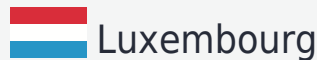


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Family maintenance



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European Judicial Network
(in civil and commercial
matters)

1 What do the concepts “maintenance” and “maintenance obligation” mean in practical terms? Which persons have to pay a maintenance allowance to another person?

Maintenance obligations are imposed by law on those who have the means to support another person with whom they have a relationship by blood or marriage. As a result, various people can claim maintenance, including:

- one spouse from the other spouse or a former spouse (Articles 212, 214 and 246 of the Civil Code (*Code civil*)) or one partner from the other partner, where they are bound by a partnership covered by the amended Law of 9 July 2004 on the legal effects of certain partnerships (*loi modifiée du 9 juillet 2004 relative aux effets légaux de certains partenariats*), or a former partner under certain conditions;
- children from their parents (Articles 203, 372-2, 376-2, 376-3 and 376-4 of the Civil Code);
- fathers, mothers and other ascendants from their children (Article 205 of the Civil Code);
- fathers-in-law and mothers-in-law from their sons-in-law and daughters-in-law (Article 206 of the Civil Code).

The rule stating that ‘maintenance is not designed to cover past claims’ means that maintenance is intended to cover present and future needs, not to reimburse past expenses. This rule has the legal value of a simple presumption; in other words, the rule may be disregarded if the creditor provides proof either that he/she has had to incur debts in order to support himself/herself, or that he/she has not remained inactive or has been unable to act.

A maintenance claim cannot be offset, unless the claim against which it is to be offset is also a maintenance claim.

2 Up to what age can a child benefit from a maintenance allowance? Are there different rules for maintenance concerning minors and adults?

Where joint parental responsibility is exercised, each parent, whether married or not, separated or divorced, is under an obligation to contribute to the support and upbringing of children in proportion to their means, those of the other parent and the needs of the child. In the event of divorce or separation, whether or not they jointly exercise parental responsibility, the parents must continue to contribute together to the costs of the child’s support and upbringing, unless a court rules otherwise. This contribution takes the form of a maintenance allowance and does not automatically stop when the child reaches adulthood. It can be paid directly to an adult child and can be revised according to the child’s needs and the changing means and expenses of each parent.

3 Should I apply to a competent authority or a court to obtain

maintenance? What are the main elements of this procedure?

The family court (*juge aux affaires familiales*) within the district courts (*tribunaux d'arrondissement*) has jurisdiction in particular over maintenance allowances, exercise of parental responsibility, and divorce and legal separation.

The applicant for maintenance must submit a claim to the family court. If the maintenance claim is connected with divorce or legal separation proceedings, the family court deciding on the application for divorce or legal separation also decides on the maintenance claim.

4 Can a request be made on behalf of a relative (if yes, what grade), or a child?

In cases of guardianship (*tutelle*) or protective supervision (*curatelle*), the guardian (*tuteur*) or supervisor (*curateur*) can submit an application on behalf of a parent or minor child.

Parent(s) exercising parental responsibility over their minor child can make an application on behalf of that child.

A minor child does not have legal personality and does not have the capacity to make an application himself/herself, except where the minor is capable of forming his/her own views pursuant to Article 1007-50 of the New Code of Civil Procedure (*Nouveau Code de procédure civile*). In this context, the minor capable of forming his/her own views can, through an application made to the district court, ask the family court to amend the exercise of parental responsibility, the exercise of access rights or living arrangements. In this case, the court orders the appointment of a lawyer to represent the minor within 15 days.

5 If I plan to bring the case to court, how do I know which court has jurisdiction?

The district court with territorial jurisdiction is:

1. the court in the place where the family home is located;
2. if the parents live separately, the court in the place of residence of the parent with whom the minor children habitually reside where parental responsibility is exercised jointly, or the court in the place of residence of the parent who exercises this responsibility alone;
3. in other cases, the court in the place of residence of the person who has not brought the proceedings.

For joint applications, the parties choose the court in the place where one or other party lives.

However, where the dispute concerns only spousal maintenance, contribution to the support and upbringing of children, contribution to the costs of the marriage, or urgent and provisional measures where a registered partnership is terminated, jurisdiction can lie with the court in the place of residence of the spouse or former partner receiving maintenance or parent chiefly responsible for the care of children, even where these are adults.

Territorial jurisdiction is determined by the place of residence on the date of the application or, in divorce cases, on the date when the initial petition is filed.

If maintenance is claimed during divorce proceedings, jurisdiction lies with the court hearing the application for divorce.

6 As an applicant, do I have to go through an intermediary to bring the case to court (e.g. a lawyer, central or local authority, etc.)? If not, which procedures apply?

An applicant can bring a case before the family court by submitting an application to the district court. This application must be filed with the registry of the district court, which serves it on the opposing party. The parties

do not have to be represented by a lawyer, except where maintenance is claimed during divorce proceedings on grounds of irretrievable breakdown of the marital relationship or during legal separation proceedings. In such cases, a lawyer must be used.

In any event, the applicant must provide the court with all documents proving his/her need. These may be, for example, payslips, tax exemption certificates, certificate of unemployment or long-term sick leave, evidence of rent, loans, dependent children, and support and upbringing costs, etc.

7 Do I have to pay fees to bring a case to court? If so, how much are they likely to be? If my financial means are insufficient, can I obtain legal aid to cover the costs of the procedure?

The costs that may be involved in legal proceedings include court costs and procedural costs that the losing party may be ordered to pay (in full or in part). Lawyers' fees may also have to be paid.

People whose income is regarded as insufficient under Luxembourg law can receive legal aid. To receive this aid, they must complete a questionnaire that can be obtained from the central social welfare office (*service central d'assistance sociale*) and send it to the president of the bar association (*Bâtonnier de l'Ordre des avocats*) which has territorial jurisdiction.

If legal aid is granted by the president of the bar association, it covers all costs arising from the court proceedings, procedures or actions for which it is granted. It covers, for example, stamp and registration duties, clerks' fees, lawyers' fees, court officers' duties and fees, notaries' expenses and fees, technicians' expenses and fees, witness taxes, fees of translators and interpreters, fees for *certificats de coutume* (a certificate or affidavit as to the applicable law), travel expenses, duties and fees for registration, mortgage and security formalities, and fees for publication in newspapers, if necessary.

8 What kind of maintenance is likely to be granted by the court? How is the amount of maintenance calculated? Can the court's decision be revised, if living costs or family circumstances change? If yes, how (e.g. by means of an automatic indexation system)?

- Type of maintenance

During the proceedings and following the granting of a divorce or legal separation, maintenance usually takes the form of a monthly payment. However, it can also take the form of a lump-sum provision consisting of either a sum of money or the surrender of goods in kind.

As regards the contribution to a child's support and upbringing, maintenance can take the form of either a monthly payment or, in full or in part, the direct payment of costs incurred for the child. Finally, it can take the form of a right of use and habitation.

If the person required to pay maintenance proves that he/she cannot afford to pay, the court can order him/her to take the person to whom he/she is required to pay maintenance into his/her home and to feed and maintain him/her.

- Calculation of maintenance

There are no reference scales. The amount of maintenance is calculated according to the debtor's means and the creditor's needs.

- Indexation

In order to adapt maintenance in line with changes in the cost of living, the court can, even of its own motion, decide that the maintenance will be index-linked based on a legally applicable variation clause.

- Revision

In the event of a change in circumstances, maintenance can be revised upwards or downwards and even terminated. This does not apply where it was paid as a lump-sum provision as part of a divorce. If the parties fail to reach agreement, the court decides on the termination or reduction of maintenance.

The court may also change the amount of maintenance that was set by agreement between the parties. This right applies not only in the event of a change in the respective situations of the creditor and debtor, but also in the absence of any change, if the court deems that the amount is insufficient or excessive.

Maintenance granted to a spouse in a divorce on grounds of irretrievable breakdown of the marital relationship cannot be paid for longer than the duration of the marriage, except in exceptional circumstances.

9 How and to whom will the maintenance be paid?

During the proceedings and after the granting of a divorce or legal separation, maintenance is paid to the beneficiary spouse.

The contribution to a child's support and upbringing is paid either by one parent to the other or to the person to whom the child has been entrusted. If the child has reached adulthood, the court can decide, or the parents can agree, that this contribution will be paid, in full or in part, to the child.

10 If the person concerned (debtor) doesn't pay voluntarily, what action can be taken in order to force him/her to pay?

A creditor has several ways of forcing a recalcitrant debtor to pay maintenance.

Civil law:

A creditor has several options:

- In the event of divorce, a creditor can bring the case before the family court by submitting an application to the district court for authorisation to receive, to the exclusion of his/her former spouse and without prejudice to the rights of third parties, any income of that former spouse, including retirement pensions and annuities, and any other amounts that may be payable by a third party according to the proportions and conditions set by the court. This decision is subject to revision in the event of a change in circumstances.
- A creditor can apply for ordinary enforcement measures, such as third-party attachment (for example from a bank account), attachment of tangible movable goods (car, jewellery, etc.) and attachment of immovable property (house, land, etc.), based on a court decision or enforcement order.

Criminal law:

A creditor can lodge a criminal complaint for the following offences:

- The offence of abandoning family is punishable by a custodial sentence of between one month and one year and a fine of between € 251 and € 2.500, or one of these penalties only (Article 391 *bis* of the Criminal Code (*Code pénal*)). This presupposes that the debtor is avoiding all or some of the maintenance obligations towards the creditor that are imposed on him/her by law, either by refusing to meet such obligations when able to do so or by being unable to meet them through his/her own fault.

This applies to the maintenance obligation of parents towards their children, the obligation between spouses and the obligation of adoptive parents towards adopted children.

Prosecution of the offence is preceded by the debtor being questioned by a police officer of the Grand Duchy of Luxembourg, which is recorded in a written statement. If the debtor has no known residence, questioning is not required.

- The offence of fraudulent insolvency is punishable by a custodial sentence of between six months and three years and a fine of between € 500 and € 12.500, or one of these penalties only (Article 391 *ter* of the Criminal Code). This presupposes that, even before the court decision, the debtor organised or

aggravated his/her insolvency, either by increasing his/her liabilities or reducing his/her assets, or by concealing some of his/her assets in order to avoid the enforcement of an order issued by a civil court in matters of maintenance.

For the purposes of applying Article 391 *ter* of the Criminal Code, court decisions and agreements approved by the court that impose an obligation to make payments, subsidies or contributions to the costs of the marriage, as well as maintenance provisions contained in agreements reached prior to a divorce by mutual consent, are regarded as equivalent.

11 Please describe briefly any limitations on enforcement, in particular debtor protection rules and limitation or prescription periods in your enforcement system

Actions to collect arrears of perpetual and life annuities and maintenance are barred by limitation after five years.

12 Is there an organisation or an authority which can help me to recover maintenance?

At the request of the creditor, the National Solidarity Fund (*Fonds national de solidarité*) can recover any maintenance that is payable to a spouse, ascendant or descendant. For the amounts that it must recover, the Fund is subrogated in the actions and guarantees of the creditor with regard to the recovery of his/her maintenance. Once the debtor has been notified of the amounts to be recovered, he/she must hand over these amounts to the President of the National Solidarity Fund.

13 Can organisations (government or private) advance the payment of maintenance wholly or partly in the debtor's place?

The National Solidarity Fund can, under certain conditions, pay the maintenance in the debtor's place. The request for payment must be submitted by the creditor or his/her legal representative to the President of the National Solidarity Fund.

This request is accepted by the President or his/her delegate if the creditor proves that:

1. he/she has his/her legal domicile in the country and he/she or his/her legal representative has lived there for five years;
2. his/her maintenance has been set by a court decision which is enforceable in the Grand Duchy of Luxembourg;
3. the maintenance could not be fully or partly recovered through a private enforcement measure that has been effectively carried out;
4. he/she is in a difficult financial situation.

Even if condition (c) is not met, the request is accepted if recourse to enforcement measures is expected to fail or if the debtor lives abroad. Any disputes fall within the jurisdiction of the justice of the peace (*juge de paix*) in the place of the creditor's domicile, before whom the case must be brought within 40 days of notification of the President's decision.

Creditors are automatically entitled to legal aid. From the acceptance of the request until payments by the Fund cease, the creditor cannot take any action against the debtor to recover any maintenance.

14 If I am in this Member State and the debtor has his/her residence in another country:

14.1 Can I obtain the assistance of an authority or private organisation in this Member State?

Under the New York Convention of 20 June 1956 and 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, an applicant resident in Luxembourg can, if the debtor lives abroad, apply to the Chief Public Prosecutor (*Procureur Général d'Etat*) to obtain maintenance.

The Chief Public Prosecutor, in his/her capacity as the central authority, will forward the application and accompanying documents to the central authority of the country in which the debtor lives so that said central authority can help the applicant to obtain payment of the maintenance due.

14.2 If so, how can that authority or private organisation be contacted?

The person entitled to maintenance submits the application to the transmitting authority, i.e. the Chief Public Prosecutor, using the various forms provided for under Regulation (EC) No 4/2009.

Procureur Général d'Etat

Cité Judiciaire
Bâtiment CR
L-2080 Luxembourg

15 If I am in another country and the debtor is in this Member State:

15.1 Can I address a request directly to such an authority or private organisation in this Member State?

An applicant living in a country other than Luxembourg must apply to the central authority of the country in which he/she lives. He/she cannot apply directly to a Luxembourg organisation or authority.

15.2 If so, how can that authority or private organisation be contacted and what kind of assistance can I receive?

Not applicable.

16 Is this Member State bound by the 2007 Hague Protocol?

Yes.

17 If this Member State is not bound by the 2007 Hague Protocol, which law will be applicable to the maintenance claim according to its private international law rules? What are the corresponding private international law rules?

18 What are the rules on access to justice in cross-border cases within the EU following the structure of Chapter V of the Maintenance Regulation?

In the event of applications under this EU regulation, legal aid is entirely free of charge for maintenance recipients aged under 21, irrespective of the provisions of national law.

19 What are the measures adopted by this Member State in order to

ensure the functioning of the activities described in Article 51 of the Maintenance Regulation?

In order to enable the central authority to provide the assistance described in Article 51 of the Maintenance Regulation, Luxembourg passed a law on 3 August 2011 implementing this EU regulation, as well as a grand-ducal regulation implementing Articles 2 and 3 of said law of 3 August 2011 (Official gazette (*Mémorial*) A No 175 of 12 August 2011).

These legal provisions have given the Chief Public Prosecutor direct access to certain databases.

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