| Title: | Impact Assessment (IA) |
|---|---|
| **Implementation of European Regulation (EC) 4/2009 – jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matters relating to maintenance obligations** | **IA No: MOJ082** |
| | **Date: 21 April 2011** |
| | **Stage:** Enactment |
| | **Source of intervention:** EU |
| Lead department or agency: **Ministry of Justice** | **Type of measure:** Secondary legislation |
| Other departments or agencies: **HMRC, DWP , CMEC** | **Contact for enquiries:** Angela Muir 0203-334 -3117 |

# Summary: Intervention and Options

**What is the problem under consideration? Why is government intervention necessary?**

To make provision for the proper operation of the European Regulation (EC) 4/2009 ("the 2009 Regulation) which governs the (i) the jurisdiction of EU Member States' courts to hear maintenance cases and (ii) provides for the recognition and enforcement of maintenance decisions relating to maintenance obligations. The Regulation, which comes into force on 18 June 2011, will apply a simplified system to all forms of family maintenance (including spousal and child related). It replaces provisions in an existing EC regulation ("Brussels 1") and is directly applicable in EU law such that UK is legally bound to implement it.

**What are the policy objectives and the intended effects?**

The policy objectives are twofold: to meet our legal obligation to implement the 2009 Regulation and to do this in a way that simplifies the position intra-UK. .The intended effect will directly support the Government's own Green Paper[1] proposals to reform the domestic maintenance services in England and Wales which proposes that government should use mechanisms to encourage and support parents to fulfil their responsibilities as parents through the payment of child maintenance. The 2009 Regulation provides for the use of mediation to agree maintenance arrangements as an alternative to court proceedings.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base**)

An option of "do-nothing" has been used as the baseline but is not feasible because the 2009 Regulation is directly binding on the UK as a matter of EU law and therefore must be implemented. The options for proportionate implementation are (1) implement only the strict letter of the Regulation (2) implement the Regulation; and update the existing intra-UK maintenance jurisdiction scheme, as was done for the existing Brussels I Regulation that this replaces. The Government considers option (2) is preferable as it continues to provide one simple scheme for maintenance enforcement for both international and intra UK cross jurisdictional enforcement. Option (1) would create two different regimes, with potentially increased workload for the courts and practitioners.

| | |
|---|---|
| **Will the policy be reviewed?** It will be reviewed. **If applicable, set review date:** 6/2016 | |
| **What is the basis for this review?** Duty to review. **If applicable, set sunset clause date:** Month/Year | |
| **Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review?** | Yes |

**SELECT SIGNATORY Sign-off** For enactment stage Impact Assessments:

***I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.***

Signed by the responsible Minister: Lord McNally Date: 27th April 2011

[1] *Strengthening families, promoting parental responsibility: the future of child maintenance*, DWP, January 2011

## Summary: Analysis and Evidence — Policy Option 2

**Description:** Implement the 2009 Regulation through domestic legislation s. 2(2); and update the existing intra-UK maintenance jurisdiction scheme

| Price Base Year 2011 | PV Base Year | Time Period Years | Net Benefit (Present Value (PV)) (£m) | | |
|---|---|---|---|---|---|
| | | | **Low:** Optional | **High:** Optional | **Best Estimate:** |

| COSTS (£m) | Total Transition (Constant Price) | Years | Average Annual (excl. Transition) (Constant Price) | Total Cost (Present Value) |
|---|---|---|---|---|
| **Low** | Optional | | Optional | **Optional** |
| **High** | Optional | | Optional | **Optional** |
| **Best Estimate** | | | | |

**Description and scale of key monetised costs by 'main affected groups'**

- *Public bodies:* England and Wales Central Authority - two additional administrative staff to assist with the range of functions under the 2009 Regulation (but the staff will also support other work not related to the 2009 Regulation) cost £0.05m per annum (two staff) and HMRC maximum two staff cost £0.05m per annum, charged to MoJ to process data access requests.

**Other key non-monetised costs by 'main affected groups'**

Increase of costs for some citizens who can now only challenge the enforcement proceedings at the court of origin in the EU (e.g. travel costs.) There may be costs from additional provision of legal aid for certain cases.

| BENEFITS (£m) | Total Transition (Constant Price) | Years | Average Annual (excl. Transition) (Constant Price) | Total Benefit (Present Value) |
|---|---|---|---|---|
| **Low** | Optional | | Optional | **Optional** |
| **High** | Optional | | Optional | **Optional** |
| **Best Estimate** | | | | |

**Description and scale of key monetised benefits by 'main affected groups'**

It is not possible to provide monetised benefits due to a lack of data on case flows under the existing Brussels I maintenance regime. As part of implementation such data will be collected in future.

**Other key non-monetised benefits by 'main affected groups'**

There will be positive benefits from implementation: greater accessibility of legal aid provisions to UK residents in respect of their cases in other EU member states; improved case coordination across member states leading to better flow of cross border maintenance; updated intra-UK maintenance jurisdiction scheme would ensure clearer regime for intra-UK jurisdiction and minimise confusion in UK courts;.

**Key assumptions/sensitivities/risks** **Discount rate (%)**

The assessment is sensitive to lack of data on the current flow of maintenance cases between the UK and other EU Member States. Efforts have, however, been made to assess this and to quantify a number of other aspects e.g. the costs of applying necessary criminal sanctions in order to support the effective operation of the 2009 Regulation and the burden on Central Authorities. The impact assessment should therefore be regarded as a best estimate assessment using the available data.

| Direct impact on business (Equivalent Annual) £m): | | | In scope of OIOO? | Measure qualifies as |
|---|---|---|---|---|
| **Costs:** | **Benefits:** | **Net:** | Yes | IN/OUT |

# Enforcement, Implementation and Wider Impacts

| | | | | | |
|---|---|---|---|---|---|
| What is the geographic coverage of the policy/option? | | | United Kingdom | | |
| From what date will the policy be implemented? | | | 18/06/2011 | | |
| Which organisation(s) will enforce the policy? | | | HMCTS, MoJ,HMRC,DWP/ CMEC, Central Authorities | | |
| What is the annual change in enforcement cost (£m)? | | | Minimal/negligible | | |
| Does enforcement comply with Hampton principles? | | | Yes | | |
| Does implementation go beyond minimum EU requirements? | | | Yes | | |
| What is the $CO_2$ equivalent change in greenhouse gas emissions? (Million tonnes $CO_2$ equivalent) | | | **Traded:** | **Non-traded:** | |
| Does the proposal have an impact on competition? | | | No | | |
| What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable? | | | **Costs:** | **Benefits:** | |
| Distribution of annual cost (%) by organisation size (excl. Transition) (Constant Price) | **Micro** | **< 20** | **Small** | **Medium** | **Large** |
| Are any of these organisations exempt? | Yes/No | Yes/No | Yes/No | Yes/No | Yes/No |

# Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

| Does your policy option/proposal have an impact on…? | **Impact** | **Page ref within IA** |
|---|---|---|
| **Statutory equality duties**[1] Statutory Equality Duties Impact Test guidance | Yes | |
| **Economic impacts** | | |
| Competition Competition Assessment Impact Test guidance | No | |
| Small firms Small Firms Impact Test guidance | No | |
| **Environmental impacts** | | |
| Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance | No | |
| Wider environmental issues Wider Environmental Issues Impact Test guidance | No | |
| **Social impacts** | | |
| Health and well-being Health and Well-being Impact Test guidance | No | |
| Human rights Human Rights Impact Test guidance | No | |
| Justice system Justice Impact Test guidance | Yes | |
| Rural proofing Rural Proofing Impact Test guidance | No | |
| **Sustainable development** Sustainable Development Impact Test guidance | No | |

[1] Public bodies including Whitehall departments are required to consider the impact of their policies and measures on race, disability and gender. It is intended to extend this consideration requirement under the Equality Act 2010 to cover age, sexual orientation, religion or belief and gender reassignment from April 2011 (to Great Britain only). The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

# Evidence Base (for summary sheets) – Notes

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

### References

Include the links to relevant legislation and publications, such as public impact assessments of earlier stages (e.g. Consultation, Final, Enactment) and those of the matching IN or OUTs measures.

| No. | Legislation or publication |
|---|---|
| 1 | Maintenance Orders Act 1950 |
| 2 | Maintenance Orders Act 1958 |
| 3 | Administration of Justice Act 1970 |
| 4 | Attachment of Earnings Act 1971 |
| 5 | Matrimonial Causes Act 1973 |
| 6 | Domicile and Matrimonial Proceedings Act 1973 |
| 7 | Domestic Proceedings and Magistrates' Courts Act 1978 |
| 8 | Magistrates Court Act 1980 |
| 9 | Matrimonial and Family Proceedings Act 1984 |
| 10 | Children Act 1989 |
| 11 | Child Support Act 1991 |
| 12 | Social Security Administration Act 1992 |
| 13 | Civil Partnership Act 2004 |
| 14 | Civil Jurisdiction and Judgments Act 1982 |
| 15 | EU Regulation (EC) No. 44/2001 - "Brussels I" |

### Evidence Base

Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form (recommended maximum of 30 pages). Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).

The spreadsheet also contains an emission changes table that you will need to fill in if your measure has an impact on greenhouse gas emissions.

### Annual profile of monetised costs and benefits* - (£m) constant prices

| | $Y_0$ | $Y_1$ | $Y_2$ | $Y_3$ | $Y_4$ | $Y_5$ | $Y_6$ | $Y_7$ | $Y_8$ | $Y_9$ |
|---|---|---|---|---|---|---|---|---|---|---|
| **Transition costs** | | | | | | | | | | |
| **Annual recurring cost** | 0.10 | 0.10 | 0.10 | 0.10 | 0.10 | 0.10 | 0.10 | 0.10 | 0.10 | 0.10 |
| **Total annual costs** | | | | | | | | | | |
| **Transition benefits** | | | | | | | | | | |
| **Annual recurring benefits** | | | | | | | | | | |
| **Total annual benefits** | | | | | | | | | | |

* For non-monetised benefits please see summary pages and main evidence base section

# Evidence Base (for summary sheets)

## 1. Background and Introduction

### Scope of Impact Assessment

1.1 This Impact Assessment (IA) underpins the proposed approach to making provision for the proper operation of the European Council Regulation (EC) no.4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matters relating to maintenance obligations ("the 2009 Regulation"). It assesses so far as is possible from existing data the costs and benefits of implementing the Regulation. It follows the procedures and criteria set out in the IA Guidance and is consistent with the HM Treasury Green Book.

1.2 The IA focuses on presenting, as far as, possible a factual assessment of the potential impacts of implementing the Regulation. It is important to state at the outset that full quantification of numbers, costs and benefits has not been possible due to the uncertainty of the impacts and lack of historic data available. This impact assessment is sensitive to lack of data on the current flow of maintenance cases between the UK and other EU Member States. Efforts have, however, been made to assess this and to quantify a number of other aspects e.g. the costs of applying necessary criminal sanctions in order to support the effective operation of the 2009 Regulation; the burden on Central Authorities; and the impact on legal aid. The impact assessment should therefore be regarded as a best estimate assessment using the available data. As part of implementation we propose to put in place mechanisms to establish with more certainty volume flows under the Regulation and these will be important to the Post Implementation Review described elsewhere in this assessment.

### Objectives of Regulation

1.3 The Maintenance Regulation aims to provide a quick and simple process for the establishment and enforcement of maintenance orders and other decisions on maintenance across EU borders.

1.4 The Regulation extends maintenance obligations arising from a family relationship, parentage, marriage or affinity. It also provides specific rules about legal aid in these cross border maintenance cases, and provides a system of “Central Authorities” (“CAs”) in each Member State to facilitate the establishment and enforcement of maintenance across EU borders.

### Affected Groups and Sectors

1.5 The Regulation will apply to the three UK jurisdictions: England and Wales, Scotland and Northern Ireland. This Impact Assessment relates to England and Wales only.

1.6 The following groups and sectors are likely to be affected by the Regulation :

- *Judiciary*: Direct enforcement (i.e. no registration) will apply to all enforcement cases except those from Denmark and transitional cases. This will mean changes for Magistrates’ Courts when determining jurisdiction and recognising decisions in international maintenance cases.
- *Public Authorities:* HM Revenue and Customs (HMRC), the Department for Work and Pensions (DWP) and the Child Maintenance and Enforcement Commission (CMEC) will be required to share data with the Central Authorities as required under the Regulation to facilitate the making of maintenance decisions and their enforcement. These public bodies are considered to provide good but proportionate coverage in terms of the information required under the 2009 Regulation.
- *Central Authorities:* The Central Authorities will be required to carry out more extensive duties than under the current instrument (Brussels I). However, these duties are comparable to those required of Central Authorities under other EU and international instruments relating to children cases in terms of facilitating and assisting.
- *Legal profession:* Specialist lawyers or law firms working on issues related to maintenance obligations. There will be changes to procedure and lawyers will need to be familiar with these

in the small number of cases lawyers get involved in. Qualitative evidence from court staff is that solicitors are not often involved in maintenance cases in the magistrates' courts (where the overwhelming majority of these cases are heard). We are testing this as part of our technical consultation on our implementing regulations. However, we consider that implementing Option 1 (limiting to changes for outside UK cases only) would potentially create an extra burden on the legal profession by requiring them to operate under different schemes for intra and outside UK cases.

- *Individuals*: This will be the parties to these cases i.e. debtors and creditors. The 2009 Regulation should simply the process for these individuals. We expect to confirm this assessment as a result of our technical consultation on the implementing regulations.

## 2. Problem under Consideration

2.1 The Regulation is directly applicable in EU law and the UK is legally bound to ensure its proper and timely application from the 18th June 2011. It is proposed to implement through s. 2(2) European Community Act 1972 regulations to ensure the proper operation of the Regulation and to remove inconsistent existing legislation. It is also proposed that as well as implementing the Regulation the opportunity is taken to update an intra-UK maintenance jurisdiction scheme to align jurisdictional rules as between the different territorial units of the UK with those of the 2009 Regulation. This was the approach adopted when the measures in the existing EU Regulation (Brussels I" Regulation (EC No. 44/2001), governing maintenance cases between EU Member States was implemented in 2002. Whilst this may technically be viewed as "gold plating" there is a strong policy justification for doing so because there will be benefits to practitioners and individuals from having one simplified system in operation. The Regulation therefore replaces existing regulations for enforcement of maintenance which also provide for aligned jurisdictional rules. This approach has been agreed with the other UK jurisdictions.

## 3. Cost Benefit Analysis

3.1 This section sets out some potential costs and benefits of implementing the Regulation and other associated legislation.

### Scope of CBA

#### Principles

3.2 The IA aims to identify, as far as possible, the impacts of the proposals. In particular, it considers whether the proposed secondary legislation when implemented will deliver a positive impact and take account of economic, social and distributional considerations.

3.3 In undertaking this IA, we have focussed on non-monetised impacts, with the aim of understanding what the net impact might be from our proposed approach to implementing the Regulation. It has not been possible to quantify costs due to data limitations.

#### Policy Focus

3.4 The IA restricts itself to the key elements of the 2009 Regulation, and in particular, to an assessment of the qualitative impacts and benefits of the proposed approach to making provision for the proper operation of the Regulation.

### Base Case

#### Description

3.5 The IA process requires that all options are assessed relative to a common baseline. The baseline for this IA is to "do nothing". This is assumed to mean that the UK would maintain existing provisions under "Brussels I" Regulation (EC No. 44/2001). In practice this is not feasible or realistic because the 2009 Regulation is binding on the UK and therefore must be implemented.

3.6 It is important to note that Brussels I itself is replaced at EU level by the 2009 Regulation to the extent that it applied to maintenance cases. The current intra-UK jurisdictional scheme is aligned with the scheme as set out in Brussels I. When the 2009 Regulation comes into effect on 18 June this will mean that the current intra-UK jurisdiction scheme will operate differently from the revised scheme required under the 2009 Regulation as between EU Member States. Without action by the UK to align its jurisdictional scheme, as was done at the time of implementation of Brussels I, there will be two jurisdictional regimes in operation – one for cases between the UK and other EU Member States governed by the 2009 Regulation and one for intra-UK cases based on the scheme that was contained in Brussels I.

3.7 So far as implementation of the 2009 Regulation is concerned, the baseline of "do nothing" is not an option. Doing nothing (non implementation) could lead to significant infraction costs and reputational damage for the UK with implications for other areas of EU law where the UK may wish to exert its influence.

## Option 1 – "Implement the 2009 Regulation Only" to the strict letter of EU law

### General Description

3.8 ***Implement the EU Maintenance Regulation through domestic legislation s. 2(2)***. It is proposed that all implementing legislation s.2(2) European Community Act 1972 regulations ("the s.2(2) regulations") will be in place by the 18th June 2011 – as required by the EU. The s.2(2) regulations will apply to the whole of the UK. **Although this area of law is devolved in Scotland and Northern Ireland, it has been agreed by those administrations that the s.2(2) regulations will apply for the whole of the UK owing to time constraints imposed by elections in those territorial units.** The s.2(2) regulations will make provision to ensure the proper operation of the Regulation and to remove inconsistent existing legislation.

3.9 The s.2(2) regulations will, in particular, make provision for recognition and enforcement of the maintenance decisions of other Member States in UK courts and related matters; establish the CAs for each territorial unit of the UK (England and Wales, Scotland, Northern Ireland) to take on the functions of CA identified by the Regulation; and make provision for data sharing from specified public bodies to the CAs as required by the Regulation.

3.10 The assessment of this option has focused on two areas:

- Key areas where significant differences exist between the Regulation and the existing regimes. These are mainly choice of court agreements; abolition of "exequatur" (explained below); enhanced legal aid provisions; and the expansion of the role of Central Authorities consistent with the scope of similar duties imposed on Central Authorities under other EU and international instruments.
- The (i) application of existing "criminal sanctions" in domestic legislation to Central Authority staff in the UK to prevent authorised disclosure of personal data by those staff and to align their position with that applicable to staff in DWP and HMRC from where data will be requested and (ii) the creation of two new offences in relation to the failure of a person who has an obligation to pay maintenance to notify the court of a change of address. These changes and their scope is directly related to the need to make provision for the correct operation of the 2009 Regulation.

3.11 It should be noted, however, that under Option 1 there would be ongoing impacts to maintenance creditors, debtors, courts and lawyers from lack of realignment between national law and the 2009 Regulation, given that the Regulation is directly applicable.

### Choice of Court

#### *Description*

3.12 The Regulation allows parties to agree which EU Member States courts they wish to resolve disputes relating to maintenance obligations. (E.g. supplemental support for partners). No choice of court rules currently exist in this area.

#### *Rationale*

3.13 Choice of Court agreements in the family law context allow individuals to choose the "best" or "most efficient" court to hear their case. Such agreements also potentially lessen the possibility of subsequent disputes over jurisdiction.

### *Costs and Benefits*

3.14 The proposal provides an additional option to litigants for resolving their dispute. The extent to which this option would be more utilised by UK residents (and UK citizens in other MS) is likely to be minimal.

3.15 The provision allows the expansion of possible litigation venues beyond that provided by Article 3 (the basic jurisdictional rules) as follows:

(a) Courts of a Member State in which one party is habitually resident. Article.3 already gives the primary rule of habitual residence of the creditor or the defendant. The choice of court rule additionally allows choice of a court in a country where the debtor is habitually resident where the debtor is the applicant and the creditor is not a child. Both parties have to agree to use of this ground, which in practice may limit the potential for creditors to be sued in a country other than their own habitual residence because of the costs involved (e.g. travel expenses). That would suggest that this ground will not often be chosen**.**

(b) Courts of a Member State of which one has the nationality (or for the UK/ Ireland, domicile see Article 2(3)) - one could expect that in most cases people have the nationality of the place where they are habitually resident but that is not a given in the EU where there is a good degree of movement across borders. This choice of court rule expands the possibilities available to the parties compared to Article 3. It might be the case that UK laws are seen to be more favourable to creditors than some but this is a difficult matter to assess. Therefore this choice rule might influence some people to sue in the UK rather than elsewhere but this has to be put against the fact that, if the creditor is not habitually resident here anyway, it would involve her agreeing to abandon her protective jurisdiction so there has to be a good reason to do so. The additional cases in the UK as a result of this ground of choice are therefore likely to be relatively small.

(c) The grounds of choice in Article 4.1(c) will have strong overlaps with divorce jurisdiction vis-à-vis the UK because, for (i), jurisdiction to settle disputes in matrimonial matters in England and Wales and Northern Ireland (at least) *goes with* the divorce jurisdiction. For (ii), this is also a ground for divorce jurisdiction and therefore, since people tend to raise maintenance within the context of divorce rather than separately, there is likely to be an overlap with the UK dealing with the divorce in any case**.**

3.16 From an appraisal perspective the main costs of concern would be potential impacts on public services in the form of additional cases coming to UK courts. Any individual costs from utilised Choice of Court agreements are not additional as they are “unforced” (parties evaluate the costs and benefits of doing so and make appropriate decisions).

3.17 The above assessment suggests that it is unlikely that this provision would lead to greater utilisation of UK courts as a result of this provision. For this reason we believe the costs on the UK are likely to be minimal in practice.

3.18 In so far as the measure leads to greater choice for individuals, this measure would convey benefits.

## Abolition of Exequatur

### *Description*

3.19 Exequatur is a legal term to describe the present arrangements whereby when an individual seeks to enforce a maintenance order made in one EU Member State in the court of another Member state certain “checks” must be applied including whether the defendant’s rights of defence were respected in the state of origin and whether the order meets public policy requirements. The order is not enforceable in the receiving state until it has been registered as such.

3.20 For all EU Member States except Denmark (and transitional cases) there will no longer be a "recognition" stage before their maintenance orders can be enforced domestically in the relevant UK territorial unit. This means that in the vast majority of cases, the court procedure ("registration") prior to enforcement of the EU order in the domestic UK systems will disappear altogether. This two step process will remain for Denmark cases because (like the UK) Denmark will not be applying the 2007 Hague Protocol on applicable law. However, in these cases the procedure will be accelerated as direct enforcement should be quicker because time limits on the registration stage are shorter.

***Rationale***

3.21 The measure seeks to improve enforceability of decisions – to ensure that judgments obtained in one Member State are enforceable in another. The rationale is that decisions coming from Member States who apply applicable law are "trusted" so that there is no need for a registration process in respect of orders to be enforced in another Member State, but these will now proceed direct to enforcement in the other country. The reduction in procedural costs for such applicants is because there is no need to go through and pay for the registration process.

***Costs and Benefits***

3.22 The abolition of exequatur means that EU citizens will, under the Regulation, not be subject to registration processes in the UK except for decisions from Denmark. This may lead to lost revenue for *legal professions* where their expertise is sought. However, evidence from the magistrates' courts which deal with cross EU maintenance orders in England and Wales is that lawyer involvement in these cases is usually minimal. We have sought confirmation of this in our technical consultation on the implementing regulations.

3.23 The abolition of exequatur would also lead to reduction in the possibility of UK citizens (debtors under the maintenance order, generally) to challenge registration in UK courts. There may be new additional costs to UK citizens who can now only challenge the enforcement at the court of origin in the EU (except for judgments from Denmark). This may include travel costs and other expenses.

3.24 The benefits for the UK from this abolition are for UK citizens applying for maintenance in those Member States whose courts make the orders to be enforced in the UK. The exequatur process would still be retained by Member States with respect to decisions emerging from the UK (Articles 23, 24 & 42). However, in theory the process should be faster for UK creditors relative to the current situation.

## Legal Aid Provisions

***Description***

3.25 The 2009 Regulation introduces separate rules on legal aid for maintenance so that where an application is made by a creditor through a Central Authority under Chapter VII A.56 (i.e. not directly), in relation to a parent-child relationship for a child under 21 years old, the proceedings relating to application for maintenance to children are free of charge. The UK must provide this benefit to cases from other Member States, and UK citizens will benefit from the same treatment in other Member States. The existing instruments all contain rules on legal aid, but this goes specifically further for a child case. This must be seen in the context that if people are able to obtain child maintenance more easily, there should be a corresponding saving to the taxpayer because the taxpayer will not be supporting via social security benefits children whose parents should be contributing to their upkeep.

***Rationale***

3.26 The economic rationale for provision of legal aid is largely based on treating justice as a public good / service. As such it is likely to be underprovided because the benefits to society tend to outweigh the benefits to individuals. As legal aid is a key ingredient in the production of justice, interventions to expand legal aid are usually undertaken for that purpose. In this case, the EU believes that justice through ensuring maintenance obligations are met would be undermined without access to legal aid. There may also be distributional / fairness reasons in play.

***Costs and Benefits***

3.27 The appraisal impact is likely to be neutral because legal aid provision in this case should be regarded as a transfer from government to the legal profession.

3.28 Where legal aid is a *policy instrument* (as in this case) the main impact is on its efficiency allocation. People's willingness to pay for accessing justice in this context is lower than what government (or the EU) sees as socially desirable (or 'optimal'). As such a deliberate decision is being made to subsidise it by making legal aid freely accessible for the specific cases set out in the Regulation. Legal aid therefore lowers the price of accessing legal representation faced by the relevant group, increasing their benefits, albeit at the expense of taxpayers. Taxpayers incur a cost, while legal aid users incur a benefit, therefore leading to zero outcome overall.

3.29 However, it should be noted that subsidies have inherent efficiency losses (or 'deadweight' losses) because they are predicated on increasing production beyond what the market already provides (or judges to be the 'optimal' provision). The provision of legal aid therefore does lead to some efficiency losses for society as a whole but these are difficult to estimate.

3.30 There will be a legal aid burden to Government (and corresponding benefit to legal profession), which is important to estimate from a *financial* perspective, but not from an *economic* perspective because it is a transfer.

3.31 It has not been possible to estimate the government burden from legal aid because the Legal Services Commission does not separately record either (a) the costs of maintenance enforcement proceedings or (b) the numbers of cross border proceedings funded by legal aid under current arrangements. However, any additional burden on government is likely to manageable because many applicants are unlikely to need legal assistance, and because existing arrangements for legal aid mean that a proportion of cases funded under this Regulation would have been funded under existing arrangements. This Regulation requires legal aid to be provided on a non means tested basis where the maintenance is for a child under 21 (currently this would be means and merits tested legal aid, available where the child is under 18 or older and in full time education). In other cases legal aid has to be provided to the extent provided in the home country and/or on a means and merits tested basis, and this broadly matches current arrangements.

## Central Authorities

### *Description*

3.32 The Regulation introduces the new system of Central Authorities. These are administrative bodies which discharge the day-to-day functions required under the 2009 Regulation. The Central Authority for England and Wales will be the Lord Chancellor but the day-to-day functions will be discharged by the Reciprocal Enforcement of Maintenance Orders (REMO) unit which is part of the Ministry of Justice. REMO already operates a more basic administrative system to deal with international maintenance cases, including those from the EU, but the Central Authority obligations under the 2009 Regulation will be more extensive than under existing maintenance instruments. In relative terms, however, the functions required under the 2009 Regulation are very similar in nature and scope to the requirements imposed on Central Authorities under other EU and international instruments. In England and Wales, comparison can be made with the nature of Central Authority functions discharged currently by REMO's sister operational unit (the International Child Abduction and Contact Unit) under the 1980 Hague Convention on Child Abduction and Council Regulation (EC) No. 2201/2003 (known as Brussels IIa). This comparison is useful in determining the extent of changes needed to REMO's existing functions and how these will be required to operate under the 2009 Regulation.

3.33 The functions of Central Authorities under the 2009 Regulation are described primarily in Article 51. The CAs will transmit and receive Article 56 applications, and "facilitate" (rather than actually provide) certain of the services to maintenance creditors and debtors. Additionally, they have power to obtain information relevant to the case from public bodies in certain circumstances. This information may be required and requested by national courts making decisions about the establishment of a maintenance order, or enforcement of an EU Member State court decision, where there is a cross border element (but not in purely domestic cases).

### *Rationale*

3.34 The main rationale is to improve coordination across EU Member States and reduce associated inefficiencies in the processing and facilitation of orders.

*Costs and Benefits*

3.35 The provisions will lead to more complex work being undertaken by UK Central Authorities. We estimate a total cost of £0.1m per year

3.36 *Requirement to facilitate proceedings* i.e. facilitate the provision of legal aid; to help locate the debtor or creditor; to encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where appropriate by use of mediation. Provision is being made in the implementing regulations for Central Authorities to make data access requests of relevant UK agencies for the purpose of locating a debtor or creditor.

- *Provisions related to timeliness*. *Article 58* provides a time limit of handling requests with 60 days of acknowledge. This is designed to ensure minimum standards. The detailed operational approach to these requirements are being assessed through process mapping and will be subject to the development of service level agreements between, for example, the REMO team and HMRC / DWP.
- *Language provisions* under Article 59. There is likely to be a reduction in translation costs for applications coming into the UK due to the use of standardised application forms and the requirement of requesting member states to complete the forms in the language of the requested member state.
- *Costs of processing shared data*, this is to be finalised but will be the full economic cost in accordance with HMT Guidance. In charging the Ministry of Justice HMRC will limit costs solely to the equivalent staff time needed to undertake data access requests.

**3.37** In relation to our efforts to establish existing case volumes (and therefore potential data access costs) between the UK and EU Member States this is set out below. The requests for data from HMRC by the requested Central Authority will be on a case by case basis. The 2009 Regulation sets out the type of information that may be requested and the circumstances in which it must be provided. By Article 61(2), the information must be information which is already held by the public bodies in question (so there is no requirement to seek out, compile and maintain additional information not already held on data bases in the public domain). It must be **adequate, relevant and not excessive.**

3.38 We expect to agree internal timescales for UK agencies to process routine requests made under the Regulation, although provision will be needed to process urgent cases where these arise. In this way, we would expect that routine requests could be dealt with by HMRC on a batch basis.

3.39 Statistics are not routinely collected within the REMO unit on information requests and correspondence received. However, at our request REMO has undertaken an exercise to estimate the volume of (a) correspondence and (b) applications received by the unit from Europe. For (a) this was derived from a one week period, and for (b) over a two week period.

3.40 The count for (a) was 126. On a pro rata basis this suggests an annual volume of 6,552 (126 x 52). The count for (b) was 47 (47 x 26). On a pro rata basis this suggests an annual volume of 1,222 applications. On a greatest volume scenario this would mean an annual volume of just under 8,000 searches (or 155 searches per week).

3.41 This assumes that every case would need information from HMRC on (i) address and/or (ii) financial situation. This will not be the case. For example, DWP already provides to REMO details of addresses only for debtors and we have obtained from DWP annual volumes for this. The data is:

| | |
|---|---|
| Year 2007/08 | 296 requests |
| Year 2008/09 | 317 requests |
| Year 2009/10 | 484 requests |
| Year 2010/11 | 503 (to date as at 7/2/11) |

3.42 This data is worldwide and REMO has agreements with more than 100 countries.

3.43 DWP is only able at present to provide information on the address of a debtor so the overall number of information requests could potentially be higher if requests for information on financial situation of the debtor were included as separate data access requests from the Central Authority. Even if we assume a figure of 600 requests for 2010/11 and double this to reflect potential

additional information sought (initial establishment of identify from name and address and then a subsequent enquiry about financial status) this would only mean circa 1,200 requests annually (or circa 25 per week) on a worldwide basis. It is not possible to estimate what proportion of this worldwide volume might be accounted for in terms of cases between the UK and other EU Member States but clearly given the ease of mobility and closer links with EU Member States this would represent a significant proportion. It is important to note here that overlapping information is held by HMRC and DWP so the pool of potential information to be accessed is smaller than might appear at first to be the case. Which organisation is approached with an information request will need to be determined on the basis of incoming information about the case from the Central Authority in the distant EU Member State. Where this is not determinative, we propose to put in place a protocol on whether HMRC or DWP is to be approached first so that data access requests are not made unnecessarily.

## Criminal Sanctions: Failure to Notify Change of Address

### *Description*

3.44 As required by EU law, the procedure for enforcing maintenance decisions from other EU Member States will follow the procedure for enforcing domestic maintenance decisions as closely as possible. Domestic orders are enforceable in the magistrates' court and give rise to an obligation for the person liable to pay maintenance to inform the court of a change of address, failure to comply with which is a summary offence.

3.45 In line with the domestic position, maintenance orders made in other EU Member States will be enforceable in the magistrates' courts and it is proposed to create two offences of failing to notify the court of a change of address in the regime to enforce maintenance orders made in other EU member states – one will apply to orders made in Denmark, and the other will apply in respect of all other EU member states.

3.46 It is important to note that: EU law requires maintenance orders made by other EU member states to be enforced as though they were domestic orders, and the two offences of failing to inform the court of a change of address mirror the domestic position. This will not result in any new behaviour being criminalised – the current regime under Brussels 1 already criminalises a failure to notify the court of a change of address. However, it is necessary to separate the offence into two in the new regulations since Danish orders will be subject to a separate procedure

3.47 The offence has been narrowed to ensure it does not catch behaviour more widely than is necessary. In order to avoid imposing a blanket obligation to inform the court of a change of address where there is no requirement to register the maintenance order concerned (i.e. for all EU countries other than Denmark), the obligation will be restricted to those cases in which enforcement proceedings are active or have occurred. That means that the offence will only bite where the maintenance order is subject to enforcement proceedings.

3.48 To support the implementation of the 2009 Regulation, two criminal sanctions are therefore proposed (replacing the existing sanctions) where the debtor fails without reasonable excuse to provide notice of change of address to the designated officer of the court. This would apply under two scenarios:

(i) Where the debtor obligation arises under a (EU) maintenance order which is registered in magistrates' court (for Denmark and transitional cases)

(ii) Where enforcement proceedings have been or are being taken (for all other EU cases)

3.49 The debtor may be liable on summary conviction to a fine not exceeding level 2 on the standard scale which is around £500.

### *Base Case*

3.50 There will be a reduction in the numbers of persons liable to the offence because whereas at the moment, every order must be registered and potential liability attaches to every debtor upon registration, under the Maintenance Regulation most orders will not have to be registered. It is only when enforcement proceedings are taken that potential liability attaches to the debtor. This is likely

to be a much smaller number of cases because it will only be those cases where the debtor is not obeying the maintenance order that go to court (whereas at the moment, every decision is registered whether there is a problem with compliance or not).

*Costs and Benefits*

3.51 The main impacts would relate to new violations under (ii). This may affect the police and crown prosecution services. There would also be court costs associated with prosecution of the summary offence. It has not been possible to quantify the costs of this new sanction because there is no data on how many potential cases might be involved.

## Criminal Sanctions: Protection of Shared Data

*Description*

3.52 The Regulation includes an obligation on designated public bodies to share specific data with the Central Authority for purposes of meeting the requirements of the Regulation. The Government is proposing to designate HMRC, DWP and CMEC for these purposes in England & Wales and Scotland (Separate bodies are suggested for Northern Ireland). The implementing regulations will specify who these bodies are.

3.53 To ensure that data is protected, it is proposed to apply to officials working in the CAs (and persons providing services to them) existing criminal offences which are applicable to handling of data provided for Regulation purposes by the designated bodies (such as HMRC and DWP) in discharging their own functions in relation to tax and welfare benefits for example. The proposal effectively extends to CA staff, in the course of their employment, existing offences for HMRC and DWP officials for wrongful disclosure of the same information. The proposal does not extend to court staff handling this data.

3.54 The proposed sanction is a prison sentence of 3 months for summary conviction, and/ or a fine; or up to 2 years imprisonment (and/or a fine) for conviction on indictment. In practice, DWP and HMRC will be more likely to use existing disciplinary sanctions for minor breaches or prosecute for theft or fraud if a more serious breach is involved and financial gain is the motive. Therefore, the extension of the data sharing offences is intended to act as a deterrent and is likely in practice to result in few prosecutions as disciplinary or other existing criminal offence are more likely to be used instead. Extension of the data sharing offences is a condition of HMRC and DWP agreeing to share data and reflects assurances given to Parliament about safeguarding sensitive personal data about the tax and other financial affairs of UK residents.

*Base Case*

***3.55*** The criminal sanctions are a necessary consequence of implementation the 2009 Regulation to ensure the effective operation of its provisions within the context of UK domestic law. The base case assumes no criminal sanctions are in place as provision for (i) applying to Central Authority staff criminal existing sanctions applicable to HMRC and DWP staff and (ii) creating new offences applicable to the debtor for non-notification of change of address need to be provided for in the implementing regulations to be made under either Option 1 or Option 2.

*Costs & Benefits*

3.56 The likely impact would be additional costs on the criminal justice system. This would be a standard with the usual impacts on the following:

- Police – there would be costs associated with preparing the case for prosecution and associated investigation. The costs would depend on the complexity of the case but standard indictable offences would cost £11k per case.
- Crown Prosecution Service – there would be costs associated with prosecution of the offence. This would be around £2,400 per case.
- Magistrates and Crown Courts. There would be costs for committals for trial at the magistrates – these may be estimated at £2,000 per session. The case would then proceed to Crown Court were the cost per session increases to £4,400.
- Defence representation – there may be legal aid costs associated legal aid. This would depend on trial length. The cost per case is estimated around £7000.

- Prisons – the proposed penalties are (a) up to 2 years and/or fine on conviction on indictment; and (b) up to 3 months prison and/or fine up to statutory maximum on summary conviction. (a) is completely in line with the existing offences for HMRC staff. It is assumed that offender only serves half their sentence. This would cost around £5,000 per offender.

3.57 It is difficult to estimate the number of cases that could be brought under this offence however it is thought to be positive but minimal, as the number of staff potentially liable to the offence is likely to be no more than 10 for England and Wales. Also robust systems will be put in place and audit trails in respect of the handling of this data. It is also difficult to say the number of cases that HMRC and DWP have brought under this criminal sanction in respect of their own staff as matters relating to unlawful disclosure or use of data will, in almost all cases (except the most serious), be dealt with by way of disciplinary sanctions.

## Option 2 – "Implement Regulation and Intra-UK maintenance jurisdiction"

### General Description

3.58 This Option involves two elements :

(a) Implement Regulation through domestic legislation s. 2(2)

(b) update the existing intra-UK maintenance jurisdiction scheme to align rules of jurisdiction as between the different territorial units of the UK (i.e. Scotland, NI, England and Wales) to reflect closely those of the EU Maintenance Regulation

3.59 The impacts of (a) are set out under Option 1. The assessment below focuses on the additional impacts associated with (b).

### Intra-UK maintenance jurisdiction scheme

#### *Description*

3.60 This element of the legislation would allow for an intra-UK maintenance jurisdiction scheme that would be introduced in the same s.2 (2) regulations to update rules of jurisdiction as between the different territorial units of the UK (i.e. Scotland, NI, England and Wales).

3.61 Not replicating these EU rules will mean that intra-UK cases will continue to broadly follow Brussels I (the existing regulation for EU cross border cases). This will confuse matters as there will be two parallel systems (and Brussels I will no longer apply to maintenance at the Member State level) so clarity is desirable for those using the rules, the court users.

#### *Rationale*

3.62 The intra-UK proposals are designed to realign domestic practice (as far as appropriate) with the jurisdictional rules between EU Member States. Existence of two parallel, unaligned, systems will further increase complexity in a difficult area and lead to unnecessary costs and delay.

3.63 Intra-UK jurisdictional rules are currently governed by a scheme which largely replicates the jurisdictional rules of Brussels 1 at intra-UK level. The intention behind this option is to update those rules to closely reflect the jurisdictional rules of the Maintenance Regulation, since that Regulation will replace Brussels 1 regarding maintenance. Court users will be used to the fact that intra-UK rules for jurisdiction are closely modelled on whatever EU rules of jurisdiction are current, and one might expect them to be confused by any failure to update intra-UK rules to match those of the Maintenance Regulation. It is likely that the Maintenance Regulation has some direct effect as regards intra-UK jurisdiction but in respect of some, not all, of its provisions. A failure to clearly align the intra-UK jurisdictional position with that of the Maintenance Regulation rules would therefore be likely to be confusing, leading to cost and delay in the courts

#### *Costs and Benefits*

3.64 When the maintenance provisions in Brussels I were implemented in 2002 a policy decision was made to align domestic legislation so as to mirror the provisions on jurisdiction with the Regulation. The rationale for this was to streamline and improve the rules of jurisdiction which applied intra-UK. Whilst this approach went beyond what was strictly needed to implement the maintenance provisions in Brussels I the public policy justification was to realise the benefits for practitioners

and court users of having a consistent, cohesive system. We believe there is an expectation that the same approach should be adopted to the 2009 Regulation for the same reason: there is a beneficial impact for UK residents and for UK practitioners.

3.65 We are currently undertaking a limited technical consultation on the draft implementing regulations for the 2009 Regulation and have asked for views on various aspects which, taken together, will inform whether this approach to making provision for the proper operation of the 2009 Regulation will result in effective implementation of the 2009 Regulation in the UK, and what practical difficulties, if any, could arise if we do not adopt this approach. The draft implementing regulations are constructed on the premise that we should align the domestic position with the 2009 Regulation but we have made it clear that there is no policy commitment at this stage to proceed on this basis as this will be subject to collective agreement. For reasons of parliamentary timing due to elections in Scotland and Northern Ireland we are making provision in the implementing regulation for those Devolved Administrations as well as for England and Wales. Discussion at official level with the Devolved Administrations supports alignment of the domestic position.

3.66 Whilst our proposed approach may be considered to be "gold plating" there is a strong argument for going beyond the strict letter of the Regulation and using our implementing regulations to again align the domestic UK position with the EU. The alternative option would be just to implement the letter of the Regulation and leave the intra UK position as it is currently under Brussels I. That would in effect create a two tier system which would be confusing and difficult to navigate.

3.67 This is a different kind of gold plating because we are seeking to simplify, not introduce extra complexity, layers or burdens. As the new Regulation replaces the provisions on maintenance in the existing Regulation ('Brussels 1') this is a "one in, one out" measure. We consider that implementing Option 2 will remove the potential for a burden on business (the legal profession) by allowing them to operate under the same scheme for intra and outside UK cases.

## 4. Specific Impact Tests

4.1 The Impact Assessment Guidance sets out a number of tests which need to be assessed. We have focused on those tests that may be relevant to the implementing regulations.

### Competition Assessment

4.2 There is no competition issue regarding implementation of the Regulation.

### Small Firms Impact

4.3 The IA Guidance requires that new proposals are assessed on the extent to which they impose or reduce the cost on business. We do not believe the proposals adversely affects small businesses. There will be a very small burden on firms of lawyers to familiarise themselves with these new rules – however, that burden falls on lawyers whenever there are changes to legislation, practice or procedure and therefore this is part of the unavoidable cost of being a practising lawyer.

### Justice Impact Test

4.4 The impacts on the justice system have been considered in the main Evidence Body.

### Human Rights

4.5 The proposed Regulation will be compliant with the Human Rights Act. No particular points arise out of the implementing regulations themselves. In terms of the 2009 Maintenance Regulation, Article 6 ECHR - rights of the defence - are respected by the Regulation because the defendant has opportunities to be heard whether in the State of origin or State requested as regards the original decision, and recognition and enforcement, and these regulations ensure those

opportunities are properly implemented domestically. Schedule 2 of these regulations raises privacy points – Article 8 - because it enables the information provided (usually in confidence, and for specific purposes) by an individual to certain public bodies to be provided to the CA for use in the process of recovering maintenance. However, the implementing regulations do not derogate from the requirement to treat the information so obtained in line with the requirements of the Regulation, which itself makes very specific provision about what information can be provided, when, and to whom. It is clear that information can only be used for the recovery of maintenance in line with the Regulation and therefore Article 8 is not breached, since the interference with A.8 rights is in accordance with law and proportionate, and is intended to protect the rights of others (the other litigant in the maintenance case).

## Equalities Impact Assessment

4.6 An EIA has been completed. These Regulations are neutral in their design and operation.

## Rural Proofing

4.7 Rural proofing is a commitment by Government to ensure domestic polices take account of rural circumstances and needs. It is a mandatory part of the policy process, which means as policies are developed, policy makers should consider whether their policy is likely to have different impacts in rural areas, because of particular circumstances and if so adjust the policy where appropriate, with solutions to meet rural needs and circumstances. The assessment suggests that there are no specific rural impacts from the proposals.

## Health Impact Assessment

4.8 The Ministry of Justice has concluded that a health impact assessment is not necessary. The proposed Regulation will not have a significant effect on human health or have an effect on the wider determinants of health. In addition, it will not impact on the lifestyle-related variables provided in the guidance or on health or social care services.

## Sustainable Development

4.9 The Ministry of Justice have concluded that there are no significant environmental impacts resulting from the implementation of the particular Regulation.

## Enforcement and Implementation

4.10 This will be implemented by the legislation requirement as set out in the s 2(2) regulations and Rules of Court.

# Annexes

Annex 1 should be used to set out the Post Implementation Review Plan as detailed below. Further annexes may be added where the Specific Impact Tests yield information relevant to an overall understanding of policy options.

# Annex 1: Post Implementation Review (PIR) Plan

A PIR should be undertaken, usually three to five years after implementation of the policy, but exceptionally a longer period may be more appropriate. If the policy is subject to a sunset clause, the review should be carried out sufficiently early that any renewal or amendment to legislation can be enacted before the expiry date. A PIR should examine the extent to which the implemented regulations have achieved their objectives, assess their costs and benefits and identify whether they are having any unintended consequences. Please set out the PIR Plan as detailed below. If there is no plan to do a PIR please provide reasons below.

| |
|---|
| **Basis of the review:** [The basis of the review could be statutory (forming part of the legislation), i.e. a sunset clause or a duty to review , or there could be a political commitment to review (PIR)];<br>It is statutory as forms part of the Maintenance Regulation under Article 74. |
| **Review objective:** [Is it intended as a proportionate check that regulation is operating as expected to tackle the problem of concern?; or as a wider exploration of the policy approach taken?; or as a link from policy objective to outcome?]<br>The Review is to evaluate the practical experiences relating to the cooperation between Central Authorities, in particular regarding those Authorities' access to the information held by public authorities and administrations, and an evaluation of the functioning of the procedure for recognition, declaration of enforceability and enforcement applicable to decisions given in a Member State not bound by the 2007 Hague Protocol. It is necessary the review should also provide proposals for adaptation. |
| **Review approach and rationale:** [e.g. describe here the review approach (in-depth evaluation, scope review of monitoring data, scan of stakeholder views, etc.) and the rationale that made choosing such an approach]<br>The approach to be taken is as set out above as stipulated by the Regulation. |
| **Baseline:** [The current (baseline) position against which the change introduced by the legislation can be measured]<br>The baseline will be the current procedure operated by the courts now. |
| **Success criteria:** [Criteria showing achievement of the policy objectives as set out in the final impact assessment; criteria for modifying or replacing the policy if it does not achieve its objectives]<br>The Regulation requires proposals for adaptation of the Regulation are provided if the evaluation highlights' negative practical experiences between the Central Authorities and the public authorities on accessing information. |
| **Monitoring information arrangements:** [Provide further details of the planned/existing arrangements in place that will allow a systematic collection systematic collection of monitoring information for future policy review]<br>Operational procedures are to be put in place that will require the collection of monitoring information for the policy review. |
| **Reasons for not planning a review:** [If there is no plan to do a PIR please provide reasons here] |

Add annexes here.