Characterization of 'spousal maintenance obligations' in European private international law

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1. Introduction

The European Commission has presented a proposal, which would in the future regulate the property rights of 'international' married couples - the proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.[2] According to Article 1(3)b of the said proposal the maintenance obligations would be excluded from the scope of the future regulation on matrimonial property regimes. This is justified by the fact that the maintenance obligations have already been covered by an existing European regulation - the Maintenance Regulation.[3]

Harmonising private international law rules on matrimonial property regimes raises an interesting characterization problem that the Commission has left unsolved in its new proposal.[4] There is no doubt that the maintenance obligations between the parents and the children would be excluded from the scope of the proposed regulation. However, it is not as easy to draw a distinction between the spousal maintenance questions, which would be covered by the Maintenance Regulation and the matrimonial property issues, which would fall under the scope of the proposed regulation on matrimonial property regimes. This is due to the fact that in some member states (England and Ireland) a formal distinction between property division and maintenance does not exist as these questions are dealt as part of the same claim.[5] This means that the dividing line between matrimonial property and maintenance has, as one author has put it, become 'blurred'[6] and the currently proposed amendments to the proposal do not seem to clear the matter either.[7] What is definite, however, is that neither the Maintenance Regulation nor the proposal for the regulation on the matrimonial property regimes distinguishes between the spousal maintenance which is owed during the subsistence of the marriage and the maintenance obligations following a divorce or annulment.[8] Hence, the present article covers both the pre- and post divorce spousal maintenance obligations.

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[2] Commission, 'Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes' COM (2011) 126 final. 2011/0059.

[3] Council Regulation (EC) 4/2009 of 18 December on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L 007/1.

[4] The Recital 12 of the proposed regulation simply confirms that the maintenance obligations between the spouses are governed by the Maintenance Regulation and should thus be excluded from the scope of the proposed regulation on matrimonial property regimes. See: Commission, Proposal on matrimonial property regimes (n 1) Recital 12.

[5] Tone Sverdrup, 'Maintenance as a Separate Issue – the Relationship between Maintenance and Matrimonial Property' in Katharina Boele-Woelki (ed), *Common Core and Better Family Law in European Family Law* (Intersentia 2005) 119.

[6] Trevor C Hartley, 'Matrimonial (Marital) Property Rights in Conflict of Laws: A Reconsideration' in James Fawcett (ed), *Reform and Development of Private International Law Essays in Honour of sir Peter North* (Oxford University Press 2006) 231.

[7] The official rapporteur of the proposal (Alexandra Thein) proposes to specifically exclude maintenance settlements from the scope of the proposal: Draft Report on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM(2011)0126-C7-0093/2011-2011/0059(CNS)) 22.

[8] Article 1(1) of the Maintenance Regulation simply refers to the 'maintenance obligations arising from a family relationship, parentage, marriage or affinity'.

The purpose of the present article is to give a solution to the characterization problem that the proposal for the regulation on matrimonial property presents in conjunction with the Maintenance Regulation. Although similar problem may arise in the case of registered partnerships, the article focuses only on spousal maintenance issues. It should be mentioned however, that at the same time when the proposal on matrimonial property regimes was presented, the Commission also presented a similar proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships.[9] Similarly to the proposal on matrimonial property regimes, the proposal on the registered partnerships also excludes maintenance obligations from its scope[10] and may thus produce similar problems in the future in property and maintenance disputes between the registered partners.

The author of the article works on the presumption that the term 'spousal maintenance obligations' should be treated as an autonomous concept in order to achieve the predictability and harmony of judgements awarded by the courts of different Member States.[11] In order to characterize certain legal relationships between the spouses as falling under the autonomous concept of 'spousal maintenance obligations', the author of the article adopts a functional approach as a generally accepted method of characterization in the EU private international law.[12] Hence, the article will first look at the general objectives of the EU private international law rules on maintenance and matrimonial property. Secondly, besides relying on the functions of each private international rule, the autonomous concepts found in the European private international law rules (such as the concept of spousal maintenance) should also be based on the relevant practices of the Member States and the functions that the institutions of maintenance and matrimonial property serve in different jurisdictions. Thus, the article moves on to compare German and English law as providing the most distinctive examples on how the questions of maintenance and marital property have been addressed in different Member States with different legal traditions and approaches to the institutions of marital property and maintenance. These jurisdictions have also been chosen as representing the different enforcement of judgments schemes that the Maintenance Regulation and the proposed regulation on the matrimonial property regimes present.[13] Finally the author

[9] Commission, 'Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships' COM (2011) 127 final.

[10] Ibid Article 1(3)c.

[11] According to the Recital 11 of the Maintenance Regulation, for the purposes of this regulation, the term 'maintenance obligation' should be interpreted autonomously. Since the reason for leaving the maintenance obligations out of the scope of the proposal on matrimonial regimes was the fact that these obligations were already covered by the Maintenance Regulation, it is only natural to assume that the term 'maintenance obligations' as used in the proposal should bear the same meaning as in the Maintenance Regulation and should thus also be interpreted autonomously. This presumption is also supported by the fact that according to the explanatory memorandum attached to the proposal on the matrimonial property regimes, the notion of 'matrimonial property regime' must be given an autonomous interpretation. See: Commission, 'Proposal on matrimonial property regimes' 6.

[12] The literature on characterization in private international law is too extensive to cite it in its entirety in this article. However, on the characterization according to the functional approach in the context of the European Union regulations see: Roberto Baratta, 'The Process of Characterization in the EC Conflict of Laws: Suggesting a Flexible Approach' [2004] VI Yearbook of Private International Law 155. Baratta argues that the decisive element in characterization is to take into account the function of each conflict of law rule to be characterized and that the characterization should rely on common legal concepts and values expressed in the uniform general principles shared by the Member States, taking into account the principal objectives of the EC conflict of laws. See ibid 158 and 168.

[13] These two instruments introduce rather different regimes on the recognition and enforcement of decisions as the Maintenance Regulation Article 17 contains a rule on the abolition of exequatur, the proposal on the matrimonial property regimes on the other hand follows the traditional recognition and enforcement scheme already laid down by several other private international law regulations of the EU. Whether this difference should play a role in the characterisation of the common autonomous term 'spousal maintenance obligations' found in both of these instruments, will become clearer if the institutions of maintenance and matrimonial

analyses the judgements awarded by the Court of Justice of the European Union (hereinafter: 'the Court of Justice')[14] in maintenance disputes under the Brussels Convention[15] in order to determine whether any conclusions can be drawn from the already existing case-law for defining the term 'spousal maintenance obligations' in the context of the new Maintenance Regulation and the proposed regulation on matrimonial property regimes. In the end of the article, the relevant conclusions will be drawn in order to determine, which criteria should be decisive for concluding that a certain dispute between the spouses falls under the scope of the Maintenance Regulation or under the scope of the future regulation on matrimonial property regimes.

2. General objectives of the EU private international law rules on maintenance and matrimonial property

2.1. General objectives of the EU rules on maintenance

As is the case with all the other EU private international law instruments, the general objective of the Maintenance Regulation is to promote the aims that the European Community has set for itself. This means that the primary objective of the Maintenance Regulation is the maintaining and developing of an area of freedom, security and justice, in which the free movement of persons is ensured. The original proposal for the Maintenance Regulation explains more specifically what the Maintenance Regulation seeks to achieve – according to the proposal, the main objective of the regulation is to eliminate all obstacles, which prevent the recovery of maintenance within the European Union.[16] This in turn entails that the free flow of judgements should be the primary concern of the said regulation, which can be best illustrated by the abolition of exequatur provisions that the regulation contains in its Article 17. Abolition of exequatur in maintenance cases means firstly, that the decisions awarded in the Member States bound by the 2007 Hague Protocol[17] (that is - all Member States, except Denmark and United Kingdom)[18] are recognized in other Member States

property are compared in the legal systems of which only the first one is bound by the Hague Protocol (and the concurrent abolition of exequatur provisions).

[14] With the entry into force of the Lisbon Treaty, the whole court system of the European Union was renamed to the 'Court of Justice of the European Union', comprising of the Court of Justice, the General Court and the Civil Service Tribunal. Although this name-change became effective only as of the entry into force of the Lisbon Treaty, the article uses the term 'Court of Justice' recurrently in order not to confuse the reader. See: Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OC C306/1.

[15] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L299/32. 1968 Brussels Convention Article 5(2) contained a jurisdictional rule for the 'matters relating to maintenance' and Article 1(1) of the convention excluded 'rights in property, arising out of a matrimonial relationship' from the scope of the convention. This made it necessary for the Court of Justice to take a position on the meaning of 'matters relating to maintenance'. Exactly the same rules are contained in Articles 1(2)a and 5(2) of the Brussels I Regulation, which succeeded the 1968 Brussels Convention. See: Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L012/1.

[16] Commission, 'Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations' COM (2005) 649 final 3.

[17] Hague Conference on Private International Law, 'Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations' [2007] <http://www.hcch.net/index_en.php?act=conventions.text&cid=133> accessed 30 August 2011.

[18] On 8 April 2010 the European Community declared that its Member States shall be bound by the Hague Protocol by the virtue of its conclusion by the European Community. However, the Community declared that for the purpose of the declaration, the term 'European Community' does not include Denmark and the United Kingdom. Ireland has chosen to take part in the adoption of the decision to be bound by the Hague Protocol. For the relevant Council decision, see: Council Decision of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations [2009] OJ L331/17. Note also that Denmark has notified the Commission of its decision to implement the

without any special procedure being required and without any possibility of opposing their recognition; and secondly, that such decisions are enforced in the other Member States without the need for a declaration of enforceability as opposed to the previous regime found in the Brussels I Regulation,[19] which preceded the Maintenance Regulation.

The objective of achieving mutual recognition and enforcement of maintenance decisions and the effective step that the Maintenance Regulation takes for securing such aim by abolishing the exequatur proceedings should be borne in mind when making any conclusions as to the preferable scope of the Maintenance Regulation. Securing the free flow of judgments means that the burden on the Member States to provide for the maintenance creditors is lightened. When the maintenance creditors are able to effectively claim maintenance from the maintenance debtors, the necessity of the Member States to offer social benefits to the maintenance creditors is lessened.[20] This constitutes an economic argument for interpreting the scope of the Maintenance Regulation as widely as possible in the cases where the judgement creditor is in the need of substance.

In this point it might of course be argued that the economic considerations should not play a crucial role when deciding upon the recognition and enforcement of foreign judgements within the EU. It is true that in judicial proceedings other concerns such as the rights and interests of the parties (and more specifically the rights of the maintenance debtors in maintenance cases) should outweigh purely economic considerations of the Member States. However, interpreting the scope of the Maintenance Regulation widely would itself not automatically mean that the interests of the creditors or the economic interests of the Member States would somehow be unfairly preferred to the interests of the maintenance debtors. Firstly, the maintenance is awarded by the courts of the Member States under the substantive national rules, which although not yet harmonized,[21] generally take into account the rights and interests of the maintenance debtors. For example, the courts of the member states would often be unwilling to award maintenance depressing the debtor below her subsistence level.[22] Thus, the protection of maintenance debtors is an issue, which does not necessarily have to be

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contents of the Maintenance Regulation to the extent that this regulation amends Brussels I Regulation. See: Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2009] OJ L149/80.

[19] Brussels I Regulation (n 13).

[20] This idea is nothing novel. In the context of the negotiations for the Hague Maintenance Convention of 23 November 2007 the US supported a policy of rather generous legal assistance provisions for the maintenance creditors. One of the reasons for such policy was the belief that the state benefits in the long run if the maintenance creditors are helped to secure maintenance from the maintenance debtors as this reduces the need of the state to support the child (the usual maintenance creditor). See: Paul Beaumont, 'International Family Law in Europe – the Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity' (2009) 73 Rabels Zeitschrift für Auslandisches und Internationales Privatrecht 509, 517. For the Maintenance Convention, see: Hague Conference on Private International Law, 'Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance' [2007] <http://www.hcch.net/index_en.php?act=conventions.text&cid=131> accessed 30 August 2011.

[21] As with most other fields of private law in Europe, the harmonization of substantial rules on maintenance has so far not occurred and will probably not occur in the near future, as the community has chosen to harmonize the private international law rules instead of substantive rules. However, it is worth mentioning a positive initiative made by the Commission on European Family Law (CEFL). The commission has published non-binding principles on maintenance law, which, although not meant to be considered as a model law, aim to bestow the most suitable means for the harmonisation of family law within the Europe. See: Katharina Boele-Woelki and others, *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses* (Intersentia 2004) 3.

[22] According to the report by the CEFL this is the case for example in Austria, Bulgaria, Denmark, England and Wales, Finland, France, Germany, Ireland, Portugal, Spain, Sweden. For a general overview on the Member State practices in calculating maintenance and on the right of the debtor to retain a certain amount for his own subsistence, see the CEFL publication on the matter: Katharina Boele-Woelki, Bente Braat and Ian Sumner (eds), *European Family Law in Action Volume II: Maintenance between Former Spouses* (Intersentia 2003) 261-326.

addressed on the level of private international law, but can instead be left to be dealt as a matter of substantive justice. Secondly, the regulation contains a safeguard for the maintenance debtors, which balance any preference for the maintenance creditor that the wide interpretation of the scope of the regulation might entail. This safeguard is found in Article 19 of the regulation under which a defendant who did not enter an appearance in the Member State of origin of the decision has the right to apply for a review of the decision before the competent court of that Member State if he was not served with the document instituting the proceedings or an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence or he was prevented from contesting the maintenance claim by reason of *force majeure* or due to extraordinary circumstances without any fault of his part; provided that he has not failed to challenge the decision when it was possible for him to do so. Thus, the argument for interpreting the scope of the Maintenance Regulation as widely as possible in favour of the maintenance creditors is not rebutted by the need to protect the interests of the maintenance debtors since the interests of the debtors have already been taken into account by the substantive rules in the phase where the decisions was awarded and by the private international law rules in the possible review proceedings of the maintenance decisions. Hence, there is an argument in favour of interpreting the scope of the Maintenance Regulation more widely as covering also those spousal obligations, which lie on the borderline of maintenance and matrimonial property issues, provided that one of the spouses would lack necessary means of substance if the relevant decision would not be enforced.

However, from a purely formalistic point of view one might ask why the economic status of parties should play any role in giving meaning to the terms found in the EU regulations. Although private international law rules may favour certain litigants as a group (for example children in parental responsibility disputes[23] or the maintenance creditors[24] who are generally considered as being in a weaker position and therefore deserving extra protection) no preference should be given to particular litigants depending on their economical or social status as the private international law rules like any other legislation should be neutral towards the interests of particular litigants. Thus, while the objective of releasing the states from the burden of supporting the maintenance creditors is relevant when deciding whether certain groups of persons (spouses, children, vulnerable adults) should be covered by the Maintenance Regulation, the characteristics of specific litigants should not be decisive in order to determine whether a dispute falls under the scope of the Maintenance Regulation. This in turn means that there must be some other criterion, which determines when the Maintenance Regulation is applicable to a particular spousal dispute and that looking only at the general objectives of the Maintenance Regulation does not help to solve the characterisation problem that the new proposal on matrimonial property regimes presents in conjunction with the Maintenance Regulation.

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[23] Brussels II bis Regulation jurisdictional rules on parental responsibility matters (Articles 8-15) constitute an example on how the European legislator has chosen to rely on the interests of children when choosing appropriate connecting factors (such as the child's habitual residence) for parental responsibility cases. See: Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) 1347/2000 [2003] OJ L338/1.

[24] For example, the European private international rules of jurisdiction have generally chosen to prefer the maintenance creditors by allowing them among other places to sue in the courts of the place where the maintenance creditor is domiciled (Brussels I Regulation Article 5(2)) or habitually resident (Brussels I Regulation Article 5(2), Maintenance Regulation Article 3(b)). Similarly, the Hague Protocol has chosen to protect the maintenance creditor by providing a general conflicts of laws rule in favour of the law of the State of the habitual residence of the maintenance creditor (Hague Protocol Article 3(1)), which presumably is the law which is most familiar to the maintenance creditor. For the critical assessment of these preferences, see: Guus E Schmidt, 'Equal Treatment of the Parties in International Maintenance Cases' in Jürgen Basedow and others (eds), *Private Law in the International Arena From National Conflict Rules Towards Harmonization and Unification Liber Amicorum Kurt Siehr* (T M S Asser Press 2000) 657-660.

2.2. General objectives of the proposed EU rules on matrimonial property regimes

Similarly with the Maintenance Regulation, the general objective of the proposed regulation on matrimonial property regimes is to guarantee the mutual recognition of decisions rendered in the Member States.[25] Logically one might want to make the same economic argument in regard to the decisions on matrimonial property matters as was used in the case of maintenance decisions. That is, one might want argue that if the spouse is awarded a fair proportion of the marital property, it would not be required from the state to give subsistence for the spouse and thus the scope of the proposed regulation should be interpreted widely in order to bring more cases under the auspices of the proposed regulation and its provisions on the mutual recognition and enforcement of decisions. However, there are two counter-arguments against such preposition. Firstly, the proposed regulation on matrimonial property regimes does not foresee any abolition of exequatur, which means that the rules on recognition and enforcement of decisions would be less beneficial for the creditors than the relevant rules contained in the Maintenance Regulation and it would be more beneficial to treat the borderline cases as 'matters of maintenance' in order to release the Member States from the possible duties of providing for the spouses who cannot have their decisions enforced in the other Member States. Secondly, while in maintenance cases the maintenance creditor cannot manage without the relevant financial support from the maintenance debtor or failing that, from the state, in the matrimonial property matters, neither of the spouses is necessarily in a weaker position. According to Article 2(a) of the proposal on the matrimonial property regimes, the term 'matrimonial property regime' refers to the set of rules concerning the property relationships of spouse, between the spouses and in respect of third parties. Although the term 'property relationship' has been left undefined, it is apparent that it focuses on the property rights of the spouse instead of the economic and social needs of the spouse.[26] While the purpose of the maintenance as a legal and social concept is to provide for the party who lacks necessary financial means to get by in his everyday life, the purpose of the division of matrimonial property is to uphold the ownership rights of the spouse or to compensate him or her for the contributions that he or she has made during the marriage in relation to the matrimonial property.[27] Thus, the cases falling under the scope of the proposed regulation on the matrimonial property regimes lack the social urgency that the maintenance cases present for the Member States and at least from the economic point of view there is no need to interpret the scope of the proposed regulation on matrimonial property regimes as widely as the scope of the Maintenance Regulation. Hence, as was the case with the Maintenance Regulation, the general aim of the proposal on matrimonial property regimes does not solve the question how the borderline spousal disputes should be characterized.

Therefore, in order to characterize certain cases as falling under the concept of 'maintenance matters' one has to look at something additional. A comparative approach is generally used in private international law in order to solve characterization problems. Thus, the German and English concepts of maintenance and matrimonial property will be analysed in the following

[25] Commission, Proposal on matrimonial property regimes (n 1) Recital 27.

[26] For the comparison - according to the Schlosser Report the 'rights in property' in the meaning of the Brussels Convention included all rights of administration and disposal – whether by marriage contract or statute - of property belonging to the spouses. See: Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (1979) OJ C59 /71, 89.

[27] According to Sverdrup the main purpose of the marital property rules is distributive and the main purpose of the maintenance rules is supportive. However, both rules interact on a general level – they are both aimed at allocating the property upon divorce and providing for the future needs of the spouses. See: Sverdrup (n 4) 120. Similarly, Martiny refers to the concepts of support, sanction, solidarity and compensation for losses as the main aims of the maintenance rules. See: Dieter Martiny, 'Divorce and Maintenance between Former Spouses – Initial Results of the Commission on European Family Law' in Katharina Boele-Woelki (ed), *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia 2003) 545-546.

parts of the article in order to determine, which are the general characteristics of the maintenance and matrimonial property disputes.

3. Distinction between the spousal maintenance and matrimonial property issues in German law

Germany is bound to apply the Maintenance Regulation, which means that the German courts will need to turn to the regulation and the concurrent Hague Protocol in order to solve the questions of jurisdiction, applicable law and recognition and enforcement of judgements in international spousal maintenance disputes. This in turn means that the German courts should not proceed from their own substantive law in order to characterize the terms found in these instruments as these rules contain autonomous definitions independent from the *lex fori*. However, if not decisive, the treatment of maintenance and matrimonial issues in German domestic law would at least be a logical starting point for the German judge in order to give meaning to the autonomous concept of 'spousal maintenance obligations', which has not yet been defined by the European legislator or the Court of Justice in the context of the Maintenance Regulation or the proposal on the matrimonial property regimes.

The term 'maintenance' is not expressly defined in the German substantive family law. However, the German Civil Code (*Bürgerliches Gesetzbuch* (BGB))[28] Section 1360a(1) defines the scope of the general obligations to maintain, which also covers spousal maintenance obligations during the marriage. According to Section 1360a(1) of the BGB the reasonable maintenance of the family includes everything that is necessary, depending on the circumstances of the spouses, to pay the costs of the household and to satisfy the personal needs of the spouses and the necessities of life of the children of the family entitled to maintenance. The word 'necessary' used in this provisions should not be read as focusing on the level of subsistence of the spouse claiming the maintenance,[29] but instead the purpose of the rule is to ensure that both spouses make contributions in order to attain the living standard, which is deemed appropriate for the family in each particular case. However, awarding the maintenance depends nevertheless on the needs of the particular spouse even if such needs are higher than the minimum level of subsistence. Similarly, other specific maintenance provisions found in BGB proceed from the presumption that the awarding of maintenance depends on the specific needs of the creditor, like the need for insurance for the old age and for the reduced earning capacity[30] or (in the case of post-divorce maintenance) for the old age[31] or illness or infirmity[32], which all make it impossible for the maintenance creditor to earn necessary allowance by himself. The main purpose of the German post-divorce spousal maintenance rules is to enable the spouse to live independently from the other spouse.[33] Thus, the main criterion for deciding whether a spouse has a right to

[28] 1896 German Civil Code (*Bürgerliches Gesetzbuch (BGB)*) (Federal Republic of Germany).

[29] For the purposes of Section 1360(a)(1) the entitled spouse does not have to be 'needy' (*bedürftig*). See: Franz Jürgen Säcker and Roland Rixecker (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (5th ed Verlag C. H. Beck 2010) § 1360 para 6; This is due to the fact that the family maintenance under the Section 1360 is usually paid in kind and not owed in cash. Instead of the term 'neediness' (Bedürftigkeit), the term 'requirement' (Bedürfnis) or 'necessity' (Erforderlichkeit) is used in order to describe the precondition upon which the maintenance is owed. See: Beate Heiβ and Winfried Born (eds), *Unterhaltsrecht Ein Handbuch für die Praxis* (39th ed Verlag C. H. Beck 2011) ch 11 para 6.

[30] For example, if divorce proceedings are pending between the spouses, who are living apart, then maintenance, from the date when the proceedings are pending, also includes the costs of appropriate insurance for old age and for reduced earning capacity. German Civil Code (n 26) 1361(1).

[31] German Civil Code (n 26) Section 1571.

[32] German Civil Code (n 26) Section 1572.

[33] Philipp Wendl and Siegfried Staudigl (eds), *Das Unterhaltsrecht in der familienrichterlichen Praxis. Die neuere Rechtsprechung des Bundesgerichtshofs und die Leitlinien der Oberlandesgerichte zum Unterhaltsrecht und zum Verfahren in Unterhaltsprozessen* (7th ed Verlag C. H. Beck München 2008) § 3 para 1.

maintenance before or after the divorce is the necessity of the said spouse. Therefore, the German maintenance rules serve supportive rather than distributive or compensatory functions.

In contrast, German substantive rules on matrimonial property do not proceed from the necessity of the spouse as a relevant criterion when solving the marital property dispute. Under the German statutory property regime the spouses live under the property regime of accrued gains,[34] unless they opt for the community of property regime upon which the property of the spouses would become the joint property of both spouses.[35] The statutory property regime of accrued gains means that the property of the spouses does not become the common property of the spouses. The same applies to the property that one of the spouses acquires after the marriage. However, the accrued gains that the spouses acquire during the marriage are equalised between the parties if the community of accrued gains ends.[36] Thus, the German rules on matrimonial property serve distributive[37] and compensatory[38] functions allowing the spouse who has stayed at home to care for the children to get his share from the income that the other spouse has earned during the marriage. In addition, since the equalisation of the accrued gains also depends on the behaviour of the spouses during the marriage, the rules on matrimonial property also serve retributive function. For example, in order to determine the extent of the final assets of the spouse the following is taken into account: whether the spouse, after the beginning of the property regime made gratuitous dispositions by which he was not fulfilling a moral duty or showing regard for decency or whether he squandered property or performed acts with the intention of disadvantaging the other spouse.[39] Thus, the matrimonial property rules in German law serve rather different aims as opposed to the maintenance rules, which main function was supportive rather than distributive or compensatory. This means that the rules on matrimonial property are not based on the concept of the necessity of the spouse. Hence, there is a clear difference between the functions of the maintenance and matrimonial property rules in German substantive law and between the relevant criteria that these rules take into account in order to characterize financial claims that one of the spouses is making against the other.

The distinction in the German substantive law between the functions of maintenance and matrimonial property rules has also been reflected by the German case-law on the Brussels I Regulation. Article 5(2) of the Brussels I Regulation uses the term 'matters relating to maintenance', which has been interpreted by the German Supreme Court (*Bundesgerichtshof*) in 2009 by a case[40] concerning a decision made by the English High Court in a spousal

[34] 'Accrued gains' means the amount of the property by which the final assets of the spouse exceed the initial assets. Te term 'initial assets' refers to the assets, which belong to the spouse at the beginning of the property regime after the deduction of liabilities. Assets, which the spouse acquires after the beginning of the property regime as a result of death or with regard to a future right of succession, by donation or as advancements, are added to the initial assets after the deduction of the liabilities, to the extent that in the circumstances they are not to be seen as income. The term 'final assets' refer to the assets, which belong to the spouse at the end of the property regime after the deduction of the liabilities. See: German Civil Code (n 26) Sections 1373-1375.

[35] German Civil Code (n 26) Section 1416(1).

[36] German Civil Code (n 26) Section 1363(2).

[37] The justification of accrued gains regime is that in a marriage, which is based on the division of labour, the spouse who, in the interests of the family is not working full time and enabling to other spouse to work full-time, should be entitled to fully participate in the division of the profit earned by the other. See: *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (n 27) preliminary remark to § 1363 para 8.

[38] Due to the distribution of roles in the family the spouse who stays at home is entitled for the compensation for waiving her opportunity to work. See: Heinz Georg Bamberger and Herbert Roth (eds), *Beck'scher Online-Kommentar BGB* (20th ed Verlag C. H. Beck 2011) § 1363 para 12.

[39] German Civil Code (n 26) Section 1375(2).

[40] Decision of the German Supreme Court from 12 August 2009 BGH FPR 2009, 541. *Bundesgerichtshof* has been criticized for not asking a preliminary ruling on the matter from the Court of Justice. See the case analysis by: Bettina Heiderhoff, 'Wann ist ein "Clean Break" unterhaltsrechtlich zu qualifizieren?' (2011) 2 Praxis des Internationalen Privat- und Verfahrensrechts 156.

dispute. The English Court had (among other things) ordered to transfer the right regarding the life insurance policy as a security for the maintenance of one of the spouses, the payment of 213 055 GBP as a lump sum and periodic payment of 24 600 GBP per year for the maintenance of the spouse. Deciding upon the enforcement of the decision in Germany, the *Bundesgerichtshof* found that the English decision could not have been enforced under the Brussels I Regulation concerning the ordering of the lump sum of 213 055 GBP. According to the *Bundesgerichtshof* this was the issue, which dealt with the division of matrimonial property of the spouses and thus fell outside the scope of the Brussels I Regulation.[41] The *Bundesgerichtshof* proceeded to give guidelines on how the distinction between the maintenance and matrimonial property issues should be made. According to the *Bundesgerichtshof*, a maintenance duty is established when the performance that is granted by the decision secures the sustenance of the spouse or when the needs and means of both spouses are considered when awarding the maintenance.[42] In contrast, if the decision's purpose is to distribute the financial assets of spouses then the decision concerns the division of matrimonial property and not the maintenance and cannot therefore be enforced under the Brussels I Regulation. Furthermore, relying on the case decided by the Court of Justice (*Van den Boogaard v Laumen*)[43] the *Bundesgerichtshof* noted that characterizing a decision as an award of maintenance is not questioned simply because part of the property is transferred from one of the spouses to the other. Such decision can also be about the accumulation of capital, which purpose is to secure the sustenance of the other spouse. However, a clean break[44] between the spouses according to which all the financial matters are solved between the spouses with one decisions goes beyond maintenance. Thus, the *Bundesgerichtshof* chose to characterize the term 'matters relating to maintenance' in the light of the distinction found in the German substantive law according to which the rules on maintenance and matrimonial property serve different functions with the rules of maintenance bearing supportive function and the rules on matrimonial property bearing distributive function.

4. Distinction between the spousal maintenance and matrimonial property issues in English law

Contrary to German law, English substantive law does not formally distinguish between the property division and maintenance upon divorce. In addition, the policies that English law follows when dealing with pre- and post divorce maintenance vary from its German counterpart. Under the English domestic rules there are several procedures available for making financial orders while a marriage is still subsisting.[45] For example, under the Matrimonial Causes Act 1973[46] a spouse may apply for the court for a maintenance order on the ground that the other spouse has failed to provide reasonable maintenance for the first spouse during the marriage. There are several factors which the English courts must take into

[41] Brussels I Regulation (n 13) Article 1(2)(a).

[42] The court had reached similar conclusions already in 2007. See the Decision of the German Supreme Court from 17 October 2007 BGH XII ZR 146/05.

[43] Case C-220/95 *Van den Boogaard v Laumen* [1997] ECR I-1147.

[44] A 'clean-break' option means that the court orders the assets of the parties so that the spouses cannot be subject to any further claim by the other spouse. The benefits of such orders include the finality of decisions and financial certainty of the spouses. However, the clean-break orders may be criticized for addressing the events only up to the time of the divorce, whereas the disadvantages of the spouses may be much more long lasting. On the advantages and disadvantages of the clean-break orders as opposed to the periodic payments orders of maintenance, see: Geoffrey Shannon, 'Clean-Break or Long-Term Payment of Maintenance' in Katharina Boele-Woelki (ed), *Common Core and Better Family Law in European Family Law* (Intersentia 2005) 103-117.

[45] For the general overview on these procedures, see: Judith Masson, Rebecca Bailey-Harris and Rebecca Probert, *Cretney Principles of Family Law* (8th ed Sweet & Maxwell 2008) 99-103; Nigel Lowe and Gillian Douglas, *Bromley's Family Law* (10th ed Oxford University Press 2007) 956-966.

[46] Matrimonial Causes Act 1973 (United Kingdom) s 27(a).

account when awarding such maintenance orders.[47] Among these are the financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future, the standard of living enjoyed by the family before the breakdown of the marriage, the contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family and the conduct of each of the spouses, if that conduct is such that it would in the opinion of the court be inequitable to disregard it. Thus, the English rules regulating spousal maintenance prior to the divorce do not focus merely on the need of the maintenance creditor. On the contrary, the need of the spouse is only one factor amongst many which is taken into account when awarding maintenance.

The redistribution of property upon divorce has even more functions and underlying policies in English law compared to the provisions regulating the provision of maintenance during the marriage. The statutory powers of the courts to make financial orders[48] in divorce proceedings and the factors that the courts consider when making such orders are remarkably wide.[49] It has been stated that the general principles to be taken into account by the English courts when making financial awards are the 'need' of the spouse, 'compensation' and 'sharing'.[50] In addition, other policies that the English law seeks to protect upon the redistribution of property upon divorce include the aim of supporting the spouse and the children, upholding the respect for the marriage as a contract, upholding the respect for the partnership of the parties, securing the equality between the spouses and the equal opportunities after the divorce and upholding the general state interests such as saving of the public money.[51] Thus, opposed to the German courts the English courts enjoy wide discretion to take into account various policies and purposes when awarding financial orders upon divorce and there exists no clear cut between the issues of maintenance and matrimonial property which was found in German law when deciding upon the financial relations between the spouses upon divorce.[52]

The lack of clear distinction between the maintenance and matrimonial property orders in the English domestic law has not stopped English courts from interpreting the autonomous term 'matrimonial matters' found in the predecessors to the Maintenance Regulation[53] and from developing criteria for distinguishing between the maintenance and matrimonial property matters in private international law cases. Namely, in *Moore v Moore*[54] the Court of Appeal gave preference to the objectives of the applicant as the decisive criteria for distinguishing between the claims for maintenance and for the division of marital property. The Court of Appeal decided that since the essential object of the applicant in *Moore v Moore* was to achieve sharing of the property on his terms rather than an order based on financial needs, the application was not for the maintenance but for the division of the wealth or assets to which the couple had a claim. In order to verify the exact objective of the applicant, the wording of

[47] Matrimonial Causes Act 1973 (United Kingdom) s 25(2)(a)-(h).
[48] Under the Matrimonial Causes Act 1973 such orders may be made against the spouse and may include: unsecured periodical payments to the other spouse, secured periodical payments to the other spouse, lump sum payments to the other spouse, transfer of property to the other spouse or for the benefit of any child of the family etc. For the general overview on the powers of the court to award such orders, see: Lowe and Douglas (n 43) 983-985, 991-1018.
[49] Masson, Bailey-Harris and Probert (n 43) 340.
[50] *Miller v Miller* [2006] House of Lords UKHL 24, [2006] 2 AC 618 paras 138-141.
[51] Jonathan Herring, *Family Law* (4th ed Pearson Education Limited 2009) 208-214.
[52] Which has led Lord Denning to aptly compare the flexibility of the courts to make financial orders with taking small pieces from a mixed bag and handing them to the spouses without "paying any too nice a regard to their legal or equitable rights but simply according to what is the fairest provision for the future, for mother and father and the children". *Hanlon v The Law Society* [1981] House of Lords A.C. 124, 146.
[53] That is - in the Brussels I Regulation and the Brussels Convention.
[54] *Moore v Moore* [2007] Court of Appeal (Civil Division) EWCA Civ 361

the application was taken as a starting point for shedding the light on the purpose of the application.[55]

Two criteria can be derived from the *Moore v Moore* for deciding whether a certain dispute should be characterized as a maintenance or matrimonial property case in the English legal doctrine. Firstly, the objective of the application should be the claim for maintenance. Secondly, the pursued order of maintenance should be based on the need of the applicant. The second of these criteria is nothing novel and is very similar to the one already identified in the German substantive law. Whether the intention of the party should play any role in characterizing certain issue as maintenance or matrimonial property is, however, disputable and taking into account the factual context of *Moore v Moore*, it might be argued that this case is not the most appropriate one for making any general conclusions as to the characterisation of maintenance issues.[56] In addition, it has also been argued that for most marriages a couple's resources on divorce are probably insufficient, which means that in most cases the distribution of property disputes will instead be governed by the relevant maintenance rules and even in the case of fairly wealthy couples there might be little property left to be classified as 'matrimonial property'.[57] This in turn entails that the parties might not have an adequate access to qualified legal aid due to the lack of resources that they can spend on the legal expenses. In the light of this possibility, the intention of the applicant should not be a crucial criterion in order to characterize the issue as maintenance or matrimonial property simply because the applicant might not be sufficiently qualified in order to make decisions as to the exact nature of his claim. Since the maintenance decisions (awarded by the courts bound by the Hague Protocol) would circulate in Europe without any exequatur blocking their enforcement, in contrast to the decisions which are awarder under the proposed regulation on matrimonial property and which would follow the general scheme already established by Brussels I Regulation, the stakes of leaving the characterization simply for the applicant are just too high. This might be amplified if the United Kingdom decides not to take part in the proposed regulation on matrimonial property regimes. Currently there are no rules of recognition and enforcement of matrimonial property decisions in Europe, which means that if the United Kingdom decides not to take part in the application of the proposed regulation,[58] the recognition and enforcement of English decisions on financial relief concerning matrimonial property might be substantially more complicated in other member states than the enforcement of English maintenance decisions. Currently the English maintenance decisions circulate in Europe under the recognition and enforcement scheme found in Chapter IV, section II of the Maintenance Regulation which constitutes an alternative to the abolition of exequatur provisions of the regulation. Thus, the English litigants might be interested that the English courts would characterize the borderline cases as maintenance cases in order to secure a smoother circulation of such decisions in other Member States, which makes it even more inappropriate to leave it to the applicant to determine how the dispute between the spouses should be characterized.

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[55] Ibid para 86.

[56] In *Moore v Moore* the English court had to evaluate whether the application made to the foreign court related to 'maintenance'. The court however did not characterize the legal relationship between the parties or the rules under which the maintenance was claimed, but instead only assessed whether it was obliged to stay the proceedings in favour of the Spanish court to which the application falling under the Brussels I Regulation was made before the English application.

[57] Chris Clarkson, 'Matrimonial Property on Divorce: All Change in Europe' [2008] December Journal of Private International Law 421, 428.

[58] This seems possible taking into account the previous opposition of the United Kingdom to the Green Paper of 2005 for the Rome III Proposal. For example, Clarkson argues that there might be opposition to the loss of the power of the English courts, when recognizing a foreign divorce, to grant financial relief to either party who has not remarried. Under the proposal, foreign judgments would be entitled to automatic recognition and the English courts would thus loose their discretion of subsequent amendments. See: Clarkson (n 53) 431. For the Green Paper of 2005, see: Commission, 'Green Paper on applicable law and jurisdiction in divorce matters' SEC (2005) 331.

5. Autonomous definition of maintenance claims under the case law of the Court of Justice of the European Union

Finally, in order to give meaning to the term 'maintenance obligations' found in the new Maintenance Regulation and the proposal on matrimonial property regimes, it is worth looking at the criteria that the Court of Justice has already developed in regard to similar concepts found in other European instruments in order to evaluate how these criteria correspond to the practices of the courts and the functions that the institutions (and rules on) maintenance and matrimonial property serve in different Member States.

The Court of Justice has so far interpreted the term 'matters of maintenance' only in the context of the Brussels Convention. In *Cavel v de Cavel (No 1)*,[59] a case concerning a French order for freezing bank accounts of one of the spouses, the Court of Justice ruled that the terms 'rights in property arising out of a matrimonial relationship' and 'maintenance' should be treated autonomously. There is no reason why this should not similarly hold true when interpreting the Maintenance Regulation and the proposal on matrimonial property regimes, s such interpretation would help to achieve the general aim of these instruments - to secure the uniform application of these instruments and the ensuing free flow of judgements between the Member States.

The main issue in the case *de Cavel v de Cavel (No 2)*[60] was whether an ancillary order of maintenance could fall under the scope of the Brussels Convention if the primary issue in dispute (divorce) falls outside the scope of the convention. The Court of Justice held that for the purposes of the Brussels Convention, maintenance orders made in the context of divorce proceedings come within the scope of the Brussels Convention. Thus, the ancillary claim of maintenance comes under the scope of the convention even when the primary dispute (granting a divorce) relates to the status of persons, which under Article 1(1) of the Brussels Convention falls outside the scope of the convention. This does not help us in distinguishing between the two ancillary claims to divorce – those of the maintenance and division of property. What is more important, however, for the purposes of the present article, is that as a side issue the court gave a definition in the *Cavel v de Cavel (No 2)* for the rules on maintenance. The court held that such rules are concerned with financial obligations between the former spouses after divorce, are fixed on the basis of their respective needs and resources and are in the nature of maintenance.[61] Thus, the court referred similarly with the *Bundesgerichtshof* to the necessity of the spouse and to the supportive function of the maintenance rules as a relevant criterion for deciding whether such rule should be characterized as having the nature of maintenance or matrimonial property.

The Court of Justice has also given general guidelines on how to decide whether an English financial order should be characterized as the order of maintenance or as the order for the division of property. An order for a lump sum and transfer of ownership comes under the scope of the maintenance as long as the purpose of the award is to ensure the former spouse's maintenance as held in the *Van den Boogaard v Laumen.*[62] On divorce, English court may, by the same decision, regulate both the matrimonial relationships of the parties and matters of maintenance. In order to decide whether the order is in its essence a maintenance order the distinction between those aspects of the decision which relate to rights in property arising out of a matrimonial relationship and those which relate to maintenance should be made, having

[59] Case 143/78 de Cavel v de Cavel (No 1) [1979] ECR 1055.
[60] Case 120/79 *de Cavel v de Cavel (No 2)* [1980] ECR 731.
[61] The case concerned the French Civil Code Article 270 providing for certain 'compensatory payments' for the spouse. See: Ibid para 5.
[62] Case C-220/95 *Van den Boogaard v Laumen* [1997] ECR I-1147.

regard in each particular case to the specific aim of the decision rendered.[63] According to the Court of Justice, the aim of each decision should be deduced from the reasoning of the decision. If the reasoning of the decisions shows that a provision (sum) awarded is designed to enable the spouse to provide for himself or if the needs and resources of each spouse are taken into consideration in the determination of the amount, the decision will solely be concerned with maintenance.[64] Basing the characterization of the judgement only on the reasoning of the judgement is somehow contradictory, since as explained above, in English divorce proceedings the needs and resources of each spouse are taken into consideration even when making orders for the division of matrimonial property. For example, where both parties are earning well an order awarding a lump sum will frequently be intended as a division of assets rather than maintenance and should be characterized accordingly.[65] The fact whether the maintenance was awarded as a lump sum or as a periodic payment is irrelevant according to the Court of Justice, since the choice on method of payment by the original court cannot alter the nature of the aim pursued by the decision.[66] Likewise, the fact that the decision of which enforcement is sought also orders ownership in certain property to be transferred between the former spouses cannot call in question the nature of that decision as an order for the provision of maintenance - the aim is still to make provisions, by means of a capital sum, for the maintenance of one of the former spouses.[67]

In conclusion, although general in its nature, the criteria developed by the Court of Justice uphold the same legal policies that are already found behind the domestic rules of maintenance and matrimonial rules of the Member States. Namely, the Court of Justice has tried to uphold the need to consider the necessity of the spouse as a core issue in the maintenance matters and the distributive function of the property rules as the main aim in the matrimonial property cases.

6. Conclusions

Based on the previous, it is evident that the problem how to characterize 'maintenance obligations' can rise in very different phases of proceedings starting from the jurisdictional questions and ending with the recognition and enforcement of foreign judgments. The following general conclusions can be made in order to tackle the characterization problem that the term 'spousal maintenance obligations' (as found in the new Maintenance Regulation and the proposal for the matrimonial property) presents.

Firstly, although the courts have laid down relatively clear criteria for deciding whether certain foreign decisions should fall under the scope of the rules regulating the recognition and enforcement of maintenance decisions (as opposed to matrimonial property), no such criteria has been developed in order to decide whether a certain legal dispute itself between the parties relates to maintenance. So far, the cases that have come before the Court of Justice and *Bundesgerichtshof* on this matter have dealt with the questions of recognition and

[63] Ibid para 21.
[64] Ibid para 22. However, the distinction might be hard to make in practice due to the intermingling of the matrimonial property and maintenance one hand and multi-purposiveness in substantive law on the other. Ulrich Magnus and Peter Mankowski (eds), *Brussels I Regulation* (Sellier 2007) 162.
[65] Case C-220/95 *Van den Boogaard v Laumen* [1997] ECR I-1147, Opinion of Advocate General Jacobs, para 80.
[66] Ibid para 24. Although the judge deciding upon the recognition or enforcement of the judgement should in principle always have the right to inspect whether a matter comes under the scope of the relevant instrument (Brussels Convention, Brussels I Regulation, Maintenance Regulation), the Court of Justice puts the actual burden on the original judge who solved the case on its merits and possibly also solved the jurisdictional dispute under the relevant European instrument, since the reasoning of this judge will be decisive for the latter conclusion on whether the awarded decision falls under the scope of the relevant instrument.
[67] Ibid para 25.

enforcement of foreign judgements. Similarly, the English case *Moore v Moore* is not a classical case of jurisdiction or applicable law, but instead deals with the question of staying the English proceedings in favour of a foreign court. While the judgments of different courts are undoubtedly authoritative, due to the factual nature of these judgments, they focus too much on the aims and reasoning of the foreign decisions or applications made to foreign courts. Thus, the guidelines given by the courts cannot be applied word-by word in the jurisdictional and applicable law disputes and the existing case-law should be considered inadequate in order to solve the characterisation problem that the proposed regulation on matrimonial property regimes presents in conjunction with the Maintenance Regulation.

Secondly, in order to ascertain whether certain legal disputes themselves (as opposed to the foreign decisions) should be characterized as involving the 'spousal obligations to maintain' the author of the article chose to turn to the general purposes of the EU Private international law rules and the relevant domestic rules of the Member States in order to determine which criteria can be used for characterizing certain legal relationships as involving maintenance obligations. From this comparative exercise one criterion repeatedly stood out as being the shared justification for treating certain obligations as maintenance obligations. This is the necessity of the spouse to acquire maintenance for his subsistence as a central characteristic in any maintenance case. Thus the obligation to give spousal maintenance in order to guarantee such subsistence should form the core of the corresponding 'maintenance obligation'.

Thirdly, due to the general autonomous nature of the concept 'spousal maintenance obligations' and in the absence of any specific guidelines given by the Court of Justice on the matter, the courts of the Member States are currently in a position where they can interpret the 'obligations to maintain' widely as to achieve the circulation of their judgements in other Member States. Although this practice has not yet been reflected in the case-law it is a consideration worth taking into account when the Court of Justice finally arrives at the interpretation of the term 'maintenance obligations' as found in the new instruments. With the abolition of exequatur from the Maintenance Regulation and the possibility of some states opting out from the proposed regulation on the matrimonial property regimes, the free movement of judgements is a consideration that the Court of Justice should take into account when finally interpreting the term 'maintenance obligations'.