The New Maintenance Regulation: A Guide for Family Lawyers

Eleri Jones provides an overview of the key aspects of the new EU Maintenance Regulation which comes into force on the 18th June

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Summary
This article aims to provide an overview of the key aspects of the new **Maintenance Regulation**, coming into force on 18th June 2011. It considers the European definition of 'maintenance', looks at the jurisdictional and applicable law provisions and examines the new procedure for recognition and enforcement of judgments under the Regulation. It compares it, where possible, to the current provisions of Brussels I and concludes by raising questions as to the effect that the Regulation will have on family law in practice.

A When and to whom it applies
As of the 18th June 2011, Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ("the Maintenance Regulation") will come into force and will be directly effective in English law. It will apply to all 27 EU Member States with a few modifications for some countries[1].

The Maintenance Regulation is designed to replace the provisions in Council Regulation No (EC) 44/2001 (Brussels I) relating to maintenance (Article 68(1), recital 44)[2]. The aim of the Maintenance Regulation is to enable a maintenance creditor to obtain easily, in one Member State, a decision which will automatically be enforceable in another Member State without further formalities (i.e. registration) (Recital 9). Recital 1 reminds us that the underlying objective is the proper functioning of the internal market.

The Regulation applies to "maintenance obligations arising from a family relationship, parentage, marriage or affinity" (Article 1). Recital 11 provides that the term "maintenance" should be interpreted autonomously and does not provide any further definition of the term (see further section B below). It will clearly apply to maintenance as between spouses, civil partners, and parents and children. The term 'affinity', though, may be applied more widely in different Member States to include decisions in relation to other types of relationships, which the English courts would have to recognise automatically and enforce, even if that type of relationship did not exist under English law.

Recital 21 makes clear that these new rules are designed to apply only to maintenance obligations, and do not determine the law applicable to the establishment of the family relationships upon which the maintenance obligations are based. Family relationships will still be determined by national law. Recital 25 further stipulates that recognition in Member State B of a decision relating to maintenance made in Member State A does not imply the recognition by

State B of the family relationship out of which the maintenance obligation arose[3], the only object of the recognition is the recovery of maintenance under the decision.

A 'decision' can be made by a court, whether called a decree, order or judgment and includes costs decisions (Article 2(1)(1)). Chapter IV on recognition and enforcement also applies to court settlements and authentic instruments (e.g. notarised documents) (see Article 2(1)(2),(3) and Article 48). The term 'court' includes administrative authorities (Article 2(2), recital 12) and such bodies can be treated as 'maintenance creditors' for the purposes of recognition and enforcement. Therefore it is arguable that this would include decisions of the Child Maintenance and Enforcement Commission (Article 64, recital 14). It seems logical to assume that the decision can be either interim or final: so long as the decision is in force, no other maintenance award could be made which would give rise to a conflicting judgment. Notably, an application may be made to the courts of a Member State for such provisional, including protective, measures as may be available, even if, under the Maintenance Regulation, the court of another Member State has jurisdiction as to the substance of the matter (Article 14). Importantly, however, this cannot assist a party in an application for MPS, as this has been held not to constitute a 'provisional' or 'protective' measure (see *Wermuth v Wermuth (No. 2)* [2003] EWCA Civ 50, [31]-[33]).

B What counts as 'maintenance'?

The problem of adhering to a European definition of 'maintenance' is not a new one. Guidance can be taken from the decision of the Court of Justice of the European Union ("CJEU", formerly "ECJ") *Van den Boogaard v Laumen* (1997) ECR I-1147, (albeit that this related to the Brussels Convention 1968) which was summarised by the Court of Appeal in ***Moore v Moore*** [2007] EWCA Civ 361 (a case relating to Brussels I; see [68]-[80]). The Court of Appeal stated that in giving 'maintenance' an autonomous interpretation, the definition given to the same by national law is not decisive. As set out by the Court of Appeal, Van den Boogaard held that a lump sum or transfer of property may be in the nature of maintenance if it is intended to ensure the support of a spouse. If, however, it serves only the purpose of division of the assets, it will not be treated as maintenance. Further it was proposed that whether a claim relates to maintenance will depend on its purpose, in particular whether it was designed to enable one spouse to provide for him/herself, or if the needs and resources of each of the spouses was taken into consideration in the determination of the amount, or where the capital sum set was designed to ensure a predetermined level of income.

There have long been, and will continue to be, difficulties in reconciling the English and European approaches to monetary awards following divorce. Questions of interpretation will arise, as demonstrated in a recent German case which involved the interpretation of an English ancillary relief order for enforcement in Germany under Brussels I. Even though the court examined carefully the reasoning behind the English award, which included a lump sum payment, periodical payments, transfer of life insurance claims and a costs order, the Federal Supreme Court in Germany did not regard the lump sum order as 'maintenance', despite the fact that the order was meant for the maintenance (including costs for housing) of the wife and children. The German court's approach was to regard such a transfer of assets as more than mere maintenance because the spouse receiving it gains the value of the asset as well. Accordingly that part of the order was held to be unenforceable. With such an interpretation in mind, one

might ask what the outcome would have been if the asset to be transferred were to be held on trust to provide maintenance, which would revert to the other spouse at a certain point[4].

A further reminder of the differences between English and continental family law is the treatment of housing as part of 'needs'. An English court would consider carefully the housing needs of the parties. In Europe however, it is not given such prominence. If a judgment is to be enforced in another Member State, it will be important for the judgment to explain very carefully the aspects of the award which relate to maintenance and those which deal with division of matrimonial property. Particularly, it will be desirable to avoid references to 'sharing' or 'compensation' which may cause difficulty with interpretation.

A question which arises out of the above is whether pension sharing orders would be considered as 'maintenance'? If so, once a maintenance award has been made in another Member State, this will therefore preclude a party from issuing an application for a pension sharing order in England.

C Jurisdiction

Jurisdiction for making decisions relating to maintenance can be established under one of five different grounds as set out in Articles 3 to 7. The use of 'domicile' as under Brussels I is removed. The default position is found in Article 3, which states that jurisdiction shall lie with the court where (a) the defendant is habitually resident; or (b) where the creditor is habitually resident; or in the court with jurisdiction to entertain proceedings as to (c) the status of a person (i.e. marital status) or (d) parental responsibility, where the maintenance is ancillary to those proceedings (unless jurisdiction is based solely on nationality).

In order to increase legal certainty, predictability and the autonomy of the parties (according to recital 19), the parties may agree that a particular court has jurisdiction (deriving from Article 23 of Brussels I). Article 4 provides that, except in disputes relating to maintenance for a child under 18, jurisdiction may be agreed between the parties for: (a) the court of a Member State in which one of the parties is habitually resident; or (b) where one of the parties has his/her nationality; or (c) in disputes between spouses, the court with jurisdiction to deal with the divorce, or the court where the spouses had their last common habitual residence for at least one year. Such agreement is to be in writing and shall be exclusive unless the parties have agreed otherwise. The exception relating to maintenance for children is a notable departure from the situation under Brussels I, under which such an agreement could be made (thus superseding, for example, ***M v V*** [2010] EWHC 1453. Recital 19 explains that this is to protect the weaker party. It should further be noted that there is no requirement set out in Article 4 that the parties should obtain independent legal advice before making such an agreement.

A ground of jurisdiction based on submission is set out in Article 5: a court before which the defendant enters an appearance shall have jurisdiction, save for where the defendant appears only to contest jurisdiction (as under Article 24 of Brussels I). Article 6 provides a subsidiary jurisdiction, providing nationality as a basis for jurisdiction where no court of a Member State has jurisdiction under Articles 3, 4 or 5. This is therefore no longer left to national law to determine, as was the case under Article 4 of Brussels I. Article 7 of the Maintenance Regulation, entitled '*forum necessitatis*', provides jurisdiction for the courts of a Member State

on an exceptional basis so that it may hear the case if proceedings cannot reasonably be brought or conducted, or would be impossible, in a third State with which the dispute is closely connected. Recital 16 suggests that this might be, for example, when there is civil war in that third State. The dispute must still, though, have a sufficient connection with the *forum necessitatis*.

Interestingly, an amendment was proposed to the Maintenance Regulation for a mechanism to transfer jurisdiction to a court better placed to hear a dispute (as under Article 15 of Brussels II Revised), but this was removed.

D Limits on Jurisdiction, Variation and Review

Articles 12 and 13 echo those of Articles 27 and 28 under Brussels I, providing that for proceedings with the same cause of action (*lis pendens*), any Member State court other than the first seised shall stay its proceedings of its own motion until the jurisdiction of the Member State first seised is established. If it is so established, the other court(s) shall decline jurisdiction (Article 12). For related actions, the court other than the first seised may stay proceedings and may, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the related action and can consolidate those actions (Article 13). The Maintenance Regulation defines 'related actions' in the same way as under Article 28 of Brussels I, namely that the proceedings are "so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings".

The Maintenance Regulation attempts to limit the possibility of forum shopping by preventing a debtor from seeking in Member State B a new decision, or the modification of an existing decision made in Member State A[5], whilst the creditor remains habitually resident in Member State A (Article 8, recital 17). This is subject to situations where there is an agreement as to jurisdiction under Article 4, or where the creditor submits to that new jurisdiction under Article 5. Article 8 represents a notable change from the position under Brussels I in which variation of registered orders was possible if based on a change of circumstances (as in the case of *M v V* [2010] EWHC 1453 (Fam) per Wall P): under the Maintenance Regulation there will not be jurisdiction to vary directly in State B if the creditor remains habitually resident in State A, supporting the notion of protecting the weaker party. Variation applications would have to be made in State A and then enforced in State B.

E Applicable Law

Chapter III, Article 15 of the Maintenance Regulation deals with the law applicable to maintenance obligations. It states that the applicable law shall be determined in accordance with the 2007 Hague Protocol[6] in those Member States bound by the Protocol. The United Kingdom (along with Denmark) is not one of those Member States and accordingly, the law applied to maintenance obligations in the English courts will be English law. The applicable law provisions will apply in other Member States, and therefore the courts of another Member State bound by the 2007 Hague Protocol will have to apply English law, if the circumstances so prescribe, for example where parties have agreed for this to be the case (Article 8 of the Protocol). The general rule under the Protocol is that the law governing the dispute shall be that of the State of the creditor's habitual residence, save where the Protocol provides otherwise

(Article 3 of the Protocol).

F Recognition and Enforcement

As mentioned above, the aim of the new Maintenance Regulation is automatic enforcement in Member State B of a decision relating to maintenance made in Member State A. Under Brussels I, not only was the scope of maintenance narrower, but decisions required a declaration of enforceability (*exequatur*).

(a) Decisions made in Member States bound by the 2007 Hague Protocol

The process of exequatur (or 'registration' for the United Kingdom, Article 38(2) of Brussels I) is abolished under the Maintenance Regulation in relation to decisions made in those Member States bound by the 2007 Hague Protocol (all Member States except the UK and Denmark). Where a decision of a Member State (bound by the Protocol) is enforceable in that country, it shall be enforceable in another Member State (e.g. England) without the need for registration (Article 17). For the purposes of enforcement, Article 20 sets out the documents required in the Member State of enforcement (Annex I attached to the Maintenance Regulation).

There are no grounds for refusing to recognise the decision, but there are grounds to refuse or suspend enforcement, such as in relation to limitation periods or where the decision is irreconcilable (Article 21). Article 21 permits Member State B to refuse or suspend enforcement of Member State A's decision where that decision is irreconcilable with a decision given in Member State B or a decision made in another Member State (C) or third State which fulfils the conditions necessary for its recognition in State B. Notably, a later decision made in State A which varies its first decision does not fall under the definition of 'irreconcilable' where that variation was on the basis of changed circumstances (Article 21 (2), paragraph 3).

Whilst Article 42 provides for no review as to substance in the Member State where recognition or enforcement is sought, there is a possibility for review of the decision made in a Member State bound by the 2007 Hague Protocol if a defendant did not enter an appearance due to not having been properly served, or was prevented from contesting the maintenance claim by reason of force majeure or other extraordinary circumstances without fault on his/her part (Article 19). This right to a review is subject to strict time restrictions and should be considered an extraordinary remedy (recital 29).

(b) Decisions made in Member States not bound by the 2007 Hague Protocol

Although no special procedure is required for recognition, unlike the decisions of those Member States bound by the Protocol, a decision shall not be recognised if it is manifestly contrary to public policy in the Member State of enforcement, where it was given in default of appearance (unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so) , or the decision is irreconcilable (Article 24). Article 24 permits refusal of recognition in Member State B of a decision from Member State A if State A's decision is irreconcilable with a decision of State B concerning the same parties or if it is irreconcilable with an earlier decision of a different Member State (C) with the same cause of action and parties, where State C's decision fulfils the conditions necessary for recognition in State B. As with Article 21 above, a later decision of State A where recognition is sought in State B is not 'irreconcilable' if it is a variation based on a change of circumstances (Article 24,

paragraph 2).

Post-recognition, decisions of the English courts arising out of contested proceedings will require a declaration of enforceability, and a simplified *exequatur* procedure is set out from Articles 23 to 38. This is similar to the process under Brussels I, but with strict time limits. The procedure is set out in Article 28 and the document required is Annex II. The decision on the application must be made by the Member State of Enforcement within 30 days except where exceptional circumstances make this impossible (Article 30). The debtor has no right to make any submissions on the application, but may appeal against the grant of a declaration (Article 32).

G Procedure

Under the common provisions for recognition and enforcement (Articles 39 to 43), procedure for enforcement will be under local law (Article 41). Chapter VII of the Maintenance Regulation provides for cooperation between and assistance from central authorities both in relation to making applications (transmission and processing) and obtaining information about a creditor or debtor and their respective financial circumstances (Articles 50, 51). Notably, the general rule is that each central authority shall bear its own costs in applying the Maintenance Regulation (Article 54). There are also generous legal aid provisions set out in Chapter V (Articles 44-47).

The new Family Procedure Rules 2010 do not yet cater for the coming into force of the Maintenance Regulation. However, the Ministry of Justice is due to publish (imminently) additional secondary legislation to address this. Some primary legislation is also due to be updated, for example Schedule 1 of the Children Act 1989, s27 of the Matrimonial Causes Act 1973 and s16 of the Matrimonial and Family Proceedings Act 1984.

Conclusion

Many of the issues raised by the provisions of the Maintenance Regulation are not new to those practising in this field, as they have already been considered in the application of Brussels I. The new Maintenance Regulation widens the bases of jurisdiction available in maintenance cases, and enforcement in England of decisions from abroad will be more streamlined. The provisions relating to legal aid and the central authorities will assist enforcement within the EU. Overall, however, the effect for the UK is not significant. A modified exequatur process will still be required for enforcement of English decisions in the EU.

Not only in view of the limit on proceedings set out in Article 8(1), but in respect of the Maintenance Regulation in general, one might ask how much it will impact further the ability of the English courts to make financial provision under Part III of the Matrimonial and Family Proceedings Act 1984, be it an application for a new financial award following divorce abroad, variation of an existing order, or fresh proceedings after dismissal of a spouse's claim in the original Member State[7].

Additionally, what will happen in relation to decisions between a Member State country and a third State? Will the English courts have power to stay proceedings in relation to maintenance in favour of a third State? What if there are parallel proceedings in that country? Or will the decision in *Owusu v Jackson* (2005) ECR I-1383 (removing the power to grant discretionary stays in civil and commercial cases) apply to the new Maintenance Regulation? Pending any

reform of Brussels I, it is suggested that the application of Owusu is inevitable, as maintenance fell under Brussels I[8].

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[1] The UK and Denmark have not adopted the 2007 Hague Protocol on Applicable Law Applicable to Maintenance Obligations (see note 6 below) and accordingly Article 15 of the Maintenance Regulation on applicable law will not apply in these countries (as to which see section E, Applicable Law). Denmark has only adopted the new Maintenance Regulation insofar as it amends Brussels I (Council Regulation (EC) 44/2001) and accordingly Chapters III (applicable law) and VII (co-operation between central authorities) of the Maintenance Regulation will not apply to relations between the Member States and Denmark (see OJ 12.6.2009 L 149/80). The transitional provisions are set out in Article 75.

[2] Notably Article 68(2) preserves the European Enforcement Order for uncontested claims (Council Regulation (EC) 805/2004) between countries not bound by the 2007 Hague Protocol. This could therefore continue be used for the immediate recognition of consent orders in other Member States. It would seem that, as parties could elect whether to use Brussels I or Regulation 805/2004, the choice would still exist but now as between the Maintenance Regulation and Regulation 805/2004.

[3] This is echoed in Article 22, 'No effect on the existence of family relationships', the contents of which seems, by its own wording, to apply to the whole Regulation, yet falls under Section 1 of Chapter IV, 'Decisions given in a Member State bound by the 2007 Hague Protocol'.

[4] For further detail about this case and its interpretation in respect of 'maintenance', see Sherpe and Dutta, *Cross-Border Enforcement of English Ancillary Relief Orders: Fog in the Channel – Europe Cut Off?* (2010) Fam Law 385.

[5] This also applies to decisions given in a third State which is party to the 2007 Hague Convention on the International Recovery of Child Support and other forms of Family Maintenance, also of 23 November 2007. The 2007 Hague Convention was adopted on behalf of the EU on 31 March 2011 (OJ 7.4.2011 L 93/9). The Convention has been signed by other countries, such as the United States, but not yet ratified. See http://www.hcch.net/index_en.php?act=conventions.status&cid=131 for an up to date status table for the Convention).

[6] See Council Decision of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (2009/941/EC) (OJ 16.12.2009 L 331/17). The Protocol is an optional part of the 2007 Hague Convention. Where Member States are concerned, the Maintenance Regulation takes precedence over the Convention (see Article 69(2)). For further detail as to the 2007 Hague Convention and Protocol and the Maintenance Regulation, see Eames, *'Maintenance Enforcement: The 2007 Hague Convention and the EC Regulation'*, (2009) IFL 47.

[7] For further discussion of the impact of the new Maintenance Regulation, see Eames, *'The New EU Maintenance Regulation: A Different Outcome in Radmacher v Granatino?'*, (2011)

Fam Law 389.

[8] Lucy Theis QC (as she then was) sitting as a deputy judge of the Family Division held in JKN v JCN [2010] EWHC 843 (Fam) that *Owusu v Jackson* did not apply to Brussels II Revised. The decision has not been subject to an appeal but a reference on this point, or the same in relation to the Maintenance Regulation, could be made to the CJEU at any time, even from a court of first instance. Notably, Brussels I is due for a review in 2012 and there has already been a Green Paper in this respect (COM(2009) 175 final, 21.4.2009) which contemplates the ability of a Member State court to decline jurisdiction in favour of a third State when there are already parallel proceedings there (which there were not in *Owusu v Jackson*).