Family maintenance and multi-speed integration – a Norwegian perspective

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1. Family maintenance and multi-level regulation

Globalisation, free movement of labour and migration impact regulations on judicial cooperation and cross-border proceedings in family matters, including family maintenance.[1] Since the turn of the millennium, European Union (EU) (procedural) family law has emerged as a field of law. The EU Maintenance Regulation[2] was drafted concurrently with the 2007 Hague Convention on maintenance,[3] creating a direct link between EU law and international law. Until then, the Brussels regime[4] on the jurisdiction and the recognition and enforcement of civil and commercial matters had a few provisions regulating family mediation. So did its parallel instrument, the Lugano Convention,[5] which extends the free movement rulings to the entire single market, including the EFTA states. [6] Despite the fact that the Agreement on the European Economic Area (EEA) enlarges the single market and the four freedoms to states outside the EU, the development of family law for the EEA or European Free Trade Association (EFTA) has stagnated. International law and EU law on family maintenance have taken a leap forward and formed a connection. Simultaneously, the connection between EU law and EFTA law has weakened, as the Treaty of Amsterdam[7] has developed the competencies of the EU while EFTA law has maintained the status quo.

Currently, family maintenance is regulated on five levels: (1) on an international level through the Hague regime, (2) on a EU level, (3) on a EFTA level, (4) on a regional level and, finally, (5) on a

[1] Child maintenance was one of the first areas regulated by the Hague Conference on Private International Law in the 1956 Convention on the Law Applicable to Maintenance Obligations and the 1958 Convention on Recognition and Enforcement of Maintenance Obligations. Further, the New York Convention on the Recovery Abroad of Maintenance of 1956 underline the importance of international cooperation in the field. See Volker Lipp in this volume for more detailed information.

[2] Council Regulation (EC) 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Maintenance Regulation) [2009] OJ L7/1.

[3] The Convention of 23 November 2007 on the International Recovery of Child Support and other Forms of Family Maintenance.

[4] The Brussels regime is used to refer collectively to the Convention on jurisdiction and the enforcement of civil and commercial matters of 27 September 1968 (the Brussels Convention); Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) [2001] OJ L12/1; and European Parliament and Council Regulation (EC) 1215/2012 on jurisdiction and the recognition and enforcement in civil and commercial matters (Brussels I bis Regulation) [2012] OJ L351/1.

[5] Convention of 13 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention) [2007] OJ L 339/3. The 2007 Lugano Convention repealed the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 19 September 1988 (the 1988 Lugano Convention).

[6] The term EFTA is used to demonstrate that the Lugano Convention extends beyond the EEA Agreement. Despite the close connection between the EEA Agreement and the Lugano Convention, Liechtenstein is not a party to the convention, but Switzerland is.

[7] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340/1.

national level. The three first levels of law are interconnected and partially overlapping. However, a multi-level approach may be beneficial for regulating family maintenance in a multi-speed Europe. A multi-level, multi-speed approach may also increase complexity and opacity, creating an intricate web of regulation.

This contribution examines the interplay between instruments at different levels and discusses whether the relationships are constructive or disruptive. Several levels of regulation results in complexity, yet the levels are complementary, filling lacunae. This text explores how different levels of law could be used to enhance integration of civil procedure, including the advantages and disadvantages of each level. The focus is on managing multi-speed integration, where some countries are part of, or closely tied to, the single market, but do not participate in the judicial cooperation.

The Nordic countries will be discussed, in particular, to analyse the impact of EU membership and the EFTA law on cross-border maintenance. Nordic regional law will also be discussed in the context of a multi-level approach to regulation. This contribution concentrates primarily on jurisdiction and enforcement, but will also discuss the scope of application and administrative cooperation when relevant. The contents of each instrument will not be discussed in detail, since the aim is to discuss the interplay of the instruments and role of the instruments in multi-speed integration, not the instruments themselves.

First, some introductory remarks on family maintenance law will be served in part 2. Parts 3, 4 and 5 discuss and compare the regulation of jurisdiction and enforcement in the Lugano Convention and the 2007 Hague Convention from an EFTA law perspective. The choice between the conventions is also examined. Thereafter, in parts 6 and 7, the relationship between the instruments is discussed. Does the multi-level approach lead to coherence or complexity? Here, the Nordic regional level is introduced. The final part discusses the outlooks of multi-level regulation of family maintenance.

2. Cross-border family maintenance

Defining child and spousal maintenance is arduous. Family law maintenance is based on family law relationships, parentage, marriage or affinity. Depending on the country, other family relationships, such as cohabitation or same-sex partnerships, may also establish a duty to maintenance.[8] In some countries, maintenance for children above the age of 18 or 20 is rare, in others parents are expected to support their children until they finish university. Countries with a highly individualised welfare state tend to limit family maintenance, whereas countries with a family-based welfare system extend maintenance. Family maintenance is delimited from maintenance obligations based on *inter alia* inheritance law and tort law. Maintenance can be paid in several ways: monthly, annually, as a lump sum, etc., and it can even be part of the division of marital property. A single transaction may include both division of marital property and maintenance. The Lugano and Hague Conventions escape the problem by not defining maintenance or family maintenance.

Family law, including family maintenance, is deeply embedded in national culture and society. Differences concerning *inter alia* the status of cohabitation and same-sex partnerships result in hesitance towards recognising foreign maintenance decisions. Yet, family maintenance is often pivotal for the children and parents concerned. Globalisation and the single European market increases the flow of people and consequently the need for uniform regulation ensuring efficient

[8] See *inter alia* Andrea Bonomi, *Explanatory Report Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* (Hague Conference on Private International Law 2007) 27; Lara Walker, *Maintenance and Child Support in Private International Law* (Hart Publishing 2015) 38–39.

enforcement of maintenance obligations.[9] In the process, both liberal, 'divorce friendly', countries and conservative countries must relinquish some of their principles.

Maintenance is decided in different settings and processes. A maintenance claim is often ancillary to divorce or child custody proceedings. It may be agreed upon in consensual proceedings or proceedings at administrative agencies. In many countries, such as the Nordic countries, a public body will pay (some) maintenance in case the debtor does not pay or pays late. The public body recovers the maintenance from the original debtor. Thus, the public body has a direct interest in having rights as a party in court and enforcement proceedings. Because maintenance often covers long periods, proceedings on amendment of maintenance are commonplace.

As for family law, in general, the parties in maintenance cases are individual citizens, often with limited information of their legal rights and limited resources to enforce those rights. In cases involving maintenance to the child (and its residential parent), the best interest of the child requires expeditious proceedings. Due to the limited knowledge and resources of the parties and the pivotal role of family maintenance, international judicial cooperation proceeds generally through central authorities. Central authorities provide information to the parties on the documents and forms needed, receive and process applications and exchange information. They reduce cost for parties and ensure specialisation in cross-border family matters. The disadvantage of central authorities is two extra steps in communication, since the national authorities communicate with the national central authority instead of directly with each other.

Although family law matters are often intertwined, the regulation of these matters is fragmented. Marriage, separation, divorce and matrimonial property is regulated in three different Hague Conventions,[10] maintenance in the 2007 Hague Convention and its Protocol and predecessors,[11] and parental responsibility in the 1996 Hague Convention.[12] Although questions on judicial cooperation and applicable law are interconnected, only the 1996 Hague Convention on parental responsibility have achieved the goal of regulating both aspects in a single instrument. The 2007 Hague Convention on maintenance has the rules of applicable law in a separate protocol.[13]

Since the turn of the millennium, EU family law has evolved and expanded rapidly. The Brussels II (bis) Regulation[14] on matrimonial matters and parental responsibility extended the EU regime of jurisdiction, recognition and enforcement to family law in 2001, and, in 2009, the Maintenance

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[9] David Bradley, 'A Family Law for Europe? Sovereignty, Political Economy and Legitimation´ in Katharina Boele-Woelki (ed) *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia 2003); Erik Jayme, 'Cultural Dimensions of Maintenance Law from a Private Internaional Law Perspective' in Paul Beaumont and others (eds), *The Recovery of Maintenance in the EU and Worldwide* (Hart 2014); Walker (n 8) 15–36.

[10] The 1970 Convention on the Recognition of Divorces and Legal Separations, the 1978 Convention on the Law Applicable to Matrimonial Property Regimes and the 1978 Convention on Celebration and Recognition of the Validity of Marriages.

[11] Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

[12] 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children.

[13] For the background of the 2007 Hague Convention, see Paul Beaumont, 'International Family Law in Europe–the Maintenance Project, the Hague conference and the EC: a triumph of reverse subsidiarity' (2009) The Rabel Journal of Comparative and International Private Law 509 and Volker Lipp, in this volume.

[14] Council Regulation (EC) 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses [2000] OJ L 160/19 was repealed by Council Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L338/1. The latter entered into force 1 August 2004.

Regulation was enacted to regulate cross-border family maintenance. The Rome (divorce) III and Rome IV (Succession) Regulations followed suite.[15] With the exception or Rome III Regulation, these regulations order procedural cooperation, administrative cooperation and choice of law. The close connection between private international law and procedural law in these regulations should not be overemphasised. The Brussels I (bis) Regulation is connected to Rome Regulations[16] on applicable law and the European Court of Justice (ECJ) interprets the Brussels regime in light of the Rome regime.

3. The Lugano Convention and family maintenance

3.1 Introductory remarks on the Lugano Convention

The 1988 Lugano Convention[17] was established as a parallel to the 1968 Brussels Convention,[18] to create a single, coherent regulation of jurisdiction, recognition and enforcement in civil matters in the European Communities and the EFTA.[19] The single market requires uniform rules to ensure that the common substantial regulation can be enforced on an equal basis. Thus, the Lugano Convention is a necessary extension of the EEA Agreement, as it establishes free movement of civil judgments. The rules are to be interpreted uniformly with the Brussels regime; thus, the case law of the ECJ is key source for interpretation of the Convention.

The Brussels I Regulation repealed the Brussels Convention in 2001. The Lugano Convention was revised in 2007 to re-establish parallelism. Since the Maintenance Regulation and the Brussels I bis Regulation entered into force, the Lugano Convention and the Brussels I bis Regulation are not fully parallel. The revisions of EU instruments have so far not sparked a process for revision of the Lugano Convention. Consequently, some of the rules, *inter alia*, family maintenance, differ.[20]

The Lugano Convention is applicable to civil and commercial law (Art 1.1), but family matters are not covered, Art 1 (2)(a). Maintenance claims are, however, included almost regardless of whether they arise from family relations or other types of maintenance. The main demarcation is between family and inheritance law matters, on the one hand, and maintenance, on the other hand, while

[15] Council Regulation (EU) 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L 343/10; Regulation (EU) 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201/107.

[16] European Parliament and Council Regulation (EC) 593/2008 on the law applicable to contractual obligations [2008] OJ L177/6; European Parliament and Council Regulation (EC) 864/2007 on the law applicable to non-contractual obligations [2007] OJ L199/40.

[17] Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 19 September 1988 (1988 Lugano Convention).

[18] Convention on jurisdiction and the enforcement of civil and commercial matters of 27 September 1968.

[19] Liechtenstein is not party to the Convention despite its EEA membership. Switzerland is a party to the Convention through its membership in EFTA. However, Switzerland is not party to the EEA Agreement.

[20] For a short background on the 2007 Lugano Convention, see e.g. Fausto Pocar, 'The New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters' (2008) 10 *Yearbook of Private International Law* 1; Despina Mavromati and Rodrigo Rodriguez, 'The Revised Lugano Convention from a Swiss Perspective' (2009) 20 *European Business Law Review* 579.

differentiating among maintenance obligations is normally of little relevance.[21] Family maintenance covers cohabitation and same-sex relationships.[22]

3.2 Jurisdiction and enforcement of maintenance

In addition to the general rule in Art 2 that a person shall be sued in the state of domicile, article 5 (2) of the Lugano Convention gives alternative fora for maintenance matters. To enhance the positions of the maintenance creditor as the weaker party, Art 5 (2) allows the creditor to raise the claim at his or her domicile or habitual residence (*forum actoris).* A court hearing a divorce or child custody case, may hear an ancillary maintenance claim when it has jurisdiction according to its own law.[23] Jurisdiction in proceedings on amendment of maintenance is independent of the first proceedings. Thus, the court that first ruled on maintenance does not have jurisdiction in a subsequent case unless the defendant is domiciled in the state or the creditor is domiciled or habitually resident in that state, and the national rules point to that court. The Convention is, in principle, against rules where a court retains jurisdiction for subsequent cases, even when the rule protects the weaker party.[24] The general rule in Art 6 on multiple defendants and counterclaims is applicable to maintenance, as well. Article 23 on choice of court clauses applies fully to maintenance cases, giving the maintenance creditor as the weaker party limited protection from draconian clauses. Thus, a well-informed maintenance debtor may easily avoid the alternative courts.[25]

Although the Lugano Convention is limited to civil and commercial cases, the ECJ found that it is *prima facie* applicable also when a public agency seeks to recover maintenance it has paid on behalf of the original debtor. This applies only as long as the claim for reimbursement is based on ordinary (private) law, and not on a situation where 'the legislature conferred on the public body a prerogative of its own' and the amount is the same as the obligation under statutory (private) law.[26] The public agency may not use the alternative forum provided in Art 5 (2), because the rationale of the alternative forum is to protect the weaker party, the maintenance creditor.[27] It is assumed that the Convention is applicable when a private party, for instance a step-parent, claims reimbursement of maintenance paid. The private party is assumed to be allowed to benefit from the alternative *fora* enlisted in Art 5 (2).[28] The rules on reimbursement exemplify the dynamic element in the Lugano Convention and the role of the ECJ in providing the elasticity.

The Lugano Convention does not allow use of central authorities; all recognition and enforcement is by direct application to the competent court. Recognition and enforcement is under the same rules

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[21] Peter Mankowski, 'Article 5' in Ulrich Magnus and Peter Mankowski (eds), *Brussels I Regulation*, 2 nd. rev. edn (Sellier European Law Publishers 2012) 215–219.

[22] It is assumed that the Convention classifies maintenance obligations arising from co-habitation as based in family law. See Mankowski (n 21) 217; Wolfgang Hau, 'Verfahren mit Auslandsbezug' in Hanns Prütting and Tobias Helms (eds), *FamFG Kommentar mit FamGKG* (Verlag Dr. Otto Schmidt 2013) 967.

[23] When maintenance is ancillary to divorce or child custody proceedings, the court does not become competent for maintenance if it has assumed jurisdiction based solely on the nationality of one of the parties.

[24] Paul Oberhammer, 'Art 5' in Felix Dasser and Paul Oberhammer (eds), *Lugano-Übereinkommen (LugÜ)*, 2 edn (Stämpfli Verlag 2011) 154.

[25] Matthias Abendroth, 'Choice of Court in Matters Relating to Maintenance Obligations' in Paul Beaumont and others (eds), *The Recovery of Maintenance in the EU and Worldwide* (Hart 2014).

[26] Case C-271/00 *Steenbergen v Baten* [2002] ECLI:EU:C:2002:656, paras 32–37.

[27] Case C-433/01 *Freistaat Bayern v Jan Blidjenstein* [2004] ECLI:EU:C:2004:21, para 30.

[28] Hau 'Verfahren mit Auslandsbezug' (n 22) 1155.

as other civil judgments.[29] Article 57 (2) extends the scope of enforceable rulings to include maintenance obligations concluded with or authenticated by administrative authorities. The latter exception is important, because in many countries, administrative authorities have important roles in making decisions on maintenance.

3.3 The Lugano Convention and Maintenance Regulation

After the Maintenance Regulation entered into force in June 2011, the parallelism between the Lugano Convention and the Brussels I Regulation was broken for family law maintenance. The Maintenance Regulation does not have a counterpart in EFTA law, and the rules on maintenance were amended in the Brussels I bis Regulation to cover primarily non-family maintenance. The loss of parallelism results in different rules in the EU and in the EFTA states. Because the differences are subtle, one must be vigilant to spot the differences and not take similarity for granted. The relationship between the two instruments has been discussed. Some commentators maintain that the Maintenance Regulation cannot be classified as a successor of the Brussels I Regulation, but an instrument regulating particular matters.[30] Others find it clear that the Maintenance Regulation is a successor, and that the relationship between the instruments is clear.[31] If the Regulation is a successor, Art 64 of the Lugano Convention regulates the relationship between the instruments, otherwise Protocol 3 regulates it. Ideally, a separate Protocol to the Lugano Convention should settle the matter.[32]

The Maintenance Regulation passes on the rules of the Brussels I Regulation and adjusts them to family maintenance. The rules on choice of court agreements (art 4), *forum necessitatis,* (art 7) and detailed rules on public bodies as creditors (art 46) are examples of such adjustments. Enforcement is expedited as the *exequatur* and most public policy and procedural defences have been abolished.[33] Some differences have limited practical consequences, such as use of habitual residence instead of domicile.

The long-term consequence of lost parallelism is lack of development of the Lugano Convention. As a parallel instrument to the Brussels I (bis) Regulation, the Lugano Convention relies in practice on the ECJ for authoritative interpretation and development. Although not formally binding, case law on the Brussels I (bis) Regulation ensures equal application and development of the law. Thus, the development of EFTA maintenance law has halted. Case law on the Maintenance Regulation is not

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[29] Additionally, art 50 has special rules for legal aid when the maintenance decision has been given by an administrative authority in Denmark, Iceland or Norway. Legal aid is not awarded for proceedings before the administrative authority, and, without the exception, the creditor would not qualify for legal aid at the enforcement stage.

[30] See e.g. Jolante Kren Kostkiewicz and Michaela Eichenberger, 'International maintenance law in legal relations between Switzerland and the EU' [2015] *Comp L Rev* 13 and Tanja Domej, 'art 64' in Felix Dasser and Paul Oberhammer (eds), *Lugano-Übereinkommen* (Stämpfli Verlag 2011) 943–944.

[31] Wolfgang Hau, 'Das Zuständigkeitssystem der Europäischen Unterhaltsverordnung - Überlegungen aus der Perspektive des deutschen Rechts' in Dagmar Coester-Waltjen, Volker Lipp, Eva Schumann and Barbara Veit (eds) *Europäisches Unterhaltsrecht* (Universitätsverlag Göttingen 2010).

[32] For a discussion on the choice between the Brussels I (bis) Regulation and the Lugano Convention, see e.g. Axel Buhr, *Europäischer Justizraum und revidiertes Lugano-Übereinkommen* (Stämpfli Verlag 2010), p 394–396; Andreas Furrer, 'The Brussels I Review Proposal: Challenges for the Lugano Convention?' in Eva Lein (ed), *The Brussels I Review Proposal Uncovered* (The British Institute of International and Comparative Law 2012) 174–176 and Trevor C. Hartley, *Choice-of-court agreements under the European and international instruments : the revised Brussels I regulation, the Lugano Convention and the Hague Convention* (OUP 2013) 107–108.

[33] Ilaria Viarengo, 'Enforcement of Maintenance Decisions in the EU: *Requiem* for Public Policy?' in Paul Beaumont and others (eds), *The Recovery of Maintenance in the EU and Worldwide* (Hart 2014).

directly applicable for the Lugano Convention and does not have persuasive authority,[34] but could serve as a non-binding source of arguments.

4. The 2007 Hague Convention on Family Maintenance

4.1 Scope of the 2007 Hague Convention

The 2007 Hague Convention on family maintenance regulates recognition, enforcement and administrative cooperation, but not jurisdiction. Hence, it partially overlaps with the Lugano Convention. By the end of 2018, it has entered into force in almost throughout Europe, and Brazil, Honduras and the United States of America. The scope of application of the 2007 Hague Convention is vague. The Convention does not define family maintenance. States may limit the scope of application to children under the age of 18 and spousal maintenance in connection with it, or to expand it to maintenance obligations based on family relationships (arts 62 and 63). It is not entirely clear whether preliminary or ancillary issues regulated in the same decision as the maintenance obligation itself are also included in the scope of application.[35]

The Hague Convention accepts public bodies as creditors and applicants when these are acting in place of an individual as a maintenance creditor or to reimburse maintenance the public body has paid to an individual creditor, art 36. Maintenance decisions by administrative authorities are enforceable under the Convention. The optional Protocol to the 2007 Hague Convention regulates the applicable law and helps to create coherent regulation of private international law and international procedural law.

The international character of the 2007 Hague Convention is an asset and an impediment. The scope of application is not standard: some countries limit the Convention to child maintenance for children under the age of 18 and spousal support in connection with it, others extend it to cover all types of family maintenance. Each state determines whether cohabitation and same-sex partnerships are considered as family relations.[36] Vigilance is required to assess whether the Convention is applicable to the maintenance in question in all involved countries.

4.2 Jurisdictional rules in the Hague Convention

Although the 2007 Hague Convention does not regulate jurisdiction directly, recognition and enforcement depends on the grounds on which the issuing court seized jurisdiction. Rulings and decisions from exorbitant courts and authorities do not deserve to be recognised and enforced. To ensure a common understanding of when a court or authority has assumed jurisdiction rightly, jurisdiction must be regulated at least indirectly by outlining some principles for acceptable or non-acceptable grounds for jurisdiction (*competence indirecte).*

Article 20 enlists acceptable bases for jurisdiction. Contracting states may make reservations on some grounds of jurisdiction, thus, the list may not be applicable in all states.[37] States may recognise rulings based on other rules for jurisdiction as well. The principles lead to approximation, if not full

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[34] When the Brussels regime and the Lugano Convention are parallel, case law of the ECJ has persuasive authority, see Tanja Domej, 'Das EU-Zivilprozessrecht und die Schweiz' in *Jahrbuch Junger Zivilrechtswissenschaftler 2009: Europäische Methodik: Konvergenz und Diskkrepanz europäischen und nationalen Privatrechts* (Richard Boorberg Verlag 2009) 405–432.

[35] Walker (n 8) 47–51; Beaumont (n 13) 528.

[36] Bonomi (n 8) 27.

[37] Algeria Borrás and Jennifer Degeling, *Explanatory Report. Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (Hague Conference on Private International Law 2013) 159–167.

harmonisation of jurisdiction, because contracting states may wish to align their national rules with the Convention.

Article 18 regulates some aspects of jurisdiction for modifications of maintenance decisions. When a court or an authority in the state of habitual residence of the creditor has made the first decision on maintenance, that state will retain jurisdiction on modification provided that the creditor still lives there. There are exceptions from the rule when the parties have an agreement on jurisdiction, where the creditor submits to the other court or when it is not possible to obtain a decision that is enforceable in practice from the said court. The rationale is to avoid change of jurisdiction as a surprise and to the detriment of the creditor.[38]

Articles 18 and 20 illustrate the advantage of holistic regulation of jurisdiction, recognition and enforcement. Without rules on jurisdiction, a convention will inevitably be a torso.

4.3 Recognition and enforcement – choice of tracks

The Hague Convention has two tracks for recognition and enforcement: a three-stage model and one two-stage model. The three-stage model foreseen in art 23 is the default. It follows the classical model where the competent authority performs a *prima facie* review before declaring the decision enforceable. In the second stage, either party has a time limit of 30 or 60 days to lodge a challenge or an appeal. A final decision on enforceability is made. The third stage is enforcement. In the alternative model in art 24, the declaration on enforceability is based both on the grounds the respondent has raised and on a limited review *ex officio.* The second stage consists of enforcement. The grounds for *ex officio* review differ slightly depending on the track.[39]

The 2007 Hague Convention requires child maintenance – and connected spousal support – be channelled through central authorities. Other types of family maintenance are not required to pass through the central authority. States may extend proceedings in central authorities to all types of maintenance. The extension is only available between countries with the same extension. Norway has declared that it accepts only applications filed through central authorities. Since both the EU and Norway have made a declaration to extend the use of central authorities to all kinds of spousal support, applications between EU Member States and Norway pass through central authorities. Albania, for example, has not made the same declaration and acknowledges only direct applications for spousal maintenance unconnected to child support. An application from Albania is not recognised in Norway, as it cannot be filed through the central authority and direct applications to courts are not available. Although the 2007 Hague Convention covers spousal maintenance in both countries, the method of filing leads to non-recognition.

The two tracks for recognition and enforcement, the numerous opportunities for declarations to extend or limit the scope of application and applicable rules and the opportunity for reservations was necessary to achieve a Convention. The caveats of creating so many exceptions are incoherencies and opaqueness of the rules. The grounds for non-recognition are also wider than under EU law and the Lugano Convention.[40] Procedural fraud and on-going proceedings on the same matter in the state addressed are grounds for non-recognition in the Hague Convention, but not in the Lugano Convention.

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[38] Walker (n 8) 153–157.

[39] Walker (n 8) 165 *et seq*.

[40] See also Walker (n 8) 173.

5. The Lugano Convention and Hague Convention

5.1 Comparison of the 2007 Hague and Lugano Conventions

The Lugano Convention has precise and comprehensive rules compared to the 2007 Hague Convention. Jurisdiction is regulated comprehensively and the proceedings of recognition and enforcement leave little room for discretion. The rules are applicable to all types of maintenance; enforcement cannot be hindered on the grounds that the ruling is not based on a family relationship. However, unlike the 2007 Hague Convention, enforcement is not expedited, and it may be difficult to navigate due to the absence of a central authority. Costs are likely to be higher and legal aid lower under the Lugano Convention. Nor are the rules tailored to family maintenance.

The Hague Convention has tailored rules, but the rules vary depending on the type of family maintenance, and the particular choices of each country. For instance, cohabiting and same-sex couples may or may not fall under the scope of the Convention. Child maintenance may be covered until the age of 18 or extend beyond 21 years.[41] The Convention does not regulate jurisdiction, but limits jurisdiction indirectly. Extensions and limitations must often be mutual to apply. Recognition and enforcement is tailored to be simple for the creditor, but variation in proceedings makes the system complex.

Furthermore, the Hague Convention does not have a source for binding interpretation. Thus, states may interpret the provisions differently. Some provisions are ambiguous by design. Consequently, the Hague system is tailored to maintenance, but is opaque.

Both conventions lack a direct mechanism for providing authoritative interpretation and development. Since the Lugano Convention and the Maintenance Regulation are interlinked, one may draw on case law on the Maintenance Regulation when interpreting the Lugano Convention.

5.2 The choice between the 2007 Hague Convention and Lugano Convention

Both the 2007 Hague Convention and the Lugano Convention regulate recognition and enforcement of decisions on family rulings. Hence, in matters on recognition and enforcement of maintenance awards, the question arises which Convention applies, or may the creditor select the most effective rules.

For jurisdiction, the matter is simple, because the Hague Convention does not concern jurisdiction. Art 67 of the Lugano Convention is strict for jurisdiction, because conflicting rules on jurisdiction reduce predictability and may result in parallel proceedings, which the convention seeks to avoid. Formalism could solve the problem: the Hague Convention does not formally regulate jurisdiction, thus the Lugano Convention prevails.

For the recognition and enforcement of maintenance decisions, the question is more complicated. The Lugano Convention supersedes conventions 'that cover the same matters' and states are precluded from entering into new agreements (art 65). According to art 67(1), the Lugano Convention does not affect the power of states to enter into agreements 'in relation to particular matters'. The question is whether the Hague Convention covers the same matters as the Lugano Convention or covers particular matters. Annex VII of the Lugano Convention enlists conventions superseded. Although the list is not exhaustive, it illustrates the type of conventions considered to cover the same matters. All conventions enlisted cover civil matters in general. The previous Hague Conventions on maintenance are not enlisted.

[41] Bonomi (n 8) 27; Walker (n 8) 38–39.

In *Tatry,*[42] the ECJ touched on the question of what a specialised convention is and recognised the Brussels Arrest Convention 1952 as such a convention. However, it did not indicate the grounds on which the convention was considered 'special'. Family maintenance is a particular matter on the outskirts of civil law. Rules on family maintenance have even been excluded from the Brussels I bis Regulation and added to the Maintenance Regulation. This underlines the special character of family maintenance. Thus, good arguments support that the Hague Convention prevails as a particular regulation and supersedes the Lugano Convention.

However, the Explanatory Report on the 2007 Hague Convention[43] clearly explains that the Lugano Convention supersedes the Hague Convention because the Lugano Convention was concluded approximately one month before and thus falls under art 51. Consequently, both Conventions declare the other convention supersedes it.

The 2007 Hague Convention has expedited proceedings tailored to maintenance claims. Yet it leaves more leeway to the enforcing state than does the Lugano Convention. Although the 2007 Hague Convention may be more expedient in general, in certain situations the Lugano Convention may be preferable. Article 52 of the Hague Convention gives parties the right to choose the most effective rules, such as the Lugano Convention. Furthermore, when an issue is not regulated in the 2007 Hague Convention, the Lugano Convention is applicable.[44] This applies *inter alia* to same-sex relationship where the Lugano Convention applies, but not necessarily the Hague Convention. To reduce uncertainty, a party may prefer the former. The prevailing party can therefore choose the convention offering the best rules.

6. European law and international law – a complementing relationship?

6.1 The Lugano Convention may fill the gaps in the Hague Convention

An immediate response to fragmented, partly overlapping legal regulation in the field of maintenance law is to claim that the law is opaque and (too) complex. However, in many aspects the opposite is true. European law reduces fragmentation, when prudently used.

The 2007 Hague Convention exposes some inherent weakness of international cooperation. It does not form a comprehensive regulation because it does not regulate jurisdiction. Additionally, it provides numerous opportunities for customisation, or a candy-shop approach, where states can pick and choose. The cost is loss of coherence, transparency and predictability in the form of 'rough patches' where law differs among the signatories.

European law can fill the gap in regulation of jurisdiction. In the absence of the Lugano Convention, jurisdiction would be determined based on national law and bilateral or regional treaties. The result would be unpredictable rules and probably increased likelihood of non-recognition. The Lugano Convention creates a coherent systems for jurisdiction. Relying on EU/EFTA law rather than national law has the advantage of coherence both in respect of having to deal with only one set of rules regardless of the country in question and that the Lugano Convention constitutes a (at least

[42] Case C-406/92 *The owners of the cargo lately laden on board the ship 'Tatry' v the owners of the ship 'Maciej Rataj'* [1994] ECLI:EU:C:1994:400, paras 21–27.

[43] Borrás and Degeling (n 37) 217.

[44] Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG* [2010] ECLI:EU:C:2010:243, paras 54–56. One could question whether this is applicable to the Lugano Convention as well. Considering the paramount goal of uniform application of the Brussels regime and the Lugano Convention, the answer should be affirmative.

comparably speaking) coherent set of rules.[45] Thus, the Lugano Convention effectively fills much of the lacunae in the Hague Convention.

The Lugano Convention is also useful when a maintenance case is not covered by the 2007 Hague Convention. The Hague Convention covers cohabitation and same-sex partnerships only when the countries involved recognise these as spousal or family relationships. The Lugano Convention does not limit maintenance to child and spousal maintenance and is therefore applicable for maintenance for former co-habitants and same-sex couples, too. Thus, these groups can rely on the Lugano Convention to enforce their rights. The Lugano Convention functions as a safety valve that citizens can fall back on when the Hague Convention is not applicable.

Iceland and Switzerland are parties to the Lugano Convention, but not to the 2007 Hague Convention. For Iceland, the Lugano Convention is the only European or international instrument available to secure recognition and enforcement. Switzerland is a party to the 1973 Hague Convention. However, the 1973 Hague Convention does not regulate the procedure for recognition and enforcement in detail, but leaves it to national law. Thus, the Lugano Convention is the more predictable option.

The Lugano Convention fills many of the gaps in the Hague Convention, increasing coherence in the EFTA region.

6.2 The Hague Convention fills gaps in European law

The 2007 Hague Convention fills gaps in European (EFTA) family maintenance law by providing rules for recognition and enforcement fitted to family maintenance. European countries could increase predictability by making uniform declarations. For instance, Norway and the EU have declared that they accept spousal support filed through central authorities. The gaps are not completely filled, as EU has extended the convention to all types of family maintenance, but Norway has not. Despite some differences, deliberate, strategic use of mutual declarations is a strategy for solving gaps.

Furthermore, cross-pollination between private international law and international procedural law could be used to fill gaps. The Rome I and II Regulations serve as a source for interpretation for the Brussels I (bis) Regulation and the Lugano Convention. Although the Rome Regulations are not binding on Norway, Norwegian courts use them as a source of interpretation both for procedural law and private international law.[46] Norwegian private international law is mainly uncodified, which increases the role of foreign or non-binding international law as a source of legal arguments. Thus, the Hague Protocol could serve as a tool for interpreting the Lugano Convention and the 2007 Hague Convention, although the protocol is not binding on Norway. A mind-set favouring uniform interpretation of international convention could therefore lead to approximation of law.

The EU approach has some caveats as well. First, exceptions, voids and overlapping law is created through EU law. Denmark and the United Kingdom have exceptions in judicial cooperation. Therefore, EU instruments do not apply universally in the EU. Second, family procedure has taken a quantum leap within the EU, but a corresponding development in EFTA law has not occurred. These questions will be explored in the next part.

7. Unsolved issues in European family procedure

7.1 Exceptions, voids and overlapping law originating from EU law

Exceptions, voids and overlapping law emanating from EU law is tangible in the Nordic countries. Some of the voids are an inherent by-product of multi-speed integration, where Iceland and Norway

[45] See also Hau, 'Das Zuständigkeitssystem der Europäischen Unterhaltsverordnung' (n 31).
[46] In HR-2016-1251-A and HR-2011-809-A, the Norwegian Supreme Court has confirmed the role of the Rome Regulations as a source of arguments.

are part of the EEA Agreement, but not the EU. Further complication arises from the Danish opt-outs from the cooperation in the area of civil justice and from Denmark and Iceland not having signed the 2007 Hague Convention. Nordic cooperation still exists in the field of family law, adding a regional level of law.

The Maintenance Regulation does not *prima facie* apply in Denmark, but the rules in Chapter IV section 2 are applicable for enforcement and recognition of decisions from other member states in Denmark and the UK. However, Denmark agreed in 2005 to implement the Brussels I Regulation and any amendments to it. In 2009, Denmark declared that the rules on jurisdiction, recognition and enforcement in the Maintenance Regulation apply. [47] The rules on administrative cooperation do not apply, though. Denmark is not a signatory to the 2007 Hague Convention and Protocol.

Within the Nordic EU states, the Maintenance Regulation and the 2007 Hague Protocol apply between Finland and Sweden, but in relations involving Denmark, only part of the Maintenance Regulation applies and one has to fall back on the Brussels I bis Regulation and the 1973 Hague Convention on maintenance. Furthermore, the rules on recognition and enforcement are different for out-going decisions from Denmark and the United Kingdom than for other EU Member States. The rules for incoming cases are the same as in the other European countries.

In relations among two EFTA states, or an EFTA state and an EU Member State, the Lugano Convention applies.

On the international level, Finland and Sweden are parties to the 2007 Hague Convention and Protocol. Norway is a party to the 2007 Hague Convention, but not the Protocol. Denmark and Iceland are parties to neither. All Nordic countries, except Iceland, are parties to the 1973 Hague Convention. Thus, in situations where one needs to fall back on the international level of law, the safety-net varies in coverage. The 1973 Hague Convention has few specific procedural rules and relies overwhelmingly on national law. It is unclear why Denmark has not signed the 2007 Hague Convention. It may be a question of a slight delay or a question of principle. The Danish restrictive approach to judicial cooperation may have rubbed off on the 2007 Hague Convention due to its close relationship with EU law. Iceland, as a small country, often follows Denmark, and will probably await the Danish decision to sign the Convention.

Due to the requirement of unanimity in family law matters,[48] the Nordic Convention on Collection of Maintenance of 23 March 1962 has survived European integration.[49] The Nordic Convention is an example of an instrument that supersedes the Maintenance Regulation and the Lugano Convention in matters of child and spousal maintenance. Under it, rulings and decisions by authorities are directly enforceable without a declaration of recognition and enforceability as if the ruling was national. It is advantageous for the creditor; the majority of inter-Nordic maintenance claims are enforced under it. The Nordic Convention does not regulate jurisdiction, therefore, the Maintenance Regulation and the Lugano Convention are applicable for jurisdiction. Neither are there rules on

[47] Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, letter from the Commission 12.6.2009 L 149, 80. See also Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2005] OJ L 299/62.

[48] See art 81(3) of the Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C326/47.

[49] For an account of Nordic cooperation in family law and the 'back-seat driver' attitude of Finland and Sweden, see Maarit Jänterä-Jareborg, 'The Nordic Input on the EU's Cooperation in Family and Succession Law: Exporting Union Law Through 'Nordic Exceptions'' in Burkhard Hess, Maria Bergström and Eva Storskrubb (eds), *EU Civil Justice Current Issues and Future Outlooks* (Hart 2015).

administrative cooperation. It bridges some of the gaps on enforcement created by multi-speed integration, but simultaneously it creates a new layer of law.

The Nordic countries expose a patchwork of two regulations and four conventions regulating jurisdiction, recognition, enforcement and administrative cooperation in family maintenance law. The equivalent applies to EFTA law, as Switzerland is a party to the Lugano Convention and the 1973 Hague Convention. Brexit may increase the 'rough patches' and gaps in European family proceedings, because the United Kingdom will exit from the Maintenance Regulation and the Brussels I bis Regulation. The United Kingdom is a signatory to the 2007 Hague Convention through its EU membership and will have to sign the Convention as a non-member to maintain its status.

7.2 Maintenance and the single market – do we need EFTA law?

Extending the single market and free movement of labour to the EEA member states augments the need for regulation of cross-border family relationships, including maintenance. Until the Maintenance Regulation entered into force, the Brussels and Lugano regimes combined served the purpose.

Today, the 2007 Hague Convention fulfils part of the needs, but it entails measures to fill the gaps and ideally a mechanism ensuring uniform interpretation. Furthermore, using international law as a tool to create coherence in Europe requires political will imbued with a sense of pragmatism. Consequently, European law has an important function.

Currently, the main problem is the differences between the Lugano Convention and the Maintenance Regulation. One could argue that the Maintenance Regulation codifies developments in case law and indicates an organic development of particular rules for family maintenance. It builds on its predecessor, the Brussels I Regulation, and has been supplemented to increase access to justice in family maintenance. The Lugano Convention, and its EU counterparts, have been markedly flexible instruments, amenable to development through teleological interpretation. Hence, it would be natural to interpret the Lugano Convention in line with that tradition and consequently align it with the Maintenance Regulation.

This approach has a significant weakness. Loss of parallelism between the Brussels I (bis) Regulation and the Lugano Convention has ripped the Lugano Convention of a mechanism for ensuring uniformity. Who would determine whether the Maintenance Regulation is used to interpret the Convention? Who would determine whether the displacement would be full or partial, and which parts would be displaced? Should the Supreme Court in one of the countries do it unilaterally presuming the other jurisdictions will follow the lead?

Alternatively, the Lugano Convention could be amended or a European Maintenance Convention could be drafted. Brexit could hinder this solution, at least on a short- to mid-term basis. Resources are channelled to Brexit, leaving little room for negotiations with EEA states. Depending on the outcome in Brexit, the EU may be unwilling to enter into such agreements to deter other countries from leaving the EU. The opposite may also be true: Brexit could underline the importance of European non-EU law and sparkle new development.

A fully parallel regulation is nevertheless unlikely. EFTA states will probably oppose the rules requiring 'blind' mutual trust. The public policy aspect could be a hindrance, as Norway prefers 'divorce friendly' rules. Removal of safeguards for ensuring fair trial rights is perhaps a more serious obstacle.[50] Hence, complete uniformity between the Maintenance Regulation and the Lugano Convention may not feasible.

[50] For a criticism of the blind mutual trust required, see Viarengo (n 33); Walker (n 8) 105 *et seq*.

8. Multi-layer maintenance law – fragile and robust

European legislators are aware of, and have acted on, the need for judicial cooperation in family maintenance. Within the EU, the result is an innovative combination of EU and international instruments. Although the arrangements result in increased coherence for EU Member States, development of the EFTA aspects has stagnated. The broken parallelism between the Lugano Convention and the Brussels I bis Regulation, and the Danish hesitance for cooperation, expose the fragility of multi-level integration. Some challenges can be mitigated through interpretation and active use of other instruments, but interpretation alone cannot bridge the gaps.

A study of the Nordic countries demonstrates that legal coherence and approximation requires political will, along with courts committed to the goal of uniform interpretation. The price is to recognise and enforce rulings and decisions even when national law grants a different solution. The gain is transparency and foreseeability, and lessening the burdens of families with cross-border matters. Comparing the Norwegian pragmatic approach to the Danish principled approach manifests the consequences of the political stance.

EFTA European family law is a question of managing multi-speed integration. The European and the international approach can be successfully combined, but it entails developing EFTA law. Free movement of people requires free movement of family law judgments. Norway and Switzerland could perhaps accept a revision of the Lugano Convention to include specific rules for maintenance, a Lugano II Convention for family law, or both. However, Brexit has altered the landscape, causing complications and delaying development of a multi-speed approach. In the shadow of Brexit, the EU may not be willing to negotiate new instruments allowing for a ‘pick-and-choose’ approach to European integration. Alternatively, Brexit could mark a burgeoning of EFTA law.