



Ministry  
of Justice

*Review of the  
Balance of Competences*

# **Call for Evidence**

## Civil Judicial Cooperation

May 2013



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**CALL FOR EVIDENCE ON THE GOVERNMENT'S REVIEW OF THE BALANCE OF  
COMPETENCES BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION**

**CIVIL JUDICIAL COOPERATION**

**MINISTRY OF JUSTICE**

Closing date: 5 August 2013

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## **Background**

**Please send your evidence in a WORD document to  
balanceofcompetences@justice.gsi.gov.uk by midday on 5 August 2013.  
The same email address should be used for any related enquiries.**

1. This review is part of a Coalition commitment to examine the balance of competences between the UK and the European Union (EU). The review will provide an analysis of what membership of the EU means for the UK national interest. It aims to deepen public and Parliamentary understanding of our EU membership and provide a constructive and serious contribution to the national and wider European debate about modernising, reforming and improving the EU in the face of collective challenges. We have not been tasked to produce specific recommendations or to look at alternative models for the UK's overall relationship with the EU.
2. The review is broken down into a series of reports on specific areas of EU competence, spread over four semesters between autumn 2012 and autumn 2014. The review is led by Government but will also involve non-governmental experts, organisations and other individuals who wish to feed in their views. Foreign governments, including our EU partners and the EU institutions, are also being invited to contribute.

## **Evidence**

3. This public call for evidence sets out the scope of the review of the Balance of Competences in the area of civil judicial cooperation (which includes family matters). We invite input from anyone with relevant knowledge, expertise or experience. This is your opportunity to express your views.

4. Your evidence should be objective, factual information about the impact or effect of the competence in your area of expertise. In providing your evidence, you may choose to focus on a discrete area of the EU's action – e.g. the cross-border requirement. Or you may choose to focus on a broader aspect of EU action – family law for example. We welcome both.
5. We will expect to publish your response and the name of your organisation unless you ask us not to (but please note that, even if you ask us to keep your contribution confidential, we might have to release it in response to a request under the Freedom of Information Act). We will not publish your own name unless you wish it included. Please base your response on answers to the questions set out below.

### **Devolution**

6. This review is a UK Government initiative and the Call for Evidence is addressed to interested parties throughout the UK. The views of the devolved administrations and interested parties across the UK will be an important factor.
7. The UK Government consults the devolved administrations on matters within their competence. The policy areas covered by EU legislation in civil judicial cooperation are generally devolved to Scotland and Northern Ireland (e.g. civil procedure and jurisdiction, family law etc). With respect to Wales, these are generally not devolved matters (there are exceptions to this relating to administrative cooperation regarding children).

## Call for Evidence on Civil Judicial Cooperation

### What is civil judicial cooperation?

8. The increase in the **free movement of persons, goods and services** across the European Union means that individuals and companies increasingly have relationships involving people from different EU countries – family relationships, business to business relationships, consumer relationships. UK citizens are increasingly studying, working and settling in other countries, and they are increasingly buying goods and services from other EU countries. UK companies are also increasingly buying and selling goods and services to other companies and individuals across the EU.
9. This inevitably leads to cross-border disputes, such as contract disputes, consumer disputes and disputes about finances and children following relationship breakdown. Given that each Member State of the European Union has a different legal and court system, with different rules, the Treaty of Rome of 1957 first contemplated cooperation between Member States to simplify cross-border judicial processes in order to remove obstacles to the internal market. This led to a number of agreements between Member States, such as the 1968 Brussels Convention setting out rules for jurisdiction and the recognition and enforcement of civil and commercial judgments across borders. This cooperation to clarify and simplify which country's rules and courts would resolve which disputes became known as '**civil judicial cooperation**'.

#### EU facts and figures

12 million EU citizens study, work or live in another Member State of which they are not nationals.

Around two thirds of EU countries' total trade is done with other EU countries.

([www.europa.eu](http://www.europa.eu))

10. The EU now legislates in this field as a result of powers which Member States first gave the EU in the 1997 Treaty of Amsterdam, and which are now contained in the Treaty of Lisbon, which came into force in 2009.
11. If such a framework of EU legislative rules did not exist, it would be left to national law and bilateral agreements to manage the conflicts between the rules as applied by different countries. As it stands, a legal framework that provides certainty and predictability about which rules will apply in the case of a dispute, and that simplifies judicial procedures, is designed to facilitate the operation of the **internal market** for companies, and **free movement of individuals** in the European Union.
12. In this Call for Evidence, we set out the main actions that the EU has taken in this area, including key legislation that it has passed, and we ask whether you think that UK interests, in particular the interests of UK companies and individuals, have been advantaged or disadvantaged by these measures.

### **Cross-border shopping facts and figures**

Substantial numbers of EU citizens take advantage of the single market and make regular purchases from other Member States:

According to a Eurobarometer Survey on the European Small Claims Procedure, in the last 12 months:

- Around one in ten citizens ordered or bought goods or services from sellers based in other EU countries (11%). (16% of UK citizens)
- Around one in five citizens had made recent purchases while in another EU Member State on a holiday or business trip (19%). (24% of UK citizens)
- Three in ten citizens purchased offline and online goods from businesses based in other Member States (30%).

(Special Eurobarometer 395 / Wave EB78.2 – TNS Opinion & Social)

The value of UK goods and services exports to the EU in 2011 stood around £234bn (around 47% of total exports). The UK has recorded a trade surplus with the EU since 2004, growing strongly to record a net surplus of £15.9 billion in 2011.

Germany, Netherlands and France remain the largest destinations for UK exports. However, the EU's enlargement has opened up new export markets for British companies – in 2011, UK exports to the EU12 were worth around £16.6bn, over double the value in 2004. The top ten fastest growing markets for UK exports in the EU were in the EU12.

(ONS Pink Book 2012)

### **Example:**

An English woman and an Italian man marry in England and have a son. Their relationship breaks down and they divorce in England. The father agrees with the mother that he will pay maintenance for the child. After the divorce the father returns to Italy. Mother and child are living in England. He then refuses to make the maintenance payments as previously agreed. The mother decides that the only way to get the money owed is to go to court – but which court to go to and what is the most effective route to use?

Under the EU Maintenance Regulation 4/2009 the mother, who is the creditor, can apply to the court in England and Wales for a maintenance order, then apply through the England and Wales Central Authority (and through them the Italian Central Authority) for the enforcement in Italy of the court order from England and Wales for the payment of maintenance by the father, who is the debtor.



## The EU's 'competence' in civil judicial cooperation

13. EU institutions can only pass legislation, and take other actions, that Member States have empowered them to take through the EU Treaties. The EU's powers are known as its 'competence' to act.

### What is competence?

For the purposes of this review, we are using a broad definition of competence. Put simply, competence in this context is about everything deriving from EU law that affects what happens in the UK. That means examining all the areas where the Treaties give the EU competence to act, including the provisions in the Treaties giving the EU institutions the power to legislate, to adopt non-legislative acts, or to take any other sort of action. But it also means examining areas where the Treaties apply directly to the Member States without needing any further action by the EU institutions.

The EU's competences are set out in the EU Treaties, which provide the basis for any actions the EU institutions take. The EU can only act within the limits of the competences conferred on it by the Treaties, and where the Treaties do not confer competences on the EU they remain with the Member States.

There are different types of EU competence: exclusive, shared and parallel. Only the EU can act in areas where it has exclusive competence, such as the customs union and common commercial policy. In areas of shared competence, such as the single market, environment and energy, either the EU or the Member States may act, but the Member States may be prevented from acting once the EU has done so.

In some cases the EU also has external competence i.e. the power to enter into international agreements and to join international organisations. This competence may also be exclusive or shared with Member States, depending on the subject matter in question.

The EU must act in accordance with fundamental rights as set out in the Charter of Fundamental Rights (such as freedom of expression and non-discrimination) and with the principles of subsidiarity and proportionality. Under the principle of subsidiarity, where the EU does not have exclusive competence, it can only act if it is better placed than the Member States to do so because of the scale or effects of the proposed action. Under the principle of proportionality, the content and form of EU action must not exceed what is necessary to achieve the objectives of the EU Treaties.

The Court of Justice of the European Union plays an important role in defining the scope of the EU's competence. Cases can be taken to the Court by individuals, companies or the governments of Member States which challenge actions by EU institutions on the basis that they exceed the powers given to them by the Treaties and/or that they are not taken in accordance with the rights or interpretive principles discussed above.

14. In the field of civil and judicial cooperation, **the EU's competence to legislate is established in and essentially defined by Article 81 of the Treaty for the Functioning of the European Union (TFEU)**. Under Article 81, the EU is expected to 'develop' judicial co-operation in civil and commercial matters (encompassing family law) with cross-border implications, 'particularly' when necessary for the proper functioning of the internal market.

15. In this field the EU's competence is shared with Member States, and it has both 'internal' and 'external' competence. Internal competence means that it can pass legislative measures 'internal to the EU' that are aimed at civil judicial cooperation with an internal 'cross-border' dimension. This means essentially that **the EU can only make rules that will apply where a dispute has a cross-border element**, such as cases involving the purchase of services or goods from another EU Member State, or the enforcement of a small claim or child contact decision from one Member State in any other.
16. This said, the European Commission, which is responsible for legislative proposals, has at times suggested that the EU could pass legislation that would apply to purely domestic matters. The Council and nearly all Member States have challenged such proposals, stating that a cross-border element is necessary in order for the EU to have competence.
17. The legislative measures which the Commission wanted to apply to purely domestic matters include the **Legal Aid Directive**, the **European Order for Payment**, the **European Small Claims Procedure** and the **Mediation Directive**. In each separate negotiation, the UK and other Member States successfully resisted the proposals. These instruments are discussed in more detail in the table below.
18. **In certain circumstances**, such as when an international agreement might affect internal EU rules, **the EU also has competence to act 'externally'**. This means that it has the capacity to act internationally as a single entity, the European Union, on its own behalf, in particular by entering into binding agreements under international law. In the area of civil judicial cooperation as with its competence generally, the EU shares external competence with the UK, depending on the subject matter in question. However, because the EU has legislated in a number of areas in civil and family law, it now has exclusive external competence to enter into international agreements in certain areas in order to ensure that bilateral agreements between Member States and non-EU countries do not affect the operation of the EU's internal legislation.
19. For example, in 2006 the Court of Justice of the European Union ruled that the EU had exclusive external competence to conclude an agreement with three non-EU countries (Iceland, Norway and Switzerland) on rules governing jurisdiction and the recognition and enforcement of judgments. This agreement, known as the Lugano Convention, extends the jurisdiction and recognition and enforcement rules contained in an EU measure known as 'Brussels I' (described in the table below) and the Court ruled that the Lugano Convention rules would affect the EU rules. The UK and other Member States had disputed the EU's assertion that it had exclusive competence to enter into this agreement.
20. In other areas the existence or extent of external competence is not as clear. For example:
  - The European Commission has argued that the existence of the **Brussels IIa Regulation** (described in the table below) means that there is exclusive competence for the EU to negotiate and enter into international agreements in matters relating to the 1980 Hague Child Abduction Convention, which establishes a mechanism for the return of children in cases of cross-border child abduction. In December 2011 it issued eight proposals for the EU to authorise Member States to accept new States as parties to the Convention. The majority of Member States, including the UK, dispute that the EU has the competence to do this, on the basis

that the acceptance of new States parties to the 1980 Hague Convention by individual Member States would not affect the EU's Brussels Ila Regulation. As discussed above, the EU gains exclusive competence to conclude an international agreement where it would affect the operation of an EU measure.

- In addition, the European Commission has recently proposed to negotiate with non-EU countries to establish rules relating to service of documents and taking of evidence (i.e. how to serve legal documents and obtain evidence). The Commission asserted exclusive external competence but the majority of Member States rejected the proposal and made clear that they disagreed that exclusive external competence existed, on the basis that these rules would have had little or no effect on the operation of the internal EU Regulations in this area.

**Example:**

An unmarried couple are living in Wales with their 4 year old daughter. The father has parental responsibility. The relationship breaks down and the couple split up but all the family remain in Wales, with the parents sharing residence and contact of the child between them. One day the mother fails to return the child to her father when expected. It is discovered that the mother has fled with the child to Poland with her new partner. Having failed to persuade the child's mother to return the child, the father knows that he needs to go to court to get his daughter back to Wales, but which court to go to and what is the most effective route to use?

Under the 1980 Hague Convention the father can apply, through the England and Wales Central Authority and the Polish Central Authority, to the Polish court to make an order for the return of the child. The mother tells the court in Poland that there is a grave risk that return would expose the child to harm because the child would be affected by the emotional abuse the mother has suffered from the father. The Polish court decides to make a non-return order.

Brussels Ila mostly deals with jurisdiction, recognition and enforcement of judgments. It also has provisions about child abduction which change the way the 1980 Hague Convention operates, between Member States only. Usually a non-return order in Hague proceedings ends the case and the child stays where she has been taken. Under Brussels Ila, the court in Poland must send the papers to the court in Wales. The court in Wales, because the child lived in Wales before the abduction, can consider the case, provided the father asks the court to do so within the time limit. If the court decides the child should be returned, the Welsh court order will mean the child will come back to Wales despite the earlier decision of the Polish court.

## The UK's Opt-in

21. When the 1997 Amsterdam Treaty was agreed, the United Kingdom and Ireland negotiated a Protocol which provided that no EU legislative measures in certain areas would apply to the UK or Ireland unless they expressly 'opted in' to the proposal or legislation. These areas included civil judicial cooperation (including family matters). This opt-in continues to be available following the Lisbon Treaty.
22. The effect of the Protocol is that:
  - neither the UK nor Ireland is bound by legislation adopted unless each country gives notice of its wish to take part in the adoption of the proposal (i.e. opts in) within three months of publication of the proposal;
  - if the UK or Ireland does not opt in, each country can nonetheless give notice of its wish to accept the measure at any time after adoption by the participating Member States; in that case, the Commission and the Council can determine any conditions under which such participation will be allowed.
23. In the event that the UK decides not to opt in to a proposal, it can still take part in the negotiations, but its influence can be limited by the fact that it does not have a vote. **The opt-in is widely seen as an important safeguard for the UK, including for its legal system.** It means, for example, that the UK can stand aside from EU measures which are not compatible with the common law (such as the measure on matrimonial property regimes).
24. The UK has opted in to the majority of European Commission proposals for legislative measures in the area of civil judicial cooperation. However, there have been several measures where the UK has not opted in, and others where it has only opted in after it successfully negotiated changes to key provisions. For example:
  - following a public consultation, the UK did not opt in to a Regulation on succession matters (i.e. inheritance of property) because it contained provisions which would have created legal uncertainty or results that were not compatible with concepts in the UK's legal system for estate matters. For example, the measure would have required the UK to apply a legal device that applies in many other Member States called 'clawback', in which gifts made during a person's lifetime can be recouped to their estate after their death;
  - the UK did not initially opt in to a Regulation on choice of law in contractual matters, known as 'Rome I' because it contained elements which many in the UK believed would cause legal uncertainty, such as a provision that would have caused courts in the UK to apply a discretionary rule found in foreign law in circumstances that were unclear. However, in 2009, the UK decided to opt in because it had negotiated a change to this provision which effectively matched domestic law.

**Example:**

A woman in England buys a television from a company in Germany. However the television never arrives and she demands a refund but the company fails to acknowledge the demands and the refund is not sent. The woman decides that the only way to recover her debt is to go to court – but which court to go to and what is the most effective route to use?

Under the Brussels I Regulation the courts with jurisdiction are usually in the country where the consumer lives. The woman, who is a consumer in this case, is therefore able to bring her case in the English courts.

The legislation that has been agreed means that the consumer has a number of options.

- 1) She can sue the German company in the English courts and obtain a judgment which she can then have enforced in Germany under the procedures for recognition and enforcement of judgments which are set out in the Brussels I Regulation.
- 2) If during the English court process the German company does not respond to the claim, the English consumer could apply in England for a European Enforcement Order to enable automatic recognition of the English judgment in Germany.
- 3) On the basis that the German company has never responded to her request, the consumer could assume that the claim will be uncontested and decide to apply to a court in England for the more streamlined European Order for Payment designed for such cases. A European Order for Payment will be directly enforceable in another Member State.
- 4) If the value of the television and any other costs arising from the claim is below €2000, the consumer can choose to apply to an English court using the European Small Claims Procedure. This is another simplified procedure and can apply where the defendant contests the claim. Judgments from this procedure are also directly enforceable in another Member State.

## Overview of legislation

25. This section describes the main instruments that have been adopted by the EU in the area of civil judicial cooperation since the EU gained competence to legislate in this area in the Amsterdam Treaty of 1997. It also sets out whether the UK has opted in to these instruments.

Instrument	Description	Has the UK opted in?
<b><i>Civil law instruments</i></b>		
<b>Brussels I</b>	Foundation instrument in the area of civil judicial cooperation. It sets the rules for determining which Member State's courts will hear a cross-border dispute and facilitates recognition and enforcement of judgments issued in other Member States.	Opted in. The UK has also opted in to a Regulation agreed in December 2012 that amends Brussels I. This is due to come into force in 2015.
<b>Council Decision (2007) on the signing by the EU of the 'Lugano Convention'</b>	Extends the Brussels I rules to Iceland, Norway and Switzerland.	Opted in. The Council decision followed a Court of Justice ruling that the EU had exclusive competence to enter into the agreement. See also paragraph 19.
<b>European Enforcement Order</b>	Allows creditors with uncontested judgments from one Member State to obtain an EEO certificate to allow the enforcement in any other Member State of their court judgment or other confirmation of entitlement to a sum of money.	Opted in.
<b>European Order for Payment</b>	A simplified procedure to enable a creditor to obtain an enforceable order against a defendant for a specified sum of money where the claim remains uncontested. These orders are recognised automatically in all Member States.	Opted in.
<b>European Small Claims Procedure</b>	Enables creditors to seek judgments on claims not exceeding €2000. The judgments are recognised automatically in all Member States.	Opted in.

Instrument	Description	Has the UK opted in?
<b>European Account Preservation Order</b>	Will enable creditors to apply to freeze a debtor's account if there is danger that the debtor might transfer or withdraw assets from a bank account.	Did not opt in on the basis that the Commission's proposal had not sufficiently balanced the rights of the claimants with necessary safeguards for defendants. The UK is, however, participating fully in negotiations.
<b>Rome I</b>	Adopted by the Council to replace the 1980 Rome Convention that Member States had agreed between themselves. Regulates choice of law issues in contract matters.	Did not initially opt in primarily because there was concern that certain provisions would lead to legal uncertainty in some financial transactions.  In 2009 the UK opted in after it successfully negotiated a change that generally reflected the UK position.
<b>Rome II Regulation</b>	Addresses conflicts of laws in non-contractual matters, such as claims of negligence i.e. it sets out which country's law will apply in cases with cross-border elements.	Opted in.
<b>Succession Regulation</b>	Established rules for recognition and enforcement, jurisdiction and conflicts of law for those whose property on death is connected with more than one jurisdiction.	The UK did not opt in on the basis that the divergence between the UK's inheritance arrangements and those used in most other Member States were not satisfactorily addressed in the instrument as finally adopted.

Instrument	Description	Has the UK opted in?
<p><b>Regulation on Insolvency Proceedings</b></p>	<p>Provides a regime for the coordination and administration of cross-border insolvencies where the debtor has their 'centre of main interests' in the EU.</p>	<p>Opted into Regulation agreed in 2000.</p> <p>The UK has also opted in to the recently published proposals to revise this Regulation. The proposals would expand the scope to cover rescue and pre-insolvency proceedings, and introduces provisions to improve the efficiency and coordination of proceedings.</p>
<p><b><i>Family law instruments</i></b></p>		
<p><b>Brussels IIa</b></p>	<p>Concerns jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility. Sets out the criteria for a court to determine if it has jurisdiction under the Regulation and provides a mechanism for court decisions from one Member State to be recognised and enforced in another.</p>	<p>Opted in.</p>
<p><b>Proposals for Council Decisions on the acceptance by Member States of eight accessions to the 1980 Hague Child Abduction Convention</b></p>	<p>The 1980 Hague Convention provides a civil law mechanism to seek the return of children wrongly removed or retained away from their country of habitual residence, usually by one parent</p> <p>The EU proposals assert EU competence for accepting accessions to this Convention.</p> <p>There is no directly equivalent EU instrument which provides such a mechanism so the Member States apply the rules of the 1980 Convention between themselves and other contracting states. Brussels IIa provides enhanced provisions for EU Member States for use with this Convention.</p>	<p>The UK opted in, but stated that it disputes the EU's assertion of exclusive competence. See also paragraph 20.</p>



Instrument	Description	Has the UK opted in?
<p><b>Council Decision authorising certain Member States to ratify or accede to the 1996 Hague Protection of Children Convention</b></p>	<p>The 1996 Hague Convention established a range of protection measures for children from parental responsibility orders and contact to public measures of protection and care, representation and protection of children's property in order to protect the child.</p> <p>It is accepted that the EU has exclusive competence for the majority of the subject matter of this Convention but that Member States share competence with the EU in relation to the applicable law elements of the Convention.</p>	<p>The UK opted in.</p>
<p><b>Maintenance Regulation</b></p>	<p>Provides rules for determining which country's courts have jurisdiction in maintenance disputes, for determining which law will be applied, and for the recognition and enforcement of maintenance decisions from other Member States.</p>	<p>The UK did not originally opt in on the basis that the choice of law provisions would have caused UK courts to apply foreign law in some maintenance cases. The UK eventually opted in because it successfully negotiated a change so that the choice of law provision does not apply in the UK.</p>
<p><b>Council Decision on the approval of the 2007 Hague Convention on International Child Support and other Family Maintenance</b></p>	<p>The EU is due to ratify the 2007 Hague Convention which will apply between EU Member States and other contracting states for the enforcement of (currently) child and spousal maintenance obligations.</p> <p>It is accepted that the EU has exclusive competence to ratify this Convention.</p>	<p>The UK opted in.</p>
<p><b>Rome III Regulation</b></p>	<p>Provides rules on which country's laws should be applied in divorce proceedings.</p> <p>This measure does not apply in all Member States.</p>	<p>The UK did not opt in on the basis of concerns about the practical difficulty and expense of applying foreign law in UK family courts.</p>

<b>Instrument</b>	<b>Description</b>	<b>Has the UK opted in?</b>
<b>Proposals on matrimonial property regimes and property consequences of registered partnerships ( e.g. UK civil partnerships)</b>	Two proposals currently being negotiated to establish a framework of rules regulating jurisdiction, applicable law, recognition and enforcement of judgments relating to property consequences of spouses/partners resulting from their marriage and partnership both with each other and third parties and following the end of the marriage or partnership following divorce or dissolution in cross-border situations.	The UK has not opted in to these proposals in part on the basis that property regimes of this sort do not exist in the same way in the UK's jurisdictions.
<b>Regulation on the mutual recognition of protection measures in civil matters</b>	Recently adopted. Will allow individuals who have obtained a protection order to enforce the order in another Member State and for people from other Member States to get their protection orders enforced here.	Opted in.
<b><i>Civil and family instruments</i></b>		
<b>Regulation on the service of documents</b>	Provides procedures to enable parties to litigation in another Member State to receive and respond to documents and then to respond to or otherwise defend proceedings.	Opted in to original Regulation agreed in 2000 and to revised Regulation agreed in 2007
<b>Regulation on taking of evidence</b>	Ensures there are rules governing how evidence for use in court proceedings in one Member State can be obtained from another Member State.	Opted in.
<b>Legal Aid Directive</b>	Establishes common minimum rules for the grant of legal aid in cross-border disputes.	Opted in.
<b>Mediation Directive</b>	Facilitates access to alternative dispute resolution and to promote the amicable settlement of disputes through the use of mediation in cross-border disputes.	Opted in.
<b>European Judicial Network in Civil and Commercial Matters</b>	Aims to improve cooperation at official level between judicial and legal authorities in the Member States in civil, commercial and family matters. It helps to eliminate obstacles to the resolution of cross border disputes.	Opted in to original Decision agreed in 2001 and to amending Decision agreed in 2009.

Instrument	Description	Has the UK opted in?
<p><b>Regulation establishing the Justice Programme in 2014-2020</b></p>	<p>Proposes a funding scheme with the stated objectives to promote judicial cooperation in civil and criminal matters, to facilitate access to justice and to prevent and reduce drug supply and demand.</p>	<p>The UK did not opt in on the basis that it was not persuaded that it represented good value for money.</p>

## Interdependencies

26. This review will link to a number of reviews led by other Government departments. Findings and evidence from our review will be shared with the teams leading these related reviews where appropriate. **You may be interested in other reviews that share a link with this one**, namely:
27. **Overall synoptic review of the Internal Market**, led by the Department for Business, Innovation and Skills (BIS) and the four separate reports examining the four freedoms underpinning the internal market. All of these reports relate to civil judicial cooperation with particular reference to its link to the effective operation of the internal market.
- Free movement of goods, including the customs union and intellectual property (Articles 28 to 37, and 118 of the Treaty on the Functioning of the European Union (TFEU)). The call for evidence for this report is now open and available at <https://www.gov.uk/review-of-the-balance-of-competences>
  - Free movement of services, including financial services, public procurement, certain establishment provisions, and the digital single market (Articles 56 to 62 of TFEU). This call for evidence will be published in autumn 2013 – spring 2014.
  - Free movement of capital (Articles 63 to 66 of TFEU). The call for evidence for this report will be published in autumn 2013 – spring 2014.
  - Free movement of persons (Articles 20 and 21; 45-48 and aspects of Articles 49-53 relating to self-employment of TFEU). The call for evidence for this report is now open and available at <https://www.gov.uk/review-of-the-balance-of-competences>
28. **Trade and Investment**, led by BIS. Again, a strong link to the effective operation of the internal market, in particular the various civil law measures (Brussels I, Rome I, European Enforcement Order, Small Claims Procedure etc) that are seen as essential for cross-border trade.
29. **Asylum and immigration**, led by the Home Office. This report relates to the Ministry of Justice civil judicial cooperation review in relation to the free movement of people.
30. **Fundamental Rights**, led by the Ministry of Justice. This report will look at the EU's Framework on Fundamental Rights and the systems in place to support the EU's work in this field.
31. **Social and employment** led by BIS, Government Equalities Office and Department for Work and Pensions.

## Questions

1. What are the advantages and/or disadvantages to businesses and/or individuals in the UK of EU civil judicial cooperation? You may wish to focus on a particular instrument.
2. What is the impact of EU civil judicial cooperation on UK civil and family law?
3. How is civil judicial cooperation necessary for the functioning of the internal market? Which aspects support and/or hinder it?
4. Are there any areas where EU competence in this area has led to unintended and/or undesired consequences for individuals and companies in the UK? Please give examples.
5. What are the advantages and/or disadvantages of the opt-in for the UK?
6. What are the advantages and/or disadvantages of the cross-border requirement for the UK's national interests?
7. What impact might any future enlargement of the EU have on civil judicial cooperation?
8. What future challenges and opportunities are there in the area of EU civil judicial cooperation?
9. What are the advantages and/or disadvantages to the UK of the EU's powers to act internationally in this area?
10. What would the advantages and/or disadvantages to the UK of action being taken at an international rather than EU level?

Please make clear to which instrument you are referring in your answer.

## Legal Annex

### Section 1: Development of the EU's competence in the field of civil judicial cooperation

#### *Intergovernmental cooperation: the Treaty of Rome*

1. Member States contemplated cooperation in civil justice matters as early as the 1957 Treaty of Rome, though only through cooperation among the governments of Member States rather than through legislation by the institutions of the then European Economic Community. Article 220 of the Treaty stated:

*“Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:*

*....*

- *the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.”*

2. It was on the basis of this provision that in 1968 the then six EEC Member States agreed the Brussels Convention providing for mutual recognition and enforcement of civil and commercial judgments. This Convention eventually extended to other Member States of the then EC as well as to some non-Member States through the parallel Lugano Convention (discussed in paragraph 25). The UK acceded to the Brussels Convention in 1978.
3. In 1971 the signatory states to the Convention agreed a Protocol providing for the European Court of Justice to have jurisdiction to interpret the Convention. This Protocol resulted in over 100 rulings by the Court.<sup>1</sup>
4. In 1980, the then 9 Member States also signed the Rome Convention on contractual choice of law, though it is commonly recognised that this fell outside the scope of Article 220, since Article 220 covered reciprocal recognition and enforcement of judgments, rather than rules about the law that courts would apply if they had jurisdiction to adjudicate a case. A protocol to this Convention also conferred limited jurisdiction on the European Court of Justice, and was eventually signed by all acceding Member States.

#### *The Maastricht Treaty*

5. In 1992 Member States agreed the Maastricht Treaty, in which they provided that civil judicial cooperation was in their ‘common interest’ in helping to achieve ‘the free movement of persons’ in the new European Union.<sup>2</sup> Civil judicial cooperation was placed in the so-called ‘Third Pillar’, which established a limited EU-level

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<sup>1</sup> Steve Peers, *EU Justice and Home Affairs Law*, 3d ed (Oxford: Oxford University Press, Inc., 2011), p. 596.

<sup>2</sup> Article K, in particular article K.1(6) of the EU Treaty.

competence in certain fields, though this was done expressly 'without prejudice' to Article 220 of the EC Treaty.<sup>3</sup> Title VI of the EU Treaty was entitled 'Provisions on Co-operation in the Fields of Justice and Home Affairs' and encompassed civil judicial cooperation. It allowed the Council<sup>4</sup>, for example, to adopt 'joint actions' and draw up conventions which it could recommend to Member States. But the institutions of the EU did not yet have competence to legislate in this field.

6. Measures in the field of civil judicial cooperation therefore remained largely a matter for intergovernmental cooperation agreement between Member States, either based on Article K of the EU Treaty or on the basis of Article 220 of the EC Treaty.

*The establishment of EU legislative competence: the Amsterdam Treaty*

7. Member States agreed in the 1997 Treaty of Amsterdam that the field of civil judicial cooperation would be moved from the Third Pillar to the First Pillar and thereby become a field of EC legislative competence. The Treaty came into force in 1999. EC competence in civil judicial cooperation, now situated in Title IV of Part 3 of the EC Treaty, was limited to matters having "cross-border implications" and to measures adopted only so far as "necessary for the proper functioning of the internal market." Article 65 EC stated:

*"Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include:*

*(a) improving and simplifying:*

- *the system for cross-border service of judicial and extra-judicial documents;*
- *cooperation in the taking of evidence;*
- *the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;*

*(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;*

*(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States."*

8. Transfer of civil judicial cooperation from the Third Pillar to the First Pillar also meant that legislative measures taken under this Article would be subject to adjudication by the European Court of Justice, subject to certain limitations.<sup>5</sup>

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<sup>3</sup> Article K.3(2)(c) of the EU Treaty.

<sup>4</sup> The full title is the Council of Ministers of Member States, with separate Councils for different subjects. This paper relates to the Justice and Home Affairs Council involving Ministers of Justice and Interior Ministers.

<sup>5</sup> Art. 68(1) EC.

### *The UK's opt-in*

9. The UK, together with Ireland, negotiated a special 'opt-in' protocol to the Treaties which provided that any legislative measure adopted under Article 65 competence or indeed otherwise under the new Title IV would not apply to the UK or to Ireland unless it expressly opted in to the measure.<sup>6</sup> This included any international agreement into which the EC entered pursuant to its competence in those fields, and included all decisions of the European Court of Justice interpreting any provisions or measures under that Title.

### *Voting requirements*

10. Civil law measures under Article 65 could at first only be adopted by unanimous vote in the Council, following consultation with the European Parliament, and at the initiative of either the European Commission or the Member States. Article 67 provided for a transitional period of five years, after which the Council could decide that these measures would in future be decided by qualified majority voting and co-decision with the European Parliament. However, before the five years had elapsed, Member States agreed in the Treaty of Nice,<sup>7</sup> which entered into force in 2003, that civil law measures, except for 'aspects relating to family law', would be subject to the qualified majority voting and 'co-decision' procedure<sup>8</sup>. At the same time, the Treaty eliminated the possibility of legislative proposals from Member States. Measures on administrative cooperation under Article 66 EC were also subject to qualified majority voting as of May 2004. Family law measures remained subject to the unanimity requirement and the other decision-making rules set out in Article 67, though from May 2004, legislative measures could also only be adopted following proposals from the Commission.
11. After the conferral of competence brought about by the Amsterdam Treaty, the EC sought to convert the Conventions already in place amongst Member States into EC legislation. This is set out in more detail in Section 3 below.

## **Section 2: The EU's competence today**

### *The Treaty of Lisbon*

12. Since the entry into force on 1 December 2009 of the Treaty of Lisbon, the legal basis for EU measures in civil judicial cooperation is now Article 81 of the Treaty on the Functioning of the European Union, which provides:

*"1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.*

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<sup>6</sup> Art. 69 EC; Protocol on the position of the United Kingdom and Ireland.

<sup>7</sup> Art. 67(5) EC.

<sup>8</sup> Art. 251 EC.



2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

- (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial case;
- (b) the cross-border service of judicial and extrajudicial documents;
- (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
- (d) cooperation in the taking of evidence;
- (e) effective access to justice;
- (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the member States;
- (g) the development of alternative methods of dispute settlement;
- (h) support for the training of the judiciary and judicial staff.

3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The proposal referred to in the second subparagraph shall be notified to the national parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision.”

13. Article 81 differs from the former basis of EU competence – Article 65 EC – in a number of ways.
14. First, it states that the European Parliament and Council are to adopt measures *particularly* when necessary for the proper functioning of the internal market. Former Article 65 EC stated that the EU had competence to legislate measures.... “*insofar as necessary for the proper functioning of the internal market...*” (emphasis added). This removes the requirement for an EU measure in this field to be necessary for the proper functioning of the internal market.
15. Second, a number of additional aims for legislative measures in this field have been enumerated: effective access to justice; the development of alternative methods of dispute settlement; and support for the training of the judiciary and judicial staff. These aims were not expressly listed in the former Article 65 EC, although the EU had used that power to legislate in these areas. The list of aims in the former Article 65 EC was on its face non-exhaustive, whereas the Article 81 list is expressed to be exhaustive.

16. As is clear from Article 81 above, EU legislative measures under that Article generally remain subject to qualified majority voting and the co-decision procedure, while measures in family law remain subject to a requirement for unanimity in the Council and consultation of the European Parliament (now called a 'special legislative procedure'), though the Council, on a proposal from the Commission, may determine that certain "aspects of family law" with cross-border implications may be subject to the ordinary legislative procedure. However, the proposal cannot proceed if one national Parliament formally opposes it.
17. When the Lisbon Treaty was negotiated and agreed, the UK retained its opt-in power to what were now all 'Title V' matters under the new Area of Freedom, Security and Justice, including civil judicial cooperation matters. This meant that in the absence of a UK opt-in, no measure adopted pursuant to a Title V legal base, no provision of any international agreement concluded by the EU pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure is binding on or applicable in the UK.<sup>9</sup> The operation of the UK's opt-in vis a vis the EU's internal and external competence is discussed in more detail further below.
18. The UK's opt-in under the Title V Protocol applies to the UK as a single entity, since there is nothing in the Protocol that suggests that it is possible for only part of the UK to opt in. Therefore the UK must opt in or not as a whole, and in this context, the UK includes Gibraltar,<sup>10</sup> though it does not include the Channel Islands or the Isle of Man, to which any Title V measures do not apply.<sup>11</sup>

#### *Scope of the EU's competence*

19. The EU shares competence with Member States in the field of civil judicial cooperation,<sup>12</sup> both to legislate internally and to negotiate and enter into international agreements. In certain respects its 'external competence' (i.e. its competence to negotiate and enter into international agreements), is exclusive,<sup>13</sup> meaning that Member States cannot enter into international agreements in those

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<sup>9</sup> TFEU, Protocol on the position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice.

<sup>10</sup> Title V TFEU applies to Gibraltar by virtue of Art. 355(3) TFEU, because the UK is responsible for Gibraltar's external relations. The exceptions for Gibraltar in the UK Act of Accession do not cover Title V matters.

<sup>11</sup> Title V TFEU measures do not apply to the Channel Islands or the Isle of Man by virtue of Art. 355(5)(b) TFEU which provides that the Treaty only applies "to the extent necessary to ensure the implementation of the arrangements for those islands set out in [the UK's Accession Treaty]". Article 1 of Protocol 3 to the UK's Act of Accession effectively provides that it is only EU rules on customs matters and quantitative restrictions that apply to the Channel Islands and the Isle of Man.

<sup>12</sup> Art. 4(2)(j) TFEU.

<sup>13</sup> Art. 3(2) TFEU describes the situations in which the Union's external competence is exclusive and effectively sets out the legal bases. Article 216 further provides that the EU may conclude an international agreement where it is "necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope."

respects on their own behalf – the competence to negotiate and conclude such agreements falls to the EU.<sup>14</sup>

20. The UK's opt-in applies both to the EU's internal and external competence. If the UK does not opt in to an internal measure, as stated above it is not bound by the measure or any Court of Justice decisions interpreting it. Where the UK decides to opt in to an internal measure, it cannot legislate in a manner contrary to that measure. Similarly, if the UK has not opted into an EU external agreement, it is not bound by the agreement; and if it has, it is bound to comply with that agreement in the same way as the other Member States.

### Section 3: Major pieces of EU legislation

#### *Mutual recognition, enforcement and jurisdiction*

##### Brussels Convention, Brussels I Regulation and recent amendments

21. In 2001, the Council adopted the 'Brussels I' Regulation (No 44/2001) to replace the 1968 Brussels Convention, which had been an intergovernmental agreement only.
22. Brussels I regulates the mutual recognition and enforcement of civil and commercial judgments across Member States, and sets out rules of jurisdiction for these cases. It applies to civil and commercial cases and sets out a general rule that the court where a defendant is domiciled shall have jurisdiction. There are a number of exceptions to this general rule set out in the Regulation itself and/or as interpreted by the Court of Justice. These include special jurisdiction rules for a number of matters, such as contract<sup>15</sup> and tort disputes,<sup>16</sup> or cases with multiple defendants.<sup>17</sup>
23. At the end of 2012, the Parliament and Council adopted a Regulation<sup>18</sup> which will repeal and replace Brussels I. The new Regulation comes into force in 2015 and

<sup>14</sup> The EU's exclusive external competence has been the subject of a number of Court of Justice cases. These include the 1971 *AETR* judgment, in which the Court held that "each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provision laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules...." (Case 22/70 *Commission v Council (AETR)* [1971] ECR 263, para. 17). In 2006 the Court confirmed and refined this principle, holding that the EU has implied exclusive external competence only if action by the Member States would, on the facts of the case, have some identifiable effect on the EU's internal rules (Opinion 1/03 (*Lugano*)) [2006] ECR I-1145.

<sup>15</sup> Art. 5(1); Case C-386/05 *Color Drack* [2007] ECR I-3699; Case C-204/08 *Rehder* [2009] ECR I-6073.

<sup>16</sup> Art. 5(3); Case C-189/08 *Zuid-Chemie* [2009] ECR I-6917.

<sup>17</sup> Art. 6(1); Cases C-103/05 *Reisch Montage* [2006] ECR I-6827, C-98/06 *Freeport* [2007] ECR I-8319 and C-462/06 *Glaxo SmithKline* [2008] ECR I-3965.

<sup>18</sup> Regulation No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

follows proposals from the Commission to address, in large part, a number of Court of Justice decisions.<sup>19</sup>

### Lugano Conventions

24. Since 1988, there has been a Convention operating in parallel to the Brussels Convention and subsequently the Brussels I Regulation. The 'Lugano Convention' was agreed by the then Member States of the European Union and the contracting states of the European Free Trade Association (EFTA) in order to establish a similar set of rules in those countries for the recognition and enforcement of civil and commercial judgments, and for establishment of jurisdiction in civil and commercial matters.
25. Following the accession of most of the EFTA contracting states to the EU, the only EFTA states which were not EU states were Iceland, Norway and Switzerland. In the 1990s and early part of the following decade, the EC (which became the EU as of the Amsterdam Treaty of 1997) endeavoured to both replace and revise the Brussels Convention in a new Regulation (which became the 'Brussels I' Regulation) and, in parallel, revise the Lugano Convention.
26. Following the 'Lugano Opinion' from the Court of Justice (discussed in footnote 14), which held that the EU had exclusive competence to enter into the renegotiated Lugano Convention, and following a Council Decision<sup>20</sup> approving its signing, the EU concluded the agreement in 2007 with Iceland, Norway and Switzerland.<sup>21</sup>

### Other instruments

27. In 2004, the Council and Parliament adopted Regulation 805/2004 creating a European Enforcement Order for 'uncontested claims' i.e. claims in which a creditor, in the verified absence of any dispute by the debtor, has obtained a court decision or other enforceable document. Under the Regulation, the enforcement order circulates freely in the EU provided certain requirements are met, thereby allowing the creditor to avoid intermediate steps to enforce the decision or other document in other Member States.
28. In 2006, the Council and Parliament adopted Regulation 1896/2006 establishing a European Payment Order, which allows a creditor to obtain an order for payment of an outstanding monetary claim which is enforceable throughout the EU without the need to take intermediate steps.
29. In 2007, the Council and Parliament also adopted Regulation 861/2007 establishing a European small claims procedure applying to claims of €2000 or

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<sup>19</sup> These included Case C-116/02 *Gasser v MISAT* [2003] ECR I-14693 and Case C-185/07 *Riunione Adriatica Di Sicurta v West Tankers* [2009] ECR I-663).

<sup>20</sup> Council Decision of 15 October 2007 on the signing, on behalf of the Community, of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2007/712/EC).

<sup>21</sup> Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (88/592/EEC).

less at the time that the claim was received by the court or tribunal with jurisdiction, excluding interest, expenses and disbursements.

30. In 2011, the Commission proposed<sup>22</sup> a Regulation which would create a European Account Preservation Order to assist in the cross-border debt recovery in civil and commercial matters. The UK decided not to opt in to this proposal,<sup>23</sup> but it is participating in negotiations.

### *Conflict of laws*

31. In 2008, the Parliament and Council adopted Regulation 593/2008 (known as 'Rome I'), replacing the 1980 Rome Convention on conflict of laws in contract (though the Rome Convention continues to apply to all contracts agreed before 17 December 2009).
32. Rome I applies to civil and commercial contractual matters and has as a first principle the premise that contracting parties are free to designate the law that should apply to their contract. The Regulation only designates the applicable law if a contract does not provide for choice of law, subject to special rules for certain kinds of contract.
33. The UK had been an original signatory state to the Rome Convention which was a result of intergovernmental agreement only and not a legislative measure by the EC. The UK did not initially opt in to the Rome I Regulation, but it continued to negotiate, and opted in to the Regulation in 2009.<sup>24</sup>
34. At about the same time, the Council and Parliament also adopted Regulation 864/2007 (known as 'Rome II') which addresses conflict of law issues in non-contractual cases such as negligence claims or other actions based in tort law. There are a number of kinds of cases that are excluded, such as company law disputes or disputes based in trust law. The UK opted in to this measure.
35. The UK has also opted into Regulation 662/2009 which establishes a procedure for Member States to negotiate and conclude agreements with third countries concerning choice of law in contractual and non-contractual matters. This Regulation was agreed in the wake of the Lugano Opinion (discussed in footnote 14) in order to provide for the continuing possibility that Member States could enter into bilateral agreements with other countries. Many such agreements already existed when the Lugano Opinion was issued.

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<sup>22</sup> Proposal for a Regulation of the European Parliament and of the Council creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters (2011/0204 (COD)).

<sup>23</sup> Written Ministerial Statement of then Parliamentary Under-Secretary of State for Justice Jonathan Djanogly, 31 October 2011, Column 28WS.

<sup>24</sup> Written Ministerial Statement of then Parliamentary Under-Secretary of State for Justice Lord Bach, 22 January 2009, Columns 177-78WS.

## *Civil procedure*

### Service of documents

36. In 2000, the Council adopted Regulation 1348/2000 on the service of documents in Member States in order to expedite judicial proceedings that involved parties in more than one Member State. In 2007, the Council and Parliament adopted Regulation 1393/2007, which repealed the prior Regulation and replaced it with a revised set of rules which largely maintained the system but which dealt, among other matters, with certain ambiguities in the text. Like its predecessor, Regulation 1393/2007 aims to expedite proceedings by providing, for example, for designated government agencies through which the service of documents can be effected, and for related rules about timing, refusals, further attempts at service, alternative methods of service etc.
37. There is also a Hague Convention on the service of documents<sup>25</sup> to which most Member States are parties, including the UK, together with a number of non-EU countries. Regulation 1393/2007 prevails over the Hague Convention where service matters arise between Member States.<sup>26</sup>

### Taking of evidence

38. In 2001, the Council also adopted Regulation 1206/2001 providing for cooperation between courts in the taking of evidence in civil and commercial matters.
39. Regulation 1206/2001 applies when the court of one Member State asks the court of another to obtain evidence, or asks that officials be permitted to collect evidence, and establishes a regime of mutual recognition of the evidence obtained, subject to limited exceptions.
40. There is also a Hague Convention on the taking of evidence,<sup>27</sup> to which most EU Member States are parties including the UK, together with a number of non-EU countries. Again, Regulation 1206/2001 prevails over the Convention where relevant evidence matters arise between Member States.<sup>28</sup>
41. The European Commission recently proposed to negotiate with third countries for the extension of rules on service and taking of evidence in proceedings involving persons in countries outside the European Union.

## *Access to justice*

42. One of the new areas set out in the Article 81 TFEU legal basis for EU legislation was 'effective access to justice' which is generally regarded as covering areas such as the provision of legal aid in cross-border cases.<sup>29</sup> However, in 2003 the

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<sup>25</sup> Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

<sup>26</sup> Regulation 1393/2007, Article 20(1).

<sup>27</sup> Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

<sup>28</sup> Regulation 1206/2001, Article 21(1).

<sup>29</sup> Article 81(2)(e).

Council had already adopted a Directive<sup>30</sup> regarding the provision of legal aid in cross-border cases under its more general former Article 65(c) EC power to adopt legislation that eliminated obstacles to the good functioning of civil proceedings. The UK opted in to this measure.

43. The UK also opted in to a Mediation Directive (2008/52/EC), adopted by the European Parliament and Council in 2008 to facilitate the use and mutual recognition and enforcement of mediation in cross-border civil and commercial matters.

### *Family law*

#### Mutual recognition, enforcement, applicable law and jurisdiction

44. The most significant EU legislation in the family law area is Regulation 2201/2003 (known as 'Brussels IIa' because it repealed and replaced the earlier Regulation 1347/2000 which was known as 'Brussels II'). Brussels II had established rules for the determination of jurisdiction over 'matrimonial proceedings' (principally divorce), and provided for mutual recognition and enforcement of the judgments from such proceedings. It also covered jurisdiction, and mutual recognition and enforcement of orders relating to parental responsibility (in EU terms this includes residence and contact) but only those for the children of married parents in divorce proceedings. Brussels IIa covers all these matters, but also includes all parental responsibility proceedings and orders. The UK opted in to Brussels IIa.
45. Brussels IIa also provides rules on the return of children abducted to other Member States. These rules supplement the 1980 Hague Child Abduction Convention, which provides a mechanism for the summary return of abducted children, to which EU Member States are also parties. On the basis of these provisions of Brussels IIa, the Commission has asserted exclusive external competence to conclude agreements for the accession of further states to the Convention.<sup>31</sup> While not accepting the assertion of exclusive external competence, the UK has opted in to these proposals.<sup>32</sup>
46. The Brussels IIa rules are also similar, but not identical, to rules found in the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children as between contracting states to that Convention, including Member States of the EU. Brussels IIa does not contain rules on applicable law in children matters, but the 1996 Hague Convention does. The EU has exclusive external competence in the majority of the subject matter of the 1996 Hague Convention by

<sup>30</sup> Dir 2003/8 ([2003] OJ L 26/41).

<sup>31</sup> Proposals for Council Decisions on declarations of acceptance by the Member States, in the interest of the European Union, of the accession of 8 non-EU states to the 1980 Hague Convention on the Civil Aspects of International Child Abduction: 2011/0441 (NLE) (Gabon); 2011/0443 (NLE) (Andorra); 2011/0444 (NLE) (Seychelles); 2011/0447 (NLE) (Russian Federation); 2011/0448 (NLE) (Albania); 2011/0450 (Singapore); 2011/0451 (NLE) (Morocco); and 2011/0452 (NLE) (Armenia).

<sup>32</sup> Written Ministerial Statement by Minister of State for Justice Lord McNally, 23 April 2012, Columns WS148-9.

virtue of the provisions of Brussels Ila, but Member States share competence with the EU in relation to the applicable law elements of the Convention, since that is not covered in Brussels Ila. Given the EU's areas of exclusive competence and the fact that by the terms of the Convention only states can accede to it, the accession of EU Member States was authorised by a Council Decision.<sup>33</sup>

47. It is generally accepted that the EU also has exclusive competence in the matters covered by the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. However, that Convention does allow signature and accession by regional organisations such as the EU, such that it is the EU that is due to sign and accede to this Convention on behalf of all Member States.<sup>34</sup>
48. In 2009, the Council adopted Regulation 4/2009 on mutual recognition and enforcement, applicable law and the determination of jurisdiction in maintenance proceedings. Following public consultation, the UK did not opt in to the proposal for this Regulation, but it did opt into the Regulation that was eventually adopted.
49. The UK has also opted in to Regulation 664/2009 which establishes a procedure for Member States to negotiate and conclude agreements with non-EU countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations. This Regulation was agreed in the wake of the Lugano Opinion (discussed above) in order to provide for the continuing possibility that Member States could enter into bilateral agreements with other countries in these matters. Many such agreements already existed when the Lugano Opinion was issued.
50. Regulation 1259/2010 (known as 'Rome III') provides rules on applicable law in divorce proceedings. The UK did not opt in to this proposal. Following disagreements in negotiations amongst other Member States, the Regulation eventually proceeded as an enhanced cooperation measure for 14 Member States, where it has applied since 2012.
51. Negotiations are currently in progress in the European Union for Regulations on jurisdiction, applicable law and the recognition and enforcement of decisions regarding matrimonial property regimes and the property consequences of registered partnerships. Following public consultation the UK is not participating in either of these Regulation proposals.<sup>35</sup>

### *Other*

### Succession

52. In 2012 the Council and Parliament adopted Regulation 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and

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<sup>33</sup> Council Decision of 5 June 2008 (2008/431/EC).

<sup>34</sup> Approval was granted by Council Decision of 9 June 2011 (2011/432/EU).

<sup>35</sup> Written Ministerial Statement by then Parliamentary Under-Secretary of State for Justice Jonathan Djanogly MP, 30 June 2011, Column 68WS.



enforcement of authentic instruments in matters of succession, which inter alia created a European Certificate of Succession. Following consultation with the UK public, the UK did not opt in to this Regulation when it was proposed by the Commission in 2009.<sup>36</sup>

#### Mutual recognition of protection measures in civil matters

53. Negotiations are also currently in progress for a Regulation on mutual recognition of protection measures in civil matters, including in cases of domestic violence. The UK has opted in to these negotiations.<sup>37</sup>

#### Judicial training

54. A proposal is currently being negotiated in the EU for a Regulation establishing for the period 2014 – 2020 the Justice Programme. This is a funding scheme which has among its stated purposes the promotion of judicial cooperation in civil and criminal matters and the facilitation of access to justice. As discussed in the main section of this Call for Evidence, the UK has decided not to opt in to this proposal, though it continues to participate in the negotiations.<sup>38</sup>

#### Insolvency

55. In 2000, the Council adopted Regulation 1346/2000 on insolvency proceedings with the stated aim of facilitating the efficient and effective operation of insolvency proceedings that had cross-border elements. The UK opted in to this Regulation. The Commission recently proposed that this Regulation be amended, and the UK has opted in to this Regulation. This Regulation and the amending proposal are discussed in more detail in the Call for Evidence published by the Department for Business, Innovation and Skills.

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<sup>36</sup> Written Ministerial Statement by then Secretary of State for Justice Jack Straw MP, 16 December 2009, Column 140WS.

<sup>37</sup> Written Ministerial Statement by then Secretary of State for Justice Kenneth Clarke QC MP, 15 September 2011, Column 63WS.

<sup>38</sup> Written Ministerial Statement by then Secretary of State Kenneth Clarke QC MP, 22 March 2012, Column 74WS.

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