Maintenance obligations:
European Union, Lugano and the Hague Conference

Obligații de întreținere:
Uniunea Europeanã, Lugano și Conferința de la Haga

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Abstract

The paper analyses the coordination of Regulation No. 4/2009 on maintenance obligations in the European Union and international perspective. The Regulation contains numerous provisions referring to other international convention, creating the first impression that it is well coordinated with the other EU and international measures in force. The paper analyses these provisions, with particular regard to the 2007 Lugano Convention, the Hague Conference's conventions and other EU measures on civil and judicial cooperation. The conclusion does not give such a positive framework of interrelation among sources as the first sight might have suggested.

***Keywords**: civil judicial cooperation; International coordination; EU external competence; maintenance obligations*

Rezumat

Lucrarea analizează coordonarea prevederilor Regulamentului nr. 4/2009 privind obligaţiile de întreţinere dintr-o perspectivă a Uniunii Europene şi dintr-o perspectivă internaţională în general. Regulamentul conţine numeroase referiri la convenţii internaţionale, lăsând impresia că este bine coordonat cu alte măsuri europene şi internaţionale în vigoare. Prezentul articol analizează aceste prevederi, cu o privire specială asupra de la Lugano din 2007, a convenţiilor Conferinţei de la Haga şi asupra altor măsuri europene în materia cooperării judiciare în materie civilă. Concluzia reflectă un cadru de interrelaţionare între resursele normative mai puţin optim decât s-ar părea la prima vedere.

***Cuvinte-cheie:** Cooperare judiciară în materie civilă, coordonare internaţională, competenţă externă a U.E., obligaţii de întreţinere.*

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1. Preliminary remarks

Regulation No. 4/2009[1] on maintenance obligations within the family („Regulation") is one of the richest European Union („EU") regulations with regard to the number of provisions mentioning other international instruments. An explication of this record can be the contemporaneity of its draft with the negotiations for the 2007 Hague Convention on the international recovery of maintenance obligations[2] („the 2007 Convention") and the 2007 Hague Protocol on the law applicable to maintenance obligations[3] („the Protocol").

Nevertheless, EU and international sources on private international law are not limited to these systems. Before the adoption of the Regulation, the EU had enacted a few Regulations on civil and judicial cooperation, with particular regard to Regulation No. 44/2001 on the jurisdiction, recognition and enforcement of judgments in civil and commercial matters[4], and regulation No. 805/2004 on the European Enforcement Order[5]. Currently the former is repealed by Regulation No. 1215/2012[6], whose Article 1(2)(e) excludes from its scope of application maintenance obligations arising from family relationships, but the latter is still in force.

The Regulation refers to the 2007 Lugano Convention, too[7]. Its scope of application coincides with that of Regulation No. 44/2001, but strengthens the civil and judicial cooperation with the EFTA States. To the knowledge of the present author, this is the only EU Regulation in this field expressly citing the 2007 Lugano Convention.

Finally, a special provision is dedicated to the coordination with other international convention to which EU Member States are Contracting Parties.

This framework makes the international coordination of the Regulation a specific – and not easy – topic to deal with.

2. The coordination between the Regulation and the 2007 Hague Convention: the application of the general rules

Notwithstanding the contemporariness of the negotiations of the Regulation and the 2007 Convention, and the participation of the EU to the latter, an express coordination fails within the scope of application of the former. This is remarkable, because the need for a coordination should have been almost self-evident. A rule similar to that envisaged by Article 61 of Regulation No. 2201/2003 on family matters[8] should have been welcome, since it coordinates the EU Regulation with the 1996 Hague Convention on the Protection of Children[9], providing for specific rules concerning jurisdiction, recognition and enforcement of judgments.

Neither Article 69 of the Regulation is applicable to the coordination between the two measures.

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[1] 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* L 7, 10.1.2009, p. 1-79.

[2] Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=131.

[3] Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=133.

[4] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 12, 16.1.2001, p. 1-23.

[5] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, *OJ* L 143, 30.4.2004, p. 15-39.

[6] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 351, 20.12.2012, p. 1-32.

[7] Council Decision of 15 October 2007 on the signing, on behalf of the Community, of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 339, 21.12.2007, p. 1-2.

[8] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, *OJ* L 338, 23.12.2003, p. 1-29.

[9] Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=70.

Indeed, the first paragraph is not applicable, because it refers to Conventions to which Member States were parties before the adoption of the Regulation itself. The 2007 Convention entered into force on 1st August 2014, so after the 18th June 2011, date of application of the Regulation[10]. Neither the second paragraph is relevant, since it establishes the primacy of the Regulation over international conventions to which Member States are parties[11]. Indeed, the exclusive competence to sign and to adhere to the 2007 Convention is conferred to the EU[12]. Furthermore, for the purposes of Article 69(2) of the Regulation it is not possible to consider Member States as Contracting Parties of the 2007 Convention, even if it binds them (Article 3(2) of the Statute of the Hague Conference on Private International Law). Indeed, the Regulation distinguishes between the State *bound* by the Convention (Article 15), and the State *party* to it (Article 69(2)). Therefore, the term *party* cannot be interpreted in a non-technical sense, as if it meant *beign bound*.

Therefore, it is necessary to refer to Article 51 of the 2007 Convention. Para. 4 establishes that the Convention does not prevent a Regional Economic Integration Organisation („REIO") – as the EU, party to the 2007 Convention, from applying its internal measures, enacted after the adoption of the same Convention. This prevalence must not affect the application of the 2007 Convention with other Contracting States. Concerning the recognition and the enforcement of foreign judgments, the same provision establishes that the 2007 Convention does not impact on the internal measures of the REIO, notwithstanding the date of their approval.

According to Article 3(3) of the Statute of the Hague Conference and Article 59(2) of the 2007 Convention, the EU has communicated that it has exclusive competence in all the fields covered by the 2007 Convention, and Article 51(4) of the 2007 Convention is applicable.

The primacy of the Regulation is conditioned for some aspects, absolute for others. It is necessary to draw some distinctions in the coordination of the sources.

Since the 2007 Convention does not provide for rules on international jurisdiction, the application of the Regulation is not able to affect the proper functioning of the 2007 Convention between EU Member States and third States.

Instead, there might be overlaps in the field of cooperation. Article 51(4) seems to establish that the Regulation prevails if only Member States' Central Authorities are concerned (Chapter VII of the Regulation), while the 2007 Convention is applicable if one of the States involved in the cooperation is not member of the REIO, but is part of the 2007 Convention (Chapter II). The rigidity of this bipartition

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[10] Article 76 establishes that the Regulation is applicable as from 18th June 2011, provided that the Protocol had entered into force. Article 4(1) of the 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, *OJ* L 331, 16.12.2009, p. 17-18 states that the Protocol should be applicable within the EU as from that date, if the Protocol had not entered into force internationally before that date.

[11] For the opposite view: POPOVICI, *Procedural Means of Consolidating the Right of Access to Justice in the Matter of Maintenance Obligations*, in *Towards a Better Future: The Rule of Law, Democracy and Polycentric Development*, ILIK, STANOJOSKA (eds.), Bitola, 2018, p. 47.

[12] The EU approved the 2007 Convention with Council Decision of 9 June 2011 on the approval, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, *OJ* L 192, 22.7.2011, p. 39-50. The well established Court of Justice of the European Union („CJEU") case law is coherent in confirming the EU exclusive competence in the conclusion of international agreements, provided that the EU itself had adopted internal measures in the same field (CJEU 31 March 1971, case 22/70, *Commission v. Council*, *ECR*, 1971, p. 263; CJEU 5 November 2002, case C-467/98, *Commission v. Denmark*, *ECR*, 2002, I-9519; CJEU 7 February 2006, opinion C-1/03, *ECR*, 2006, I-11457; CJEU 14 October 2014, opinion 1/14, ECLI:EU:C:2014:2303). This preclusive effect is made clear by the Declaration of competence of the European Community specifying the matters in respect of which competence has been transferred to it by its Member States, which forms the Annex II of the Council Decision of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law, *OJ* L 297, 26.10.2006, p. 1-14. The Declaration lists all the subjects included in Articles 61(c) and 65 of the Treaty on the European Community (now Article 81 of the Treaty on the Functioning of the European Union), as for being integral part of the exclusive competence of the EU. For further examination: DASHWOOD, HILLION, *The General Law of E.C. External Relations*, London, 2000; DANIELE (ed.), *Le relazioni esterne dell'Unione europea nel nuovo millennio*, Milano, 2001; CANNIZZARO (ed.), *The European Union as an Actor in international relations*, The Hague, 2002; SMITH, *European Union Foreign Policy in a Changing World*, Oxford, 2003; EECKHOUT**,** *External relations of the European Union: legal and constitutional foundations*, Oxford, 2004; AMADEO, *Unione europea e* Treaty-making Power, Milano, 2005; HILL, SMITH, *International Relations and the European Union*, Oxford, 2005; KOUTRAKIS, *EU International relations law*, Oxford, 2006; FRANZINA (ed.), *The External Dimension of EU Private International Law After Opinion 1/13*, Antwerp, 2016.

might rise practical difficulties, when sever Central Authorities are concerned, some from (one or more) EU Member State(s), some from (one or more) third Country(ies). The functions, the powers and the competences of the EU Member State's Central Authority are not clear. If Article 51 of the Regulation is applicable, it would have direct effect within third States; if Article 6 of the 2007 is applicable, instead, the strengthened cooperation among EU Member States risks being affected. The issue is not only theoretical. Although the provisions are quite similar, Regulation 4/2009 establishes an advanced cooperation system (as for example regarding the exchange of information, according to Article 50(1)(a)). Furthermore, some tasks related to the disclosure of evidence (Article 51(2)(g) of the Regulation; Article 7(2)(g) of the 2007 Convention) and to the service of documents (Article 51(2)(j) of the Regulation; Article 7(2)(j) of the 2007 Convention) are simplified at EU level thanks to Regulations Nos. 1206/2001 and 1393/2007[13]. Consequently, the application of the Regulation or of the 2007 Convention is not indifferent. The 2007 Convention seems to request EU Member States' Central Authorities to apply the Regulation or the 2007 Convention in an alternative way, when facing another EU Central Authority or a third Country's Authority. This solution is acceptable only from a theoretical point of view, but risks complicating the Central Authorities' work, whose power changes depending on the currently facing Central Authority. This difficulty increases because of the definition of *decision* for the purposes of the Central Authorities' cooperation. According to Article 2(1)(1) of the Regulation this is any „decision in matters relating to maintenance obligations given in a third State". The enforcement of decisions enacted in third Countries, which are Contracting Parties of the 2007 Convention, might vary if the request is filed with the EU Member State's Central Authority or with its competent Court. In the first case, the regulation is applicable; in the second, the 2007 Convention.

The recognition and the enforcement of judicial decisions give rise to less drawbacks. The separation of the scope of application of the 2007 Convention and of the Regulation is better clear-cut. EU Member States apply the Regulation's provisions if the decision is issued in a Member State (Article 51(4) of the 2007 Convention; Article 2(1)(1) of the Regulation). If the decision is adopted in a third Country, which is a Contracting Party to the 2007 Convention, this is applicable (Chapter V). Article 20 of the 2007 Convention, establishing „bases for recognition and enforcement", i.e. grounds of indirect jurisdiction, does not question this coordination. Indeed, these grounds mostly coincide with those established by the Regulation; if they differ, they are wider[14]. Therefore, the decision issued in an EU Member State having jurisdiction according to the Regulation fulfills the conditions established by Article 20 of the 2007 Convention. The perfect coordination risks not working if the Court, sitting in an EU Member State, hears the case without having jurisdiction (according to the Regulation). The judgment can freely circulate within EU Member States, failing any control on the jurisdiction to decide by the judge requested of the recognition or the enforcement (Articles 17 and 24 (1)(a) of the Regulation), but might not satisfy the conditions established by Article 20 of the 2007 Convention. The different regime is not surprising if we consider the relevance of the principle of mutual trust within the EU[15], so that a judgment can be recognized or enforced even when issued by a Court not having jurisdiction on the case according to any of the EU regulations on civil and judicial cooperation[16]. Still, this system might give rise to abuses, if the debtor moves his/her most valuable

[13] Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, *OJ* L 174, 27.6.2001, p. 1-24; Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, *OJ* L 324, 10.12.2007, p. 79-120. Article 51(2) of the Regulation refers expressly to both Regulations.

[14] For example, the 2007 Convention does not limit the feasibility of the choice of court. On the opposite, Regulation 4/2009 establishes a list of eligible courts, which are presumed to be closely connected with the dispute (Article 4(1)). In some cases, the choice is not possible at all (Article 4(3)).

[15] LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, in *Diritto dell'Unione europea*, 2015, p. 525.

[16] MCELEAVY, *The communitarisation of divorce rules: what impact for English and Scottish law?*, in *International and Comparative Law Quarterly*, 2005, p. 637; BALENA, *I criteri di giurisdizione nel regolamento (CE) 2201/2003*, in *La famiglia senza frontiere. Atti del convegno tenuto presso la Facoltà di Giurisprudenza dell'Università di Trento il 1 ottobre 2005*, PASCUZZI (ed.), Trento, 2006, p. 38; RICCI, *I fori «residuali» nelle cause matrimoniali dopo la sentenza* Lopez, in *Nuovi strumenti del diritto*

assets in a third Country.

Further difficulties may arise if Contracting States make reservation with respect to Article 20(1), as allowed by para. 2. At the time of writing[17], only Brazil and the United States of America made use of this possibility[18]. To some extent it will be possible for their National Authorities to refuse the recognition and the enforcement of judgments, although issued by a Court satisfying the grounds of jurisdiction provided for by Article 20(1), even sitting within a EU Member State in compliance with the Regulation. Nevertheless, the reservations have not reciprocal effect (Article 62(4) of the 2007 Convention), so that the opposite occurrence is not possible.

3. The coordination between the EU Regulation No. 4/2009 and the 2007 Hague Protocol: a key issue

The coordination between the Regulation and the Protocol is a key issue. Indeed, the Regulation establishes a double track system for the recognition and the enforcement of judicial decisions, so that if the Member State of origin is bound by the Protocol, the enforcement is automatic; on the opposite, an *exequatur* procedure is needed.

This is the first case within the civil judicial cooperation – and by now the only one – when the EU refers unconditionally to an international Convention for the internal regulation. Nevertheless, Article 15 does not exactly refer to the Protocol. Rather, it states that the determination of the applicable law is regulated by the Protocol, within Member States bound by it. These effects should be give for granted. Notwithstanding the weird literal formulation, the EU has acquired an exclusive parallel competence in the field of the applicable law to maintenance obligations. That means that the EU had the competence to adhere to the Protocol, so that Member States are not formally Contracting Parties, but still the Protocol produces legal binding effects towards them. This is the reason why the Regulation prefers the expression *Member States bound*, instead of *Contracting Parties*. This working method is questionable: the EU has not introduced uniform conflict of laws rules, neither exactly referred to the Protocol. Article 15 of the Regulation should not have any perceptive content, it being evident that an international Convention produces legal effects within bound States, and it is very difficult to interpret it as an exercise of EU conferred competence. This methodological choice does not make clear the role and the competence of the EU vis-à-vis the Member States. The Protocol is part of EU Law[19].

In order to avoid lacunae or antinomies, recital 20 of the Regulation pushed the EU to proceed to a quick acceptance of the Protocol[20]. The EU accepted the Protocol with Council Decision 941/2009, making clear that it is applicable within the EU as from 18th June 2011.

The Decision considers the special position of Ireland, United Kingdom and Denmark. Only the first Member State is part of the Decision, and therefore bound by the Protocol (as well as by the Regulation, recital n. 46). The UK decided not to opt in the Decision: therefore only the Regulation is applicable in its regards[21]. Finally, due to its opt out position, Denmark is not subject to the application of the Decision. However, Denmark benefits for a special position as regards measures amending

internazionale privato. Liber Fausto Pocar, VENTURINI, BARIATTI (eds.), Milano, 2009, p. 868.

[17] September 2018.

[18] 39 States are Contracting Parties.

[19] This is very well demonstrated by the judgment of the CJEU 20 September 2018, case C-214/17, *Mölk*, ECLI:EU:C:2018:744, where the Court did not consider the issue of the admissibility of the preliminary question on article 4(3) of the Protocol, giving it for granted.

[20] *Supra*, fn. 10. As for further debates regarding the nature of the competence conferred to the EU: MCCLEAN, *Bilateral Agreements with non-Member States after the* Lugano *Opinion*, in *The External Dimension of EC Private International Law in Family and Succession Matters*, Malatesta, Bariatti, Pocar (eds.), Padova, 2008, p. 55.

[21] Commission Decision of 8 June 2009 on the intention of the United Kingdom to accept Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (notified under document number C(2009) 4427), *OJ* L 149, 12.6.2009, p. 73.

Regulation No. 44/2001[22], and notified its willingness to apply the Regulation[23]. Only Chapters on the applicable law and on administrative cooperation are not applicable, since these do not constitute an amendment of Regulation No. 44/2001.

This arrangement is useful in order to understand the double track for the recognition and enforcement of foreign judgments. The automatic enforcement operates if the Member State of origin is bound by the Protocol, and the Member State of destination by both the Regulation. Summarizing, it excludes Denmark and UK *only* as Member States of origin[24]. For judgments issued in these Member States, a system modelled on Regulation No. 44/2001 is applicable in all the other Member States (requested of enforcement).

It is peculiar that the functioning of the double track depends on the legal effects of an international Convention. Indeed, this condition cannot be confused with a quite common requisite for the enforcement of foreign judgment outside the EU civil and judicial cooperation, which is the control of the law applied in the merits decision[25]. The difference comes to evidence if the judge on the merits wrongly applies the Protocol: the judgment can freely circulate within the EU, although the applied law is not the one designated within the Protocol.

4. The coordination between the EU Regulation No. 4/2009 and the other EC/EU measures on civil and judicial cooperation

The EU has enacted numerous regulations in the field of the civil and judicial cooperation, whose scope of application risks overlapping with that of the Regulation, or creating lacunae. Therefore, its material scope must be clearly defined within the EU system of private international law. At the time of the adoption of the Regulation, the key issue was the intertemporal law with regard to Regulation No. 44/2001. Article 68(1) of the Regulation faced the question, stating together that the Regulation modifies Regulation No. 44/2001, by replacing its provisions. The wording is not very clear, since the Regulation rather repeals the corresponding provisions of Regulation No. 44/2001.

Article 75 on transitional provisions is the general rule on the coordination of the two Regulations at stake. Regulation 4/2009 is applicable in disputes filed after the date of application[26], unless the *exequatur* proceeding started before that date (and Regulation 44/2001 is applicable for procedural economy reasons). Although the judgment is issued, or the proceeding on the merit filed, before the date of application of the Regulation, its recognition and enforcement is regulated by Part 2 of Chapter IV of the Regulation. As mentioned, this *exequatur* procedure is modelled on the one provided for by Regulation No. 44/2001, so that the application of the Regulation (instead of Regulation No. 44/2001) does not jeopardise the legitimate expectations of the parties (at the time the dispute was filed or the *exequatur* requested). Generalising, this transitional rule does not change the position of the parties in the dispute in case of international recognition and enforcement of the judgment.

Article 68(2) establishes that the Regulation replaces Regulation No. 805/2004, except for Enforcement Orders issued in a Member State which is not bound by the Protocol. The double track prevents from the

[22] Article 3(2) of the Council Decision of 20 September 2005 on the signing, on behalf of the Community, of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 299, 16.11.2005, p. 61-70.

[23] Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 149, 12.6.2009, p. 80.

[24] UK and Danish Courts must automatically enforce decisions issued in any EU Member State bound by the Regulation, due to the literal formulation of Article 16 of the Regulation. This rule had not been initially accepted by English Courts (BARNES, *EU Manteinance: whatever happened to direct enforcement?*, in *International Family Law*, 2014, p. 175).

[25] GAUDEMET-TALLON, *Le pluralisme en droit international privé: richesses et faiblesses (Le funambule et l'arc-en-ciel)*, in *Collected Courses of the Hague Academy of international law*, 2005, t. 312, p. 380; MAYER, *Le phénomène de la coordination des ordres juridiques étatiques en droit privé*, in *Collected Courses of the Hague Academy of international law*, 2007, t. 327, p. 303.

[26] This is why the first preliminary reference for the interpretation of any provisions of the Regulation was filed only on 6 September 2013.

application of the automatic enforcement, which is a more advanced circulation system than that established by Regulation No. 805/2004. The transitional period is subject to the general rule of Article 75(1). The Regulation is applicable only to proceedings filed after the date of its application. Most probably, the rule refers both to the procedure on the merits and to the enforcement proceeding.

Article 68 affects indirectly the relationships between Regulation No. 44/2001 and Regulation No. 805/2004. According to Article 27 of the latter, the two instruments are alternative[27]. Since the Regulation replaces both of them, it is not anymore possible to make use of the certification as an Enforcement Order or of the *exequatur* procedure in the field of maintenance obligations (except for the intertemporal limits described above).

The Regulation No. 1215/2012 replaced Regulation No. 44/2001. Article 1(2)(e) expressly excludes maintenance obligations from its scope of application. Therefore, the Regulation can be considered as a special instrument with respect to the general legislation in civil and commercial matter. The abolition of any *exequatur* procedure pursued by Regulation No. 1215/2012 seems to confirm this conclusion, and makes less crucial a perfect distinction between the material scope of application of the two instruments (although differences are notable as far as the grounds for refusal of recognition and enforcement are concerned).

The determination of the exact scope of application of two recently adopted Regulations, No. 2016/1103 on matrimonial property regimes, and No. 2016/1104 on patrimonial effects of registered partnerships[28], is more critical. Although the new Regulations are adopted through enhanced cooperation, they bind 18 Member States as from 29 January 2019, and they are open to the access of the other Member States. For the time being, a distinction between maintenance obligations and patrimonial regime is nevertheless important, because Member States not taking part to the enhanced cooperation can still apply their national (private international) law.

The CJEU has already resolved this characterization problem, although the preliminary references were requested when the 1968 Brussels Convention[29] and Regulation No. 44/2001 were in force. Both measures included in their material scope of application maintenance obligations arising from family relationship, but excluded „rights in property arising out of a matrimonial relationship" (Article 1(2)(a) of Regulation No. 44/2001). The difference between maintenance obligations and family property regimes rests with the aim of the measure. If it grants economical resources of the creditor, according to his/her needs and the debtors' possibilities, the measure is characterized as for maintenance obligation, notwithstanding its form (periodical payment, liquidation of a single amount…)[30]. If it aims at liquidating the assets among spouses or partners, it must be considered as related to the family patrimonial regime. For continuity reason, the same interpretation should be applied for the determination of the scope of application of the Regulation and the two most recent Regulations.

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[27] ZILINSKI, *Abolishing exequatur in the European Union: the European Enforcement Order*, in *Netherlands International Law Review*, 2005, p. 471; CARBONE, *Lo spazio giudiziario europeo in materia civile e commerciale. Da Bruxelles I al regolamento CE n. 805/2004*, Torino, 2006, p. 289; FUMAGALLI, *Il titolo esecutivo europeo per crediti non contestati nel regolamento comunitario n. 805/2004*; SALERNO, *Giurisdizione ed efficacia delle decisioni straniere nel regolamento (CE) N. 44/2001 (La revisione della Convenzione di Bruxelles del 1968)*, Padova, 2006, p. 386; TONOLO, *Pluralità di giudicati ed opposizione all'esecuzione delle decisioni straniere*, in *Rivista di diritto processuale*, 2008, p. 1290.

[28] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, *OJ* L 183, 8.7.2016, p. 1-29; Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, *OJ* L 183, 8.7.2016, p. 30-56.

[29] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. Consolidated version, *OJ* L 299, 31.12.1972, p. 32-42.

[30] CJEU 6 March 1980, case 120/79, *De Cavel*, *ECR*, 731; CJEU 27 February 1997, case C-220/95, *van den Boogaard*, *ECR* I-1147; CJEU 31 March 1971, case 22/70, *Commission v. Council*, *ECR*, 1971, p. 263. Further: VIARENGO, *Le obbligazioni alimentari nel diritto internazionale privato comunitario*, in *La famiglia nel diritto internazionale privato comunitario*, Bariatti (ed), Milano, 2007, p. 233.

5. The Lugano Convention: a coordination opportunity failed?

There is no specific coordination rule within the 2007 Lugano Convention, which is parallel to Regulation No. 44/2001 and binds EU and EFTA Member States. This is once more very surprising, because the Regulation mentions the Lugano Convention: the opportunity of a coordination should have been evident. The provisions referring to the Lugano Convention are very specific.

Article 4(4) states that the Convention is applicable if the parties have chosen a competent court, which sits in an EFTA (non-EU) Member State, except in disputes involving children under the age of 18[31]. It is not clear why the Regulation coordinates only this aspect of the determination of jurisdiction, and does not provide for a more general rule. Furthermore, the rule seems to have a scarce practical impact. It aims at avoiding a choice of court when children are involved, which is allowed under the Lugano Convention, prohibited according to Article 4(3)of the Regulation, but seems not able to perfectly reach the target. Indeed, EFTA Courts shall not apply the Regulation, and will not refuse jurisdiction because of Article 4(3) and (4). Therefore, the rule modifies the impact of the Lugano Convention unilaterally, that means only with respect to EU Member States' Courts, which can declare the choice of court null and void, and hear the case it notwithstanding.

Article 4(4) does not seem suitable in case of *lis pendens*. The second seized EU Member State Court cannot declare the choice of court null and void, if the first seized Court sits in an EFTA State. Indeed, the former must stay the proceeding until the latter verifies its jurisdiction (Article 27 of the Lugano Convention), to be established under the Lugano Convention rules. Most probably, the EFTA Court will consider the choice of court clause valid and accept jurisdiction. In the opposite case – the EU Member State Court seized as first – Article 4(4) is effective and can protect the weaker party. Indeed, this Court will declare the choice of court clause null and void and will accept jurisdiction.

The Lugano Convention is mentioned in Article 6 of the Regulation, too, on subsidiary jurisdiction. This is applicable insofar as neither EU Member States' or EFTA States' Courts have jurisdiction. The equivalence does not seem proper at a first sight, since it presumes a high level of mutual trust even between EU and EFTA States and Courts. This presumption is difficult to accept. Firstly, EFTA States do not take part to the common market; secondly, the Lugano Convention is still currently the sole Convention concluded between EU and EFTA, strongly inspired in its content by an EU Regulation on civil and judicial cooperation. Finally, the regulations on recognition and enforcement of foreign judgments differ considerably between the Lugano Convention and the Regulation, so that it is not the same for the parties whether an EU or an EFTA State Court hears the case: their jurisdiction is, more generally, not comparable. Nevertheless this assimilation is welcome. Indeed, it serves the need to respect the EFTA States' jurisdiction and the grounds of jurisdiction established by the Lugano Convention, to which the EU is contracting party, binding all the Member States. On the contrary, if an EFTA Court has jurisdiction according to the Lugano Convention, an EU Court assuming the subsidiary jurisdiction risks infringing the Convention itself.

Therefore, Article 6 – and only this– can be considered as for a special rule on the coordination between the Lugano Convention and the Regulation. Yet, it does not tackle with all the possible problems. One example is the pending actions, which has been one of the key issues that gave reasons to the CJEU to state the EU exclusive competence in opinion 1/03.

6. The other international conventions on maintenance obligations

Article 69(1) is a general clause on the coordination between the Regulation and other international conventions concluded by Member States before the entry into force of the Regulation. The provision safeguards expressly Article 307 of the TEC, currently Article 351 of the TFEU[32], so that

[31] Article 4(3) of the Regulation does not allow a choice of court in these cases.

[32] BASEDOW, *Specificité et coordination du droit international privé communautaire*, in *Droit international privé. Travaux du comité français de droit international privé*, Paris, 2005, p. 291 suggested the introduction of a compatibility clause in the regulations enacted in the field of the civil and judicial cooperation. Indeed, the automatic prevalence of the international conventions could be incompatible with former Article 65 of the TEC (currently Article 81 of the TFEU), because it would not

Member States shall eliminate incompatibilities between the Regulation and other international conventions to which they are bound, or, if the case might be, withdraw from them[33].

The coordination only appears easy. Article 51(1) of the 2007 Convention establishes a deconnection clause in favour of earlier instruments, to which Contracting States are parties. However, Article 51(4) grants primacy to the Regulation, it being an instrument of a REIO, Party to the Convention, «adopted after the conclusion of the Convention, on matters governed by the Convention». Article 19 of the Protocol does not distinguish between measures adopted before or after its adoption, and does not refer expressly to REIO's measures.

From these rules, it is clear that the Regulation should be applied in EU Member States' internal relationships, which could be easily inferred also from the primacy principle. The territorial and material scope of application of other conventions is difficult to detect, and might give rise to incompatibilities. Some distinctions can be drawn.

Concerning jurisdiction, the incompatibility should not stem from a mere difference of the grounds of jurisdictions established by the Regulation and the earlier convention(s)[34]. If it were so, the principle of safeguard of the previous international convention would be void. Nevertheless positive examples of possible incompatibilities are difficult to find out. Exorbitant jurisdictions, or a very limited list of grounds of jurisdiction in the convention in comparison with those established by the Regulation, would not affect Member States' relationships and the application of the Regulation. Although the EU Member State's Court assumes jurisdiction according to the international convention – infringing the Regulation – the judgment freely circulate within the EU, due to the absence of any monitoring on the jurisdiction on the merits at the *exequatur* stage.

A true conflict might arise in a quite complicated situation, where the earlier convention grants jurisdiction to both the EU Member State's and the third Country's Courts, and the former can accept jurisdiction according to the Regulation, too, but does not want to assume it for reasons established by the conventions (as for example, pending or related actions). The refusal of jurisdiction for reasons established by non-EU measures can amount to an infringement of EU Law, as decided in *Owusu*[35]; at the same time, the non-application of the ground of refusal of the jurisdiction can amount to a violation of the international convention. In this case, the EU Member State's Court is at a moot point, because it infringes either the Regulation, or the international convention.

Incompatibilities related to the cooperation among Authorities are also difficult to detect. Tasks should be not only different, but absolutely irreconcilable (as for example, a duty and a ban). In case of mere differences, the same problems delineated as for the 2007 Convention may arise[36].

Any inconsistency arises from the system of recognition and enforcement of foreign judgments. Indeed, the Regulation has a quite strict scope, it being applicable only if the judicial decision is issued in a Member State. Judgments coming from third Countries are subject to the international conventions system (if existing), or to national law (of the requested State).

The last issue regards the determination of the applicable law. Member States have a duty to renegotiate previous international conventions, while Article 19 of the Protocol safeguards all the international conventions concluded by Contracting States, notwithstanding the moment of their adoption. The provisions are incompatible and it is not clear which is the prevailing one, because the Regulation refers to the Protocol, which becomes consequently integral part of EU Law. It is submitted that Article 69(1) of the Regulation can be considered as a *lex specialis*, it being applicable only to EU Member States, therefore prevailing on the Protocol in its territorial scope of application. Therefore, Member States shall renegotiate or withdraw from previous international conventions. Indeed, in this field the incompatibility might be detected quite commonly, unless the rules of both the international

grant the compatibility of the rules applicable in the Member States. Indeed, some would apply the international conventions, other the regulations without having the possibility to accede to international conventions in force due to the EU exclusive competence.

[33] CJEU 4 July 2000, case C-84/98, *Commission v. Portugal*, *ECR* I-5215.

[34] Article 307 TEC represents the principle of the respect of the previous international conventions (CJEU 3 March 2009, case C-205/06, *Commission v. Austria*, *ECR* I-1301, para. 33; CJEU 3 March 2009, case C-249/06, *Commission V. Sweden*, *ECR* I-1335, para. 34).

[35] CJEU 1 March 2005, case C-281/02, *Owusu*, *ECR* I-1383.

[36] See *supra*, para. 2.

convention and the Regulation were the same, and were interpreted and applied in the same way. The individuation of different applicable laws creates inconsistencies under both the private international law and the substantive aspects perspectives[37].

The duty to modify earlier international convention might affect third Countries, Parties to the Convention. The cooperation of third Countries is therefore necessary, but at the same time these are not under any duty to start new negotiations. Consequently, it might prove impossible for Member States to keep on taking part to the international convention, since the only possible further step is the withdrawal. Furthermore, the EU has acquired exclusive competence in the field of maintenance obligations, so that Member States cannot conclude any future international convention with third Countries. The sole possibility is a request of authorisation to conclude an international agreement, whose conditions and procedure are regulated by Regulation No. 664/2009[38]. This instrument has not been successful: currently, any Member State has presented requests.

7. Final remarks

The Regulation is particularly remarkable for the number of provisions referring to other EU or international measures in the same field. Therefore, at first sight it seems to coordinate properly its relationships with other international instruments and to define precisely its scope of application. Nevertheless, the in-depth examination of these rules leaves the commentator uncertain. The few rules on spatial coordination are unclear, leaving Member States with burdensome duties to adapt their international relationships according to EU Law, and their Courts with difficult interpretative tasks. In some cases, it is not even immediately clear which is the applicable instrument, the Regulation or an international Convention.

This is not a problem only for practitioners, which are legal experts, but for the parties, too. A complicated and not clearly defined system of sources of the law risks undermining legal predictability and legal certainty, which are of the utmost value in a field such as maintenance obligations, where the protection of an economical weaker party might be at stake.

The sole and true rule on international coordination is the very well-known Article 351 of the TFEU, which remain the basic column of the international relationships for both Member States and the EU.

[37] The interpretation and the application of the rule are therefore of the utmost importance, in order to grant uniformity within the Member States bound: LAGARDE, *Les interprétations divergentes d'une loi uniforme donnent-elles lieu à un conflit de lois? (à propos de l'arrêt HOCKE de la Section commerciale du 4 mars 1963*, in *Revue critique de droit international privé*, 1964, p. 235; BAUER, *Les traités et les règles de droit international privé matériel*, in *Revue critique de droit international privé*, 1966, p. 559; LAGARDE, *Le champ d'application dans l'espace des règles uniformes de droit privé matériel*, in *Études de droit contemporain*, Centre français de droit comparé et Centre national de la recherche scientifique (ed), Paris, 1970, p. 155; BATIFFOL, *Le pluralisme de méthodes en droit international privé*, in *Collected Courses of the Hague Academy of international law*, 1973, t. 139, p. 110; DEBY-GERARD, *Le rôle de la régle de conflit dans le réglement des rapports internationaux*, Paris, 1973; BARIATTI, *L'interpretazione delle Convenzioni internazionali di diritto uniforme*, Padova, 1986.

[38] Council Regulation (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations, *OJ* L 200, 31.7.2009, p. 46-51; see further: BORRÁS, *La celebracion de convenios internacionales de derecho internacional privado entre Estatos membro de la Unione europea y terceros Estados*, in *Anuario español de derecho internacional privado*, 2009, p. 83; MARINO, *L'esercizio delle competenze esterne comunitarie e la cooperazione giudiziaria in materia civile*, in *Diritto comunitario e degli scambi internazionali*, 2010, p. 319; KUIPERS, *Regulations (EC) Nos 662/2009 and 664/2009: Can Exclusivity Be Successfully Reconcile with Flexibility?*, in *The external Dimension of EU Private International Law After Opinion 1/13*, Franzina (ed), Cambridge, Antwerp, Portland, 2017, p. 149).