

# Catching-up with the EU Maintenance Regulation: are England et al *“Little Englanders”*?

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# Catching-up with the EU Maintenance Reg.: are England et al “*Little Englanders*”?

Recovery of Maintenance in the  
European Union and Worldwide  
Heidelberg Conference 5 – 8 March 2013

## Synopsis of presentation:

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2. Why? Starting-point/motivations
3. Brave new world/*toile blanche*?
4. Core principles of EMR
5. Concepts/categorisation
6. Structure
7. Procedure for recognition and enforcement, including  
“defences” to incoming orders/applications
8. In force and transitional provisions
9. Implications for (“little ol’ ”) England
10. Perspective of the euro-political juridical debate

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# EMR CHAPTER HEADINGS

Recovery of Maintenance in the  
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I	Scope + definitions	Articles 1-2
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# 1. Big Picture before small print

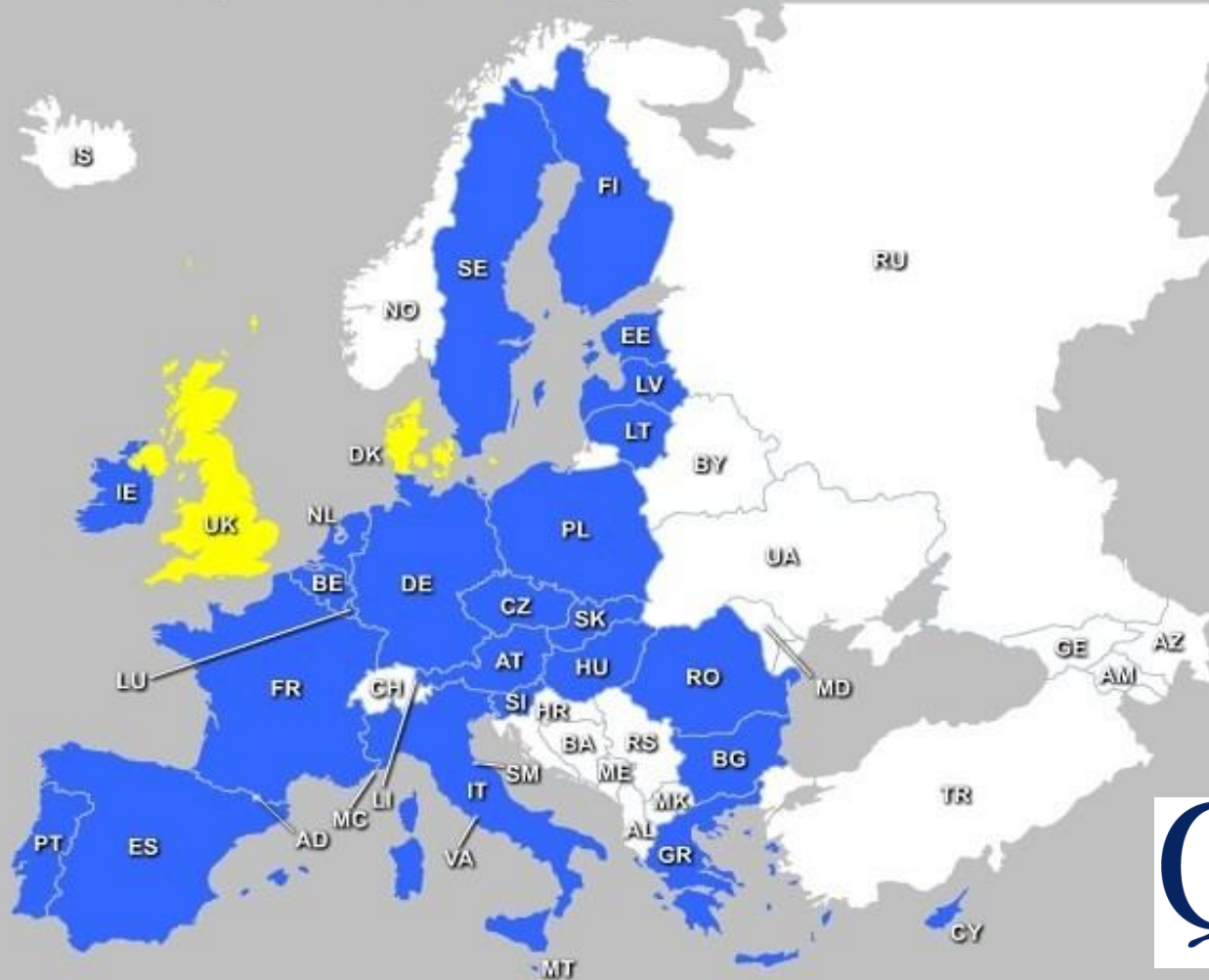
- a. In force since 18/6/11 (Saturday!): cp 21/6/12 (1259/2010: R.III)
- b. “Council Regulation (EC) No. 4/2009 of 18 Dec. 2008”
- c. “*on ... in matters relating to maintenance obligations*”:
  - i) jurisdiction
  - ii) applicable law
  - iii) recognition and enforcement of decisions
  - iv) co-operation – ie. judicial and administrative
- d. Supersedes Brussels I: EMR recital (44) + A.68(1) - except for B.I proceedings underway on 18/6/11: A.75
- e. All 27 EU states in, UK/Den in special (2<sup>nd</sup>!) class

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# 1. Big Picture: “doing the math”!

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Europe under the EC Regulation 4/2009



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## 2. Why? Starting-point/motivations

- a. national/international enforcement
  - i) crucial but disproportionately expensive
  - ii) Hague Mtncce *Convention* 2007 + EMR
  - iii) HMC pathfinder/global but core is child mtce
  - iv) HMC ratification will take years (??2013)
  - v) “reverse subsidiarity”?
- b. problem/aim: *exequatur*/abolition cp B.I A.38
- c. lofty/genuine ideal in EMR recital (1):-

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## 2. Why? continued: EMR recital (1)

*“The community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. For the gradual development of such an area, the Community is to adopt, among others, measures relating to judicial cooperation in civil matters having cross-border implications, in so far as necessary for the proper functioning of the internal market.”*

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# 3. Brave new world */toile blanche?*

- EMR replaces B.I: purer maintenance-only
- but otherwise and also new:
  - abolishes *exequatur* (well, almost!): A.17/26, ie. direct enforceability; no declarations of enforceability (exc. UK/Dk)
  - Central Authorities: help and info. cp. A.51, A.53 (including pre-action) + A.61
  - *Free* Legal Aid for Central Authority child maintenance applications for U-21s: A.46

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## 4. Core principles of EMR

- a) enforcement by recipient state: A.41
- b) no review as to substance: A.42
- c) Access to Justice + Right to Legal Aid A.44-47:  
incl free re Central Authority U-21s
- d) maintenance not status: A.22
- e) EMR takes precedence over HMC in EU:  
A.69(2)
- f) nationality/domicile UK/RoI: A.2(3)

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## 5. Concepts/categorisation

- a) getting an order/enforcing it: out-/ingoing
- b) not just *orders*, but also:
  - “court decisions” A.2(1)(1)
  - “court settlements” A.2(1)(2)
  - “authentic instruments” A.2(3) + A.48: see below
  - “court” incl. administrative authorities: A.2(2)  
+ An. X; English CMEC arrears only (because  
assessment ceases if non-resident)
- c) not just spouses/children: R.(11)/A.1; but also *other*  
relationships, including not recognised in local law
- d) “maintenance obligation” not defined: *ibid.*

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## 5. Concepts continued: breadth of “maintenance” + EMR Recital (11)

*“The scope of this Regulation should cover all maintenance obligations arising from a family relationship, parentage, marriage or affinity, in order to guarantee equal treatment of all maintenance creditors. For the purposes of this Regulation, the term ‘maintenance obligation’ should be interpreted autonomously.”*

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# 5. Concepts continued: “Maintenance obligation”

- not defined; but analogy with B.I cases
- *van den Boogaard v Laumen* (Case C-220/95) [1997]
- Spanish *Moore* [2007] EWCA Civ 361, [2007] 2FLR 339 per Thorpe LJ (Lawrence Collins LJ) at 355, para 80
- purpose/needs/support = maintenance
- income *or capital*; label not decisive
- nb. element of capital surplus-to-need: German Federal Court of Appeal (XII ZB 12/05)+DJ Bassett-Cross

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# 5. Concepts continued:

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## “authentic instruments”

- Article 2(1)(3): *“(a) a document ... relating to maintenance obligations which has been formally drawn up or registered as an authentic instrument in the Member State of origin...”*
- Article 48(1): *“Court settlements and authentic instruments which are enforceable in the Member State of origin shall be recognised ... and enforceable ... in the same way as decisions ...”*
- no requirement for legal advice, disclosure etc. (?cp. **Radmacher** [2010] UKSC 42, [2010] 2FLR 1900!)
- implications for pre-nups/maintenance-waivers, incoming and outgoing – see 9 below

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## 6. Structure/mindset of EMR

- a) getting order must be from a court with jurisdiction: A.3 and jurisdiction-choice below
- b) seizing and protective measures as per B.II r
- c) shoot first: *lis pendens* as per B.II r: A.12; but
- d) “related action” discretion: A.13 (= B.1 A.28)
- e) enforcement via Central Authority: A.51/56; + D-I-Yourself
- f) 2-speed recognition/enforcement (UK+Dk):
  - i) Protocol/non-protocol states: applicable law A.15/16
  - ii) politico-juridical compromise: applicable law x 2!
  - iii) creditor habitual resid. vs. spousal last common

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# 6. Structure continued: **jurisdiction** **for outgoing orders A.3-8**

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a) choice of:

- i) Habitual Residence of Defendant (“D”) *or* Creditor (“C”); *or*
- ii) Ancillary to status/children proceedings, *unless* jurisdiction based solely on single nationality/domicile; *or*
- iii) where D has agreed to jurisdiction: A.5; *or*
- iv) parties’ agreed EU/Lugano court (A.4), *provided*:
  - 1. agreement in writing and *not* re child under-18;
  - 2. either party hab res/national/dom, or, if spouses, matrimonial court or last common Hab Res 1 yr

b) In default, common nationality/domicile (eg. no residence/procs); in emergency, “*forum necessitatis*” (eg. TP residence + civil war)

c) Where Creditor Hab Res in EU or HMC state, variation application by Defendant must be in same state unless otherwise agreed or HMC state or decision frustrated: A.8 + nb. A. 2(10+11)

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# 7. Procedure for recognition and enforcement

- available applications: **A.56** + Annex VI/VII
- pro-forma contents + time limits: A.57/58 - sanctions?
- required documents: A.20
- Central Authority access to information on parties: A.61
- Data protection: A.62/63
- Member States' duties of information re:
  - a) laws, procedure, Legal Aid + Central Authorities: A.70
  - b) contact details for courts + authorities: A.71

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# 7. Procedure continued: available applications A.56

- A.56(1) creditor applications:

Recognition, recognition and decl/enforceability, enforcement, “*establishment of a decision*” in the foreign state, variation (“*modification*”)

- A.56(2) debtor applications:

Recognition of a decision leading to suspension or limiting enforcement, variation of decision given in the requested state or another state

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# 7. Procedure continued: “Defences” to incoming orders/applications – English Mags Ct.!

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NB. abolition of *exequatur* and no review as to substance; + **Civil  
Jurisdiction and Judgments (Mtce) Regs 2011**

+ FPR PD 34C (w/e/f 31/10/11) + Mags Ct Rules 1981 59A/B

a) In Eng (from abroad, exc. Dk): A.19/21 - apps available to D:

- i) review in foreign state, if D not served/force majeure + no delay:  
45 days and if granted, null + void
- ii) stop in England, for expiry of limitation (“prescription”) for  
enforcement, either under Engl. or foreign law, whichever longer
- iii) stop in England, enforcement irreconcilable with EU/other  
recognisable decision or pending A.19 review abroad: A.21(3)  
complaint to Mags Ct.: CJJMR §4 and Sch 1 §4(10)  
- otherwise pay up “as pleasantly as possible”!

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# 7. Procedure continued: “Defences” to incoming orders/applications – English Magistrates Court!

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- b) Abroad (on receipt of UK/Danish order) *or* in England on receipt of Dk: A.23-35 (+ in England CJJMR Sch.1 Pt.3)
- i) grounds for refusal of recognition (A.24): public policy, lack of (time for) appearance/defence, irreconcilable decisions
  - ii) stay *if* there is stay pending Engl./Danish appeal: A.25
  - iii) declaration of enforceability without review or D involvement (A.27- 30 cp. CJJMR 2011 + FPR 34.28A); *then* appeal as per A.31-35 to County Court: CJJMR Sch 1 §7(a)

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# 8. In force and transitional provisions: A.75/76

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- Selected administrative start dates 18/9/10
- Otherwise 18/6/11: EU (alone!) has signed Hague Protocol – nb. A.76 protocol trigger
- EMR Chapter IV s.2+3 (non-protocol states) apply to:
  - a) decisions given pre-18/6/11 for which declaration of enforceability sought thereafter; and
  - b) decisions *on/after* 18/6/11 in proceedings *pre-*18/6/11 which could have been, but were not, the subject of B.1 recognition/enforcement proceedings –  
Corrigenda: Official Journal of the EU 18/5/11

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# 9. Implications for (little ol') England

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- Pre-nups - authenticated instruments (but cp B.I A.57 and B.II R.22):
  - a) incoming notarised pre-nups/maintenance-waivers?
  - b) consider authenticating your outgoing pre-nups: notary public and Apostille +? consular legalisation from relevant foreign embassy/-ies
  - c) agreements to fix divorce maintenance
- Part III MFPA 1984 – foreign maintenance orders
- Needs vs. sharing: separating-out financial remedies orders
- Big leap ahead? When will England tire of being on the receiving end of other peoples' systems and, instead, engage proactively in the substantive Euro-debate?

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# 10. Perspective of the euro- political juridical debate

- Euro/Civil-law vs. world of (ex-colonial) common law
- English law state of flux/calls for reform
- Applicable law/MPRs/Franco-German bilateral/?Trojan Horse!
- Mixing/separating maintenance + other financial remedies

*Bon voyage!*

Questions?

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