        The referring court states that in Austria, maintenance can be recovered retroactively in respect of the previous three years.

9        That court specifies that according to settled Austrian case-law, delay on the part of the maintenance debtor is a condition for claiming retroactive maintenance, but that, in regard to child maintenance, a letter of formal notice need not be sent due to the particularly close ties of family law.

 The dispute in the main proceedings and the questions referred for a preliminary ruling

10      KP, born on 6 March 2013, and his parents are German nationals who lived in Germany until 27 May 2015. On 28 May 2015, KP and his mother moved to Austria, which has become the place of their new habitual residence.

11      On 18 May 2015, KP submitted a claim for maintenance against LO before the Bezirksgericht Fünfhaus (Fünfhaus District Court, Austria). On 18 May 2016, KP extended his request to relate to the period from 1 June 2013 to 31 May 2015.

12      The Bezirksgericht Fünfhaus (Fünfhaus District Court) rejected KP’s claim for payment of maintenance in respect of the period from 1 June 2013 to 31 May 2015 on the ground that it was necessary, in relation to that period, in accordance with Article 3 of the Hague Protocol, to apply German law, under which the conditions for claiming maintenance arrears were not met. It considered that Article 4(2) of the Hague Protocol on the application of the law of the forum covered only the rights arising as of the date of installation at the new place of habitual residence.

13      The Landesgericht für Zivilrechtssachen Wien (Regional Civil Court, Vienna, Austria) upheld the judgment of the Bezirksgericht Fünfhaus (Fünfhaus District Court).

14      KP brought an appeal on a point of law against the decision of the Landesgericht für Zivilrechtssachen Wien (Regional Civil Court, Vienna) before the referring court, the Oberster Gerichtshof (Supreme Court, Austria).

15      Before the referring court, KP submits that, according to Article 3(1) of the Hague Protocol, the German law on maintenance obligations applies to his maintenance claim but does not enable him to obtain maintenance retroactively as the conditions provided for in Paragraph 1613 BGB are not met. It would be appropriate, therefore, according to KP, in accordance with Article 4(2) of the Hague Protocol, to apply Austrian law, which allows the retroactive recovery of maintenance claims.

16      LO for his part contends that Article 4(2) of the 2007 Hague Protocol does not apply where individual sums claimed by way of maintenance are subject to prescription or are time-barred. In addition, that provision could apply only if the proceedings had been initiated by the maintenance debtor or if the court seised was that of a State in which none of the parties concerned has his residence. In the present case, KP has seized a court in the State of his current habitual residence. Lastly, LO considers that that provision cannot be applied to obtain the payment of maintenance retroactively where the maintenance claim is made after the removal of the maintenance creditor.

17      The referring court observes that, pursuant to Article 3(2) of the Hague Protocol, following a change of the habitual residence of the creditor, the law of the State of that creditor’s new habitual residence applies as of that change and therefore exclusively in relation to the future.

18      Therefore, according to that court, it is necessary in the present case to apply German law in respect of the period preceding that change, unless that law is to be disregarded under Article 4(2) of the Hague Protocol. However, the application of that provision in a situation such as that at issue in the main proceedings is uncertain. That court refers, in this connection, to paragraph 63 of the Explanatory Report of Mr Bonomi on the Hague Protocol (text adopted by the Twenty-First Session of the Hague Conference on Private International Law) (‘the Bonomi Report’), according to which the subsidiary connection to the law of the forum is only of use if the maintenance proceedings are instituted in a State other than that of the creditor’s habitual residence, since otherwise the law of the creditor’s habitual residence and the law of the forum coincide. The referring court adds that, according to that report, the subsidiary application of the law of the forum under Article 4(2) can be envisaged only if the proceedings are initiated by the debtor, for instance before the competent authority of the State of his own habitual residence or if the authority seised is that of a State in which none of the parties concerned is resident.

19      The referring court asks, furthermore, in view of the fact that in the present case KP has not put LO on notice, whether Article 4(2) of the Hague Protocol applies to those cases in which, under the applicable law according to Article 3 of the Protocol, a maintenance claim exists but is refused in relation to the past because the creditor does not meet certain legal conditions.

20      In those circumstances, the Oberster Gerichtshof (Supreme Court) has decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

‘(1)      Is the rule of subsidiarity set out in Article 4(2) of the [Hague Protocol] to be interpreted as meaning that that rule is applicable only where an application initiating maintenance proceedings is lodged in a State other than the State in which the maintenance creditor is habitually resident?

If that question is answered in the negative:

(2)      Is Article 4(2) of the [Hague Protocol] to be interpreted as meaning that the expression ‘unable … to obtain maintenance’ also refers to cases in which, on the ground of mere failure to comply with certain formal legislative conditions, the law of the previous place of residence does not provide for a right to retroactive maintenance?’

 Consideration of the questions referred

 **Preliminary observations**

21      It is necessary to examine at the outset whether the Court has jurisdiction to interpret the Hague Protocol.

22      In that regard, it must be recalled that, under Article 267 TFEU, the Court has jurisdiction to give preliminary rulings concerning acts of the EU institutions.

23      First, it should be recalled that, by Decision 2009/941, adopted on the basis of Article 300 EC, which became Article 218 TFEU, the Council of the European Union approved the Hague Protocol, the text of which is annexed to the decision.

24      Secondly, according to settled case-law, an agreement concluded by the Council, in accordance with Article 218 TFEU, is, as far as the European Union is concerned, an act of one of its institutions, within the meaning of subparagraph (b) of the first paragraph of Article 267 TFEU (see, to that effect, judgment of 22 October 2009 in *Bogiatzi*, C‑301/08, EU:C:2009:649, paragraph 23).

25      It follows that the Court has jurisdiction to interpret the Hague Protocol.

 **The first question**

26      By its first question, the referring court asks, in essence, whether Article 4(2) of the Hague Protocol must be interpreted as meaning that it may be applied to a situation in which the maintenance creditor, who has changed his habitual residence, has lodged before a court in the State of his new habitual residence a claim for maintenance in respect of a period in the past during which he was resident in another Member State, even though the State of the forum is the State of the creditor’s habitual residence.

27      Under Article 4(2) of the Hague Protocol, if the creditor is unable, by virtue of the law referred to in Article 3 thereof, to obtain maintenance from the debtor, the law of the forum is to apply.

28      Article 3 lays down the general rule on the applicable law which provides that the law of the State of the creditor’s habitual residence governs maintenance obligations.

29      As is apparent from Article 4(2) of the Hague Protocol, that provision, which makes it possible to apply the law of the forum instead of the law of the State of the maintenance creditor’s habitual residence, takes effect only if those laws are different from one another.

30      It must, however, be ascertained whether it is still necessary for the State of the forum to be a State distinct from that of the creditor’s habitual residence in order for the laws applicable, respectively, to be different and for that provision to have practical effect.

31      In the present case, it is apparent from the order for reference that KP has moved to Austria and that that Member State is the State of his habitual residence. Austrian law is therefore the law applicable under Article 3(1) of the Hague Protocol. However, in accordance with Article 3(2) of that Protocol, Austrian law applies only from the point at which KP’s residence was changed to Austria, that is to say, from 28 May 2015 in the present case. In respect of the previous period, from 1 June 2013 to 28 May 2015, the law of the State of KP’s habitual residence is German law.

32      The law of the forum is the law of the Member State of the court seised by the creditor, namely Austrian law.

33      It follows that in a situation such as that at issue in the main proceedings, in which the law of the forum (in the present case Austrian law) does not coincide with the law of the State of the creditor’s habitual residence in respect of the period for which the creditor is claiming maintenance (German law in this instance), Article 4(2) of the Hague Protocol may have practical effect. The fact that the creditor has seized a court in the State of his habitual residence, with the result that the State of the forum corresponds to the State of his habitual residence, does not preclude the application of that provision as long as the law designated by the ancillary connecting rule in that provision does not coincide with the law designated by the main connecting rule in Article 3 of that Protocol.

34      However, it is also necessary that the law of the forum, as referred to in that provision, can be applied regarding a maintenance claim relating to a period in the past.

35      While it appears, having regard in particular to the Bonomi report, that Article 4(2) of the Hague Protocol applies to maintenance claims in respect of periods which start to run as of the date on which such claims were made, there is uncertainty as to whether that provision also applies to periods prior to such claims and, if so, what the conditions are for its application.

36      According to the European Commission, the law of the forum referred to in that provision applies whenever the maintenance creditor cannot obtain maintenance under the law of the State of his habitual residence, or, in the case of a period in the past, of the law of the State of his habitual residence as applicable during that period. The German Government, for its part, considers that, with regard to maintenance claims relating to periods in the past, the law of the forum does not apply automatically and that there must be a connection between the factual situation giving rise to the debt claimed by the creditor and the law applicable for the purposes of assessing that claim.

37      In this connection, it should be noted that it is not possible to establish beyond doubt the scope of Article 4(2) of the Hague Protocol merely from the wording of that provision.

38      It must be interpreted taking account of the system of connecting rules established by the Hague Protocol and the objective of that Protocol.

39      As regards the system of connecting rules established by the Hague Protocol, it must be observed that Article 4(2) thereof contains a special rule to the advantage of certain creditors which completes the general rule in Article 3 thereof.

40      That first finding is such as to raise doubts as to the pertinence of the Commission’s arguments. The applicability in principle of the law of the State of the creditor’s habitual residence laid down in Article 3(1) of the Hague Protocol is limited by the second paragraph of that Article to the period covered by that residence. If Article 4(2) of the Protocol were to be interpreted to the effect that it allows the law of the forum, that is to say, in a case such as that in the main proceedings, the law of the State of the creditor’s new habitual residence, always to be applicable to the period prior to the fixing of residence in that State, providing the condition laid down in that provision is met, that interpretation would be tantamount to rendering redundant the general rule set out in Article 3(2) regarding the scope *ratione temporis* of the law of the State of the creditor’s habitual residence.

41      Moreover, as is apparent inter alia from the Bonomi report and the objectives pursued by the Commission, which participated actively in the negotiations leading to the adoption of the Hague Protocol (see the Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [COM (2005) 649]), that system seeks to guarantee the predictability of the applicable law by ensuring that the law designated is not devoid of a sufficient connection to the family situation at issue.

42      In this respect, Article 3(1) of the Hague Protocol primarily provides for the application of the law of the State of the creditor’s habitual residence, which is the most closely connected with the creditor’s situation and appears therefore to be that which is the best adapted to govern the specific problems which the maintenance creditor may encounter.

43      In order to preserve that connection, Article 3(2) of the Hague Protocol provides that, where there is a change of habitual residence, the law of the State of the new habitual residence applies as of the moment when the change occurred.

44      As regards the special rules set out in Article 4(2) to 4(4) of the Hague Protocol, which provide a range of primary and secondary connecting rules applicable in “cascade” and intended to counter the risk that the creditor is not able to obtain maintenance under the laws successively designated, Article 4(3) of the Hague Protocol designates first of all the law of the forum in cases where the creditor has seized the competent authority of the State in which the debtor has his habitual residence. As is apparent from point 59 of the Advocate General’s Opinion, that State has a connection with the family situation of the creditor and the debtor, at least in so far as the possibilities of the satisfaction of the creditor’s needs by the debtor are concerned. The predictability of that law is also attributable to the fact that it is dependent on the jurisdiction of the court chosen, which in the present case coincides with the jurisdiction under the traditional rule that the claimant must bring his action before the court of the defendant.

45      A connection with the family situation concerned also appears in Article 4(4) of the Hague Protocol, which designates the law of the State of the common nationality of the parties as the law applicable. Indeed, as the Advocate General further observed in point 59 of his Opinion, that provision contains a certain permanence vis-à-vis the family situation of the creditor and the debtor concerned by the maintenance obligation.

46      Given the system of connecting rules laid down in the Hague Protocol and that protocol’s objective of predictability, as described in paragraph 41 above, it must be held that, if the application of the law of the forum provided for in the alternative in Article 4(2) of the Hague Protocol resulted merely from the choice by the creditor of his new habitual residence without there being any connection between that law and the family situation of the creditor and the debtor concerned by the maintenance obligation as it was at the time to which that obligation relates, the application of that law would not be consistent with either that system or that objective.

47      The fact that application of the law of the forum would be to the creditor’s advantage is not in itself sufficient to justify the application of that provision, since, in the absence of any such connection, it would constitute an unpredictable choice of law from the debtor’s perspective.

48      In that regard, as is apparent from points 78 and 79 of the Advocate General’s Opinion, that connection may result from the jurisdiction which the court seised would have had to deal with maintenance disputes in relation to the period concerned, in accordance with the applicable provisions of Regulation No 4/2009.

49      That analysis is justified by the close links between the Hague Protocol and Regulation No 4/2009. Indeed, Article 15 of the Regulation expressly refers to the Hague Protocol and designation of the courts with jurisdiction in accordance with that Regulation indirectly allows designation of the law of the forum. In addition, as the Advocate General has stated in point 56 of his Opinion, that regulation is based on the premiss that there is a connection between the maintenance to which a given dispute relates and the State whose courts have jurisdiction to adjudicate on the dispute.

50      It must, therefore, be held that the necessary connection between the law of the forum and the situation of the creditor and the debtor concerned by the maintenance obligation during the period to which the maintenance claim relates is present where the law of the forum corresponds to the law of the Member State whose courts had jurisdiction to adjudicate on the disputes as to the maintenance relating to that period.

51      In the light of the foregoing, the answer to the first question is that Article 4(2) of the Hague Protocol must be interpreted as meaning that:

–        the fact that the State of the forum corresponds to the State of the creditor’s habitual residence does not preclude the application of that provision as long as the law designated by the ancillary connecting rule in that provision does not coincide with the law designated by the main connecting rule in Article 3 of that Protocol;

–        in a situation in which the maintenance creditor, who has changed his usual residence, has brought before the courts of the State of his new habitual residence a maintenance claim against the debtor in respect of a period in the past during which the creditor resided in another Member State, the law of the forum, which is also the law of the State of the creditor’s new habitual residence, can apply provided the courts of the Member State of the forum had jurisdiction to adjudicate on the disputes concerning the parties and as to the maintenance relating to that period.

 **The second question**

52      The second question concerns, in essence, the issue of whether the phrase ‘is unable … to obtain maintenance’ in Article 4(2) of the Hague Protocol applies also to the situation in which the creditor is unable to obtain maintenance under the law of the State of his previous habitual residence on the grounds that he or she does not satisfy certain conditions imposed by that law.

53      It should be noted, at the outset, that such a question arises if the referring court were to find, in the light of the answer given to the first question, that the Austrian courts had jurisdiction under Regulation No 4/2009 to rule on a maintenance claim concerning KP in respect of the period from 1 June 2013 to 28 May 2015. In such a situation, the law of the forum, Austrian law in the present case, could apply if the maintenance creditor were to be ‘unable … to obtain maintenance’ under the law of the State of his habitual residence during a period in the past such as that at issue in the main proceedings, that being German law in the present case. It must therefore be examined whether a maintenance creditor such as KP falls within such a situation.

54      In order to answer that question, it is helpful to refer to the Bonomi report, which indeed examines such an issue.

55      That report indicates that the maintenance creditor may take advantage of the law of the forum not only if the law of his State of habitual residence does not provide for any maintenance obligation arising from the relevant family relationship (for example, on the ground that that law provides for no obligation of children towards their parents) but also if, while recognising such an obligation in principle, it makes it subject to a condition that is not satisfied in the case at issue. That report cites, by way of example, the case in which the law of the State of the creditor’s habitual residence provides that the parents’ obligation towards children ceases when they reach the age of 18 years, whereas the creditor has reached that age.

56      According to that interpretation, Article 4(2) of the Hague Protocol thus also applies where a legal condition is not met.

57      It must be held that that broad interpretation of Article 4(2) of the Hague Protocol corresponds to the objective of that provision, recalled in paragraph 44 above, namely to counter the risk that the creditor is not able to obtain maintenance under the law primarily designated.

58      That interpretation may cover a case, such as that at issue in the main proceedings, in which the creditor is precluded from obtaining maintenance due to the fact that he or she did not put the debtor on formal notice and therefore failed to meet a formal legislative condition, namely that provided for in Paragraph 1613 BGB. Indeed, as is apparent from point 93 of the Advocate General’s Opinion, there is nothing to suggest that the creditor’s passive conduct renders Article 4(2) inapplicable.

59      The answer to the second question is therefore that the phrase ‘is unable … to obtain maintenance’, in Article 4(2) of the Hague Protocol must be interpreted as also covering the situation in which the creditor is unable to obtain maintenance under the law of the State of his previous habitual residence on the ground that he does not meet certain conditions imposed by that law.

 Costs

60      Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

1.      Article 4(2) of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, approved on behalf of the European Community by Council Decision 2009/941/EC of 30 November 2009 must be interpreted as meaning that:

–        **the fact that the State of the forum corresponds to the State of the creditor’s habitual residence does not preclude the application of that provision as long as the law designated by the ancillary connecting rule in that provision does not coincide with the one as the law designated by the main connecting rule in Article 3 of that Protocol;**

–        **in a situation in which the maintenance creditor, who has changed his usual residence, has brought before the courts of the State of his new habitual residence a maintenance claim against the debtor in respect of a period in the past during which the creditor resided in another Member State, the law of the forum, which is also the law of the State of the creditor’s new habitual residence, can apply provided the courts of the Member State of the forum had jurisdiction to adjudicate on the disputes concerning those parties as to the maintenance relating to that period.**

2.      The phrase ‘is unable … to obtain maintenance’ in Article 4(2) of the Hague Protocol of 23 November 2007 must be interpreted as also covering the situation in which the creditor is unable to obtain maintenance under the law of the State of his previous habitual residence on the ground that he does not meet certain conditions imposed by that law.

[Signatures]