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Response to the Call for Evidence: Civil Judicial Cooperation

The comments in this submission are directed at the measures adopted by the EU in relation to civil judicial cooperation over **international family law** adopted under **Art.81 TFEU**.¹

Art.81 TFEU provides for judicial cooperation in civil matters with cross-border implications based on the principle of the mutual recognition of judgments. It provides for measures on: mutual recognition and enforcement of judgments; cross-border service; jurisdiction and applicable law; taking of evidence; effective access to justice; compatible civil procedure rules; alternative dispute resolution; judicial training.

The measures adopted under Art.81 TFEU are *private international law* measures, and regulate litigation over private relationships that cross national borders. This is important in the area of family law where, if the parties have different nationalities, or have migrated, it may not be clear *which court or system of law governs the consequences of their relationship*. This affects adults, for example, which court has jurisdiction over a divorce, and children, for example where a child is removed by one parent from one country to another without the permission of the other parent. This area of law is important within the EU where migration is encouraged and *international families form and subsequently break up*. The consequence of these relationships has to be effectively managed. Clear and easily applicable private international law rules are important for the *efficient, cheap and effective resolution of international family disputes*.

The EU has adopted a series of measures on private international family law. This submission will consider the following measures:

- **Brussels II Revised**² covers:
 - Jurisdiction over divorce, legal separation and nullity applications, and recognition of decrees in other Member States;
 - Jurisdiction over applications over parental responsibility (custody and access to children), and recognition and enforcement of judgments in other EU Member States
 - International child abduction, providing jurisdiction rules and mechanism for the return of a child *in addition to* the Hague Convention on the Civil Aspects of International Child Abduction 1980 between EU Member States
- **Maintenance Regulation**³ covers:

¹ Previously Art.65 EC.

² Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility OJ [2003] L 338/1

- Jurisdiction over claims for maintenance arising from a family relationship
- The applicable law in relation to maintenance obligations
- The recognition and enforcement of maintenance decisions in other EU Member States
- **Protective Orders Regulation**⁴ covers:
 - Recognition and enforcement of protective orders over an individual in other EU Member States
 - Abolishes exequatur where the order has been granted a certificate in the State issuing the certificate, so that it can be automatically enforced
- **Rome III**⁵ (does not bind the UK) covers:
 - The law applicable to divorce and legal separations
- **Mediation Directive**⁶ covers:
 - Provision of mediation services in cross-border disputes, including family law disputes

The measures above provide a legal framework for cross-border family law litigation. This is an area of law that by its nature *is improved by international cooperation and agreement*. The cases affect two or more legal systems so if both States apply the same rules this enhances legal certainty and predictability for the parties. There are specific **benefits** associated with EU competence over private international law:

- **Simpler processes of recognition and enforcement of judgments** based on the *mutual recognition of judgments* and *mutual trust* between States about the content of national family law
 - Recognition of a judgment on divorce; recognition and enforcement of a decision over the custody of a child; recognition and enforcement of a maintenance decision are subject to few defences to recognition under Brussels II Revised or the Maintenance Regulation
 - Recognition and enforcement of a protective order is automatic where the order has been certified in the State issuing the order
 - If a family judgment is obtained in one Member State, it is likely to be recognised in other Member States, *improving legal certainty* and *reducing the need for renewed litigation*
- **Uniform interpretation** – Court of Justice of the EU can provide a uniform interpretation of the law through the preliminary reference procedure⁷
 - Other international agreements, e.g. Hague Abduction Convention 1980, do not have a supranational court to provide definitive interpretations of its terms, leading to differences in interpretation in national legal systems

³ Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations OJ [2009] L 7/1

⁴ Regulation 606/2013 on mutual recognition of protection measures in civil matters OJ [2013] L 181/4

⁵ Regulation 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation OJ [2010] L 343/10

⁶ Directive 2008/52 on certain aspects of mediation in civil and commercial matters OJ [2008] L 136/3

⁷ Art.267 TFEU.

- The Court of Justice can provide a single interpretation of key terms, for example ‘habitual residence’ of a child⁸ for application in all Member States
- Uniform interpretation means that the *scope of the measures* is uniformly defined, and *jurisdiction over cases is assumed on the same basis*.
- **UK retains opt-in** – UK can choose, if a measure does not work well with English domestic family law, not to opt-in
 - Rome III was adopted through enhanced cooperation, but the UK would not have opted into this measure because the law of the forum is applied to divorce applications. This illustrates that *the existing arrangements give the UK flexibility* to adopt measures which provide benefits and fit with UK family law
- **EU works alongside other international organisations** - EU is a member of the Hague Conference on Private International Law
 - Maintenance Regulation adopts the Hague Convention on the International Recovery of Child Support and other Forms of Family Maintenance 2007 and the Hague Protocol on the Law Applicable to Maintenance Obligations 2007 as its underlying framework
 - EU cooperation can encourage *wider adoption of international measures*, for example the 1996 Hague Convention⁹ which provides *greater protection for children* involved in disputes internationally
- **EU measures enhance existing measures** by adding to existing measures or creating new measures to address particular concerns through closer cooperation
 - Brussels II Revised builds on the Hague Abduction Convention 1980 to *reinforce the return of a child abducted to another Member State*
 - Brussels II Revised has a *positive effect in national law* by requiring a child of appropriate age and maturity to be heard in all abduction return proceedings¹⁰
 - The Protective Orders Regulation provides *cross-border protection otherwise not available*, especially in cases of return of a child following abduction¹¹
- **Fundamental rights in private international law**
 - Brussels II Revised specifically refers to the EU Charter of Fundamental Rights and specifically to *children’s rights* in its provisions, requiring consideration of the child’s opinion and welfare
- **EU promotes closer judicial cooperation and training**
 - Art.81 TFEU specifically refers to provision for judicial training and this is valuable in the area of international family law where *expertise is necessary to apply complex legal provisions* e.g. on child abduction correctly
 - The European Judicial Network¹² provides for *closer relationships* between judges and Central Authorities in the Member States promoting

⁸ Case C-523/07 A

⁹ Hague Convention on Jurisdiction, Applicable Law Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children 1996; Decision 2008/431, OJ [2008] L 151/36

¹⁰ *Re D (a child)(abduction: foreign custody rights)* [2006] UKHL 51.

¹¹ *In re E (children) (abduction: Court of Appeal)* [2011] UKSC 27.

communication in cases, the efficient resolution of disputes and discussion of common concerns

Despite the benefits, there are **weaknesses** in the EU's approach to developing legislation in private international family law:

- **Clarity of drafting** – measures create *complex legal arrangements*, and the drafting of some *provisions is unclear or creates gaps*, for example:
 - The child abduction provisions in Brussels II Revised create a complex legal arrangement with the Hague Abduction Convention 1980 that was challenging to implement effectively
 - The process for seising a court with jurisdiction over a child's welfare following emergency protective measures in another Member State¹³ is not properly provided for.¹⁴
 - The multiple alternative jurisdiction grounds over divorce in Art.3,¹⁵ alongside the principle of *lis alibi pendens* in Brussels II Revised creates a rush to seise the English court first when pressure to issue proceedings is not appropriate
- **Resources** – EU measures require the *carrying out of additional obligations or provision of services* without identifying or providing resource which may cause *variable implementation*
 - Each Member State is required to resource a Central Authority to carry out additional obligations under Brussels II Revised and the Mediation Regulation
 - Mediation Directive requires provision of cross-border mediation services by each Member State
- **Need for evidence-based legal measures** – the process of developing legislation needs to be *informed by understanding of the nature and impact of cross-border family law* measures to respond effectively to actual problems affecting individuals
 - Original Brussels II Regulation¹⁶ excluded some parental-child relationships from its scope based on marital status, and whilst this was corrected by Brussels II Revised, it demonstrates the need for informed legislative development and understanding of the nature of cross-border family life.
- **Multiplicity of legal instruments** – in the domestic legal context, in one international family dispute there may now be *a number of relevant international and EU legal instruments*. Establishing which is the governing instrument can be complex
 - Coordination between the EU and other international bodies regulating private international law measures is important to resolve conflicts. This is possible as demonstrated by the adoption of the Maintenance Regulation, which adopts Hague Conference measures as its underlying basis.

¹² Decision establishing a European Judicial Network in civil and commercial matters [2001] OJ L 174/25

¹³ Art.20 Brussels II Revised

¹⁴ Case C-523/07 A

¹⁵ Case C-168/08 *Hadadi*

¹⁶ Regulation 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses OJ [2000] L 160/19

- Training of counsel and the judiciary at domestic and EU level is important for accurate understanding and application of the law

Overall Assessment: Civil judicial cooperation provides *significant benefits to UK nationals migrating within Europe* when they are involved in an international family law dispute and *adds to the protection of children* involved in cross-border disputes. Concerns relate to the *use of the competence in terms of drafting and the development of specific measures*, rather than the EU having competence, but the *opt-in should be retained* for circumstances where there is not an appropriate ‘fit’ with national family law.