Bar Council response to the Civil Judicial Cooperation consultation paper

I Introduction

1. This is the response by the General Council of the Bar of England and Wales (The Bar Council) to the Ministry of Justice's consultation paper entitled Civil Judicial Cooperation.[1]

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

4. The Bar Council notes that, as part of this review, the Government has already issued, or plans to issue, several calls for evidence of interest to the Bar and its clients. The Bar will respond, so far as practicable, to the calls of particular relevance to us, and will focus on identifying legal issues. Topics raised in other calls and in our responses to them may also be of relevance to the present call. A case in point is our response to the synoptic review of the internal market[2], in which we focussed our comments on one particular area that has been a matter of concern to the Bar Council for some time, namely the European Commission's attempts to use the internal market Treaty legal basis, Article 114 Treaty on the Functioning of the European Union (TFEU), for measures that we believe to be outside its scope. That of course includes Commission proposals in the area of civil law. Since it is of obvious relevance to the present call, we refer the Ministry of Justice to that response. See: http://bit.ly/17phA3A

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[1] Ministry of Justice (2013) Civil Judicial Cooperation

[2] Bar Council response to the Department for Business, Innovation and Skill's call for evidence on the government's review of the balance of competences between the United Kingdom and the European Union

II. Executive Summary

5. At a general level, the Bar Council welcomes many of the EU measures that have been adopted in the area of civil judicial cooperation, including in the family law field, in the past 14 years or so, and has actively contributed to their development in several instances.

6. Indeed, the Bar Council has been proactively engaged in the EU's work in this area since the EU (EC as it then was) first began to explore the Justice and Home Affairs field in the late 1990s. We have contributed our expertise through our responses to Commission consultations; membership of, and / or contributions to, Commission expert working groups; involvement in domestic stakeholder groups; presentations at hearings and workshops organised by the European Parliament; position papers on adopted proposals, and by many other means. Along the way, we have observed the evolution of EU competence in the field, as amply set out in the present call.

7. Our primary observations, set out in greater detail below, can be summarised thus:

- Article 81 TFEU would appear to be an adequate legal basis for action in this field. However, we have some concerns, as yet largely untested, regarding the changes to the wording from that of Article 65 of the Treaty establishing the European Community (TEC) and the potential that may give for an expansionist agenda, in particular away from more procedural mutual recognition / private international law measures towards substantive civil law measures.
- The Commission is manifesting a desire to use Article 114 TFEU as a possible basis for legislation in the civil justice field, notably in the areas of substantive civil and commercial law, thereby potentially circumventing both the UK (and Ireland)'s Protocol 21 opt-in provisions, and the Article 81 requirement to create mutual recognition measures having a cross-border implication, in order to legislate. We are concerned about such developments and would welcome clarification on this issue.
- In this context, we are noticing an increasing acceptance within the EU institutions that Article 81 may in the future be seen as the legal basis for family law rather than other civil law measures.
- Whatever the legal basis, but especially if there is a shift away from using Article 81, where the Commission is contemplating proposing EU legislation in the civil law field in the future, we would wish to see undertaken significantly more rigorous and robust independent Impact Assessments (IA) than have been carried out to date. Moreover the Commission should not proceed with a planned measure unless the results of the IA prove need and satisfy the Treaty requirements of subsidiarity and proportionality.
- We would also welcome definitive clarification of the issue of external competence in the field of civil judicial cooperation.
- The Bar Council supports most of the measures that have been adopted in the field of civil judicial cooperation so far, including those in the field of private international law and within that, the specific measures in the family law field. In so far as the original versions of certain measures have proved inadequate to the task, despite our and other stakeholder efforts and those of the EU legislators, we hope that the EU

institutions will focus time and resources to ensure that the required revisions of these texts lead to genuine, workable improvements. The Bar will make its expertise available to contribute to the success of that work going forward, as we have recently done during the revision of the Brussels I regulation, and are currently doing in the context of the revision of the Insolvency regulation.

- In general terms, we would prefer to see the EU focus its future efforts on improving, consolidating, and simplifying the existing measures in the civil justice field, and on education, training and awareness raising, so that mutual trust is enhanced and the many practical measures already in existence are more fully utilised. In so far as there are gaps to be filled, we would prefer to see a continuing emphasis on private international and procedural law rules.
- The importance of active participation by English, or at least common law, trained lawyers at all stages of the law-making process in this area, including on occasion, by way of intervention in cases before the Court of Justice of the EU (CJEU), should not be underestimated.
- Use of the UK opt-in – We see this as a useful tool, which however, needs to be employed with great political awareness and sensitivity.

8. The remainder of this response is divided into two further sections:
   - A discussion of the key issues as we see them; and,
   - Responses to the particular questions posed in the Call for evidence, where not already covered elsewhere.
   - We hope this approach will add insight and value to the debate.

III. A Discussion of the Bar's key issues

The Treaty basis for EU action in the field of Civil Judicial Cooperation

9. The current legal basis for EU action in this area is provided by Article 81 TFEU, which has been in force since 1 December 2009. However, much of the EU legislation currently in force in the area of civil judicial cooperation was adopted under the previous Treaty basis, Article 65 et seq TEC.

10. At the time that the TFEU came into force, we identified a number of areas where the new wording in Article 81 TFEU varied from the old in Article 65 TEC, giving rise to potential ambiguity. In the time since the TFEU came into force, these ambiguities have not been wholly clarified, so far as we are aware, either during EU legislative negotiations, or before the Luxembourg Courts. It may thus be useful to highlight them here.

11. The material phrases previously contained in Article 65 TEC have not changed dramatically, but the way in which they have been set out has. Thus, the old Article 65 TEC provided that "measures in the field of judicial cooperation having cross-border implications..... and insofar as necessary for the proper functioning of the internal market shall include": followed by 3 categories of measures, including (c) "if necessary promoting the compatibility of the rules of civil procedure applicable in the Member States" (our emphasis).

12. If we compare that with Article 81 TFEU:

- The statement of Union competence in this field is now contained in a short stand-alone sub-paragraph (1). It is not entirely clear whether this means that the Union can now issue proposals with reference to this sub-paragraph alone, or whether subparagraph (1) must necessarily be read as limited by the rest of the article, in particular (2). If it is not so limited, (for example, paragraph 2 is interpreted as merely indicative of the type of measure that could be adopted) then it is arguable that the Union's competence in this field is wider than before. That said, we draw comfort from the Council of Minster's consistently strict interpretation of "cross-border implications", and its informed view that the key element is the principle of mutual recognition, which must be present. Nonetheless, there is evidence that the Commission at least, feels the EU has have greater flexibility on these issues now.
- Note that family law remains a special case (81(3)), with Council unanimity required to adopt a measure, or to introduce any other form of legislative procedure such as involving QMV – the "passarelle". It is not thought likely that the required unanimity to adopt this change could ever be secured, but the appetite for a small group of Member States (numbering at least 9) to forge ahead in this and other controversial areas using enhanced cooperation (Article 329(1) TFEU), has shown itself to be a key factor, notably in family law with the adoption of the Rome III regulation, and in other fields such as the Single European Patent.

13. Without prejudice to these potential reservations, the Bar Council broadly supports the premise of Article 81 TFEU, and the way that it has been applied and interpreted to date. We note however, that when doubt has arisen, for example on the need for cross-border implications, it has fallen to the Member States through the Council, and to the CJEU, to insist upon this element. We would not welcome any relaxation of this approach.

14. Article 114. The Bar Council is concerned about the increasing reliance by the Commission on Article 114, the so-called Internal Market legal basis, for initiatives that we believe fall out with its scope, notably recently in the financial services sector, and in the October 2011 proposal for a Common European Sales Law. As mentioned above, we have provided a full discussion on this topic in our response to the Synoptic review of the Internal Market. A few further points of amplification are made below.

The need for specialist lawyers in the development of the law

15. The Bar Council considers that it is highly desirable (if not essential) that those tasked with negotiating and drafting instruments in the area of civil judicial cooperation, including in the private international law sphere, be knowledgeable and experienced in this specialist area of law. Although private international law is concerned with apparently simple practical legal issues (Which court can try this claim? Which law will the court apply to determine the claim?) the underlying legal concepts and analysis are not straightforward; anyone contributing to the legal process in this area requires a highly developed - even sophisticated - understanding of the law.

The need for English / common law trained lawyers in the development of the law

16. The need for and benefit of English legal input at the stage of law-making should also be obvious, and we would support any initiatives to encourage a rise in the number of UK / common law trained lawyers within the EU institutions.

17. We also see the benefit of such input at the stage of judicial law making. Unsurprisingly, the existing EU private international law instruments give rise to numerous references to the CJEU, which creates a more immediate opportunity for input. With cases based on the Rome II regulation (EC867/2007) starting to come before the courts, this will only increase. It is crucially important for the development of EU law in this area that the English common law perspective on these issues is heard. Recent experience suggests that the UK may be foregoing its right to submit observations on many, if not most, references in the private international law field before the CJEU. Notwithstanding the impact of judgments of the CJEU on UK law and practice, important judgments are regularly made without the benefit of any English legal input. Despite the current economic conditions, this is short-sighted and should be addressed urgently.

18. An example of a case in which it appears from the report that no submissions were advanced by the UK is Case C-463/06 FBTO v Odenbreit [2007] ECR I-11321. In that case the CJEU held that in certain conditions a Claimant could bring proceedings arising out of an accident abroad in the courts of his own Member State against a liability insurer domiciled in another Member State. This decision has revolutionised personal injury litigation arising out of accidents abroad; it has had a very significant impact on the English courts due to the number of claims which are now brought on the basis of the decision. Whilst the ultimate outcome of the case may not have been affected by observations by the UK, nonetheless the opportunity to influence the decision or the reasoning should not have been missed.

19. The desirability of an English law analysis being advanced will be of particular importance in the next few years when key decisions will be taken under Rome II. For example, difficult issues will arise in relation to determining the respective scope of Rome I and Rome II and in delineating the scope of tort, restitution and other non-contractual obligations within Rome II. The proper characterisation or analysis of equitable obligations (including, for example, dishonest assistance or knowing receipt) is a clear example of an area in which English lawyers will bring a unique perspective.

20. Thus, as a general rule, the Bar Council would encourage the UK to intervene, whenever practicable, in cases in which it would have locus standi before the Court of Justice, regarding the interpretation of the Treaty provisions or the secondary legislation or soft-law that emanates from it, in the field of civil judicial cooperation, including on private international law, as described above.

The need for revision of existing measures

21. In endorsing at a general level the bulk of the measures adopted in this field to date, the Bar Council would stress, however, that that does not mean that we have no concerns about individual measures adopted. Many of the existing EU civil justice measures were not as well drafted as they perhaps could have been. A case in point is the original Brussels I

regulation 44/2001, seen by many as the foundation stone of EU measures in this field. We were pleased to see that the formal revision of that regulation, required in the text itself, was undertaken with care and consideration by the EU institutions, resulting in the recently adopted regulation 1215/2012, with which the Bar Council is largely satisfied. Indeed, the Bar Council provided its expertise to both the Commission and the Parliament throughout the revision exercise, and many of our recommendations are reflected in the final text.

22. There are issues arising with other existing measures too, though not necessarily because the measure itself is found wanting. For example, the European Evidence Regulation (Regulation 1206/2001) could be, but has not been, used as a way for English courts to obtain disclosure in (inter alia) competition law cases, where different domestic laws prohibit the giving of evidence in foreign courts (e.g. the so-called French Blocking Statute). The Evidence Regulation is the subject of a number of ongoing cases in the Court of Appeal, and we await its adjudications with interest.

23. Members of the Bar are currently contributing to the work of the EU institutions in revising the Insolvency Regulation 1346/2000, which we consider to be an effective measure that needs only limited improvement.

24. Several of the other existing civil judicial cooperation measures will be coming up for review in the coming years, and we look forward to contributing to improving those instruments in much the same way.

An overview of the impact of EU law on Family law in England and Wales

25. In the specific field of family law, EU measures have had a significant and growing impact. English family law barristers have had great experience in particular in the operation of Regulation 2201/2003 ("Brussels IIa") and more recently Regulation 4/2009 ("the Maintenance Regulation"). Accordingly, the focus of our comments in the area of family law in this response is on the operation of those two Regulations.

26. Our family law practitioners consider that these two Regulations have had a positive and beneficial impact overall. There are obvious advantages in having inter alia:-

- Uniform jurisdictional rules in all Member States for divorce proceedings (Brussels IIa).
- Uniform jurisdictional rules in all Member States for maintenance proceedings (the Maintenance Regulation).
- A system of summary enforcement in the courts of all Member States of orders relating to contact between parents and children made in the courts of any other Member State (Brussels IIa).
- A system of summary enforcement in the courts of all Member States of maintenance orders made in the courts of any other Member State (the Maintenance Regulation).

27. There are also disadvantages attached to both Regulations. Inter alia:-

- The strict 'first past the post' lis pendens system which gives automatic priority to whichever proceedings are started first can have results which seem arbitrary and in some cases unfair to us.

- The relationship between the two Regulations gives rise to some complex questions which are likely to have to be resolved over time in the courts of the UK and quite possibly also in the CJEU.

28. One fundamental point which underpins all EU legislation is the assumption that the courts of all Member States are on an equal footing and will deliver equivalent justice. In family law the approach to and the outcomes in most issues relating to the welfare of children are likely to be broadly similar.

29. However, in financial matters there is a very wide range of approaches in different Member States. This gives a major incentive to each party to try to gain lis pendens priority by issuing divorce proceedings in the Member State of their choice. The race to court is a real problem since large sums of money can turn on it. It is no exaggeration to say that millions of pounds can turn on whether one party's lawyer in (say) London is able to get to court quicker than the other party's lawyer in (say) Paris; and to gain priority by issuing proceedings first.

30. The answer to the problem of the race to court would be to introduce a hierarchy into the different jurisdictional bases for divorce in Article 3 Brussels IIa. Each successive basis could then only be invoked if the grounds ranking above it in the hierarchy cannot be used. This would be consistent with the approach adopted in the Brussels I Regulation and with the principle of legal certainty which is so important in EU law.

The focus of the EU's work in the field of civil judicial cooperation going forward

Consolidation, improvement and simplification

31. The Bar Council would call on the EU institutions to concentrate their efforts in the coming years in the civil justice area on improvement, refinement and consolidation of the existing texts; promoting mutual trust as well as knowledge of their existence, application and use; and filling in any obvious gaps, particularly in the areas of procedural and private international law.

Training and awareness-raising

32. Several existing EU civil justice measures could make a significant contribution to citizens' access to justice were they used more widely. The Bar shares the view of many that more resources need to be committed to raising awareness of the existence of these measures among the public and the legal professions, and on training to maximise their potential. There are several examples of simple, practical measures that are not bringing the benefits they could, but which might do so were they better known, understood and applied. Examples include the European Small Claims Procedure; the European Order for Payment Procedure, and the European Enforcement Order. We would also encourage similar efforts for more recently-adopted instruments, such as that on ODR, and the new European Protection Order so that their uptake is more rapid and effective.

Private International law, but not private law

33. Many EU instruments in this area deal with jurisdictional issues, choice of law and enforcement and as such are concerned with promoting mutual recognition through a specific EU application of Private International Law e.g. Brussels I, Brussels II, Brussels IIbis, Rome I, Rome II, Rome III, the Succession regulation. Many others have a complementary procedural, usually automatic recognition and enforcement function, e.g. the European Enforcement Order, the European Order for Payment, and the recently adopted European Protection Order. Of the rest, most are concerned with procedural issues, e.g. the service of documents, taking of evidence; provision of legal aid and measures enhancing the availability of alternative dispute resolution, including the Mediation directive and the recently-adopted measure on ODR. The Bar Council endorses the adoption of such measures, promoting as they do mutual trust and cooperation between the Member States and facilitating the lives of EU citizens as increasingly they exercise their Treaty rights of free movement in the EU.

34. On occasion, it may be appropriate to go further. Indeed, the Bar Council, through its Personal Injury Bar Association recently endorsed the call by the Pan European Organisation of Personal Injury Lawyers to propose a new EU instrument that would provide a solution in cases involving foreign accidents, where the current variations in national limitation rules cause a disproportionate amount of uncertainty, and increased expense, for injured victims. As a limited and specific exception to our general position that harmonisation of substantive law rules in this area is not desirable, we specifically endorsed the solution proposed by PEOPIL, namely that, by reference to the direct cause of action against road traffic insurers, guaranteed by the consolidating directive harmonising the protection provided to injured victims seeking compensation in respect of cross-border road traffic accident claims, there should be specific protection provided by way of an EU Regulation. Such an instrument would be proportionate, would meet a real need to protect the interests of road traffic accident victims, without affecting the autonomy of individual Member States to regulate their own civil procedure and substantive law in respect of domestic personal injury claims. This idea has been debated for some time, but so far, the EU institutions have failed to act upon it.

35. By contrast however, and as highlighted in our response to the Synoptic review of the Internal Market, referred to above, the Bar Council is concerned about the EU's increasing inroads into the field of substantive civil and commercial law – or private law, as opposed to private international law and mutual recognition, discussed above. These concerns are amplified by the Commission's apparent disregard, at least as exhibited in the context of the European contract law file, for the views of the majority of stakeholders who responded to its prior consultations, coupled with what the Bar among others considers to be a continuing absence of proven need, justifying the proposal it eventually adopted, namely the October 2011 draft regulation creating a Common European Sales Law (CESL). Moreover, the Commission's attempts to use Art 114 as the legal basis for such Private law instruments further complicate matters. In the context of this present call, the example of CESL raises a number of issues going forward, which the UK should fully consider.

i. If article 114 is to become the legal basis of choice for future EU civil and commercial law measures, the Bar remains doubtful that that legal basis provides for the possibility of using a non-binding optional instrument. Accordingly, future

private law instruments in the civil law field are likely to take the form of binding harmonisation measures.

ii. If so, they are no longer bound by the cross-border imperative of Article 81.

iii. If so, they circumvent the UK opt-in/out, and could impose harmonisation on the UK, provided a qualified majority existed in Council. In this respect, we also touched on the issue of enhanced cooperation, which will surely be used more often in the future if insufficient support is found in Council for a full EU measure. (and see Joined Cases C274/11 295/11 in the context of the decision on the European Patent)

IV. Short responses to the questions in the Call for evidence

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.

36. The Bar will restrict its comments to the impact in law of private international law and specifically family law EU instruments.

General Private International law

37. A persuasive case can be made that uniform choice of law rules for contractual and non-contractual obligations within the EU is a good thing for UK businesses and citizens:

- First – and perhaps most importantly – uniform choice of law rules increase legal certainty. They remove one layer of uncertainty when evaluating the prospects of litigation in a particular court. Wherever in the EU the claim is brought, Rome I and II will apply: those rules will, in principle, lead to the same substantive law applying whatever the forum. So foreseeability of outcome will improve and the incentive for forum shopping will be reduced. This is particularly important in the non-contractual area where there is a huge variation in substantive law: different bases for liability; differences in rules on contributory negligence and vicarious liability; enormous variation in compensation levels; different limitation provisions.

- Secondly, uniform choice of law rules facilitate the free movement of judgments under Brussels I. Recognition and enforcement of judgments is likely to be more readily accepted if the foreign court has applied the same choice of law rules, and the same law, as the English court would have applied had the dispute been litigated here.

- Thirdly – uniform choice of law rules promote equal treatment throughout the EU. So two claimants bringing claims in their home courts against a common Defendant will have the same conflict rules applied to their dispute.

38. But the full potential of Rome I and II to achieve these desirable objectives is hampered at present by two factors. Only once these are addressed will the common choice of law rules be able to fulfil their potential.

39. First, is the resolution of some of the key issues which are starting to arise under Rome II, in particular defining the respective scope of the applicable law and the law of the forum. There is no doubt that litigating in different courts will produce different results even when the same law is being applied; that is the inevitable consequence of the existence of different legal systems. But how different that outcome is will depend upon where the boundary is drawn between the role for the applicable law and the law of the forum and, in particular, how widely the concept of "law" is construed. Obviously, that is a task for the courts and ultimately the Court of Justice. Questions such as these are prime examples where input from English lawyers will be essential.

40. Secondly, the continued application of existing international conventions in this area precludes uniform application of Rome II. The Hague Traffic Accidents Convention and the Hague Product Liability Convention contain choice of law rules in these two important areas. The effect of Article 28 of Rome II is that they continue to apply in the courts of those Member States who have ratified them. So the courts of 12 Member States including – Austria, Belgium, France, the NL and Spain – do not apply Rome II when faced with a choice of law issue arising out of a cross-border traffic accident. Likewise the courts of 6 Member State including Finland, France, NL and Spain do not apply Rome II in Product Liability claims with an international element. Until this issue is addressed – and the Hague Conventions no longer take precedence – to describe Rome II as "EU wide uniform" choice of law rules is something of a misnomer – and the key benefits of Rome II including increasing legal certainty cannot be fully attained.

Response specific to Family law
(related to the two regulations, Brussels IIa and Maintenance as above)

41. It is almost entirely individuals rather than businesses who are affected by the two Regulations on which the Bar Council focuses here. Although businesses can on occasion be parties to proceedings which are governed by either or both of the Regulations, we do not make any separate points about such cases. All our comments are directed at the effect on individuals.

42. We address certain specific advantages and disadvantages of the two Regulations for individuals in our responses to the questions which follow. As a general point we think (and of course hope) that as further time passes the advantages will become more apparent and the disadvantages less so. Fundamental changes such as have been brought about by these two Regulations necessarily take a long time to become absorbed into the fabric of national law; and into the thinking and practices of practitioners.

43. There is a possibly cynical saying (which has been variously attributed) that "Any major change in the law is worth ten years work to lawyers". This reflects an underlying truth that any major law reform, even a good one, is likely to throw up a lot of issues which the courts and practitioners will take some time to adjust to and to iron out. Quite simply, any major change in the law causes disruption and confusion in its early days.

44. The Children Act 1989 is a good example of this. Even though it has been accepted from the outset as a reform which was both necessary and well-designed, it took some years for many important issues arising from it to be addressed by the courts; and for practitioners and judges at all levels to get used to it.

45. Although EU law has not impacted on substantive family as much as the Children Act, its arrival has in some respects required an even greater process of adaptation. The EU Regulations which affect family law derive almost entirely from the continental European civil law traditions. Much of the underlying legal architecture is unfamiliar and even alien to English lawyers trained in the common law tradition. One obvious example is the central importance in the Regulations of the civil law principle of legal certainty, often at the expense of the common law tradition of discretion.

46. Family lawyers are particularly used to English courts exercising wide discretionary powers. One area where English law differs fundamentally from the law in all continental Member States is how the financial consequences of divorce are addressed. In England and Wales the court exercises broad discretionary powers over all matrimonial resources; capital and income are treated as two sides of the same coin. In continental countries there is a sharp distinction between matrimonial property and maintenance. Property issues are governed by the couple's matrimonial property regime and the courts have little if any discretion.

47. Although we comment below that this has been and continues to be a slow process, English family lawyers are adapting to the advent of EU law. A new generation of practitioners is evolving who know little or nothing of the law as it was before Brussels IIa. There is now a substantial body of jurisprudence from English courts dealing with that Regulation. We are all becoming European, even if rather slowly in some cases.

48. The clock could not now be put back. If there were to be substantial changes to Brussels IIa and/or the Maintenance Regulation (or if, in the extreme case, the UK were to withdraw from the EU), that would now be a further major change in the law which would inevitably bring with it further disruption and confusion.

49. It would be particularly difficult for the English family courts to cope with this at a time when (a) legal aid has been greatly reduced in this field and many more litigants are not legally represented; and (b) the family courts are about to undergo major structural changes. There could hardly be a worse time for further major changes in family law.

2. What is the impact of EU civil judicial cooperation on UK civil and family law?

50. The impact of the private international law instruments on UK civil law is significant. To take one example, the development of the jurisdiction rules in FBTO v Odenbreit (full citation above) has meant that many more cases arising out of accidents abroad are now being brought in the UK Courts. That novel basis for jurisdiction has given rise to a number of legal issues which are currently working their way through the English legal system.

51. Furthermore, the combined effect of Rome II with the current state of the jurisdictional rules applicable in the English courts (both the Brussels I Regulation and the common law rules outside the scope of the Brussels Regulation) has meant that the English courts are being required to apply foreign law on a much more regular basis. This is giving rise to all kinds of legal and practical issues which will need to be resolved in the foreseeable future.

Response specific to Family law
(focussed on Brussels IIa and Maintenance, as above)

52. The impact of EU law on family law in England and Wales has been immense. The effect of Brussels IIa and the Maintenance Regulation taken together is that every divorce petition and every application for maintenance of any kind is governed by the jurisdictional rules of one or both Regulations: whether or not the case has any connection with any other Member State.

53. Where another Member State is concerned, the impact is much greater still. If there are competing divorce proceedings (lis pendens) a completely different regime applies. If a child is abducted between two Member States, Brussels IIa provides for important further measures beyond those which are found in the 1980 Hague abduction convention. Enforcement of orders both in relation to children and to maintenance is another obvious area. There are others.

54. It is our experience that many practitioners – both solicitors and in some cases our own members – have been slow to recognise the full extent of this impact. It took some years for the full implications of Brussels II and Brussels IIa to sink in and we believe that for many English family lawyers the full implications of the Maintenance Regulation have still not been recognised.

55. Although maintenance was within the scope of the Brussels Convention and of the Brussels I Regulation, many English family lawyers never found it necessary to get to grips with either of those instruments. Some seem to be reluctant to accept that the Maintenance Regulation is an instrument which cannot be ignored either in respect of its jurisdictional provisions or in relation to enforcement.

3. How is civil judicial cooperation necessary for the functioning of the internal market? Which aspects support and/or hinder it?

56. We refer to the points made at paragraph 33, under the heading," Private International law, but not Private law".

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.

57. One example may be the effect of Odenbreit (full case citation above) on English liability insurers and, potentially, their insureds: they can now be sued in the courts of other

Member States in relation to accidents which occurred in the UK. This comes as something of a surprise to many of them - and their foreign counterparts in the reverse situation.

Response specific to Family law
(focussed on Brussels IIa and Maintenance, as above)

58. It is not always clear what has or has not been intended, but there are certainly some areas where the Regulations have had undesirable consequences.

59. Example 1. Article 3(c) of the Maintenance Regulation provides that maintenance jurisdiction shall lie with:-
"the court which according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties" (emphasis added)

60. In England and Wales the words underlined are applicable in a case where the jurisdictional basis of a divorce is the domicile of only one of the parties: cf. Article 2.3 Maintenance Regulation, Article 7 Brussels IIa and section 5(2)(b) Domicile and Matrimonial Proceedings Act (as amended). In such a case the English court has divorce jurisdiction but (at least prima facie) not maintenance jurisdiction. This was clearly intended but is baffling to English practitioners. We do not understand the reasons behind it.

61. In any event the situation is more complicated. It seems that if the parties to a sole domicile divorce agree that the English court should have maintenance jurisdiction, it will: cf. Article 4(1)(c)(i).

62. But what if one or other of the parties is habitually resident in England and Wales at the date of the divorce petition? Is Article 3(c) to be read conjunctively or disjunctively with Article 3(a) (which gives maintenance jurisdiction where the Defendant is habitually resident), and Article 3(b) (which gives maintenance jurisdiction where the creditor is habitually resident)? There is no obvious answer to this.

63. If a conjunctive reading is appropriate, a further question is what the position is if one of the parties becomes habitually resident in England and Wales after the decree absolute of divorce. Does the English court acquire maintenance jurisdiction at that point, even though it did not have it at the date of the petition and/or the decree? This is completely uncertain.

64. A further twist is that the absence of maintenance jurisdiction does not necessarily deprive an applicant of financial claims in a sole domicile case. In a case where substantial assets had been built up during the marriage, the applicant would be able to make a case along the lines: "I accept that the court does not have maintenance jurisdiction. However, I am not seeking maintenance. I invoke the sharing principle – as developed in and since White v White – to claim half the substantial assets which have been built up during the marriage."

65. That particular twist would only arise in the small minority of cases where substantial assets have been built up during the marriage but it helps to illustrate the state of confusion which Article 3(c) has brought about.

66. Example 2. Article 4 Maintenance Regulation enables parties to agree which court shall have jurisdiction. Such an agreement can be made in advance, e.g. in a prenuptial agreement.

67. Suppose that two spouses are both French nationals. At the time of their marriage they were living in England. They entered into a prenuptial agreement which specified England as the court of choice for any maintenance issues. Their marriage breaks down when they have been living in Germany for some time. Both Germany (on the basis of habitual residence) and France (on the basis of joint nationality) will have jurisdiction under Brussels IIa for the divorce – but not for maintenance because of the choice of court agreement in favour of England.

68. England will have jurisdiction to deal with maintenance, but not with the divorce. However, there are no proceedings in England within which maintenance can be claimed. It seems that no court will have jurisdiction to deal with maintenance, at least until the divorce has been obtained elsewhere so that an application could be made in England under Part III of the Matrimonial and Family Proceedings Act 1984.

69. Example 3. A French couple marry in France under the separation de biens matrimonial property regime. The husband is successful in business and becomes rich. They move to live in England where the marriage breaks down. The husband instructs lawyers in Paris to issue divorce proceedings (on the basis of joint nationality) on the same day as the wife instructs lawyers to issue divorce proceedings in London on the basis of their habitual residence.

70. If the French proceedings are first in time, the French court will give effect to the separation de biens regime. The wife is likely to receive maintenance for a limited period and/or prestation compensatoire (a lump sum).

71. If the English proceedings are first in time, the English court will give limited effect to the separation de biens regime if it is satisfied that it would be fair to do so. If it is not satisfied that this would be fair, the wife will be able to claim a share of the husband's fortune. Even if the court is satisfied that it would be fair to give effect to the regime, the wife will still be entitled to a sum which reflects both her housing need and a capitalisation of her maintenance need. Even on this basis, her overall award is likely to be much greater than she would have received in France.

5. What are the advantages and/or disadvantages of the opt-in for the UK?

72. The main advantage of the UK opt-in is simply that it can choose whether or not to take part in an EU measure in this field. It is not reliant, as are the other Member States (bar Ireland and Denmark) on achieving a blocking minority in the Council in order to block a

measure that it does not want to see become law. Plainly, the advantage is greatest outside of the family law area, where in any event, unanimity is required in Council. That said, our family law practitioners are satisfied from a substantive point of view with the way that the opt-in was used in the negotiations for both of the regulations on which we have focussed our attention in that area in this response, namely Brussels IIa and Maintenance.

73. The UK has two opportunities to take its opt-in decision – within 3 months of the Commission adopting its proposal, or, if not then, at any time after the final text is formally adopted.

74. Within these two alternatives, there are further pros and cons:

- If the UK chooses to opt-in at the beginning, but the negotiations then go badly from its perspective, it is effectively in the same situation as all of the other Member States in needing to form a blocking minority.
- On the other hand, if it waits until the end of the legislative process before deciding whether or not to opt-in, its influence on the negotiations themselves may be diluted. This is discussed further below.

75. With one or two notable exceptions, the UK opt-in has by and large been well exercised. That said, it is important to be aware that it is, and is seen as, a political tool and as such is subject to the political vagaries in place at any one time. The Bar has observed several factors at play on this issue in recent years:

- Other Member States may resent the option that the UK secured for itself, in choosing to take part or not in justice measures on a case-by-case basis;
- This resentment is likely to be inflamed if the UK chooses not to opt-in to a measure at the time of its initial adoption by the Commission, but then seeks to play a very active role in the Council negotiations. This approach worked well for the Succession and Maintenance regulations, (and in several criminal justice files), but we are concerned that the more often the UK is seen to take this approach and then choose not to opt-in at the end of negotiations, as in the Succession file, the less accommodating the other Member States are likely to be. Thus, although HMG considered that it had no choice but to not opt-in to the Succession regulation, that last-minute stance did not play out well in certain quarters in Brussels. This "having your cake and eating it too" can have lasting, negative consequences, albeit difficult to quantify, in other areas.
- One possible unintended consequence could be the creation of potential obstacles for UK MEPs to play a key role on files in the EP if the UK has not opted-in, etc.
- The unilateral nature of this present Balance of competences review; coupled with the probable referendum on UK EU membership, and specific issues such as the Protocol 36 decision on the 2014 Opt-out or the UK's position on European Banking Union, all serve to marginalise the UK politically within the EU. This is not an ideal atmosphere in which to be trying to exercise the opt-in as the UK has done to date.
- A current example of a file on which the UK's non-opt in has been questioned is the European Account Preservation order. The Commission proposal was seen as modelled on English law, albeit woefully unbalanced as regards creditor / debtor protections. Most commentators agreed on its faults, and expected the UK to lead from the front in the negotiations. The negotiations so far have not gone in the

direction we would have hoped for. It may be arguable that an early UK opt-in might have increased the chances of success.

- The Bar also disagreed with the UK decision not to opt-in to the recently-adopted regulation setting up the Justice Programme 2014-19. We call into question the view that it was a value for money decision. The consequent reduction of opportunities for UK legal professionals, including the judiciary, to contribute to (EU-wide) judicial training and exchange of best practice, with the network-building that accompanies such projects, to the detriment of knowledge base and mutual trust and cooperation, is likely to be prove disproportionately significant by comparison to the relatively modest saving.
- Indeed, many of the measures with which we are concerned in this response are dependent for their effectiveness in practice on mutual trust and confidence as between the judges, courts and legal systems of the Member States. Removing any opportunity, such as that of participation in the Justice Programme, to build that trust, can have detrimental effects on the efficacy of those measures, with consequences far beyond the question of taking part or not in the, in this case, regulation creating the funding programme itself.
- A further point to note in this specific context, though it has also been explored elsewhere in this response, is the Commission's increased preference for adopting proposals that arguably ought to have been adapted to, and adopted under, Article 81, rather than under other Treaty Bases, most notably Article 114. There are several reasons why the EU legislator would favour that article, but it cannot be discounted that one of these is to circumvent the UK opt-in / out.

6. What are the advantages and/or disadvantages of the cross-border requirement for the UK's national interests?

76. As discussed above, the Bar has noted that the Commission appears to take the view that the change in the wording of Article 81 TFEU from Article 65 TEC may in fact have reduced or even removed the cross-border requirement. We do not agree, but await formal clarification.

77. The main interest for the UK in retaining that element is, put simply, that it avoids the imposition of EU rules in a purely domestic, civil justice setting.

78. The disadvantage from the wider EU perspective is that the EU is unable to require Member States that, for example, do not have a Small Claims Procedure, to create one, through the adoption of an EU instrument on this legal basis. That may on occasion have negative implications for UK citizens, but we do not see that as out weighing the wider policy position.

7. What impact might any future enlargement of the EU have on civil judicial cooperation?

79. If new Member States are fully and properly prepared, with relevant laws and procedures in place, then enlargement will simply widen the geographical area in which civil judicial cooperation can occur, which must be a positive.

80. We would hope that exchange of best practice, training and educational opportunities would be of mutual benefit (also to the UK, assuming that UK stakeholders are eligible to take part, say, in projects under the Justice Programme) , and would help to raise standards in the new Member States where necessary.

81. It also means that any citizens of existing Member States who wish to avail of opportunities in new Member States and thus exercise their free movement rights, benefit from the rights and protections afforded by the existing acquis in this field.

8. What future challenges and opportunities are there in the area of EU civil judicial cooperation?

82. In general terms, there are two obvious areas:

- First, the Hague Conventions as discussed above;
- Secondly the various projects foreseen in the area of eJustice, including those intended to facilitate the operation in practice of many of the measures with which we are concerned. In this context, the Bar would also wish to see an up to date and readily accessible database of civil justice case law, derived from the EU measures, from the various Member States.

Response specific to Family law
(focussed on Brussels IIa and Maintenance, as above)

83. We are aware that there has been debate in some quarters about moving towards harmonisation of substantive family law. We believe that great caution is needed over this. Substantive family law evolves in the cultural, social and societal context and norms of each country. Any attempt at harmonisation would necessarily be unable to take account of different cultural and societal norms.

84. One example is that in Scandinavian countries spousal maintenance is either unavailable or else very limited. This reflects the social context of those countries including the availability of social housing and state benefits; and an expectation that mothers will be able to and will find employment. The context in other Member States is different. As long as the Member States remain as diverse as they are at present, we cannot see how harmonisation of substantive family law could be consistent with fairness.

9. What are the advantages and/or disadvantages to the UK of the EU's powers to act internationally in this area?

85. The Bar is aware of the controversy surrounding the scope of the EU's exclusive external competence. The relevant provision for present purposes is Article 3(2) TFEU, which states:

> "The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope."

86. Historically, the Commission has tended to interpret this to mean that, provided an instrument has been formally adopted at EU level, the EU has external competence for its subject-matter. The Council takes the more restrictive view that this is the case only if the external instrument would affect the internal one.

87. Moreover, when the EU does have exclusive external competence, it is not always clear whether the power to act lies with the Commission or with the co-legislators.

88. The Bar sees the logic to the argument that if the EU has exclusive external competence in a civil justice area, and it conducts negotiations to secure wider international measures that mirror an EU measure successfully, that the result would be preferable to a series of bi-lateral measures. In an ideal world, this would create simplicity and legal certainty. An example that we have heard cited where it could be useful to have the US, say, tied into a comparable measure to that applicable within the EU would be the recently adopted regulation setting up Online Dispute Resolution in civil and commercial cases.

89. However, there are disadvantages to this approach, as witness the response in the family law field below.

90. The Bar would welcome an express limitation preventing the Commission from being able to claim external competence as soon as the EU has legislated on a particular issue in this field.

Response specific to Family law
(focussed on Brussels IIa and Maintenance, as above)

91. We have said above that we are broadly supportive of the impact of EU law on English family law. One example of a disadvantage is referred to at Paragraph 20 of the Call for Evidence: the assertion by the European Commission of exclusive competence to negotiate and agree matters relating to the 1980 Hague Abduction Convention. The UK has (for instance) been unable to recognise the accession of Singapore to the Convention: a country with which we have both historic and also important current trading links. Practitioners (and, we believe, judges) find this incomprehensible and certainly highly undesirable.

10. What would the advantages and/or disadvantages to the UK of action being taken at an international rather than EU level?

92. It is difficult to see that the level of cooperation which has been achieved at an EU level could be attained at an international level: indeed experience suggests that it could not be. Furthermore, albeit that Rome II is new, the Brussels I Regulation has been in place, in some shape or form, for so long that it is fanciful to suggest that the clocks could be turned back and that common jurisdictional rules could be negotiated on a bilateral or international level. It would also be a retrograde step given that the general perception of practitioners in England is that these instruments in general work well – and at least as well as the

equivalent English rules. Having said that, as emphasised above, it is crucial that the UK adopts a pro-active attitude towards participation in the legal process in this area.

Response specific to Family law
(focussed on Brussels IIa and Maintenance, as above)

93. In family law the EU Regulations are a (large) part of a wider background of international instruments: in particular various Hague conventions but also certain UN instruments. The interaction between (for instance) Brussels IIa, the 1980 Hague abduction Convention and the 1996 Hague children Convention is convoluted. In principle it would be very desirable to iron out the complexities which this multi-pillar system of international instruments causes. However, we recognise that it is impracticable to think that this can be achieved.

Bar Council
5 August 2013