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Administrative co-operation and free legal aid in international child maintenance recovery

What is the added value of the European Maintenance Regulation?

1. Introduction

The international recovery of child maintenance is one important piece in the larger puzzle that ensures that children receive the assistance they need and deserve. According to Article 27(1) United Nations Convention on the Rights of the Child (hereinafter UNCRC), every child has the right to 'a standard of living adequate for the child's physical, mental, spiritual, moral and social development'. The primary responsibility for guaranteeing that this right is respected falls squarely on the shoulders of the parents.[1] However, if a parent fails to meet his or her financial obligation, steps will need to be taken to ensure that the sums are eventually paid. It is within this context that the current international instruments for the international recovery of child maintenance operate. Currently, this regulatory framework is failing.

Having acknowledged the need for new legislation, both the Hague Conference and the European Union have drafted new instruments aiming to improve the functioning of the current system.[2] The core of this article centres on these new instruments, namely:

- 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (hereinafter the HMC), and
- 2008 European Council Regulation on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations (hereinafter the EMR).[3]

Both instruments lay down the framework for the creation of a network of Central Authorities, forming the cornerstone of a future European and global system of administrative co-operation with respect to the international recovery of maintenance. Since both instruments are due to enter into force at the same time, the question arises whether it was indeed necessary to have two separate instruments dealing with this issue. This article, therefore, will address the question of whether the provisions with respect to administrative co-operation in the EMR have added value alongside the provisions contained in the HMC.[4]

The aim of this article is hence fourfold. Firstly, by simultaneously comparing the administrative co-operation provisions of both instruments, this article will provide an overview of the new administrative system that will operate from June 2011 onwards. To this author's knowledge, such a detailed comparative overview of these two instruments in this field has not yet been conducted. Accordingly, this article will also afford the reader a summary of the potential benefits of this new regulatory framework compared to the current system. Thirdly, this comparison will draw attention to the textual and substantive similarities and differences between these instruments in this field. Fourthly and finally, this article hopes to provide a critical analysis of the final text adopted by the European Union with respect to the provisions on administrative co-operation.

In so doing, this article is divided into five main sections. After a brief overview of the current regulatory framework (§ 2), attention will shift to a comparison of the administrative co-operation provisions of the EMR and the HMC (§ 3), as well as the provisions regarding the effective access to justice (§ 4). After a short summary of the comparisons (§ 5), the approach adopted by the European Union will be evaluated in § 6.[5]

2. The current system of administrative co-operation[6]

Sixty-five States are presently party to the 1956 New York Convention.[7] Although work had originally been undertaken by UNIDROIT, the Convention was eventually drafted by the United Nations Economic and Social Council and signed on the 20th June 1956. Unlike other instruments in this field,[8] this Convention does not contain any substantive rules relating to the recognition and enforcement of maintenance determinations. Instead, the 1956 Convention establishes a global network of agencies aimed at regulating the administrative aspects of the recovery of transnational maintenance obligations.

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1 Art. 27(2) UNCRC.

2 For an overview of these instruments in their entirety see P. Vlas, 'Alimentatie uit Brussel met een Haags randje', *WPNR* 2009, pp. 293-295.

3 Council Regulation (EC) No. 4/2009 of 18 December 2008.

4 In this respect it is interesting to note that Hellner had asked a similar question with respect to the entire Maintenance Regulation prior to it coming into force: M. Hellner, 'The Maintenance Regulation: A critical assessment of the Commission's Proposal', in: K. Boele-Woelki and T. Sverdrup, *European Challenges in Contemporary Family Law*, Antwerp: Intersentia 2009, pp. 343-378.

5 In terms of methodology, since both instruments have yet to enter into force, this article is based on the preliminary documents to both instruments, as well as participatory observations conducted at the transmitting and receiving agencies in six European countries, namely Austria, the Czech Republic, Denmark, England & Wales, The Netherlands and Sweden.

6 No attention will be paid here to the 1990 Rome Convention which never entered into force.

7 For up-to-date information regarding ratifications visit: <http://untreaty.un.org/English/access.asp>. It is worth noting that Bulgaria, Latvia, Lithuania and Malta are the only EU Member States not currently participating in the 1956 New York Convention.

8 For an extensive overview of all international and European instruments in this field, see I. Curry-Sumner, 'International Recovery of Child Support: Are central authorities the way forward?', in: B. Verschraegen (ed), *Family Finances*, Vienna: Jan Sramek Verlag 2009, pp. 176-184.

The system established by the 1956 New York Convention is, at first glance, relatively straightforward. Each States Parties must designate a body (or bodies) to act as a transmitting and/or receiving agency (in practice these are often referred to as the 'contacts'). A maintenance creditor in a Contracting State is able to contact the transmitting agency in the State of his or her residence.[9] The transmitting agency must then communicate this claim to the receiving agency in the Contracting State having jurisdiction over the maintenance debtor.[10] The receiving agency is then obliged to 'take all appropriate steps for the recovery of maintenance, including the settlement of the claim, and, where necessary, the institution and prosecution of an action for maintenance and the execution of any order or other judicial act for the payment of maintenance'.[11]
Although the 1956 Convention provides no grounds either for the recognition or enforcement of decisions, Article 3 does lay down minimum standards and documentation requirements that must be satisfied by agencies when transmitting cases under the Convention.[12] Furthermore, all Contracting States are under a duty to provide information with regard to the proof required in maintenance claims, the evidence that needs to be submitted and other requirements that must be complied with.[13] States Parties are furthermore under no obligation to provide free legal aid and assistance since Article 4(3) simply grants transmitting States the right to recommend that a claimant be granted free legal aid or exemption from costs. The receiving State is under no obligation to follow this recommendation.
On the surface, this Convention apparently bestows Contracting States with a smooth-running, well-oiled machine. Yet, upon closer inspection, it would appear that a large number of States Parties do not even fulfil their basic obligations under the Convention, leading to severe operational problems.[14] The effective functioning of the administrative co-operation established by the 1956 Convention is reliant upon the efficient operation of the legal procedures according to Article 6. Nonetheless, the various national acts implementing this Convention display enormous differences, leading to a plethora of diverse procedures.[15] Even so, due to the nature of the 1956 Convention (i.e. its rather technical and organisational nature), this is generally only referred to in passing in case law.[16] These oft-heard complaints formed the main reason for both the Hague Conference and the European Union to undertake steps to modernise the legislation in this field.[17]

3. Administrative co-operation

3.1 Introduction

During the negotiations to the HMC and the EMR, all parties recognised the necessity of an effective and efficient system of administrative co-operation. The fact that the provisions on administrative co-operation form the cornerstone of the new rules is reflected in Article 1(a) HMC; one of the aims of the Convention is to establish 'a comprehensive system of co-operation between the authorities of the Contracting States'.[18] This section will deal in detail with the designation of the Central Authorities (§ 3.2), the functions of these authorities (§ 3.3), the types of applications that they will be able to process (§ 3.4), as well as how such procedures will work in practice (§ 3.5).

3.2 Designation of Central Authorities

Both the HMC and the EMR presume that an efficient and effective administrative cooperation system could be best achieved by establishing a network of Central Authorities.[19] A system of Central Authorities has proven to be successful in the field of adoption (1993 Hague Adoption Convention) and child abduction (1980 Hague Abduction Convention).[20] Furthermore, such a network has also been used in four other Hague Conventions, as well as four European Regulations.[21] Whether the unique nature of maintenance cases, i.e. the large volume of cases, the ongoing nature of the claims and the constant need for modification of the claim, will be factors that necessitate a different administrative co-operation system will only be answered over the course of time.[22]
A Central Authority is a public authority designated by a Contracting or Member State to discharge or carry out the duties of administrative co-operation and assistance under the international instruments.[23] Every Contracting or Member State is, however, free to determine the designation of its Central Authority. As a result, the current variety in transmitting and receiving authorities under the 1956 New York Convention will more-than-likely continue under these new instruments.[24] The variety of these agencies, bureaus and departments is as numerous as the number of agencies themselves. It could take the form of:

9 Art. 2(1) 1956 Convention.
10 Art. 2(2) 1956 Convention.
11 Art. 6(1) 1956 Convention.
12 Art. 3(3) and 3(4) 1956 Convention.
13 Art. 3(2) 1956 Convention.
14 W. Duncan, 'The Development of the New Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance', *Family Law Quarterly* 2004, pp. 663-687 at p. 666.
15 Further operational problems in relation to the 1956 New York Convention arise in relation to the substantive scope of the Convention. See, D. van Iterson, 'Het functioneren van de Alimentatieverdragen', *Tijdschrift voor Familie- en Jeugdrecht* 6/1999, pp. 127-130 at p. 128.
16 D. Katanou, 'Übereinkommen über die Geltendmachung von Unterhaltsansprüchen im Ausland – New Yorker-Unterhaltsübereinkommen', *Familie, Partnerschaft, Recht* 2006, pp. 255-258 at p. 256. For example, OLG Schleswig 14 May 1975, *Die deutsche Rechtsprechund* 1977, No. 140. However, see more recently for a clear example of an explicit reference, Gerechtshof 's-Gravenhage 19 November 2008, LJN: BH3764, *JPF* 2009, nr. 132, annotated ICS, *NIPR* 2009, nr. 90.
17 Van Iterson 1999, p. 127 (*supra* n. 15).
18 This is supported in preamble 10 EMR.
19 Art. 4(1) HMC and Art. 49(1) EMR.
20 Convention of 25 October 1980 on the civil aspects of international child abduction, Convention of 29 March 1993 on the protection of children and co-operation in respect of inter-country adoption. See also Hague Conference, *Draft Explanatory Report*, (2007) Preliminary Document No. 32, pp. 20-21, § 73 (hereinafter Draft Explanatory Report).
21 1965 Hague Service Convention, 1970 Hague Evidence Convention, 1996 Hague Child Protection Convention and 2000 Hague Adult Protection Convention. At EU level, 2001 EU Evidence Regulation, Brussels IIbis, 2006 EU Consumer Regulation and 2007 EU Service Regulation.
22 See further, Curry-Sumner 2009, pp. 191-193 (*supra* n. 8) and I. Curry-Sumner, 'International Recovery of Child Maintenance Administrative co-operation in incoming child maintenance cases', in: UCERF, *Actuele Ontwikkelingen in het Familierecht: Reeks 3*, Nijmegen: Ars Aequi 2009, pp. 53-58.
23 E.g. Draft Explanatory Report, p. 21, § 76 (*supra* n. 20).
24 See *supra* § 2.

- a social insurance agency as in Sweden (*Försäkringskassan*);[25]
- an independent public maintenance enforcing organ as in The Netherlands (*Landelijk Bureau Inning Onderhoudsbijdragen*);[26]
- a specially dedicated Ministerial department as in the Czech Republic (*Uřad pro mezianárodně právní ochranu dětí*),[27] or England & Wales (*Reciprocal Enforcement of Maintenance Obligations Office*);[28] or
- a ministerial department as in Austria (*Bundesministerium für Justiz*).[29]

One difference between the HMC and the EMR, on the one hand, and the current system of administrative co-operation, on the other, is that countries will be obliged in the future to designate *one* authority for both incoming and outgoing cases.[30] At present, although many countries have indeed fused the streams of incoming and outgoing cases into one agency (e.g. Austria, Czech Republic, England & Wales, The Netherlands, and Sweden),[31] other countries operate two entirely different systems for incoming and outgoing cases (e.g. Denmark).[32] Despite this difference, both the HMC and the EMR provide for the possibility to delegate the duty to transmit and receive applications.[33] How these organisational and structural amendments will affect the practical operation of international maintenance claims is as yet unclear.
The inclusion of a specific duty in the EMR imposed on a Central Authority that receives a request despite not being competent must be regarded as the specification of a rather self-evident obligation.[34] It is to be expected that Central Authorities operating under the authority of the Hague Convention will also apply the same obligation. Furthermore, the requirement to inform the relevant authorities of changes is included in both instruments, albeit in vastly different places within the instrument.[35]

3.3 Functions of Central Authorities

Both instruments permit applicants to pursue claims without using the Central Authority system,[36] and ensure that the use of this system is highly encouraged by providing for free legal assistance/aid if an applicant applies through the Central Authority in the State of his or her residence.[37] An interesting difference between the two instruments surfaces with respect to the interpretation of the term 'residence'. The HMC notes that the term 'residence' for the purposes of an application through a Central Authority is to be regarded as excluding mere presence.[38] An equivalent provision in the EMR is noteworthy in its absence. Nevertheless, a similar reference is made in the recital 32 to the EMR. The question must, however, be asked why this explanation has been downgraded to a reference in the preamble. Due to the lack of parliamentary proceedings or explanatory notes to the EMR, the exact significance of the placement of this reference will ultimately have to be determined by the European Court of Justice (hereinafter ECJ). It is nevertheless to be expected that the reference in the preamble coupled with the original version of the EMR[39] should lead to the conclusion that Article 55 EMR has the same scope as the equivalent provision in Article 9 HMC. Both the HMC and the EMR draw a threefold distinction between:

- general, mandatory, non-delegable functions (§ 3.3.1),[40]
- specific, mandatory, delegable functions (§ 3.3.2),[41] and
- specific, discretionary, delegable functions (§ 3.3.3).[42]

3.3.1 General, mandatory, non-delegable functions

Central Authorities will be under a general duty to co-operate with each other and promote co-operation amongst all internal competent authorities. The EMR specifically emphasises the obligation to exchange information. This inclusion is at first glance slightly unusual. However, this is linked to the inclusion of provisions in the EMR pursuant to the access of information and the holding of meetings.[43] Accordingly, attention has been explicitly drawn to the express obligation imposed on Central Authorities to exchange information.
Although explicit reference to the provision of information to the Permanent Bureau was made in earlier drafts of the HMC,[44] it was stated on numerous occasions that express reference in Article 5 to the provision of information was not

25 Translation: Social Insurance Agency.
26 Translation: National Maintenance Collection Agency.
27 Translation: Office for International Legal Protection of Children.
28 REMO is a unit of the International Litigation Section within the Litigation Services Department of the Office of Court Funds, Official Solicitor and Public Trustee. This Office is, in turn, an associated and independent office of the newly formed Ministry of Justice. As such, and in this way, REMO operates under the delegated authority of the British Secretary of State for Justice. More information on the Official Solicitor's Office can be found at: <http://www.gls.gov.uk/about/departments/offsol.htm>. See also Curry-Sumner 2009, pp. 53-58 (*supra* n. 22).
29 Translation: Federal Ministry of Justice.
30 This proposal received widespread report in the First Special Commission, Hague Conference, *Report on the First Meeting of the Special Commission on the International Recovery of Child Support and Other Forms of Family Maintenance*, (2003) Preliminary Document No. 5, p. 14, § 14.
31 See for more information with regard to the English system: Curry-Sumner 2009, pp. 53-58 (*supra* n. 22) and the Dutch system: pp. 59-63.
32 See for more information with regard to the Danish system: Curry-Sumner 2009, pp. 46-51 (*supra* n. 22).
33 Art. 6(1)(a), in conjunction with Art. 6(3) HMC and Art. 51(1)(a), in conjunction with Art. 51(3) EMR.
34 An obligation is namely imposed on the Central Authority that receives the request whilst not being competent, to forward the request to the competent Central Authority, Art. 49(2) EMR.
35 Art. 4(3) HMC and Art. 71(1) EMR.
36 See, for example, Art. 37 HMC.
37 Art. 9 HMC and Art. 55 EMR.
38 A. Borrás et al., *Explanatory Report*, Hague Conference, November 2009, p. 52, § 228.
39 COM (2005) 649 final, Art. 42(1). The original version obliged the applicant to apply to the Central Authority of his or her *habitual residence*, whereas the final text of Art. 55 EMR only refers to the term *residence*.
40 Art. 5 HMC and Art. 50 EMR.
41 Art. 6(1) HMC and Art. 51(1) EMR.
42 Art. 6(2) HMC and Art. 51(2) EMR.
43 See *infra* § 3.5.4 Arts. 61-63 EMR.
44 Hague Conference, *Working Draft of a Convention*, (2004) Preliminary Document No. 7, p. 5, Art. 7(2)(a) (hereinafter Working Draft of a Convention 2004); Hague Conference, *Working Draft of a Convention*, (2005) Preliminary Document No. 13, p. 5, Art. 5(b) (hereinafter Working Draft of a Convention 2005); Hague Conference, *Tentative Draft Convention*, (2005) Preliminary Document No. 16, p. 5, Art. 5(b) (hereinafter Tentative Draft Convention); Hague Conference, *Report of the Administrative Co-operation Working Group*, (2006) Preliminary Document No. 19, p.13, Art. 5(b) suggested language change; Hague Conference, *Preliminary Draft Convention*, (2007) Preliminary Document No. 25, p. 5, Art. 5(b) (hereinafter Preliminary Draft Convention); Hague Conference, *Revised Preliminary Draft Convention*, (2007) Preliminary Document No. 29, p. 5, Art. 5(b).

required if Article 57 was accepted.[45] Ultimately, the text of Article 57 was accepted and thus express reference to the provision of information in Article 5 was deleted. Accordingly, the specific inclusion of this reference in the EMR should not be regarded as an omission in or a narrowing in the scope of the HMC. The exchange of information is obviously an integral part of any administrative network and, therefore, should also be regarded as necessary, according to the HMC.[46]

3.3.2 Specific, mandatory, delegable functions

Extensive debate focussed not only on the wording of the various articles in these new instruments, but also on their (relative) placement. In the original draft of the HMC, no distinction was drawn between different types of specific functions.[47] After deliberations during the Second Special Commission, it was decided that two duties in particular should be set apart from the other duties due to their mandatory nature, namely the duty to 'transmit and receive applications' and the duty to 'initiate or facilitate the institution of proceedings'. In discharging these duties, a Central Authority is denied from taking 'all appropriate measures', and instead must discharge these duties comprehensively. The same distinction is also manifest in the EMR.

It is also worth noting that the Central Authorities are obliged 'in particular' to perform the tasks listed in Article 6(1) HMC and Article 51(1) EMR. Accordingly, and perhaps rather peculiarly, the mandatory obligations listed are non-exhaustive.[48] On a critical note, it must be stated that the very essence of mandatory obligations is that one is aware of the nature of these obligations prior to discharging the duty. If a Central Authority is not aware that it is obliged to discharge a mandatory duty, can it later be held not to have satisfied this responsibility? Regardless of the nature of the duties listed, the mandatory duties listed in these articles, may be delegated and thus may be performed by other public bodies.

3.3.3 Specific, discretionary, delegable functions

With respect to all the discretionary functions listed in Article 6(2) HMC and Article 51(2) EMR, the Central Authority must take 'all appropriate measures' in ensuring that these obligations are satisfied.[49] This phrase obliges States to do all that is possible within their power with the available resources and within the legal restraints.[50] Moreover, the use of the word 'shall' indicates that Central Authorities are obliged to take all appropriate measures. However, the measures that need to be taken are subsequently left to the discretion of the requested Central Authority.

Differing from the current system of administrative co-operation, both new instruments explicitly list some of the core roles and duties of the administrative authorities. The imposition of specific duties and the inclusion of such duties in international instruments ensured that these provisions were some of the most extensively discussed provisions during the negotiations of both instruments. A delicate balance needed to be drawn between creating a minimum set of standards according to which all States must operate, on the one hand, and overburdening States with inflexible duties and functions, on the other. Furthermore, as was already mentioned previously, the nature and legal position of the Central Authority in any given legal system is crucial to its functioning. As a result, flexible functions needed to be laid down which catered for this diversity in organisational structure. This flexible approach is no more apparent than with respect to the specific, discretionary, delegable functions.

In reaching agreement on the functions, tasks, roles and duties of the Central Authorities careful attention was paid to the balancing of two interests, namely the costs for applicants who often have limited means versus the increased costs for the State. In reaching consensus, delegates attempted to ensure that although a State may indeed incur more costs, these costs were not disproportionate to the resulting benefits.

(a) *The whereabouts of the debtor*: In the first working draft of the HMC, the functions of the Central Authority were defined in rather restrictive terms. For example, authorities were under a duty to 'discover the whereabouts of the debtor'.[51] However, this duty was subsequently weakened so as to impose the duty to 'help locate the debtor'. In this way, flexible verbs such as help, encourage and facilitate have been used to limit the overburdening of authorities with these duties. Furthermore, in the original convention drafts, reference was only made to the assistance needed in locating the debtor; in the preliminary draft of January 2007 this was extended to include locating the creditor.[52] The text is identical to the relevant provision in the EMR, save for the cross-reference to Articles 61, 62 and 63 in the EMR.[53]

(b) *Obtaining relevant information concerning income and assets*: Once again the choice of flexible verbs here is noticeable with a change from 'seek out relevant information' to 'help obtain relevant information'.[54] The only difference between the EMR and HMC here relates to the cross-reference in the EMR to Articles 61, 62 and 63.[55]

(c) *Encouraging amicable solutions*: In the earlier drafts of the HMC, references to mediation and conciliation had been included in separate provisions.[56] In the end it was felt that these duties would only arise in seeking amicable solutions and therefore were better suited in the same pro-

45 See, for example, the comments made by Australia and the USA: Hague Conference, *Consolidated list of comments on revised Preliminary Draft Convention*, (2007) Preliminary Document No. 36, p. 13 (hereinafter Consolidated list of comments). Art. 57 expressly refers to the obligation to provide the Permanent Bureau of the Hague Conference with information describing its laws and procedures with regard to maintenance obligations.

46 This is supported with reference to the Draft Explanatory Report, p. 24, § 91 (*supra* n. 20). Furthermore, the wording of Art. 5(1) HMC ensured coherence with the equivalent texts in Art. 30, 1980 Hague Abduction Convention and Art. 29, 2000 Hague Adult Protection Convention.

47 Working Draft of a Convention 2004, p. 5, Art. 8 (*supra* n. 44); Working Draft of a Convention 2005, p. 5, Art. 6 (*supra* n. 44).

48 Draft Explanatory Report, p. 26, § 108 (*supra* n. 20).

49 At an earlier stage, reference was made to 'the most effective measures available'. However this was not acceptable because not all measures taken will eventually be effective. Often measures may well have to be taken regardless of the outcome of success: Tentative Draft Convention, p. 5, Art. 6(2) (*supra* n. 44).

50 Draft Explanatory Report, pp. 27-28, § 119 (*supra* n. 20).

51 Hague Conference, *Working Draft of a Convention*, (2003) Preliminary Document No. 7, Art. 8(d).

52 Preliminary Draft Convention, p. 5, Art. 6(2)(b) (*supra* n. 44). Australia was the only State to comment on this inclusion: Consolidated list of comments, p. 14 (*supra* n. 45).

53 Art. 51(2)(b) EMR.

54 Hague Conference, *Working Draft Convention*, (2007) Preliminary Document No. 7, p. 5, Art. 8(e) compared with the final text in Art. 6(2)(c), 2007 Hague Convention.

55 See § 3.5.4.

56 Draft Explanatory Report, p. 33, § 153 (*supra* n. 20).

vision. Once again, there are no differences on this point between the HMC and the EMR.[57]

(d) *Facilitation of maintenance payments*: In the original drafts of the HMC reference was also made to the obligation to monitor payment of maintenance. This phrase was eventually removed. Although the reasons for this removal are not provided in the preliminary documents to the HMC, discussions with the Central Authorities reveal a reluctance to burden Central Authorities with case management tasks. In many countries, e.g. Sweden, Denmark and England & Wales, the payment of maintenance occurs completely outside the oversight of the Central Authority. To change this system would involve major structural change, which would in turn entail associated costs. Again, there are no differences in wording between the HMC and the EMR.[58]

(e) *Other obligations*: Both the HMC and the EMR also oblige the Central Authorities to facilitate the collection and transfer of payments,[59] facilitate the obtaining of evidence,[60] provide assistance in establishing parentage,[61] initiate or facilitate proceedings to obtain provisional measures[62] and the service of documents.[63]

3.4 Types of possible application

As already discussed above, the negotiations surrounding both these instruments were precarious due to the possibility of increasing State costs. Although the drafters wanted to create a Convention that would be attractive to both creditors and debtors alike, they were also well aware that States would be reluctant to ratify or approve any instrument that would seriously increase the burden on the State purse. As a result, an ingenious distinction was drawn between those applications that formed the backbone of the instruments, i.e. the general applications, and those requests that were to be regarded as additional, i.e. the specific measures. In acknowledging the risk that should these additional requests have become standard applications, the Central Authorities might have become inundated with requests, the specific requests are treated as a category apart in both the HMC and the EMR.

3.4.1 General applications

A distinction is made in both instruments between applications submitted by a creditor, on the one hand, and applications submitted by a debtor, on the other. The list of possible applications is, however, identical according to both instruments:

1. An application by the creditor or the debtor for recognition of a decision, or recognition and enforcement of a decision.[64]
2. An application by the creditor for enforcement of a decision.[65]
3. An application by the creditor to establish a maintenance decision:
   a. If no decision has yet been made,[66] or
   b. If the applicant has a decision, but recognition and enforcement of the decision is not possible in the requested State.[67]
4. An application by the creditor or the debtor for modification of a decision made in the requested State[68] or in another State.[69]

On two occasions,[70] however, the HMC provides for possibilities not covered by the EMR. Firstly, an application under the HMC is also permitted if 'recognition and enforcement of a decision is … refused, because of the lack of a basis for recognition and enforcement under Article 20, or on the grounds specified in Article 22(b) or (e).' This reference is necessitated due to the requirement under the HMC to obtain an exequatur and the use of an indirect jurisdictional test.[71] Secondly, a debtor is permitted to submit an application for the 'recognition of a decision, *or equivalent procedure* …'.[72] The additional wording 'or an equivalent procedure' allows for those States without a simple recognition procedure to use an equivalent procedure available in their internal law.[73] It is to be hoped that reference to 'an equivalent procedure' is not required within the EU context. Why these three words have not also been included in the EMR is unclear.

3.4.2 Specific measures

Requests for specific measures are to be regarded as requests for limited assistance. A request for a specific measure may be taken prior to an actual application being filed with a Central Authority. A maintenance creditor may, for example, have doubts whether a maintenance debtor is residing in France or Belgium. It might, therefore, be advisable to first ascertain the whereabouts of the debtor using an application for specific measures, prior to filing an application. Nonetheless, although both instruments utilise the notion of specific measures (*specifieke maatregelen/mesures spécifiques*), the instruments differ slightly in their approach.

57 Art. 6(2)(d) HMC and Art. 51(2)(d) EMR.

58 Art. 6(2)(e) HMC and Art. 51(2)(e) EMR.

59 Art. 6(2)(f) and Art. 51(2)(f) EMR.

60 Art. 6(2)(g) and Art. 51(2)(g) EMR. The only distinction between the provisions here is that the EMR cross-references with the provisions of the European Evidence Regulation (No. 1206/2001).

61 Art. 6(2)(h) HMC and Art. 51(2)(h) EMR.

62 Art. 6(2)(i) HMC and Art. 51(2)(i) EMR.

63 Art. 6(2)(j) HMC and Art. 51(2)(j) EMR. The only distinction between the provisions here is that the EMR cross-references with the provisions of the European Service Regulation (No. 1393/2007).

64 *Creditor*: Art. 10(1)(a) HMC; Art. 56(1)(a) EMR. *Debtor*: Art. 10(2)(a) HMC; Art. 56(2)(a) EMR.

65 Art. 10(1)(b) HMC; Art. 56(1)(b) EMR. The EMR uses the phrase 'declaration of enforceability' instead of 'enforcement'. Despite the difference in terminology there is no substantive differences between these terms, see D. van Iterson, 'IPR-aspecten van de nieuwe mondiale en Europese regelgeving op het gebied van alimentatie', *Tijdschrift voor Familie- en Jeugdrecht* 2009, pp. 246-252 at p. 249.

66 Art. 10(1)(c) HMC; Art. 56(1)(c) EMR.

67 Art. 10(1)(d) HMC; Art. 56(1)(d) EMR. A small difference is apparent with respect to this application. According to the European Regulation, the only ground for the application is that recognition and enforcement is not possible. According to the Convention on the other hand, this application is possible if recognition and enforcement is not possible, '*or is refused, because of the lack of a basis for recognition and enforcement under Article 20, or on the grounds specified in Article 22(b) or (e)*' (italics indicate extra text in HMC).

68 *Creditor*: Art. 10(1)(e) HMC; Art. 56(1)(e) EMR. *Debtor*: Art. 10(2)(b) HMC; Art. 56(2)(b) EMR.

69 *Creditor*: Art. 10(1)(f) HMC; Art. 56(1)(f) EMR. *Debtor*: Art. 10(2)(c) HMC; Art. 56(2)(c) EMR.

70 For the explanation of the inclusion of Art. 56(3) EMR, see § 4.3.

71 See for more details regarding the abolition of exequatur under the EMR, Van Iterson 2009, pp. 249-250 (*supra* n. 65).

72 Art. 10(2)(a) HMC.

73 Borrás et al., Explanatory Report, p. 58, § 268 (*supra* n. 38).

Both instruments grant the requesting Central Authority the possibility to request a foreign Central Authority for specific measures.[74] The use of the word 'may' indicates the discretionary nature of this obligation with respect to the requesting Central Authority. Once the requesting Central Authority has opted to transmit an application for a specific measure, the requested Central Authority 'shall' take such measures (i.e. a mandatory obligation), so long as two cumulative conditions are satisfied. Firstly, the measure taken must be appropriate and secondly the requested Central Authority must be satisfied that the measure is necessary to assist a potential applicant in submitting an application or deciding whether to submit an application. Yet, no criteria have been provided to determine either the appropriateness or the necessity of the measure. Given the discretionary nature of the article and the cumulative conditions imposed, it is submitted that some States will readily accept such requests, whereas others will regularly deny such requests.

If the specific measure requested relates to helping locate the debtor or the localisation of his or her assets, the European Regulation stipulates extra rules. It is with respect to these issues that the European Regulation, therefore, differs in approach from the Hague Convention. In locating the debtor or the debtor's assets, the Regulation converts the discretionary responsibility imposed on the requested Member State into a mandatory obligation;[75] the required assistance must be provided without applying an appropriateness and necessity test. Certain restrictions are nevertheless imposed, for data protection reasons, with respect to the data provided to the requesting Central Authority.[76]

3.5 Transmission of cases

Space restrictions prohibit a detailed analysis of the different processes that will apply when dealing with incoming and outgoing cases according to the new international instruments.[77] Instead, one particular process will be dealt with in-depth in this section, namely the procedure with respect to the recognition or recognition and enforcement of decisions.[78] Although the basic transmission structure is identical according to both instruments, small differences are evident.

3.5.1 Procedure for the Requesting State: Outgoing cases

When an applicant (either creditor or debtor) approaches a Central Authority and requests assistance with respect to his or her maintenance obligation, the Central Authority must first determine whether and which instruments apply. Three main questions need to be posed.

- Firstly, the instruments only apply if the applicant is resident in the State concerned.[79]
- Secondly, the requested Central Authority must determine whether or not the case involves maintenance within the scope of the instrument.
- Thirdly, the Central authority must also determine whether there is a decision.[80]

If these three cumulative conditions are satisfied, the requesting Central Authority must determine whether certain documents need to be translated and whether certified copies are required. According to the EMR, translations will not be necessary, so long as a copy of one of the Annexes I-IV is provided with the application.[81] Since the Annexes are identical in all 26 Member States,[82] the requesting Member State is able to fill out the form in their own language, yet transmit the form in the language of the requested State.[83]

At this stage, the requesting Central Authority must ensure that all relevant documents have been submitted. This stage will obviously be easier according to the EMR than the HMC as a result of the abolition of the exequatur procedure.[84] Once the requesting Central Authority is confident that the application is complete, the application must be transmitted to the requested Central Authority.[85]

3.5.2 Procedure for the requested State: Incoming cases

At this stage the requested Central Authority will have six weeks to acknowledge receipt of the file according to the Convention and thirty days according to the Regulation.[86] If after receiving the application, the requested Central Authority discovers that certain documents are missing or further explanation is necessary, a request must be sent to the requesting Central Authority. The requesting Central Authority must then respond within three months[87] of receiving this request regardless of the applicable instrument.[88] If the requesting Central Authority fails to supply the relevant documents within this allotted period, the requesting Central Authority is permitted to reject the application. Such a decision must be notified to the requesting Central Authority.[89]

The abovementioned sanction is actually the only control imposed on non-compliant Central Authorities. No sanctions are imposed on the requested Central Authority for failure to deliver speedy and timely responses to applications. Furthermore, although the requested Central Authority must supply a progress report within 3 months of acknowledging the receipt of the case (or 60 days in the case of the EMR), this status report need only contain information with regard to the 'status' of the claim.[90] Therefore, the administrative co-operation system remains grounded on the simple basis of mutual co-operation and trust, without resort to sanctions.[91]

74 Art. 7(1) HMC and Art. 53(1) EMR.

75 Art. 53(2) in conjunction with Art. 61 EMR.

76 Art. 53(2) 2nd paragraph EMR.

77 To assist in the practical application of the HMC, the Hague Conference is in the process of publishing a highly detailed and extremely useful *Practical Guide*. This guide will ultimately be essential to the proper functioning of the system of administrative co-operation.

78 *Creditor*: Art. 10(1)(a) HMC; Art. 56(1)(a) EMR. *Debtor*: Art. 10(2)(a) HMC; Art. 56(2)(a) EMR.

79 Art. 9 HMC and Art. 55 EMR.

80 Art. 19(1) HMC and Art. 2(1)(1) EMR.

81 Art. 59(2) EMR. A translation is only possible if this is necessary to provide free legal aid.

82 Denmark is not party to the EMR.

83 Art. 59(1) EMR. See § 3.5.3 for more information on the forms used.

84 Art. 17 EMR.

85 Art. 12(2) HMC and Art. 58(2) EMR. Although a specified form (Annex 1) is mentioned in Art. 12(2) HMC, the EMR also provides for specific transmittal forms in Annexes VI and VII. Reference to these forms is made in Art. 57(1) EMR.

86 Art. 12(3) HMC and Art. 58(3) EMR. Both instruments provide for standard forms (Annex 2 HMC and Annex VII EMR).

87 Or the time specified by the requested State.

88 Art. 12(9) HMC and Art. 58(9) EMR.

89 Using Annex IX, EMR.

90 Art. 12(4) HMC and Art. 58(4) EMR.

91 Art. 12(5) HMC and Art. 58(5) EMR refer to the duty imposed on Central Authorities to 'keep each other informed of: (a) the person or unit responsible for a particular case, (b) the progress of the case'.

Once the requested Central Authority is satisfied that the minimum Convention or Regulation requirements have been satisfied and the whereabouts of the debtor are known, the Central Authority must refer the case to the competent authority for recognition and/or enforcement of the decision. At this point, no provisions are included with regard to the communication requirements between the competent authority in one State and the Central Authority in another State. It could, therefore, be that at this stage the Central Authority in the requested State is more-or-less removed from the equation. The lack of clarity with regard to this stage of the procedure is, although understandable, disappointing.

3.5.3 Forms

During the negotiations on the HMC, a special Forms Working Group was established to examine the possibility and need to introduce standardised forms for the transmission of cases between authorities in Contracting States. The debate on the use of standard forms is obviously more complex at a global level than at the European level.[92] Here, great steps forward have been made by the European Union. In total the European Union has achieved a total of ten standard forms, whereas the HMC has supplied two. Nonetheless, the Hague Conference is still in the process of finalising a more extensive set of recommended forms which will aid in the transmission of cases between Central Authorities. To this end, a draft publication of numerous forms was made available in August 2010.[93]

3.5.4 Access to information

Unlike the HMC, the EMR explicitly provides for the gathering of information by Central Authorities with regard to the debtor's location and assets.[94] This set of far-reaching provisions is a fundamental breakthrough in cross-border information exchange in the field of private law. Guided by the fundamental privacy concerns raised by the European Data Protection Supervisor (EDPS), and after extensive deliberations, the text of Article 44 Draft EMR was substantially amended.
Safeguards have now been created to ensure that sensitive information does not fall into the hands of creditor or debtor, but instead will be transmitted from Central Authority to Central Authority.[95] The information may only be used for the purposes of maintenance recovery and the data subject must be informed that this information has been collected. Nonetheless, according to Article 63(2) EMR if notifying the data subject risks prejudicing the effective recovery of the maintenance, the Central Authority may defer notification for a period not exceeding 90 days. Despite this safeguard, no restraints are placed on when the Central Authority may apply this delaying technique. The term 'risk' is not defined and no supervisory body is involved in such deferral procedures.

4. Effective access

One of the most important principles underlying both the HMC and the EMR is that applicants must have effective access to the procedures necessary to complete their applications in the requested State. This is no more evident than with respect to child maintenance cases. In many child maintenance cases the sums involved are relatively small and the available assets meagre. It is, therefore, of the utmost importance that any possible payments reach the child rather than being swallowed up in expensive recovery procedures. According to preamble 36 EMR,

> 'On account of the costs of proceedings it is appropriate to provide for a very favourable legal aid scheme, that is, full coverage of the costs relating to proceedings concerning maintenance obligations in respect of children under the age of 21 initiated via the Central Authorities.'

It is interesting to note that the provision of free legal aid is restricted to those applications initiated via Central Authorities. Parties wishing to initiate claims themselves are not able to benefit from these favourable provisions.
The following section is devoted to an analysis of the various provisions with respect to free legal aid.

4.1 Definition of effective access

Despite the terminological discrepancy between the phrase 'effective access to *procedures*' in the HMC and 'effective access to *justice*' in the EMR, it is submitted that both these provisions refer to the same basic concept, namely that the applicant is able to put his or her case before the appropriate authorities in the requested State with assistance; the means of the applicant should not form a barrier.
The terminological differences do not, however, cease there. Both instruments clarify how effective access can best be secured. The HMC refers to the provision of 'legal assistance' whereas the EMR utilises the phrase 'legal aid'. The HMC provides no definition of the concept, although the draft explanatory notes state that the term legal assistance includes both legal advice and legal representation. In the EMR, on the other hand, Article 45 provides an extensive, non-exhaustive list of possible forms of legal aid, including pre-litigation advice, legal assistance in bringing a case, interpretation and translation. Only time will tell whether these two phrases will be interpreted uniformly by the authorities concerned.

4.2 Entitlement to effective access

Who is to be classified as an 'applicant'? According to both the HMC and the EMR, the term applicant covers maintenance creditors, maintenance debtors, as well as public bodies.[96] This is permitted in two different cases, namely if a public body is 'acting in place of an individual to whom maintenance is owed' or if a public body must be reimbursed 'for benefits provided in place of maintenance'. This distinction is nuanced, but extremely important. For certain jurisdictions, the maintenance amount is paid in advance by the State. In these jurisdictions the maintenance debt is then owed to the State. In Denmark, for example, all delinquent child maintenance claims are paid in advance by the Danish State.[97] In other jurisdictions, the non-payment of child maintenance is relevant in determining whether a parent with care is entitled to receive social assistance. In The Netherlands, for example, the level of social assistance depends on the income of the parent with care.[98]

92 See for the issues surrounding the creation of standard forms, Draft Explanatory Report, pp. 53-54, § 295-301 (*supra* n. 20).
93 Forms Working Group, *Recommended Forms*, (2010) Preliminary Document No. 2B revised.
94 Arts. 61-63 EMR.
95 Art. 62(2) 2nd paragraph EMR.
96 Art. 36 HMC and Art. 64 EMR.
97 Kapitel 3, *Børnetilskudsloven*. This is called *'forskudsvis udbetaling'*.
98 See M. Jonker, 'Enforcement of child maintenance in The Netherlands', in: I. Curry-Sumner and C. Skinner (eds.), *Persistent problems, finding solutions: Child Maintenance in England and The Netherlands*, Groningen: Wolf Publishing 2009, pp. 89-94.

4.3 Restrictions on access to free legal aid/assistance

According to the HMC, the free legal aid assistance offered in the case of child support applications is restricted to applications which have been initiated through the Central Authorities.[99] The EMR also imposes such a restriction, although this is much more difficult to pinpoint.[100] Although this article only deals with child maintenance cases, the type of maintenance claim is also of crucial importance.[101] Other relevant factors include:

- The presence of simplified and free procedures;
- The applicant, i.e. creditor or debtor;
- The type of application, i.e. recognition, enforcement, modification; and
- Whether a means/merits test is applied in the requested State.

4.3.1 Requests submitted by the creditor

Many States have an advanced administrative system whereby enforceable maintenance decisions are made without the need for legal representation or even for the applicant to attend the hearing. Therefore, although both instruments aim to provide for the extensive provision of free legal aid and assistance, a requested State is not obliged to provide such assistance if the applicant is able the make a claim without the need for such assistance.[102] The first restriction, therefore, provides States with simple and free procedures with the possibility of avoiding the obligation to provide free legal aid/assistance. Although this provision is not necessarily restricted to administrative procedure, in practice this will more than likely be the case.
If the case involves a child maintenance case,[103] and the child is younger than 21 years old,[104] then in principle the creditor is entitled to free legal aid or assistance, unless the Central Authority regards the request as manifestly unfounded and the claim is not for recognition, recognition and enforcement or enforcement.[105] How exactly a State will determine whether a claim is to be regarded as 'manifestly unfounded' is unclear. Is this simply another way of introducing a stricter merits test?[106]
A major difference between the two instruments is the use of a child-centred means test in the HMC. On the basis of Article 16 HMC, a Contracting State may declare that they are to use a child-centred means test in providing free legal aid. This test can only apply to an assessment of the means of the child, and does not therefore include the means of the applicant.[107] Such a test does introduce an extra restriction in providing free legal aid in accordance with the HMC, whereas such a restriction is not evident in the EMR. However, these HMC provisions only apply should Contracting States officially lodge a declaration of their intent to apply this means test. If no European Union Member State officially lodges a declaration regarding the use of this child-centred means test, then these provisions will not apply in the European Union.

4.3.2 Requests submitted by the debtor

Once again, the provisions with respect to the provision of simplified free procedures in the requested State apply to requests submitted by debtors. This is, however, the point where similarities with the requests submitted by a creditor ceases. The only requests eligible for free legal aid/assistance are those cases involving a request for recognition or enforcement made via a Central Authority.[108] However, the requested State is also permitted in accordance with both instruments to apply either a merits test or a means test, or both.[109] A means test aims to examine the income and assets of the applicant, which affect the ability of the applicant to pay for legal assistance/aid. A merits test, on the other hand, reviews the likelihood of success of case including such matters as the legal grounds for the application and whether the facts are likely to lead to a successful outcome.
States are under an obligation if they opt to apply such tests to inform the Permanent Bureau of the Hague Conference and the European Union of how these tests will apply in practice. It is obviously crucial to the proper functioning of these instruments that all States are fully aware how these tests are applied to therefore provide correct advice to debtors in their own jurisdictions.

5. Summary of the comparison

On the basis of these comparisons, it can be concluded that the vast majority of the provisions in the HMC and the EMR with respect to administrative co-operation, the procedural aspects of case management and effective access to justice are identical. Furthermore, the differences that are apparent fall roughly into three major categories:

1. non-substantive differences;[110]
2. differences as a result of internal or external cross-referencing;[111] and
3. substantive differences.

The bulk of the differences identified in this article fall squarely into the first two categories. Furthermore, although there are a number of substantial differences between the two instruments, these differences are restricted to a number of well-defined topics, for example access to information, time limits and effective access. Of the fifteen articles in the EMR dealing with the administrative co-operation, only three deal with topics not covered by the HMC.[112] Furthermore, only

99 Art. 15(1) HMC: 'applications … under this Chapter'. See also Hague Conference, *Practical Guide*, 2010, p. 39.
100 This is a combination of the Arts. 55, 56(1) and 46(1) EMR. This is furthermore underlined in recital 36 in the preamble.
101 Free legal aid or assistance is much more restrictive in cases not involving child maintenance.
102 Art. 14(3) HMC and Art. 44(3) EMR.
103 Although legal assistance and legal aid are available for non-child maintenance cases, they fall outside the scope of this article.
104 Art. 15(1) HMC and Art. 46(1) EMR.
105 Art. 15(2) HMC and Art. 46(2) EMR.
106 Although it would appear that the merits test mentioned in Art. 17(a) HMC and Art. 47(1) EMR do not provide for the word manifestly, it would appear confusing to introduce two different merits tests within the same instrument without further clarification.
107 Hague Conference, *Practical Guide*, 2010, p. 40 and P. Beaumont, 'International Family Law in Europe – the Maintenance Project, the Hague Conference and the EC: A triumph of Reverse Subsidiarity', *Rabels Zeitschrift* 2009, pp. 509-546 at p. 517, fn. 19.
108 Art. 17(b) HMC and Art. 47(2) EMR.
109 Art. 17(a) HMC and Art. 47(1) EMR.
110 E.g. the difference between 'legal aid' and 'legal assistance', and the difference between 'recognition and enforcement' and 'recognition and declaration of enforceability', or between 'effective access to justice' and 'effective access to procedures'.
111 E.g. the cross reference to provisions of relevant directives (No. 1393/2007 and No. 1206/2001).
112 Arts. 61, 62 and 63 EMR.

two articles provide for substantially different provisions than those contained in the HMC.[113] The differences between the EMR and the HMC with respect to the other ten provisions virtually all fall within the ambit of the first two categories listed above.
With respect to the provisions on effective access to justice, in only one area are the provisions of the HMC evidently more restricted than those provided for in the EMR, namely with respect to the child-centred means test. However, since these provisions only apply should a Contracting State make a declaration, the effect of this restriction is hugely limited within the EU context.

6. Evaluation

The central question posed in this article of whether the drafting technique employed by the European Union ultimately serves the desired aims is obviously very pertinent when related to the provisions on administrative co-operation.[114] Since the European Union had originally set out a number of specific aims in relation to the enactment of the EMR, it is important to analyse whether the final text meets these original aims.

6.1 Reduction in number of instruments

One of the main problems leading to the creation of a new regulatory framework was the plethora of international instruments in this field. By incorporating all the provisions with respect to administrative co-operation in one instrument, the European Union has ensured a reduction in the multiplicity of legal instruments in this field.[115] From 18 June 2011, the rules on jurisdiction,[116] recognition and enforcement[117] and administrative co-operation[118] will all be found in one instrument. Although the rules on administrative co-operation never really suffered from the multiplicity of sources, since all these provisions were neatly contained in the 1956 New York Convention, problems had arisen with respect to the interaction between the international instruments with respect to jurisdiction, applicable law and recognition, on the one hand, and the 1956 New York Convention with respect to administrative co-operation, on the other.[119] Within the European context, this problem has thus been solved.

6.2 Front-line actors

Having all the administrative co-operation provisions in one instrument may also be advantageous to front-line case-processors. These actors will only have to consult one instrument in all intra-Union cases. Accordingly, in non intra-Union cases, the HMC will apply (assuming that the States involved are Contracting States). Yet this apparent advantage conceals a very different picture when one actually looks behind the scenes into the actual work of these front-line actors.
Of the six Central Authorities visited,[120] all six operate under the auspices of the 1956 New York Convention with regard to the system of administrative co-operation. Although different recognition and enforcement procedures need to be followed with respect to individual cases,[121] each current authority operates within the same regulatory framework of administrative co-operation. In the future, this will no longer be the case. Within each organisation or Central Authority, three different administrative co-operation systems will be operational:[122]

Table 1: Applicable Administrative Cooperation Regime

Situation	Administrative Co-operation Regime
Intra-Union cases	EMR
Non intra-Union, but both parties signatories to HMC	HMC
Non intra-Union, but both parties not signatories to HMC	1956 New York Convention

As a result, not only will the front-line actors have to apply different recognition and enforcement procedures in different cases, but they will also be confronted with different organisational contexts depending upon the applicable legislation. Only time will tell whether it is feasible to have different administrative co-operation regimes operational in the same organisational entity. Complicated questions will no doubt arise when a debtor moves from one territory to another necessitating the employment of different set of administrative co-operation rules.

6.3 Simplification

A subsidiary aim in reducing the number of instruments applicable in this field was also to ensure the simplification of the rules to be applied. In this respect, it is disappointing that the vast majority of the administrative co-operation provisions in these two instruments are virtual replicates of each other. As a result, the interrelationship of these provisions is far from clear. Since it is not always true that a simple difference in terminology can be equated to a difference in substantial meaning, every difference in terminology must be traced through the preparatory documents to discover whether a substantial difference was indeed intended. This is a pain-staking and time-consuming process that unfortunately will undeniably lead to confusion and inconsistency.

6.4 Judicial jurisdiction

The inclusion of specific provisions on administrative co-operation in the EMR could be seen as ensuring that the ECJ has the competency to rule on preliminary rulings regarding the interpretation of these provisions. However, it is argued

113 Arts. 59 and 60 EMR.
114 For a good overview of these aims, see Beaumont 2009, pp. 543 et seq. (*supra* n. 107).
115 This was regarded as a major problem: Curry-Sumner 2009, pp. 176-193 at p. 185 (*supra* n. 8).
116 Currently in Art. 5(2) Brussels I Regulation.
117 Currently found in 1958 Hague Convention, 1973 Hague Convention, 1968 Brussels Convention, Brussels I Regulation and the European Enforcement Order Regulation.
118 1956 New York Convention.
119 Curry-Sumner 2009, p. 185 (*supra* n. 8).
120 In the context of current research, the author has undertaken participatory observations at various Central Authorities throughout Europe. For more details see Curry-Sumner 2009 (*supra* n. 8).
121 For example, the 1973 Hague Convention or the EEX Regulation.
122 Taking into account the geographical scope of the transmission provisions: Art. 12(2) HMC and Art. 58(2) EMR.

here that a simple reference to a Hague Convention would also have been sufficient for the ECJ to have retained ultimate competency with regard to questions of interpretation. Two examples are illustrative here. In Art. 10, Brussels II-bis Regulation reference is made to the 1980 Hague Child Abduction Convention. The question arises whether the ECJ is competent to interpret this Convention. According to Traest this reference must imply that the Convention has become an intrinsic part of the *acquis communautaire*.[123] As a result, the ECJ must have the competency to answer prejudicial questions related to this Convention. In the same vein, Boele-Woelki has also suggested the same approach with respect to the reference in the EMR to the 2007 Hague Maintenance Protocol.[124]

Irrespective of these two opinions, the ECJ has also recently ruled on a similar question with regard to the ECJs competency to rule on questions of interpretation with respect to the CMR Convention.[125] The ECJ held that it did not have the competency to hand down preliminary rulings if 'the European Union has assumed the powers previously exercised by the Member states in the field to which an international convention not concluded by the European Union applies'.[126] However, in the field of international recovery of maintenance, the European Union *has* assumed the powers of the Member States. In fact, it is the European Union that has ratified the HMC. Therefore, the recent decision of the ECJ in *TNT Express* goes further to support the theory that a reference to the HMC in the EMR would also have provided the same result with regard to the competency of the ECJ to rule on preliminary rulings as the current solution.

6.5 Terminology

Front-line actors who have to apply these rules should always be borne in mind when creating and implementing such international instruments. Luckily, the Hague Conference has indeed acknowledged the pivotal role played by the Central Authorities and is as a consequence working hard on the creation of a *Practical Operational Guide* for the HMC. This operational guide will provide assistance for all those confronted with the direct application of the HMC. It is disappointing that as of yet, the European Union has not also embarked upon a similar project with respect to the administrative co-operation regime according to the EMR. The European Union would do well to follow the lead of the HMC, and create a similar *Practical Guide* for the EMR. If the European Union does not embark upon such a project or if the Hague Practical Operational Guide is finished first, the question arises whether the Hague Guide can be used to interpret the EMR. If the answer to this question is affirmative, then this surely begs the question of why the administrative co-operation provisions needed to be included in the EMR in the first place!

Differences in phraseology can also lead to ambiguity. The exclusion of mere presence as falling under the definition of residence in the EMR is a clear example. Does the absence of such an exclusion in the text of the EMR mean that mere presence is sufficient to prove residency under the EMR? What is the significance of the inclusion of this reference in the preamble? Not having access to the preliminary documents from the committee stages of the EMR leads to speculation. At present, only the drafters of the EMR are able to elucidate the reasons behind various provisions; those not privy to the discussion are only able to speculate as to the supposed meaning.

6.6 Political compromise

The achievements made by the European Union and the Hague Conference in this field should not be underestimated. The complete abolition of enforcement proceedings for contentious and non-contentious decisions is an enormous step forwards and will be welcomed by all (apart from unwilling debtors!). This result could only be achieved if compromises were made; the most evident of which is to be found with regard to the provisions on applicable law. On the one hand, it was clear from the commencement of the negotiations that the common law countries would never be prepared to ratify an instrument that included choice of law rules.[127] On the other hand, many within the European Union believed that the abolition of enforcement proceedings could only be achieved if the same choice of law rules were to be applied. The ultimate solution – integral reference to the Hague Protocol instead of repeating the provisions – is clear, efficient and non-ambiguous. Ensuring that only those countries that apply the Protocol are able to benefit from the abolition of the enforcement proceedings ensures respect for the concerns of all parties.

Similar compromises will also undoubtedly have led to the drafting of the provisions on administrative co-operation. Perhaps without these unidentified compromises, the text may never have been completed. Unfortunately, the lack of access to preparatory documents ensures that we will never know. Nevertheless, regardless of any compromises reached, it is essential that any ultimate text adopted is clear, concise and able to satisfy judicial and practical scrutiny. In this respect, the repetition in the EMR of many of the provisions from the HMC could be said to have led to a somewhat over-complicated interrelationship between these two instruments that could easily have been avoided.

6.7 Alternative solution

One possible solution to avoid the cumbersome repetition of the current text would have been to opt for a 'referral technique'. This technique is not new and has, as already stated, been utilised previously, not least of which in the EMR itself. According to Article 15 EMR, questions related to applicable law are referred to the 2007 Hague Protocol. Another example is the reference in Article 11 Brussels II-bis Regulation to the 1980 Hague Abduction Convention. Such references avoid the recapitulation of all the rules which are in and of themselves applicable within a solely EU context. As far as this author is concerned there is no justifiable reason (other than possible political compromises) that could have stood in the way of opting for such a solution. In one main provision, the EMR could have brought the administrative co-operation provisions of the HMC within the ambit of the EMR. Additional articles could then have been drafted to specify those areas where the rules are supplemented. Such a solution has the advantage of being clearer, less ambiguous and legislatively

123 M. Traest, *De Europese Gemeenschap en de Haagse Conferentie voor het Internationaal Privaatrecht*, Antwerp: Maklu 2003, pp. 253-254, § 298-299 and pp. 476-478, § 606-608. See also ECJ, *Inga Rinau*, 11 July 2008, Case No. 195/08, *NIPR* 2009, nr. 159.

124 K. Boele-Woelki, *AA* 2009, katern 110, p. 6181. Alternatively see Vlas 2009, p. 293 (*supra* n. 2).

125 ECJ, *TNT Express Nederland BV* v. *AXA Versicherung AG*, 4 May 2010, Case No. 533/08, *NIPR* 2010, nr. 324.

126 Ibid., § 62.

127 Van Iterson 2009, p. 250 (*supra* n. 65).

more efficient. All the aims of the European Union and the Hague Conference in drafting new provisions in this field would have been upheld and the front-line actors would have been provided with one new system of administrative co-operation with supplemental rules which need to be applied in purely intra-Union cases. Comparisons between the two texts and assumptions with regard to the exact reason for differences would hence not have been necessary. A further advantage is that all the work currently being conducted at The Hague with regard to the Practical Guide could be used in its entirety.

7. Conclusion

Anno 2011, the world will be a little bit of a better place. The international recovery of child maintenance and other forms of support will have been made easier as a result of three new instruments. The achievements of the Hague Conference and the European Union should not for one second be underestimated. The abolition of exequatur at EU level and the creation of a global free legal aid for international recovery cases are two achievements that will go down in the annals of legislative history as monumental achievements.

Nevertheless, that does not make these instruments immune from criticism. As this article has shown, the provisions with respect to administrative co-operation in the EMR are far from impervious to disapproval. The central question posed in this article was whether the provisions on administrative co-operation and effective access to justice in the EMR have added value alongside the equivalent provisions of the HMC. On the basis of the comparison conducted, the answer to this question must unfortunately be formulated rather negatively since the provisions in the EMR specifically with respect to administrative co-operation do little to add to the equivalent provisions of the HMC. Although it is true that the EMR has achieved success beyond that accomplished in the HMC (especially with respect to the exchange of information and the applicable time limits), alternative drafting techniques would have served the original aims of the European Union better than the solution ultimately realised. Although the provisions of the EMR as standalone provisions serve to further the international recovery of maintenance, the interaction between these provisions and those of the HMC will lead to further complications and interpretation issues.

Although this conclusion with regard to the text of the EMR will undoubtedly not lead to amendment of the Regulation, it is hoped that the lessons learnt from the negotiations in this field will serve as fodder for the future. The European Union must learn to utilise the tools at its disposal in order to further the aims of its citizens. In so doing, the search for coherence with non-EU instruments is of crucial importance.