REUNITE RESPONSE TO THE MINISTRY OF JUSTICE CALL FOR EVIDENCE

CIVIL JUDICIAL COOPERATION

reunite International Child Abduction Centre

1. *Reunite* is the leading charity in the United Kingdom, ("the UK"), specialising in advice, assistance, mediation, and research in relation to international parental child abduction and the movement of children across borders. It is part-funded by the UK Ministry of Justice and the UK Foreign and Commonwealth Office. *Reunite* undertakes a number of roles. In particular, *Reunite*:

   (a) provides advice and assistance to those individuals who have had their child abducted, or who have abducted a child, and in relation to relocation and international contact issues;

   (b) provides advice and assistance to parents, and information and education to interested persons, national and local authorities and agencies about international parental child abduction, including to help the prevention and discouragement of the international abduction of children;

   (c) seeks, nationally and internationally, to raise awareness and understanding of international parental abduction generally and of the law concerned with it;

   (d) cooperates and works closely with the UK Ministry of Justice and Foreign and Commonwealth Office, seeking to bring about satisfactory outcomes to child abduction cases;

   (e) undertakes and publishes research concerned with the international movement of children; and

   (f) provides a mediation service for parents involved in international disputes relating to their children.

Reunites approach to this call for evidence

2. For the purposes of this call for evidence *Reunite* are principally concerned with the impact of legislation implemented by the European Union on the law operable within the UK in respect of children and, particularly, the international movement of children. Accordingly this submission will focus upon the impact, benefits of and difficulties arising from Council Regulation (EC) No. 2201/2003 ("Brussels II revised") and the impact of that Regulation on domestic and international law.

3. *Reunite* have considerable expertise in this area, being the only non-governmental body that is included as part of the government delegation from the UK which attends the Hague Conference Special Commission meetings on the practical operation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the 1980 HC"). *Reunite* has intervened – providing written and sometimes also oral submissions – in many important international children's cases including in the European Court of Human Rights ("the ECtHR"), in the Supreme Court of the United States, and in the Supreme Court of the UK[1].

Brussels II revised

4. Following its implementation Brussels II revised had direct effect within the UK as a result of Section 2 of the European Communities Act 1972. Notwithstanding this the impact of Brussels II revised on English family law, and particularly the establishment of Brussels II revised as the primary arbiter of jurisdiction in cases concerning children before the courts of the UK, was confirmed by the amendments to the Family Law Act 1986 ("the 1986 Act") made pursuant to The European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005.

[1] See, for example, (before the European Court of Human Rights) *Ignaccolo-Zenide v. Romania* (*supra*); (before the United States Supreme Court), *Abbott v. Abbott*, no. 08-645, May 17, 2010; and (before the United Kingdom Supreme Court), *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 FLR 442; *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144; and *In re I (A Child) (Contact Application: Jurisdiction) (Centre for Family Law and Practice and another Intervening)* [2009] UKSC 10, [2010] 1 AC 319.

5. Other important aspects of Brussels II revised relating to the impact of the Regulation upon proceedings concerning children have now been specifically implemented (although they were previously operational in any event) by the Family Procedure Rules 2010, which makes specific provision for:

   (a) The implementation of Article 11 of Brussels II revised within proceedings issued pursuant to the 1980 Hague Convention;
   (b) The recognition and enforcement scheme pursuant to Chapter III Sections 1 and 2; and
   (c) The enforcement scheme pursuant to Chapter III section 4

The jurisdictional scheme

6. Pursuant to Section 2 of the 1986 Act as amended (entitled **Jurisdiction: General)** a court in the UK cannot make orders under Section 8 of the Children Act 1989 ("the 1989 Act") (including residence, contact, prohibited steps and specific issue orders) or certain types of order within the inherent jurisdiction of the High Court unless it has jurisdiction under Brussels II revised. It is only where Brussels II revised does not apply that the courts are entitled to examine whether or not they have jurisdiction under the relevant parts of the 1986 Act.

7. Brussels II revised accordingly provides the jurisdictional scheme applicable in any case in which the Regulation is engaged. That certainly includes any case involving a jurisdictional dispute between two Member States. The question as to whether part (or all) of that jurisdictional scheme extends to jurisdictional disputes between the United Kingdom and a non-member state is currently being considered by the Supreme Court for the United Kingdom in the case of **Re ZA [2012] EWCA Civ 1396**[2]. Brussels II revised is therefore applied in, and may have a significant impact upon, any jurisdictional dispute, and that impact may yet be found by the Supreme Court to be wider than had previously been thought.

[2] A case in which *Reunite* made written and oral submissions

8. *Reunite* would respectfully submit that, properly applied, Brussels II revised provides a clear and easily applicable jurisdictional scheme, intended to prevent conflicts of jurisdiction between Member States.

(a) The general rule is that the courts of the Member State in which the child is habitually resident *"shall have jurisdiction in matters of parental responsibility"* – Article 8(1). There are, however, exceptions to that general rule in the form of Articles 9, 10 and 12 – Article 8(2);

(b) Article 9 provides that where a child has moved lawfully from one Member State to another and acquires a new habitual residence, *"the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved"*;

(c) Article 10 is concerned with jurisdiction where a child has been wrongfully removed or retained away from their state of habitual residence. Pursuant to the terms of that Article, jurisdiction is retained in the Member State of habitual residence until a number of conditions have been met;

(d) Article 12 allows the courts of a Member State with substantive jurisdiction in respect of a child to transfer jurisdiction to another Member State in the event that the child concerned has a substantial connection with the Member State to which the transfer is made;

(e) Finally, Article 13 allows for the exercise of jurisdiction on the basis of the child's presence, in circumstances where a child's habitual residence *"cannot be established and jurisdiction cannot be determined on the basis of Article 12"*. In allowing for a presence based jurisdiction this Article is similar to Article 20, however Article 13 allows for the exercise of a substantive jurisdiction where jurisdiction cannot be established under Article 8 or 12. Article 20 allows for an emergency jurisdiction to be exercised on the basis of the child's presence *"even if, under this Regulation, the courts of another Member State has jurisdiction as to the substance of the matter"*. Pursuant to Article 20(2) such measures *"shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate"*.

9. The jurisdictional scheme outlined above is intended to ensure that the court with the closest connection to the child concerned (*"on the criterion of proximity"*) has substantive jurisdiction in respect of that child. In that sense Brussels II revised suggests that *"The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child"* – Preamble (12). Further, the Regulation seeks to avoid what might otherwise be lengthy and complicated jurisdictional disputes, by imposing a clear and structured scheme by which jurisdiction can be determined. In that sense, it can also be said that Brussels II revised is intended to act in the best interests of the child, as it has long been recognised within English law that delay is contrary to the welfare of the child, and that proceedings should be completed as swiftly as possible – S1 of the 1989 Act.

10. Brussels II revised seeks to avoid jurisdictional disputes by the provisions imposed within Section 3. Article 17 compels a court of a Member State when seised of a case *"over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation"* to *"declare of its own motion that it has no jurisdiction"*.

11. In relation to proceedings concerning children, this jurisdictional examination is supported by Article 19(2) pursuant to which *"Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay proceedings until such time as the jurisdiction of the court first seised is established"*.

12. Brussels II revised accordingly implements a continental jurisdictional structure which, if properly applied in all Member States, would serve to ensure that lengthy jurisdictional disputes in matters concerning children are avoided if possible but, where such disputes do arise, are contained to the interpretation of tightly defined matters of law and narrow factual disputes. In this regard the aim of the structure imposed by the Regulation is beneficial to children and its continuation would be supported by *Reunite*.

13. Whilst it is true to say that in relation to the jurisdictional scheme Brussels II revised draws heavily upon that which appears within the Convention on Jurisdiction, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children of 19th October 1996 ("the 1996 HC"), Brussels II revised is different in several material (and beneficial) respects such that the continued use of the scheme pursuant to Brussels II revised is justified, notwithstanding that the UK has now implemented the aforementioned Convention.

The impact of Brussels II revised on cases of parental child abduction

14. Pursuant to Article 60, Brussels II revised takes precedence over both the 1980 and the 1996 Hague Conventions *"in so far as they concern matters governed by [the] Regulation"*.

15. Preamble (17) to the Regulation provides that *"In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention of 25 October 1980 would continue to apply as complemented by the provisions of this Regulation, in particular Article 11"*.

16. Article 11 seeks to support the operation of the 1980 HC in a number of respects:

    (a) Subject to the child's age or degree of maturity, there is a specific requirement that *"when applying Articles 12 and 13 of the 1980 Hague Convention ... the child [be] given the opportunity to be heard during the proceedings"* – Article 11(2);
    (b) Courts of Member States faced with an application pursuant to the 1980 HC must act expeditiously, particularly *"the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged"* – Article 11(3);
    (c) The approach to Article 13(b) of the 1980 HC is bolstered, in that *"A court cannot refuse to return a child on the basis of Article 13(b) ... if it is established that adequate arrangements have been made to secure the protection of the child after his or her return"* – Article 11(4);

(d) The jurisdiction of the courts of the Member State of the child's habitual residence, and the ability of those courts to make prompt decisions about a child's future notwithstanding a wrongful removal or retention are further safeguarded by Articles 11(6), (7) and (8), which provide that where a court has issued an order for non-return pursuant to Article 13 of the 1980 HC, the fact of that judgment must be communicated to the courts of the Member State of habitual residence *"immediately"* so that that court can then invite submissions within three months of the date of notification of the decision on the 1980 HC application so that *"the court can examine the question of custody of the child"* (Article 11(7)). Any decision taken pursuant to the application of these provisions *"which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III"*, which provides for enforcement without recourse to the *exequatur* procedure.

17. Brussels II revised therefore incorporates a number of measures intended to support the operation of the 1980 HC, and to ensure that children who have been wrongfully removed or retained within Member States are, in appropriate circumstances and subject to the continued operation of the exceptions to return established by the said Convention, promptly returned to their jurisdiction of habitual residence. Where it has been ordered that a child not be so returned, the courts of the Member State of the child's habitual residence retain primary jurisdiction in matters of parental responsibility concerning that child, and are encouraged to make a prompt decision regarding the child's return in the exercise of substantive jurisdiction. In that way, the court with the closest connection to the child is facilitated in undertaking an expedited welfare enquiry to ensure the child's return to its country of habitual residence, if such a return is in the child's best interests.

18. Whilst there has been notable academic criticism of the extension of the Brussels II revised regulation into the operation of the 1980 HC, both as regards the reasoning adopted by the drafters for straying into this area[3] and the impact of the same on non-returns ordered pursuant to Article 13(b), it is *Reunite's* view that if properly applied

[3] e.g. P McEleavy in McEleavy, 'The New Child Abduction Regime in the European Union: Symbiotic Relationship of Forced Partnership?" (2005) 1 *Journal of Private International Law* 5, 6

and implemented between Member States the provisions of Article 11 are beneficial to children who have been subject to a wrongful removal or retention. There is no equivalent within the 1996 HC nor within domestic law, and as such were Brussels II revised to cease to apply the important provisions supportive of the operation of the 1980 HC would be lost.

Recognition and enforcement

19. Chapters III and IV of Brussels II revised provide separate and distinct mechanisms by which a judgment delivered in another Member State in the exercise of its substantive jurisdiction can be given effect by the courts of a requested Member State, depending on the substance of the judgment and how that judgment was reached.

20. Chapter III, Section 1 relates to recognition/registration of judgments concerning matters of divorce/legal separation and parental responsibility, save for those matters which result in judgments that are automatically recognised (and therefore enforceable) without the need for determination of the question of recognition. Such judgments are addressed by the provisions contained within Chapter IV. Chapter III Section 2 provides for the enforcement of orders that have been previously recognised/registered pursuant to Section 1. These two sections provide for all matters of parental responsibility except determinations of rights of access and orders for return made following an Article 13 1980 HC non-return, both of which are within the ambit of Chapter IV.

21. Article 21 provides the general scheme for recognition and states that *"A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required"*. Article 23 provides the grounds available for non-recognition of a judgment in relation to parental responsibility. It is mandatory in its terms as, in the event that any of the seven available grounds are established, the judgment *"shall not be recognised"* and accordingly will not be capable of enforcement.

22. As aforesaid, Articles 24, 25 and 26 prohibit a review of certain aspects of the procedure (24 and 25) and substance (26) leading to and of the decision that it is sought be enforced.

23. Section 2 of Chapter III concerns enforcement. In the UK a judgment may only be enforced when it has been registered for that purpose. The authorities make it clear that registration and enforcement are two separate aspects of the decision making process (see generally: *Re S (Brussels II: Recognition: Best Interests of Child) (No. 1) [2004] 1 FLR 571* and *Re S (No. 2) [2004] 1 FR 582* which dealt with the two aspects separately over the course of two hearings; *Re D (Brussels II revised: Contact) [2008] 1 FLR 516* which considered only the question of recognition and adjourned enforcement for later determination; and *LAB v KB (Abduction: Brussels II revised) [2010] 2 FLR 1664* where both recognition and enforcement were considered within the same hearing and determined accordingly).

24. Pursuant to Article 30 the procedure for making an application for enforcement "*shall be governed by the law of the Member State of enforcement*". The question as to whether the reference to "*the law of the Member State of enforcement*" imports into the decision making process an element of discretion remains undetermined on binding authority and the first instance authorities that are available have demonstrated occasional differences of opinion on this issue, but more regular disparities of approach are apparent even where a strict line on enforcement is taken (see, for example, the two different approaches suggested by Mr Justice Holman in *Re S (No. 1)* and *Re S (No.2) (supra)* and the same but involving Mr Justice Roderic Wood in *Re S (Brussels II revised: Enforcement of Contact Order) [2008] 2 FLR 1358* and later in *LAB v KB (supra)*) .

25. Article 31 provides that an application "*may be refused only for one of the reasons specified in Articles 22, 23 and 24*" and repeats the prohibition on any review of the substance of the judgment given. Article 33 establishes the Appeal procedure.

26. Section 3 of Chapter III makes provisions common to consideration of both recognition pursuant to Section 1 and enforcement pursuant to Section 2. It is this section that establishes the differences between the *exequatur* procedure and the automatic procedure contained within Section 4. There is specific provision at Article

37(2) for documents that must be produced *"in the case of a judgment given in default"* in which case the following documents are required:

> *"(a) the original or certified true copy of the document which establishes that the defaulting party was served with the document instituting the proceedings or an equivalent document; or*
>
> *(b) any document indicating that the defendant has accepted the judgment unequivocally"*

27. The court is afforded a measure of discretion in respect of such documents as a result of Article 38, which provides that:

> *"If the documents specified in Article 37(1)(b) (*the Annex II certificate*) or (2) are not produced, the court may specify a time for their production, accept equivalent documents or, if it considers that it has sufficient information before it, dispense with their production"*

28. Whilst, pursuant to Article 38, it is possible for judgments to be recognized and enforced without the production of the requisite certificate, it is generally the case that the court will require a certificate before it recognises and/or enforces the decision of another Member State. A certificate is mandatory in the case of automatic recognition pursuant to Section 4 (see below). The certificates serve to demonstrate that the minimum procedural requirements for enforcement pursuant to the Regulation have been met, allowing the Member State of enforcement to sufficiently trust the decision that it is sought be enforced, and therefore to enforce it without the need for any further or more in-depth enquiry.

29. The position under Section 4 of Chapter III is different, in that decisions enforced by these Articles (principally Articles 41 and 42) need not be recognised before they can be enforced. In order to enforce the decision of another Member State pursuant to these Articles, the production of a certificate is mandatory and the Articles are prescriptive as to what it is that the Judge in the Member State of origin must consider prior to issuing such a certificate. Accordingly, due to the nature of the decisions concerned and the higher degree of consideration required of the Judge in the Member

State of origin before the requisite certificate can be issued, the court need not consider whether or not the decision should be recognised.

30. The recognition and enforcement aspects of Brussels II revised have been significant since their implementation. Experience suggests that Member States who often demonstrate difficulties in strict compliance with the terms of the 1980 HC may be more willing to enforce orders made in the exercise of a substantive welfare jurisdiction than to order a summary return on 1980 HC principles.

31. Further, the possibility of the recognition of an order prior to an international move, with the possibility of swift enforcement in the event that the order is later breached, may give greater confidence to those seeking to relocate internationally with their children, lessening (or shortening) what are often protracted and bitter disputes between parents to the benefit of children concerned. The 'left-behind' parent can also take some comfort in knowing that any rights of access granted to them as part of the relocation can be effectively (and to an extent automatically) enforced in the receiving Member State.

32. Although the principal has not yet been tested before the domestic courts, it appears on first examination of the 1996 HC and its explanatory report that the enforcement mechanisms available within that Convention may be less stringent and more easily opposed than those applicable pursuant to Brussels II revised. Accordingly the provisions of the Regulation applicable in this area can be said to be of significance and of considerable assistance. Should they be lost through the removal of Brussels II revised, many whose children have been wrongfully removed or retained, or who are being denied rights of access granted to them following a welfare enquiry in the Member State of substantive jurisdiction, may be denied an otherwise effective remedy.

The impact of Brussels II revised and the European Maintenance Regulation on divorce, financial relief and child support

33. Those affected by parental child abduction resulting from family breakdown may also be involved, or become involved, in divorce proceedings, the resolution of disputes

relating to their family finances, and, for married or unmarried couples, maintenance and child support.

34. For families who have a connection with more than one European state, the establishment of jurisdiction is the first question in the resolution of these disputes. The set of rules for establishing jurisdiction must avoid complication and complexity in order to avoid protracted, costly and time-consuming litigation associated with what is only a preliminary question (of jurisdiction) before the substantive issues in the dispute can be resolved. *Reunite* is well aware that the costs of such litigation, and the emotional pressures it results in, have a profoundly negative impact on the children involved. *Reunite* also notes that variations in the approach to determining financial relief on divorce or separation and in the assessment of quantum of maintenance in different European countries can render the foundation of jurisdiction a point of financial significance for the parties involved. Accordingly, *Reunite* believes that clear and consistent sets of rules are essential.

35. Establishing jurisdiction for divorce (and therefore the associated financial relief that arises therefrom) in the UK and Member States of the EU is at present governed by the jurisdictional requirements set out in Article 3 of Brussels II revised and focuses on domicile and/or habitual residence. Through the lis pendens 'first in time' provision set out in Article 19, disputes relating to the appropriateness of a Member State to entertain the divorce petition (i.e. on common law forum conveniens grounds – for instance regarding the degree of connection the parties have with the state in question) are avoided.

36. In relation to maintenance between married and unmarried couples, the implementation of Council Regulation EC No 4/2009 ("the Maintenance Regulation") in June 2011 has brought into play a separate regime specifically in relation to both spousal and child maintenance (support). The Maintenance Regulation addresses jurisdiction in questions relating to maintenance, but also recognition and enforcement of foreign maintenance orders, with the overall purpose being simple and expeditious recovery of maintenance. The maintenance creditor (often, but of course not always, the mother) may apply for maintenance in her country of habitual residence or the country of the maintenance debtor's habitual residence, thereby

giving the creditor a choice. In relation to enforcement, with the exception of the UK and Denmark, maintenance orders made in one Member State are now automatically enforceable in another, without the need for declarations of enforceability. In relation to the UK and Denmark, maintenance orders made in other Member States are automatically enforceable in the UK and Denmark, but not vice versa. The reason that the UK and Denmark are in a different category is because they are the only states which are not signatories to the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations ("the 2007 Hague Protocol"). The general rule under the 2007 Hague Protocol is that the law governing the maintenance dispute shall be that of the creditor's habitual residence. The UK will not apply foreign law, which means that UK maintenance orders or assessments are required to go through a process of acquiring a declaration of enforceability in the enforcing state. The Maintenance Regulation provides that a decision of a Member State not bound by the 2007 Hague Protocol shall not be recognised if it is manifestly contrary to public policy in the Member State of enforcement, where the defendant failed to enter an appearance (unless the decision has not been challenged in circumstances where it could have been) or where the decision is irreconcilable with a decision of the enforcing Member State or another Member State.

37. The desire for easing the recovery of maintenance is furthered by the provision in Article 42 that there can be no review as to substance on an application for enforcement (save in certain circumstances, for instance where the defendant did not enter an appearance in the country of origin). The Maintenance Regulation also:

    (a) applies not only to court ordered maintenance, but also to decisions of administrative bodies (the Child Support Agency in the case of the UK);
    (b) provides for legal aid in proceedings relating to maintenance obligations in respect of those aged under 21 initiated through the Central Authorities (i.e. for recognition and enforcement).

38. There are significant advantages to families of a system which enables fast, cost-effective and simple recovery of maintenance. Co-operation between states and the implementation of the Maintenance Regulation is a step forward in achieving that aim, particularly in the Member States bound by the 2007 Hague Protocol. Greater

harmony between European countries in issues relating to maintenance obligations, child support and recovery reduces the prospect of parties, and children, being left without financial support.

Reunite's position on Brussels II revised – general

39. The impact of European Union law upon the law of the UK insofar as it relates to children, families and, particularly from the perspective of *Reunite*, the international movement of families has been profound. It is now a rare case before the courts of the UK where the various European Regulations that have been described (in summary) within the preceding parts of this document do not have some relevance.

40. There are a number of theoretical benefits to the increasing impact of European Union law in this context, including:

    (a) The imposition of a standard jurisdictional scheme across Member States prevents, when combined with the *lis pendens* rule and the availability of the Court of Justice of the European Union to clarify the interpretation of the applicable rules, conflicts of jurisdiction between the UK and the states from which there is likely to be the highest incidents of cross border movement of children;
    (b) The standardization of jurisdictional rules aids judicial interpretation in cross border situations, as a Judge in one Member State can be confident that the Judge of another will, when the courts of two Member States are concerned with applications concerning the same child, apply uniform jurisdictional rules in attempting to determine the correct jurisdiction as expeditiously as possible;
    (c) The prompt determination of jurisdiction as described above, and the prevention of protracted jurisdictional conflicts or, of greater effect, competing judgments between Member States, is in the interests of children generally as it prevents delay and allows prompt enforcement of decisions taken by the courts of substantive jurisdiction;
    (d) The enforcement provisions allow for the aforementioned decisions to be implemented swiftly and without further delay, even where the child has moved internationally between Member States following the initial decision;

(e) Finally, where Brussels II revised seeks to support the 1980 HC, the provisions attempt to expedite proceedings seeking the child's summary return to the Member State of origin, strengthen the 1980 HC by preventing reliance upon the Article 13(b) defense where there are adequate protective measures in the Member State of origin, and finally enforce one of the underlying policies of the Regulation by ensuring that even in an abduction context substantive decisions about a child's welfare are taken by the Member State with the closest connection to the child.

41. *Reunite* recognise, however, that there are difficulties that may arise through the implementation of the European Union family law scheme, particularly through the operation of Brussels II revised. In practice, and in *Reunite's* experience, such difficulties do not arise through the implementation of Brussels II revised within the UK, but rather through the manner in which Brussels II revised is interpreted and applied in other Member States, in contrast to the approach adopted by the courts of the UK. By way of example:

(a) There are a number of Member States who fail to complete 1980 HC proceedings within the 6 week target imposed by Article 11 of Brussels II revised. It is accepted that the average length of such proceedings in the United Kingdom is also outside of that target, however we continue to be a leading nation in terms of expediting proceedings of that nature, and consistently come close to the target, whereas a number of Member States are consistently far outside of the target time for determination;

(b) There appears to be wide-spread misapplication (or misinterpretation) of the jurisdictional scheme, with the result that the jurisdictional conflicts that the scheme hopes to avoid still occur;

(c) There are a number of Member States that have a poor record of returning children on applications made pursuant to the 1980 HC, and who in the experience of *Reunite* are similarly reluctant to enforce orders made by other Member States

42. *Reunite* also have concerns about the competence of the supranational institutions and courts to further involve themselves in matters that may perhaps be better regulated

either domestically or, if wider regulation is required, at a truly international level through the Hague Conference.

43. This criticism was leveled at the legislative drafters in relation to those parts of Brussels II revised that are concerned with the 1980 HC, and particularly Article 11(4) which was intended to address a perceived misapplication of Article 13(b) of the 1980 HC in some Member States, seemingly based upon the statistical analysis that demonstrated that Article 13(b) was the most relied upon Article in cases where an order for non-return had been made. It was suggested by some that the appropriate way to address this issue would have been by the negotiation and implementation of a protocol to the 1980 HC which would have had the advantage of being applicable among all signatory states, rather than by European Regulation, which has had a necessarily more limited impact. There were also concerns that Article 11(4), whilst impacting upon the Article 13(b) defence at a superficial level, ignored the fundamental issue behind the frequent reliance upon Article 13(b), which was the effective protection of the abducting parent and the subject child within the country of origin. In that regard, it may be said that the Brussels II revised regulation did not actually meet the need that had been identified by statistical analysis, perhaps as a result of the lack of expertise of the drafters in this relatively specialist area.

44. In addition to the European Union becoming involved in issues concerning children by the implementation of the aforementioned Regulations, the ECtHR has been increasingly willing to determine applications made in respect of children and, recently and particularly, the implementation of the 1980 HC in Member States.

45. Similarly to its concerns about the competence of legislators within the European Union to effectively legislate in relation to, for example, the operation of the 1980 HC between Member States, *Reunite* have concerns about the competence (in the context of the quality of decisions made, as opposed to procedural competence) of the ECtHR in this specialist area. *Reunite* sought to express these concerns in an *amicus* brief filed with the said court for the Grand Chamber hearing in the case of X v. LATVIA (Application no. 27853/09).

46. Notwithstanding the aforementioned concerns, *Reunite* believe that on balance, and from a family law perspective, the UK is benefited by being involved in the European Union and accordingly subject to the aforementioned Regulations. In addition to the benefits explained above, should the UK withdraw from the European Union this jurisdiction will have a more limited standing from which to try and influence practice in the other Member States with a view to attaining consistently good practice across all Member States in the application of the aforementioned Regulations and, particularly, the 1980 HC.

47. Therefore, in *Reunite's* view, children and parents within the UK would be better served by this jurisdiction remaining within the European Union and subject to Brussels II revised, whilst from that position attempting to influence practice and policy, with a particular focus upon:

    (a) Improving practice in the operation of the Brussels II revised regulation and the 1980 HC across Member States;
    (b) Attempting through negotiation to influence the establishment of monitoring of the implementation and operation of the Brussels II revised regulation and the 1980 HC (particularly within states that have recently or will imminently become part of the Union); and
    (c) Complimentary to the attempt to implement monitoring, consideration of the imposition of some form of sanction against states that do not meet set standards of good practice.

The Call for Evidence – specific questions

1. **What are the advantages and/or disadvantages to business and/or individuals in the UK of EU civil judicial cooperation?**

For the purposes of this question *Reunite* have chosen to focus on the Brussels II revised regulation and its impact on individuals and families. There is a clear consequential impact on businesses through the increased ability for workers to move freely between Member States, with some security that any issues in relation to their children as may arise whilst away from the country of the child's habitual residence can be swiftly and competently

addressed in a manner that will apply in any other Member State without the need for, or possibility of, repeated litigation on the same or similar issues.

Accordingly, *Reunite* would identify the advantages to individuals in the UK of EU civil judicial cooperation as regulated by the Brussels II revised regulation as follows:

i. Jurisdiction in respect of any child or children involved in or affected by any relocation can be easily identified, ensuring that any substantive issue can be determined by the courts with the closest connection to the child, whereas any urgent issue or emergency can be considered in the Member State in which the child or children are present;

ii. In the event that there is a need for litigation, that litigation can accordingly take place without risk of the significant delay associated with the resolution of a jurisdictional dispute;

iii. Once a decision has been taken, that decision can be recognised and enforced in any other Member State on a relatively expedited basis in accordance with the Regulation, removing the possibility of competing litigation in a different Member State at a later stage. It appears from the wording of the enforcement provisions of Brussels II revised, and particularly from the supporting material released in relation to each instrument, that the enforcement scheme pursuant to Brussels II revised is likely to be more automatic and less capable of being defeated on subsequently raised welfare grounds than that applicable pursuant to the 1996 HC;

iv. In the event of an unlawful removal or retention, the left behind parent is afforded increased protection by operation of the Regulation. There is no equivalent scheme to that imposed pursuant to Article 11(7) of the Regulation under any UK domestic law or under the 1996 HC;

v. Accordingly families (or parts of families) can move within the European Union between Member States with increased confidence, knowing that any issue that may arise concerning their children can be dealt with by the courts of the country with the greatest connection to the child concerned, without the possibility of having to re-litigate the same issue at a later stage;

vi. Parents can accordingly involve themselves in or otherwise agree to relocations between Member States (for example for the purposes of work or alternatively education of the children) with an added security.

In *Reunite's* view, the disadvantages of the operation of Brussels II revised arise mainly as a result of the inconsistent implementation of the constituent parts of the Regulation across Member States, with the result that whilst in theory the advantages identified above will be available to parents across Member States, in reality that depends upon the attitudes adopted by the courts of the particular Member State in question to the operation of the Regulation.

As there is no monitoring agency concerned with the implementation of the Regulation across Member States, with the result that compliance is essentially only monitored by the ECtHR upon application to that court by an allegedly wronged party, there is arguably no effective sanction for non-compliance as the ECtHR can, unless the urgent injunctive procedure is adopted (only available in certain cases) take a significant period of time to reach a determination, with the consequence that because of an intervening change in the child's circumstances it is often impossible to repair any damage to a parental relationship as may have been caused in the intervening period.

It is therefore *Reunite's* contention that there are few obvious disadvantages arising from the application of the Regulation to the UK. Should the Regulation no longer apply, the UK is likely to lose any standing that it has to try and achieve best practice across Member States, to the disadvantage of parents and children resident in the UK and travelling from this jurisdiction to any other Member State.

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

Please see paragraphs 6 – 39 above for a full and detailed summary of the impact of EU civil judicial cooperation on UK family law.

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

The imposition of a consistent jurisdictional scheme across Member States, with the consequential possibility for recognition and enforcement of decisions concerning children and the strengthening of the return mechanism pursuant to the 1980 HC in circumstances of wrongful removal and/or retention, supports the free movement of persons between Member

States due to an increased confidence that familial relationships can be safeguarded and maintained by prompt judicial action in the event of any breakdown or unilateral act.

Any such confidence, and the subsequent support of the free movement of persons, may be undermined by differing standards of compliance with the said schemes across Member States. Such lack of confidence may be increased by the inability of any agency to monitor the implementation of the Regulation and of the 1980 HC, and/or to implement sanctions in the event of non-compliance or poor standards.

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?

Reunite's primary concern regarding the extension of EU competence into the area of family law (and particularly, in this context, the operation of the 1980 HC among Member States) has been the influence of the ECtHR upon the interpretation and implementation of the 1980 HC by and between Member States.

Reunite recognises that in its judgments and decisions the ECtHR has identified (and, where appropriate, commented upon deficiencies in the approach to) a number of factors central to the good working of the 1980 HC, for example:

(a) the requirement for national authorities to carry out their decision-making processes expeditiously (see, Article 11 of the 1980 HC; and *Deak v. Romania and the UK*, no. 19055/05, 3 June 2008 at paras [76] and [80]), reflecting the common international understanding that delay in making decisions in contested matters concerning children, especially in cases of international child abduction, is not in their interests: *"the passage of time can have irremediable consequences for relations between the children and the parent who does not live with them"* (see, *Ignaccolo-Zenide v. Romania*, no. 31679/96, 25 January 2000 at para [102]; *Shaw v. Hungary*, no. 6457/09, 26 July 2011 at para [66]; and, see Article 11(3) of *BIIbis*);

(b) the critical importance of swift and effective enforcement of return orders (*Ignaccolo-Zenide v. Romania* (*supra*); and *Sylvester v. Austria*, nos. 36812/97 and 40104/98, 24 April 2003); and

(c) the requirement to determine any applications under the 1980 HC fairly and expeditiously (*Maire v. Portugal*, no. 48206/99, 26 June 2003; *Bianchi v. Switzerland*, no. 7548/04, 22 June 2006; *H.N. v. Poland,* no. 77710/01, 13 September 2005; and *Deak v. Romania and the UK (supra)*).

Reunite further commends the important summary provided by the ECtHR in *Carlson v. Switzerland (supra)* of the Court's role in determining applications before it concerning the 1980 Hague Convention (at para [73]): *"...it is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law...of which the international treaties incorporated therein form a part. However, in so far as the Court has jurisdiction to review the procedure followed before domestic courts, in particular to ascertain whether the interpretation by those courts of the Hague Convention's guarantees gave rise to a violation of Article 8 of the Convention...it is required to examine whether and to what extent the manner in which they proceeded was consistent with the object and purpose of the Hague Convention, which are, according to the preamble and Article 1 in particular, to guarantee the 'prompt return' of wrongfully removed or retained children... ".*

Reunite is aware, however, that where the ECtHR had within recent decisions referred to the important and universal concept of "best interests" (for which see, for example, Article 3(1) of the 1989 United Nations Convention on the Rights of the Child, ("the 1989 UNCRC"), and Article 24(2) of the European Union Charter of Fundamental Rights and which under Article 53 of the European Convention on Human Rights, ("the ECHR"), inform the said Court's consideration of any matter concerning children) in the context of a series of cases concerning the 1980 HC, some interested parties, specialist practitioners and in certain circumstances domestic courts formed an impression that what was in fact being suggested was that an examination of a child's "best interests" within the context of a 1980 HC case necessitated a fuller welfare enquiry than might otherwise have been required to determine the application of the exceptions to a summary return. Substantively, the ECtHR referred to the concept in the following areas and in the following ways: in *Neulinger and Shuruk (supra)*, the Court said, so far as it is relevant, (at paras [134] and [135]): *"In this area the decisive issue is whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order – has been struck, within the margin of appreciation, afforded to States in such matters...bearing in mind, however, that the child's best interests must be the primary consideration...as is indeed apparent from the Preamble to the Hague Convention, which provides that 'the interests of children are of paramount*

importance in matters relating to their custody'...The Court notes that there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount... " and furthermore (at para [138]), the Court said that:"*It follows from Article 8 that a child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable. The child's best interests from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences... For that reason, those best interests must be assessed in each individual case*" and finally (at para [139]), the Court said that: "*... To that end, the Court must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin...* ".

This approach, combined with the interpretation of the aforementioned decisions by certain practitioners and commentators, gave *Reunite* cause for concern that the decisions of the ECtHR, a non-specialist court in this area, may result in a less stringent approach to the determination of the exceptions to return pursuant to the 1980 HC, with a commensurate reduction in returns pursuant to the said Convention. As such, in its intervention in *X v Latvia, Reunite* submitted that it is both plain, and consistent with the decisions of the ECtHR, that the 1980 HC is primarily concerned with protecting the interests of children generally (see the Preamble to the 1980 HC). It is equally plain that it is also concerned with protecting individual children. As the *Perez Vera Report* said (at para [24], as noted above): "*the struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests.*" The interests of individual children are protected by the limited welfare based exceptions to the obligation to return offered by Articles 12, 13 and 20 of the 1980 HC (see, for example, the *Perez Vera Report* at para [116], in relation to Article 13(b): "*The exceptions contained in b deal with situations where international child abduction has indeed occurred but where the return of the child would be contrary to its interests...* ").

It is accepted that a "child's interest comprises two limbs" (see *Neulinger and Shuruk (supra)* at para [136]; *Raban v. Romania (supra)* at para [28] (v); and *Sneersone and Kampanella (supra)* at para [85] (v)).

In both preventing and remedying international child abduction, the 1980 HC does plainly take into account the child's best interests as "***a primary*** consideration", (that is also in accordance with the international obligation of Article 3(1) of the 1989 UNCRC). This general approach was clearly set out by the Court in *Maumousseau and Washington (supra)* (at para [68]): *"The Court is of the view that the concept of the child's 'best interests' is also* ***a primary*** *consideration in the context of procedures provided for in the Hague Convention. Inherent in that concept is the right for a minor not to be removed from one of his or her parents and retained by the other, that is to say by a parent who considers rightly or wrongly, that he or she has equal or greater rights in respect of the minor... ".*

This, *Reunite* suggested, should not be misunderstood as permitting consideration of a child's best interest as the court's "***paramount*** consideration" (i.e. as opposed to ***a primary*** consideration) as part of a determination of an application under the 1980 |HC (c.f. *Monory v. Romania and Hungary,* no. 71099/01, 5 April 2005 at para [83]). More importantly, it does not encourage national courts in the requested state wrongly to undertake a merits assessment of welfare matters equivalent to that which would be undertaken after a return in the courts of the requesting state. Nor does it subvert or substitute the clear language of the 1980 HC (in relation, for example, to Article 13(b)) by permitting courts to ask the more simple question: would a return be in the overall best interests of this particular child in these particular circumstances? (see *Neulinger and Shuruk (supra)* at para [138]). For a national court to pose such a question would render *"the substance and primary purpose of the Hague Convention... meaningless*" (see, *Maumousseau and Washington (supra)* at para [73]).

In light of those concerns, in its intervention in the aforementioned case of X v Latvia, *Reunite* invited the ECtHR to make clear that the "in-depth examination" in the context of a 1980 HC case was only that required to ensure that the *return* complies with the ECHR, not the different and fuller "in-depth examination" that must be made by the Courts of the child's habitual residence seised with a custody hearing *after* that return. *Reunite* further invited the Court to clarify that this statement of principle derived from a passage in *Maumousseau and Washington (supra)* was not itself suggesting a principle of general application for future child abduction cases. However, it has received worldwide attention and although the Court

was clear that the *"in-depth examination"* should only take place *"in the context of an application for his return to his country of origin"* the reasoning of *Neulinger and Shuruk (supra)* has appeared to some to suggest that a court engaged in determining a 1980 HC application should undertake a more far-reaching comprehensive review of what is in the child's interests. Such an interpretation, if applied by national courts, could cause them to reject the expeditious and summary investigation which the 1980 HC envisages in return applications; it might also prejudice, by supplanting, the investigation, and decision making process in relation to custody and/or access matters in the courts of the child's habitual residence; and/or it might be contrary to the spirit, if not the letter of Articles 16 and 19 of the 1980 HC.

From the points raised above, it can be seen that whilst *Reunite* have had some concerns regarding the potential influence of the judgments of the ECtHR in this fundamental area, those judgments are not, in fact, universal in raising points that might be interpreted as suggesting a less than summary approach to consideration of applications for return made pursuant to the 1980 HC. Those judgments that do appear to support such arguments, however, do give rise to an argument that the ECtHR are not the most competent forum for consideration of issues arising as a result of the implementation of the 1980 HC in Member States, being a non-specialist court relatively infrequently faced with applications concerning that important international instrument.

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

Reunite considers legislation in relation to children, families and the international movement (or litigation in respect of the international movement) of the same to be areas of considerable sensitivity, requiring of a great degree of thought and consultation prior to making any significant amendments to existing areas, or legislating in any new area.

As a result, *Reunite* see the opt-in as an important safeguard to ensure that the UK has the opportunity to carefully consider any proposed new legislation in this area and the impact of the same upon existing family law prior to becoming subject to it. The ability to engage in negotiations regarding the form of any new legislation, notwithstanding that the UK has not at that stage opted in to it, is also important as any new legislation passed by the EU and

operable in the other Member States will undoubtedly have an impact on intra-EU relocations, notwithstanding that the legislation will not come into force in the UK.

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

Reunite are of the view that the cross border requirement serves to preserve the UK's national interests and the sovereignty of its domestic law (in appropriate circumstances) as those measures implemented by the European Union by regulation or other measure serve to have an obvious impact only in proceedings concerning the UK and another Member State. *Reunite* believe this to be an important distinction and one that should be preserved, for the same reasons as are advanced in support of the 'opt-in' within the response to question 5 (above).

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

In the field of family law and particularly bearing in mind the aims of and measures applicable pursuant to Brussels II revised, the enlargement of the EU and concurrent expansion of states to which the jurisdictional and enforcement measures apply is certainly beneficial to children and families for the various reasons explained above.

Notwithstanding the above, *Reunite* do have concerns about the expansion of the EU and the extension of the aforementioned measures in circumstances where it is not clear that 'new' Member States are fully 'audited' to ensure an ability (or willingness) to comply with the scheme imposed by Brussels II revised.

Therefore *Reunite* would recommend consideration at an EU level of training in relation to the EU family law scheme within any new Member State. That training should then be backed by appropriate monitoring of compliance, backed by appropriate sanction should strict compliance not be evident within an appropriate period of time. *Reunite* are disappointed that notwithstanding the extension of EU competence into, for example, the operation of the 1980 HC by the relevant Articles of Brussels II revised, there has been no suggestion for monitoring of this type. Typically such monitoring has not been possible

within the more diverse organisation of the Hague Conference, but the EU may be better placed, having extended its reach into this specialist area, to ensure that the measures are being applied uniformly across Member States to the benefit of children and families.

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

The most significant challenge that it appears will be faced in the near future is ensuring good practice across Member States in the operation of Brussels II revised. In *Reunite's* experience, a number of Member States have a tendency to act 'nationalistically' in their interpretation and application of the jurisdictional rules, to the detriment of the operation of the Regulation across the EU, and to the detriment of children involved in proceedings before the courts of those Member States, as a protracted jurisdictional enquiry or alternatively further unnecessary litigation may thereafter result, delaying final determination of the issues concerning the child or children involved, with a resulting impact upon their welfare.

An example of this concern arises from a query fielded by *Reunite* in the course of exercising its function as an adviser to parents who find themselves in a cross-border situation concerning their children. This case, as the facts were presented to *Reunite*, concerned two children who had joint nationality. The parents married in and the eldest child was born in Subsequently the family moved to , and the youngest child was born there. In 2009 the parties relationship broke down. The father filed for divorce in April/May of that year. The mother filed in . August 2009 there was a hearing in the at which the father argued that the courts had jurisdiction. That argument was rejected.

Subsequent to that hearing, the children 'relocated' to 'n disputed circumstances whereby in September 2009 courts directed the father to return the children to that jurisdiction, being the jurisdiction of their habitual residence.

In December 2009 courts rejected the father's application for custody of the children on the grounds of lack of jurisdiction. It was ordered that the mother could return the children , who by that stage had granted the mother's application for divorce and placed the children into her custody. The father appealed the courts decision on jurisdiction. In May 2010 the mother accordingly returned the children to

In August 2011 the court determined that they had exclusive jurisdiction to determine issues of parental responsibility concerning the children and refused to recognise the orders.

As a result of the above situation, and as the father is unable to re-enter there is no direct contact between the children and their father.

On a straightforward application of the jurisdictional rules of Brussels II revised the unfortunate decision described above should not have arisen. Neither child had ever lived in and as such it is strongly arguable that they could not be habitually resident in that jurisdiction. None of the exceptions to Article 8 of Brussels II revised would apply. A competent court within the EU, ie : court, had declared a lack of jurisdiction in favour of the In *Reunite's* view this case demonstrates the real difficulties that can arise as a result of exorbitant claims to jurisdiction outside of the commonly applicable jurisdictional rules set out within Brussels II revised.

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

Reunite have certain concerns about the extension of the EU's powers to act internationally in relation to family law, arising from the extension of EU powers into the operation of the 1980 HC through the relevant parts of Brussels II revised and the increasing willingness to rule on issues concerning the implementation of the 1980 HC demonstrated by the ECtHR.

As stated above, there are concerns that by attempting to extend its sphere of influence into international family law, the EU risks making ever more stringent in roads into carefully crafted and (in certain situations) long standing international instruments in respect of which there is not EU concentration of expertise, in contrast (for example) to the expertise held by the Hague Conference in the operation and implementation of the 1980 HC.

It may be said that, to a certain extent, the EU's ability to act internationally was not a foreseen consequence of the EU's extending influence in matters of family law. *Reunite* take the view that the EU should use its power in this regard judiciously, and that the UK should discourage any attempt to exorbitantly influence international law in this way, by using its continuing standing in the EU to this effect.

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

In contrast to the concerns expressed above about the EU acting internationally in the field of international family law, *Reunite* would be supportive of action being taken at an international level, for example through the Hague Conference. The Hague Conference has a concentration of expertise and significant experience putting into place successful and longstanding Conventions that have defined international family law for many years. In contrast the European Union has not such concentration of expertise in this area.

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For and on behalf of Reunite International Child Abduction Centre[4]

5th August 2013

[4] with further thanks to Henry Setright QC, Edward Devereux, Michael Gration, Nuala Mole, Anne-Marie Hutchinson OBE and Carolina Marin Pedreno, the drafters of the intervention submitted on behalf of Reunite in the case of X v Latvia, from which the answer to Question 4 (above) was drawn