

BALANCE OF COMPETENCES REVIEW SCOTTISH GOVERNMENT RESPONSE

CIVIL JUDICIAL CO-OPERATION (INCLUDING FAMILY MATTERS)

Operation in Scotland

General remarks

1. The Scottish Government is supportive in principle of the European Union having competence in the area of civil judicial co-operation by virtue of Article 81 of the Treaty of the Functioning of the European Union ("TFEU"). Measures adopted under Article 81 are mainly aimed at ensuring that court judgments and other judicial decisions in one Member State are recognised and can be enforced in another Member State. It also enables the EU to adopt measures which harmonise national laws in this field. Creating mechanisms for the expeditious enforcement and recognition of judgements across Member States is vital to the proper functioning of an internal market and for the effective enforcement of civil rights.

2. There have, however, been civil law proposals under Article 81 TFEU which would not have translated correctly into Scots private law. The Scottish Government therefore considers it is important to maintain a safeguard in this area, and therefore supports the principle of the opt-in which the United Kingdom currently enjoys.

3. The Scottish Government believes that retaining this flexibility strikes the right balance between protecting the interests of Scots law, while seeking to participate in as many EU measures as possible. Indeed, the Scottish Government has supported the UK opting into the vast majority of civil judicial co-operation measures; for example: European Enforcement and Payment Orders, European Small Claims Procedure and the Mediation Directive.

How is Article 81 TFEU applied in Scotland?

4. Subject to certain constraints, the Scotland Act 1998 transfers general competence to the Scottish Government and Scottish Parliament to implement EU obligations in devolved areas. Depending on the requirements of the EU measure, a number of implementing options might be appropriate, and might require administrative as well as legislative measures to give them full effect.

5. Scots private law (civil law) is not, in itself, a reserved matter but it can relate to devolved or reserved matters. In practice, most areas of Scots private (civil) law relate to devolved matters.

Practical application of Article 81 TFEU in Scotland

6. In the time available, the Scottish Government has not been able to carry out a consultation of its own. It has, however, made enquiries of the Scottish Court Service; the Accountant in Bankruptcy; the Keeper of the Registers of Scotland; and offers observations from its own perspective as a Central Authority under the Brussels Regime. Separately, the Law Society of Scotland¹ and the Faculty of Advocates² have submitted responses to the Ministry of Justice from the perspective of practitioners on the domestic application of Article 81 TFEU.

7. There is little data readily available held by the Court Service on the numbers of court actions relying on measures made under Article 81 TFEU, nor by the Keeper regarding property registrations in Scotland relying on Article 81 TFEU measures.

¹ http://www.lawscot.org.uk/media/649594/lawref%20_civil_judicial_cooperation.pdf

² http://www.advocates.org.uk/downloads/news/responses/20130814_balanceofcompetencies.pdf

8. However, the Keeper is of the view that civil judicial co-operation is advantageous as it results in the formulation of statutory evidentiary criteria which the Keeper can refer to when seeking to determine if a particular document is acceptable from a registration perspective, which augments the reliability of the registration system overall.

9. Again, there is little data readily available regarding insolvency practice. However, the Accountant in Bankruptcy has found the current Insolvency Regulation a useful measure, and has successfully used it to recover cross-border assets that would otherwise have been disposed of. This has been particularly important where there is the opportunity for “bankruptcy tourism” (or forum shopping) to allow trustees to quickly take control of cross-border assets.

10. The Scottish Government has more experience as a Central Authority under the Brussels Regime, particularly in relation to Parental Child Abduction (Council Regulation No 2201/2003, “Brussels II bis”) and Family Maintenance Obligations (Council Regulation No 4/2009). The Central Authority dealt with 20 cases under the Brussels II bis Regulation in 2012, 44 in 2011 and 23 in 2010. The Regulation is a useful bolt-on to the 1980 Hague Convention, for example in relation to provisions for the collation and exchange of information between Member States. The Maintenance Regulation has only been in force for two years. In the first year of operation, the Scottish Central Authority dealt with just under 100 cases. There have been a few teething problems, but we generally find the processes to work well.

Intra-UK issues

11. EU measures adopted under Article 118 TFEU do not make provision for the recognition and enforcement of judicial decisions as between different jurisdictions in a single Member State. The Scottish Government has noted that there continue to be issues about the enforcement of certain judgments and orders as between the different jurisdictions in the UK. We have previously noted the terms of section 18(3)(a) of the Civil Jurisdiction and Judgments Act 1982.

12. That appears to mean, for example, that Domestic Violence Protection Orders issued by Magistrates Courts in England and Wales are, at least in theory, not enforceable in Scotland. This would be anomalous given that we are due to implement the EU Regulation on the Mutual Recognition of Protection Measures in Civil Matters. Any legislation to amend section 18(3)(a) would be for Westminster.

13. There have also been examples of difficult intra-UK cases in relation to residence of and contact with children. It would be helpful to highlight in England and Wales that, in certain circumstances, there may be Scottish jurisdiction in cases with a Scottish connection (see, for example, the terms of section 41 of the Family Law Act 1986).

Examples of challenges to the EU’s competence in this area

14. The Scottish Government agreed with the UK Government that we should not opt-in to proposals on matrimonial property regimes and property consequences of registered partnerships.

15. We noted at the time that the law in Scotland on financial provision on divorce and dissolution is very different to the “ancillary relief” provisions operating in other parts of the UK. However, we agreed that the UK should not opt into the EU proposals. We considered, along with the UK Government, that the proposals could lead to fragmented jurisdiction; it was not clear how the proposals would fit with succession law and the drafting of the proposals was criticised by a number of bodies (including academics in Scotland).

16. The Scottish Government also agreed with the decision not to opt into the Succession Regulation. We agreed that the divergence between, on the one hand, the UK’s succession regimes and, on the other hand, those used in most other EU Member States was not satisfactorily addressed in the Regulation. Specifically, the

EU Regulation on Succession and Wills does not offer adequate protection to creditors, it imposes an unnecessary court process on non-contentious succession cases and fails to protect recipients of lifetime gifts from future clawback.

17. Although not covered by Article 81 TFEU, the Scottish Government has concerns about the draft EU Regulation on the abolition of legalisation and the introduction of common format multi-lingual civil status documents.

18. There are no significant concerns about the abolition of legalisation. However, it is not clear that the introduction of common format documents is proportionate.

19. The extension of the proposal to other documents, such as documents showing property rights could be particularly problematic. Property registration covers complex matters such as:

- The boundaries of the property.
- Any rights others have over the property.
- Any rights others have in relation to the land beneath the property.
- Any standard security (mortgage) or other charges over the property.