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**АНАЛІЗ ЗАКОНОДАВСТВА ЄС У СФЕРІ ВІДНОСИН
ЩОДО УТРИМАННЯ ДІТЕЙ**

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**ANALYZE OF THE EU ACQUIS IN THE SPHERE OF
CHILD MAINTENANCE RELATIONS**

Statement of the problem. The institute of maintenance which has singular social importance is one of the most detailed legal institutions of family law, including the Ukrainian one. The most important task of every social law-governed state is to develop the effective life support system for its population. Despite the increase in average and real incomes of the people, they are still too low in Ukraine. Families with many children and single-parent families where children are actually deprived of the care of their parents are in the most crisis status. Therefore, the topical problems that should be solved at legislative level are: fixing the proper alimony rate and its increase; prior application of the favorable law for weak party of the maintenance relations in the international private law; overcoming many difficulties during enforcement of the court decision on collection of the alimony in Ukraine and foreign countries.

Analysis of researches and publications. Present scientific works mainly contribute to the understanding of the essence of the children's right to be maintained by their parents. It should be mentioned that in 50–70-ies of the XX century there was a peak of researches on these problems by the national and Soviet scientists devoted to studying the actual at that time legislation. The period of formation of the institution of the maintenance of parents and children, especially an adoption of the first acts of codification of family legislation of Ukraine, is

unreasonable deprived of the attention of scientists. Scientific works of recent years researched the problems of implementation and improvement of the Ukrainian legislation, and comparative analysis of the law of foreign countries is not systematic, and international legal problems of the maintenance are not represented there in general.

L.I. Patseva researched obligations for the maintenance of minors (1972) [1, p. 3]. L.V. Afanasyeva researched mutual alimentary obligations of parents and children exceptionally in the context of the Ukrainian legislation (2006) [2, p. 39]. O.G. Drizhchana researched conflict issues on the children maintenance of (1972), and O.E. Burlai researched some problems of unification of norms on the maintenance in the light of legal relations between spouses in the international private law (2007). The related problems were researched by such well-known experts in the international private law as: V.Ya. Kalakura (1993), V.I. Kysil (1980), Yu. Chernyak (2006). G.K. Matvyeyev and A.S. Dovgert also made an important contribution to the development of the international private law doctrine. The foreign researchers are the following: Frances Rada, Patrick C. Marshal, Suzanne E. Miller, Robert S. Merlin, William Duncan, Diane Galarneau, etc. but their works were devoted to the analysis of legislation of the foreign countries and did not have comparative aspects with the Ukrainian legislation.

Thus, at present, there is no comprehensive analysis of the paternal obligation to maintain the children under the EU legislation that could be implemented to the Ukrainian legislation.

The purpose of the work. The purpose is to make a comprehensive analysis of the paternal obligation to maintain the children and its role in science and practice of the international private law, making proposals on improvement of the effective legislation of Ukraine in the children maintenance field based on the experience of the EU countries.

General Principles of Regulation of the Children Maintenance under Legislation of the EU Countries. The Convention on the Rights of the Child (1989) declared the following: "States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents..." (Article 27), thus emphasizing the role of state authorities in ensuring the children maintenance. The state role in the issues of maintaining the parents who do not receive alimony for the child varies a lot in different countries, and in Ukraine, it has a number of problems, so it should be useful for the Ukrainian legal system to consider and take into account the relevant experience of the foreign countries.

By general rule, the amount of costs for the child maintenance is determined by the both parents, court and (or) the competent administrative agencies. At the first stage, the competent authorities sanction the parents to agree on the amount of costs for the child maintenance (and maybe alimony) and intervene at the stage when parents disagree. For example, in Belgium, France and Sweden all contracts on the maintenance must be registered in the court. Courts play the main role in the calculation and granting of the alimony in Austria, France, Germany, and Sweden, while in Denmark, Norway and Great Britain such obligation was laid on the state agencies on the child maintenance.

The rules for determining the alimentary obligations of parents vary considerably, some systems have strict rules, others — unofficial recommendations and instructions. The Member States of the Organization for Economic Co-operation and Development (OECD) with a system of agencies use strict mathematical formulas to calculate the alimony for the child. In general, the appropriate maintenance rate depends on the following factors: the financial status of a creditor and debtor, presence of obligation to maintain other children or another spouses (former spouses), guardianship arrangements (division of the time to contact with child and perform the care duties), needs and interests of the child.

Often the child maintenance obligation terminates when such child reaches majority. This period can be extended until the dependent completes the full-time study (Ireland, Poland, and Great Britain) or until he/she discontinues being financially dependent on his/her parents (Czech Republic).

The EU acquies on the Paternal Responsibility. In the most countries, the procedure of determination of the formal arrangement on the maintenance of children born out of wedlock and children of the divorced parents is the same. Thus, under *the Law on the Paternal Responsibility (1995)* the concept of joint paternal authority was introduced to the Belgian legislation, under which the child maintenance is made jointly by the both parents within their financial capabilities in spite of such parents are married or not, living together or separately.

The United Kingdom of Great Britain and Northern Ireland in the *Child Support Act (1995)* defined the obligatory conditions to perform the maintenance, in particular: 1) parents are responsible for maintenance of their children in any circumstances; 2) if the father (mother) has more than one child, he/she is obliged to maintain all children equally and without prejudice to the principle of equality of such maintenance [3].

The Italian legislation imposes on parents the obligation to maintain and educate their succession taking into consideration the abilities, talents, and constitutional bias of the children. The court practice of Italy indicates that “moral and emotional” damages incurred by the child in the result of the maintenance miserableness could be additionally collected from the unfair father. Also, parents are obliged to maintain the children who reached majority but have not received the proper economic independence for reasons beyond their control [4, p. 227–229].

In Poland, the parents are obliged to maintain their children and give them money for upbringing if it is necessary. The amount of the alimony payments depends on the reasonable needs of the child, as well as the debtor's opportunity to earn money and his/her property status.

The Serbian law on marriage and family determines the alimony amount for each child as a percentage of the parents' earnings and it cannot be less than 7% and more than 22% of the average parents' earnings (Article 1 of the Changes and Amendments to the Law on Marriage and Family Relations dated May 5th, 2001). Taking into consideration parents' financial resources, they should maintain their children until they reach 26 years old if such children continue to study under the valid reasons [4, p. 233].

In Czech Republic the legislator requires both parents to maintain their own children “until they will be able to maintain themselves” without any reference to

the concrete age. During calculation of the maintenance amount there take into account which parent and to what extent personally takes care of the child, and if the parents live together there take into account the degree of participation in housekeeping. The debtor is obliged to prove the court in documentary form a size of his/her income if it is unsteady. Otherwise, while setting the alimony amount the court will proceed from the fact that the debtor's average income is a 15-fold amount of the minimum subsistence level recognized as sufficient to pay the alimony and satisfy the debtor's personal needs [4, p. 240].

The Comparative Aspects of the Legislation of Some EU Countries.

Taking into consideration the existing division of countries by their belonging to the systems of continental or common law, there is corresponding peculiarity and differences in regulation of performance of the paternal obligation to maintain their children. Let us consider procedure of the children maintenance by the parents under the legislation of such countries as Germany, France, and Greece.

In Germany according to Article 1602 of the *German Civil Code* (hereinafter – BGB) children under 21 years old who are not married and unable to support themselves independently have the right to be maintained by their parents [5, p. 407]. If the child does not receive any incomes and needs the maintenance, their parents should use all possible resources to maintain themselves and their children [6, p. 3]. At the same time, they are not obliged to maintain their child if their own situation became worse (Part 1, Article 1603 of BGB), but they have to prove this fact by themselves. The alimentary obligation continues to exist even after the death of the debtor and it is passed to his/her heirs (if they exist) (Article 1615 of BGB). The essence of the paternal obligation to maintain the children includes the cost of all needs, like food, clothing, accommodation, medical insurance and costs for spiritual music and professional development of the child. The main criterion is the amount of costs that parents should spend on their child under the condition that their marriage remains stable. The higher debtor's incomes cause bigger alimony amount for the child that is determined by so-called Düsseldorf table; herewith, the incomes of the parent with whom the child lives is not taken into account. As the purpose of the alimony is to meet vital needs of the child but not to enrich the lender, its rate should conform to the living standard in place of the creditor's and dependent's residence.

Comparing legislations of Germany and Ukraine, the German one determines that the alimony for children is calculated under procedure that takes into account the increasing needs of the child and the costs entailed with special features of the age. In Germany there are two types of the child maintenance: the first is calculated on the basis of the debtor's financial status and the child's way of life; the second is based on the state directives, and the amount increases every second year to adapt the alimony amount to the growing rate of the dependent's needs (Article 1615 of BGB). The law foresees the following systems of protection of the child's interests: contractual, judicial and administrative. The contractual system means that notary controls the abidance of the weak party interests and legality of the contract on the maintenance just on the stage of concluding such contract (Article 1934 of BGB) and its approval by the court (Article 1615 of the BGB). The judicial system ensures protection in the form of the court decision against the debtor which is

subject to immediate execution. The child (his/her representative) may solicit the court to sell a part of the debtor's property to hold the amount of the owed costs and percents for the delay in payment (Article 288, Article 291 of BGB). The court is also authorized to oblige the debtor to provide the detailed reports on all sources of his/her incomes, and the employer of the debtor – to make the direct deductions of the alimony amount from his/her salary (Articles 166–168, 835 of the Civil Procedural Code of Germany). Article 170 of the Criminal Code of Germany also determines responsibility for defaulting the alimony and classifies it as a crime. The administrative system, in its turn, offers children the maintenance in the form of payments or compensations for loss of the breadwinner (during military service).

The French Civil Code (hereinafter – CC of France) determines the additional paternal alimentary obligation for children born out of wedlock and adopted ones (Carbonnier, 1991:557). Unlike Germany, the paternal alimentary obligation is not a subject to succession and the debtor's heirs are not required to pay the alimony [6, p. 5]. The legislator expands this obligation by taking into account the cost per child under the exceptional circumstances. The determinant factor for the court is a level of income that the debtor should receive using all types of incomes that are at his/her disposal. It is important that any other debtor's alimentary obligation cannot be the grounds for termination or reduction of the alimony [6, p. 6]. The court is authorized to grant the amount of costs taking into consideration the child's needs or debtor's financial status, so the corresponding change can be made automatically by including the terms on indexation to the court decision. Currently, the law does not allow strict fixing of the percent of such alimony amount increase because of the indexation level unpredictability.

The French law provides similar ways of the child's right protection, as follows: 1) the right to receive costs from the state and public organizations authorized to search the debtor and to force him/her to pay the alimony under the appropriate court decision; 2) the payment of costs in favor of the child can be made by the *Tresor Public* following the appropriate prosecutor's instructions [6, p. 8], the tax service is also authorized to perform the debt recovery; 3) the debtor could be brought to the criminal responsibility for defaulting the alimony during 2 months (Article 357-2 of the CC of France).

In Greece the children maintenance is settled by the Articles 1485–1502 of the Civil Code of Greece (hereinafter – CC of Greece), provisions of which are very similar to the above-mentioned ones. Thus, children born in marriage and out of wedlock and the adopted ones have the right of maintenance (Article 1502 of the CC of Greece); the prerequisite is the lender's incapability to maintain himself independently (Article 1468 of the CC of Greece) and debtor's possibility to pay the alimony without any risk to become in unfavorable financial status (Article 1469 of the CC of Greece). The child maintenance includes “all necessary to maintain the dependent taking into consideration the real but not the desired nature of such needs” (Article 1493 of the CC of Greece).

Provisions of civil and civil procedural legislation of Greece define a number of specific restrictions, as follows: the maintenance cannot be the object of real welfare or mortgage (Article 1178, 1247 of the CC of Greece); a refusal from the

right of maintenance is considered as invalid (Article 1499 of the CC of Greece). It should be additionally mentioned that the crime of willful defaulting the alimony becomes graver if the “minor needed help in the result of corporal or another injure” (Article 308 of the Criminal Code of Greece).

State Maintenance System in Some EU Countries. Nowadays many countries have their own state maintenance system which regulates paternal legal obligation to maintain their children and operates at the same level as the judicial one. The maintenance is provided to the lender by so-called state maintenance grants when the judicial system is powerless. The main “consumers” of such grants are guardians and custodians of the children under 7 years old, and if father of the minor is permanently disabled – under 18 years old [7, p. 311]. In 1991 the German government extended the period of maintenance of the child (on account of the state) from 6 to 12 years old [8, p. 114]. For example, in Poland, the maintenance fund was established due to the penalties from debtors, subsidies from the budget and voluntary contributions from which the money payments are made in case of the failure alimony debt recovery [9].

It should be noted that introduction of various forms of state maintenance is very important under conditions of the global labor force migration and leaving millions of children for relative tutors [7, p. 311]. Some economically developed countries (for example, England and the Netherlands) improved the procedure of collecting the alimony from parents who do not live with their children, handing full authority “to collect” the payments to the governmental agency which is solely in charge with the alimony unlike the executive service.

The experience of the Great Britain in this respect may be useful as the state has a long history of the formation of the maintenance institution. The unexpected court decisions on the child maintenance, increasing pressure on taxpayers because of the failure of paternal obligations, steadily growing number of single-parent families at one time put the parents in a constant dependence on the state grants. So, in the *Child Support Act* (1991) the English government introduced radical changes. Firstly, the function of evaluation, review, collecting and ensuring the children maintenance was laid on the specialized institution – the Child Support Agency (hereinafter – Agency) instead of the court. Secondly, the courts were forbidden to enter the court decisions on collecting the alimony in cases where the amount was determined by the Agency. Thirdly, a single formula to calculate the alimony amount was defined. The next step was to pay more attention to the stage of execution of the court decision by introducing the child maintenance arbitrator system to settle disputes and special executive body that works separately from the Agency. Lately in 2011 the Agency was reorganized into the Child Maintenance and Enforcement Commission, and the maintenance system had the following changes: a) the Commission received more powers as taking the passports, collecting costs from the accounts under aegis of the financial organizations; b) parents with low income level received the right to larger share of the maintenance that belongs to them; c) parents who live with their child and receive state support (as unemployed) was entitled to conclude their own contracts on the maintenance; d) calculation the maintenance amount was simplified by using the available tax

information for the previous year; e) in order to find the defaulter parents the scheme of formal collections was implemented to cover expenses from the enforcement of the court decisions; d) the Commission influences on debtor's possibility to receive the credit or hypothecation in case of non-payment or debt of the alimony; f) there exists system of penalties to encourage the debtors to conclude the contracts on the maintenance [10, p. 485].

The Guarantee Fund of Costs for the Children Maintenance. Latvia demonstrates the positive experience. Since 2005 by the initiative of the Ministry of Children and Family Affairs the Guarantee Fund of Costs for the Children Maintenance (hereinafter – the Fund) started its work, it pays costs to one of the parents if another evade his/her obligation to maintain the child. The effectiveness of the structure is ensured by a number of factors: a) the Fund staff regularly check the work of bailiffs to find out the violations; b) as in other states the debtors are limited to obtain various services from the governmental agencies, including the credit ones; c) in case of illegal highly paid employment of the debtor the bodies of labor inspection, tax service and police are involved to collect the child alimony amount in debt. And if the state pays money for the child maintenance instead of his/her father or mother, such debt before the state has no period of limitation, however, it does not transfer from the debtor to his/her heirs [9, p. 215].

The example of Latvia and successful eight years experience of the Fund deserve special attention of the national legislators. Establishing the similar fund is possible, for example, under the aegis of the Office of Social Insurance of the Ministry of Social Policy of Ukraine. The costs of the alimony fund from which the payments are made can be formed due to the debts recovery, grants from the budget, voluntary contributions and other sources. The right to receive payments from the alimony fund will have children to whom the alimony is adjudged by the court but its collecting was impossible. The Office has to grant the amount of such payments which should be made during the year followed by the compulsory transfer. Payments from the Fund should be terminated when the child reaches majority and he/she does not continue to study.

Analyzing the legislation of the foreign countries we can conclude the following: the European states are similar in the matter of the regime of the child maintenance in connection with nature of obligation, its content, duration, performance, because all of them rely on the judicial system of definition, solving and execution of the court decisions on the child maintenance.

Conclusions. Based on the positive experience of some developed countries of the EU we suggest to determine in the Family Code of Ukraine the differentiation of the alimony amount to be collected as the fixed cash amount, as follows: from birth to 6 years old (preschool age), from 6 to 12 years old, 12 to 18 years old (by reaching majority).

We propose to include the provision on consideration of the debtor's income from the lease of real property to the *List of Types of Incomes Used during Granting the Alimony Amount* dated February 26th, 1993.

Solving the disputes on alimony the EU courts take into account the following: 1) the potential ability of the parties to have a high salary or total income

using all means at the disposal of the person; 2) the amount of time spent with a child that determines the maintenance rate. We offer to define in the Family Code of Ukraine a possibility to divide the care of parents by concluding a separate written contract on custody if the court constituted that time spent by the minor over a long period with each parent is essentially equivalent. This approach may be very useful for non-resident parents.

Taking into consideration the topicality of implementation of various forms of state support and following the example of such foreign countries as Latvia, and Poland we propose to establish the Guarantee Fund of Costs for the Children Maintenance in Ukraine. Cash payments of the Fund should be formed due to the debts recovery, grants from the budget, voluntary contributions and other sources.

It is more effective to implement the collection of the children alimony at the administrative level (like in Great Britain and Latvia), so we propose to create in Ukraine specialized institution empowered to calculate the alimony, search for the debtors, to collect the alimony and apply the appropriate influence on the debtors.

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Ліпець Л.В. Аналіз законодавства ЄС у сфері відносин щодо утримання дітей

Стаття присвячена особливостям батьківського утримання в країнах ЄС, що не є притаманним для України. Автор проаналізував особливості роботи Гарантійного фонду коштів на утримання дітей в Латвії, дослідив механізм Державної системи забезпечення у Великій Британії та Німеччині. Також досліджено та проаналізовано законодавство держав-членів Організації економічного співробітництва та розвитку, в яких діє система державних агенцій з утримання дитини, що користуються чіткими математичними формулами для вирахування аліментів, тощо.

Ключові слова: аліменти, утримання дітей, батьківський обов'язок, відповідальність батьків за ухиленні від сплати аліментів, дитина-кредитор, батько-боржник.

Ліпець Л.В. Анализ законодательства ЕС в сфере отношений по содержанию детей

Статья посвящена особенностям родительского содержания в странах ЕС, которые не приняты в Украине. Автор проанализировал особенности работы Гарантійного фонда средств на содержание детей в Латвии, исследовал механизм Государственной системы обеспечения в Великобритании и Германии. Также исследовано и проанализировано законодательство государств-членов Организации экономического сотрудничества и развития, в которых действует система государственных агентств по содержанию ребенка, пользующихся четкими математическими формулами для вычисления алиментов и т.д.

Ключевые слова: алименты, содержание детей, родительский долг, ответственность родителей за уклонение от уплаты алиментов, ребенок-кредитор, родитель-должник.

Lypets L. Analyze of the EU Acquis in the Sphere of Child Maintenance Relations

This article is devoted to peculiarities of the paternal maintenance in the EU countries that is not typical for Ukraine. The author analyzed special features of work of the Guarantee Fund of Costs for Children Maintenance in Latvia, researched a mechanism of the state maintenance system in Great Britain and Germany. The author also considered the legislation of the Member States of the Organization for Economic Co-operation and Development (OECD) which have a system of state agencies on the child maintenance that use strict mathematical formulas to calculate the alimony, etc.

Keywords: Alimony; Children Maintenance; Paternal Obligation; Parents' Responsibility for Defaulting the Alimony; Child-creditor; Father-debtor

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