HM Government

Review of the Balance of Competences between the United Kingdom and the European Union

Civil Judicial Cooperation

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Contents

Executive Summary

This report examines the balance of competences between the European Union (EU) and the United Kingdom (UK) in the area of civil judicial cooperation, and is led by the Ministry of Justice. It is a reflection and analysis of the evidence submitted by experts, non-governmental organisations, businesspeople, Members of Parliament and other interested parties, either in writing or orally, as well as a literature review of relevant material. Where appropriate, the report sets out the current position agreed within the Coalition Government for handling this policy area in the EU. It does not predetermine or prejudge proposals that either Coalition party may make in the future for changes to the EU or about the appropriate balance of competences.

Civil judicial cooperation refers to the way cross-border legal disputes in the areas of civil, commercial and family law can be considered and resolved through the judicial system and methods of alternative dispute resolution such as mediation.

By comparison to some reports published in this semester, the Ministry of Justice received fewer written responses to its Call for Evidence. However, we are pleased with the 34 responses we received. EU civil judicial cooperation is not a term widely recognised or understood except by those who specialise in cross-border civil and family matters or those members of the public who have been involved in such a dispute. This report was informed not only by the written evidence received, but also by the evidence collected in our wider stakeholder events. Over 90 stakeholders attended workshops held in London, Brussels and Edinburgh, and stakeholder meetings. As a result a range of stakeholders participated in our Call for Evidence including legal practitioners, academics, the judiciary, legal professional bodies, organisations such as Resolution, Members of the UK and European Parliaments and individuals.

The majority of responses came from the legal and academic sectors rather than the business sector, although business organisations were invited to participate. Many of the legal practitioners who participated in the Call for Evidence represented businesses, including those involved in cross-border trade, and stated specifically that they were able to discuss how the EU measures had impacted on their clients. In the area of family law, although some individual responses were received, the majority of evidence was provided by family practitioners and organisations like Reunite which some families turn to for help when a cross-border dispute arises.

Participants made a number of assertions about the EU legislation in this field but did not necessarily provide statistics or data to support those assertions. By its nature it is not easy to obtain comprehensive statistics on the work in this area because we will not know how many UK citizens and businesses have sought redress using the different EU legislative measures

discussed in Chapter 2 in the courts of different Member States. Where data is available, it is usually in respect of individual EU legislative measures as recorded in our courts or surveys, examples of which are provided in Chapter 3.

Chapter one sets out the **development of EU competence** in this area. Prior to EU legislation, cross-border cooperation in this area was achieved through a network of agreements between Member States. The EU first gained legislative powers in civil judicial cooperation matters as a result of the 1997 Treaty of Amsterdam. When the Treaty was agreed, the UK and Ireland negotiated a Protocol which provided that no EU legislative measures in this area, and other fields, would apply to the UK or Ireland unless they expressly opted in to the proposal or legislation.

Chapter two sets out the **current EU competence in this field** which now derives from the 2009 Treaty of Lisbon (the Treaty on the Functioning of the European Union (TFEU)). Under Article 81 of TFEU, the EU is expected to develop judicial cooperation in civil and commercial matters (including family law) with cross-border implications, 'particularly when necessary for the proper functioning of the internal market'. The UK and Ireland's opt-in power continues, so that no measures adopted under this Article apply to the UK or Ireland unless they expressly opt in. The Chapter also describes the main legislative measures adopted by the EU in this field and whether the UK has opted in to those measures. It also notes those areas where the UK disagrees with the EU's assertion of competence.

Chapter three explores the **impact of EU civil judicial cooperation measures**, including discussion about what the measures do, the role they play in the functioning of the Single Market, the UK's use of the opt-in and the EU's role on the international stage. This is based on the views of respondents to the Call for Evidence; it is not possible to back it up with data or statistics.

- **The impact of the EU measures in civil and family law matters**. 18 respondents, and participants at workshops, stated that the EU measures, which the UK has opted in to, are advantageous for UK citizens and businesses. This is seen to be as a result of the UK's negotiation of certain aspects of the instruments in conjunction with its use of the opt-in and more generally the use the UK has made of the opt-in provisions. A number said that the EU measures adopted by the UK were an improvement on the previous system of intergovernmental cooperation. Others disagreed. Respondents also said that the EU measures provided certainty over how disputes would be resolved and helped UK citizens and businesses by setting out rules about which court will have jurisdiction in a dispute, which country's law will apply and for the mutual recognition and enforcement of judgments. Respondents did, however, consider that improvements could be made to some of the existing instruments, and suggested ways in which this could be done when the opportunity arises. The role and rulings of the Court of Justice of the European Union (the ECJ) were also discussed. Whilst it was recognised that there is the need for such a court to interpret the EU instruments and to ensure Member States comply with these instruments, some respondents said that its rulings in commercial matters had caused practical problems, although they did note that some of these problems have been addressed by recent changes to the Brussels I Regulation. The impact of the EU measures on the UK's role as a leading international centre for legal excellence was raised in the responses received, with a number of respondents from the legal sector stating that they did not impact adversely on the UK's role.
- **The role of civil judicial cooperation in the Single Market.** Respondents said that the EU measures in this field provided certainty over how disputes will be handled in Member States and that this supported and encouraged cross-border trade and

the free movement of persons. Some respondents stated that some of the access to justice measures introduced by the EU, such as the European Small Claims Procedure, were not well known or used and greater awareness might assist the smooth functioning of the Single Market.

- **The use of the opt-in in civil judicial cooperation matters**. Respondents stated that the UK opt-in in civil matters was seen as important in maintaining the integrity of the UK's legal systems, since it allowed the UK to stand aside from any instrument proposed under Article 81, the content of which did not appear to benefit the UK or was not compatible with the UK's legal systems. 17 respondents, and participants at workshops, said they supported the way in which the UK had used its opt-in to date. However, there was some debate about when the UK should opt in to a measure; some wanted the UK to opt in to a measure when it was first proposed, while others wanted the UK to wait and opt in after negotiations had been concluded. Some respondents expressed concern that the use of the opt-in may diminish the UK's influence in the negotiation of future civil and family law measures and must therefore be used carefully.
- **International Issues**. There were mixed views about the EU's competence to act in international matters. Some respondents said that the EU may be able to secure better deals than Member States acting on their own. Other respondents had reservations about the EU's exclusive competence to act in certain international matters and its impact on the UK's international standing. Reservations were also expressed about the EU's assertion of exclusive competence – for example, the dispute between Member States and the EU over the EU's recent assertion of exclusive external competence in respect of the acceptance of accessions to the 1980 Hague Convention on the abduction of children. On the most appropriate level for international action in civil judicial cooperation, there were also mixed views: a few respondents supported work being undertaken at a wider international level: other respondents said that wider international measures were not an alternative to EU level legislation because of the lack of similar enforcement mechanisms, but did advocate a cooperative and constructive relationship between the EU, Member States and international organisations such as the Hague Conference on Private International Law.

Chapter four considers **future options and challenges for the UK based on the evidence** received.

- **It looks at areas where for the EU to do less might be in the UK's interests**. Respondents stated that, rather than introducing more legislation, the EU should focus on improving, consolidating and simplifying the current legislation. They also said that there should be fewer proposals aimed at harmonising civil and family law and moving towards a more civil law-centred regime in the UK.
- **It looks at areas where for the EU to do more might be in the UK's interests.** Respondents stated that it would be in the UK's interests if the EU did more of the following: raising awareness of some of the measures that already exist; providing better data and information about the impact of new EU measures; allowing greater transparency over legislative processes; promoting co-operation between Member States and sponsoring more education and liaison programmes between Member States.

- It explores where **challenges** are likely to come in the future. One challenge is the enlargement of the EU. It notes some respondents' views that there may be benefits for the UK of the current EU legislation being adopted by more Member States. It also notes potential issues raised by some respondents, including difficulty in achieving unanimity in decision-making in certain areas and uncertainty over the impact of countries whose legal systems are founded on religious principles. The Chapter notes further challenges referred to in respondents' evidence, including future ECJ rulings on EU instruments, the use of the opt-in and the EU seeking to extend its exclusive external competence in this field.

Introduction

This report is one of 32 reports being produced as part of the Balance of Competences Review. The Foreign Secretary launched the Review in Parliament on 12 July 2012, taking forward the Coalition commitment to examine the balance of competences between the United Kingdom (UK) and the European Union (EU). It will provide an analysis of what the UK's membership of the EU means for the UK national interest. It aims to deepen public and Parliamentary understanding of the nature of our EU membership and provide a constructive and serious contribution to the national and wider European debate about modernising, reforming and improving the EU in the face of collective challenges. It has not been tasked with producing specific recommendations or looking at alternative models for Britain's overall relationship with the EU.

The Review is broken down into a series of reports on specific areas of EU competence, spread over four semesters between 2012 and 2014. More information on the Review can be found at www.gov.uk/review-of-the-balance-of-competences.

For the purposes of this Review, we are using a broad definition of competence. Put simply, competence in this context is about the power the EU institutions have to take action, and the powers that the UK retains or shares with the EU.

Civil Judicial Cooperation

Civil judicial cooperation refers to the way that cross-border legal disputes in the areas of civil, commercial and family law can be considered and resolved through the judicial system and methods of alternative dispute resolution such as mediation. Examples include monetary claims between private parties and/or companies and matters relating to divorce, parental responsibility or maintenance payments.

Civil judicial cooperation provides a framework to help relevant parties, legal representatives and national courts:

- Know which Member State's jurisdiction is responsible for determining cases;
- Know which Member State's law applies;
- Have effective mechanisms to allow judgments from one Member State to be recognised and enforced in another;
- Ensure effective cooperation between courts in different Member States.

This report analyses the impact on the UK national interest of the EU's use of its competence in civil judicial cooperation and is based on evidence received during the Call for Evidence period. The Call for Evidence was launched on 16 May 2013 and closed on 5 August 2013. The report draws on written submissions, as well as on contributions made in stakeholder events and meetings held during the Call for Evidence period. A list of evidence submitted can be found at **Annex A** and details of the stakeholder events can be found at **Annex B**. An overview of the legislation discussed in this report can be found at **Annex C**.

Chapters 1 and 2 of this report set out the development of the EU's competence in civil judicial cooperation matters and the current balance of competence between the EU and the UK. Chapter 3 considers the impact of EU competence on the UK's interests, based on submissions made to the Call for Evidence. Chapter 4 looks to the future, noting suggestions and challenges mentioned by respondents to the Call for Evidence.

Chapter 1:
The Historical Development of EU Competence in Civil Judicial Cooperation

1.1 The concept of cooperation between Member States' governments in civil justice matters was established over 50 years ago. Prior to EU legislation, cross-border cooperation was achieved through a network of bilateral agreements between Member States. This Chapter charts the move from that intergovernmental cooperation to the establishment of the EU's legislative competence in these matters.

Intergovernmental Cooperation

Treaty of Rome (the Treaty establishing the European Community)

1.2 Member States contemplated cooperation in civil judicial cooperation matters as early as the 1957 Treaty of Rome, though only through cooperation between the governments of Member States rather than through legislation by the institutions of the then European Economic Community (EEC). Article 220 of the Rome Treaty stated:

> Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:
>
> – the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

1.3 On the basis of this provision, in 1968 the EEC Member States agreed the Brussels Convention providing for mutual recognition and enforcement of civil and commercial judgments. In 1971, the signatory States to the Brussels Convention agreed a Protocol providing for the ECJ to have jurisdiction to interpret the Convention. The UK acceded to the Brussels Convention in 1978.

1.4 In 1980, the Member States also signed the Rome Convention on contractual choice of law. A Protocol to this Convention also conferred limited jurisdiction on the ECJ and was eventually signed by all acceding Member States.

Treaty of Maastricht (Treaty on European Union)

1.5 In 1992, Member States agreed the Treaty on European Union (TEU), also known as the Treaty of Maastricht.

1.6 The TEU provided that civil judicial cooperation was in the Member States' 'common interest' in helping to achieve 'the free movement of persons' in the new EU (Article K.1). Title VI of the TEU 'Provisions on Co-operation in the Fields of Justice and Home Affairs' encompassing civil judicial cooperation was placed in the so-called 'third pillar' which established cooperation in certain fields. Title VI allowed the Council of Ministers of Member States (the Council) for example, to adopt 'joint actions' and draw up conventions which it could recommend to Member States. But the institutions of the EU did not yet have competence to legislate in this field.

1.7 Measures in the field of civil judicial cooperation therefore remained largely a matter for intergovernmental cooperation agreement between Member States.

The Establishment of EU Legislative Competence

The Treaty of Amsterdam

1.8 Cooperation on judicial matters became of greater importance as internal borders between Member States disappeared, the Single Market emerged and membership of the EU grew. The Treaty of Amsterdam was agreed by Member States in 1997 and entered into force in 1999 and it gave the European Community the competence to legislate in the field of civil judicial cooperation by inserting a new provision, Article 65, into the Treaty Establishing the European Community (TEC). This competence was limited to matters having 'cross-border implications' and to measures adopted only so far as 'necessary for the proper functioning of the internal market.' Its aim was to improve the efficacy and ease with which cross-border disputes were handled.

Article 65 of the TEC stated:

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

(a) Improving and simplifying:

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

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

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

1.9 The Treaty of Amsterdam also provided that legislative measures taken under Article 65 were subject to adjudication by the ECJ, subject to certain limitations (Article 68(1)).

Tampere Conclusions

1.10 The European Council held a special meeting in October 1999 in Tampere, Finland on the creation of an area of freedom, security and justice in the EU. The results of that meeting (the Tampere Conclusions) set the context for EU work in the area of civil and family law. The Tampere Conclusions stated that the European Council was determined to develop the EU as an area of freedom, security and justice by making full use of the possibilities offered by the Treaty of Amsterdam. They stated that individuals should be able to 'approach courts and authorities in any EU country as easily as in their own' and that the principle of mutual recognition should become the cornerstone of judicial cooperation in both civil and criminal matters.[1]

1.11 Since Tampere, the objective has been that the closer cooperation between the courts and authorities of EU countries should help to eliminate any obstacles caused by different legal systems in each Member State.

1.12 After the conferral of competence brought about by the Treaty of Amsterdam, and the meeting in Tampere, the European Commission (the Commission) sought to convert the Conventions already in place between Member States into EU legislation, and this is discussed in more detail in Chapter 2.

EU Legislative Process

1.13 Civil law measures under Article 65 of the TEC could at first only be adopted by unanimous vote in the Council, following consultation with the European Parliament, and at the initiative of either the Commission or the Member States.

1.14 Article 67 of the TEC provided for a transitional period of five years, after which the Council could decide that these measures would in future be decided by qualified majority voting (QMV) and co-decision with the European Parliament.

1.15 However, in the Treaty of Nice, which entered into force in 2003, Member States agreed that civil law measures, except for 'aspects relating to family law' would be subject to QMV (in the Council) and 'co-decision' with the European Parliament. At the same time, the Treaty eliminated the possibility of legislative proposals from Member States, so that the Commission had the sole right to propose legislative initiatives in this area. Measures on cooperation between administrative authorities under Article 66 of the TEC were also subject to QMV as of May 2004.

1.16 Family law measures remained subject to the unanimity requirement and the decision-making rules set out in Article 67 of the TEC although, from May 2004, legislative measures could also only be adopted following proposals from the Commission.

[1] Tampere European Council, conclusions on the creation of an area of freedom, security and justice in the European Union, EU, (1999).

The Justice and Home Affairs (JHA) opt-in[2]

1.17 The Treaty of Amsterdam gave the EU competence to legislate in areas related to asylum, immigration and border controls, as well as judicial cooperation in civil and family matters. Alongside these provisions, the Treaty also introduced a Protocol on the position of the UK and Ireland which allowed them to opt in to legislation adopted in the area of freedom, security and justice. The UK negotiated the opt-in to maintain its border controls and to protect its common law system. Common law is relatively rare in the EU (though widespread worldwide); apart from the UK only Ireland, which also negotiated an opt-in, has a common law system, although the Maltese and Cypriot systems have some common law elements.

[2] The opt-in in this report refers only to its use in civil judicial cooperation matters. The use of the opt-in in asylum and immigration will be addressed in the second semester report of the same title and the use of the opt-in in police and criminal justice matters will be discussed in a separate report as part of semester four www.gov.uk/review-of-the-balance-of-competences#semester-4.

Chapter 2:
The Current State of Competence

TFEU

2.1 The Treaty of Lisbon amended the TEU and replaced the TEC with TFEU. It entered into force on 1 December 2009. These Treaties set out the way in which the EU functions and provide the legal basis and competence for the EU to take action and propose legislation at a European level.

2.2 The EU's competence to legislate in the field of civil and judicial cooperation is established in, and essentially defined by, Article 81 of the TFEU. Please see definition in the text box on the following page.

Article 81 of the TFEU

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

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

(a) The mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;

(b) The cross-border service of judicial and extrajudicial documents;

(c) The compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;

(d) Cooperation in the taking of evidence;

(e) Effective access to justice;

(f) The elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;

(g) The development of alternative methods of dispute settlement;

(h) Support for the training of the judiciary and judicial staff.

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

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

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

2.3 Article 81 of the TFEU differs from the former basis of EU competence (Article 65 of the TEC) in a number of ways.

2.4 Firstly, it states that the European Parliament and Council are to adopt measures particularly when necessary for the proper functioning of the internal market. Former Article 65 stated that the EU had competence to legislate measures […] 'insofar as necessary for the proper functioning of the internal market […]' Article 81 therefore removes the requirement for an EU measure in this field to be necessary for the proper functioning of the internal market.

2.5 Secondly, a number of additional aims for legislative measures in this field have been enumerated: effective access to justice; the development of alternative methods of dispute

settlement; and support for the training of the judiciary and judicial staff. These aims were not expressly listed in the former Article 65, although the EU had used that power to legislate in these areas. The list of aims in the former Article 65 was on its face non-exhaustive, whereas the Article 81 list is explicitly exhaustive.

2.6 Under Article 81, EU legislative measures generally remain subject to QMV and the Ordinary Legislative Procedure (OLP), while measures in family law remain subject to a requirement for unanimity in the Council and consultation of the European Parliament (now called a 'special legislative procedure'), though the Council, on a proposal from the Commission, may determine that certain 'aspects of family law' with cross-border implications may be subject to the OLP. However, any such proposal cannot proceed if one Member State opposes it.

2.7 When the Treaty of Lisbon was negotiated and agreed, the UK retained its opt-in power to what are now all 'Title V' matters under the new Area of Freedom, Security and Justice, including civil judicial cooperation. This means that in the absence of a UK opt-in, no measure adopted pursuant to a Title V legal base, no provision of any international agreement concluded by the EU pursuant to that Title, and no decision of the ECJ interpreting any such provision or measure is binding on or applicable in the UK. It is the Government's policy that the opt-in applies to all proposals where there is justice and home affairs content relevant to Title V and not just where the proposal is issued with a Title V legal base.

2.8 The UK's opt-in under the Title V Protocol applies to the UK as a single entity, since there is nothing in the Protocol that suggests that it is possible for only part of the UK to opt in. Therefore the UK must opt in or not as a whole and, in this context, the UK includes Gibraltar, though it does not include the Channel Islands or the Isle of Man, to which none of the Title V measures apply.[1] [2]

2.9 The UK has opted in to the majority of proposals in the area of civil judicial cooperation within three months of their publication. However, the UK has twice opted in to a measure after a proposal has been adopted – the Rome I Regulation and the Maintenance Regulation – both of which are discussed in more detail below. On both occasions, the decision not to opt in at the start of the negotiations was based on concerns about the effect the original proposal would have had in the UK.

Scope of the EU's Competence

2.10 The EU can only act within the limits of the powers conferred on it by the treaties; where the treaties do not confer competence on the EU, that competence remains with the Member States. The EU must act in accordance with the principles of subsidiarity and proportionality. Under the principle of subsidiarity, where the EU does not have exclusive competence it can only act if the objective cannot be sufficiently achieved by Member States acting on their own and if the objective therefore can be better achieved by the EU. In practice this will often be because of the scale or the effects of the proposed action. Under the principle of proportionality, the content and form of EU action must not exceed what is necessary to achieve the objectives of the EU Treaties.

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

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

2.11 As discussed above, EU competence in the area of civil judicial cooperation is essentially defined by Article 81 TFEU. While the scope of that competence clearly covers some areas – for example, rules on cross-border service of judicial documents – it is disputed in some others.

2.12 Some instruments by their nature apply only to cross-border matters – for example, taking of evidence in another country. However, others – especially those that create European wide procedures – have no such automatic restriction. The European Commission has at times proposed that some instruments should be able to apply to domestic as well as cross-border disputes such as in the negotiation of the Legal Aid Directive, the European Order for Payment, the European Small Claims Procedure and the Mediation Directive, all discussed later in this Chapter. Among other reasons, the European Commission argued that it would be difficult to define a cross-border dispute and thought such a restriction would be artificial because what was a domestic dispute could become cross-border during proceedings. They have also argued that having the same systems applying in each Member State would facilitate the working of the Single Market as access to justice would be available in each Member State under equal conditions.

2.13 The UK has argued consistently that the reference to cross-border implications, both under Article 65 TEC, under the pre-Lisbon arrangements, and Article 81 TFEU, following Lisbon, means that there must be a real cross-border restriction to any civil judicial cooperation legislation. The UK has sought to avoid its domestic law in this area effectively being harmonised with the domestic law of other Member States, not only because it has considered that this is beyond the scope of Article 81 measures, but also because such harmonisation could risk undermining our domestic common law system or the mixed common and civil law system in Scotland. Nearly all Member States agreed the need for such a restriction and the scope of each of the instruments mentioned above is confined to cross-border disputes. There is no single definition of what constitutes a cross-border dispute. Different definitions have been agreed by the Member States in the Council and the European Parliament during the negotiation of each relevant instrument based on the particular requirements of that instrument.

2.14 Under Article 114 TFEU, measures can be adopted by the Council and the European Parliament which have as their object the establishment and functioning of the Single Market, save where action in the area concerned is provided for in another part of TFEU. There have been a number of recent proposals and adopted instruments brought forward under Article 114 where there has been a debate about whether Article 81 would be more appropriate. These include the proposed Common European Sales Law, a Directive on consumer alternative dispute resolution and a Regulation on consumer online dispute resolution. Importantly, Article 114 does not contain an express requirement for measures to apply to cross-border matters, and the UK's opt-in power does not apply to measures proposed under Article 114. The Government always considers whether the Commission has issued proposals under the correct treaty base and argues strongly for the use of Article 81 where it believes that is more appropriate than Article 114.

2.15 Under the Treaties, the EU also has the power to act 'externally', that is, to enter into international agreements and to participate in international organisations. This competence is generally shared with Member States. However, in certain circumstances the EU has exclusive external competence. These include international agreements that may affect measures that the EU has legislated on, or that may alter their scope. The extent to which a measure internal to the EU creates exclusive EU external competence has often been disputed. For example, in 2006 the ECJ ruled Opinion 1/03 (Lugano) that the EC had exclusive external competence to conclude an agreement with three non-EC countries

(Iceland, Norway and Switzerland) on rules governing jurisdiction and the recognition and enforcement of judgments. This agreement, known as the Lugano Convention, extends the jurisdiction and recognition and enforcement rules contained in an EU measure known as Brussels I (discussed below). The ECJ concluded that the Lugano Convention rules would affect the EU rules, and on that basis, the EU had exclusive competence to enter into the Convention. The UK and other Member States had disputed the EU's assertion that it had exclusive competence to enter into this agreement.

2.16 As stated, the disputes are often about the extent to which the internal legislation would be affected by action at an international level. For example, the European Commission has argued that the child abduction measures contained in the Brussels IIa Regulation (discussed below) mean that the EU has exclusive competence to accept the accession of new States to the 1980 Hague Child Abduction Convention. The issue is now before the ECJ, and the UK has joined with the majority of Member States to dispute the Commission's claim to exclusive external competence, on the basis that the acceptance of the accessions of new countries to the Convention would not affect the EU's Brussels IIa Regulation. This is an example of how the UK is prepared to resist any extension of external competence where it is not considered justified.

2.17 Where it is agreed by Member States that the EU has exclusive external competence in certain fields, mechanisms have been put in place for the EU to authorise Member States to enter into bilateral agreements in these areas (see paragraphs 2.34 and 2.44).

Main Adopted Instruments to which the UK has Opted In

2.18 As a result of the EU assuming competence to legislate in the field of civil judicial cooperation, a number of legislative measures have been adopted. The instruments set out below provide a framework aimed at achieving effective judicial cooperation in civil and family matters.

Civil Law Instruments

Brussels Convention, Brussels I Regulation and Recent Amendments

2.19 In 2001, the Council adopted Regulation 44/2001 (known as 'Brussels I') to replace the 1968 Brussels Convention, which had been an intergovernmental agreement only.

2.20 Brussels I regulates the mutual recognition and enforcement of civil and commercial judgments across Member States, and sets out rules of jurisdiction to govern cross-border disputes. The general rule is that the court where a defendant is domiciled shall have jurisdiction. There are a number of exceptions to this general rule, as set out in the Regulation itself and/or as interpreted by the ECJ. These include special jurisdictional rules for a number of matters such as contract, tort and employment disputes or cases with multiple defendants.

2.21 At the end of 2012, the Parliament and Council adopted Regulation 1215/2012 which will repeal and replace Brussels I. The new Regulation comes into force in 2015 and seeks, in large part, 'to improve the application' of certain of its former provisions following a number of ECJ decisions, which are discussed in more detail in Chapter 3.

Brussels I and the Lugano Convention

2.22 Since 1988, there has been a Convention operating in parallel with the Brussels Convention and subsequently the Brussels I Regulation. The Lugano Convention was agreed by the then Member States of the EC and the contracting states of the European Free Trade Association (EFTA) in order to establish a similar set of rules in those countries for the recognition and enforcement of civil and commercial judgments, and for the establishment of jurisdiction in civil and commercial matters.

2.23 The only EFTA States which have not acceded to the EU are Iceland, Norway and Switzerland. In the 1990s and the early part of the following decade, the EC (which became the EU as of the 1992 Treaty of Maastricht) endeavoured both to replace and revise the Brussels Convention in a new Regulation (which became known as the Brussels I Regulation) and, in parallel, revise the Lugano Convention.

2.24 Following the Lugano Opinion from the ECJ, discussed above at paragraph 2.15, which held that the EC had exclusive competence to enter into the renegotiated Lugano Convention and, following a Council Decision approving signature, the EU concluded an agreement in 2007 with Iceland, Norway and Switzerland.[3]

European Enforcement Order

2.25 In 2004, the Council and Parliament adopted Regulation 805/2004 creating a European Enforcement Order for 'uncontested claims', that is claims in which a creditor, in the verified absence of any dispute by the debtor, has obtained a court decision or other enforceable document. Under the Regulation, provided certain requirements are met, a judgment can be automatically recognised for enforcement in all other participating Member States.

European Order for Payment

2.26 In 2006, the Council and Parliament adopted Regulation 1896/2006 establishing a European Order for Payment, which establishes a simplified procedure to enable a creditor to obtain an enforceable order against a defendant for a specified sum of money. If the debtor does not respond, the order becomes automatically enforceable throughout the EU.

European Small Claims Procedure

2.27 In 2007, the Council and Parliament adopted Regulation 861/2007 establishing a European Small Claims Procedure applying to claims of €2000 or less at the time that the claim was received by the court or tribunal with jurisdiction, excluding interest, expenses and disbursements. Judgments under this procedure are automatically enforceable throughout the EU. On 19 November 2013, the Commission issued a proposal to revise the Regulation, including a proposed increase of the threshold to €10,000.[4]

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[3] Council Decision of 2007/712/EC, on the signing, on behalf of the Community, of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 2007.

[4] European Commission Proposal for a Regulation of the European Parliament and of the Council amending Regulation 861/2007/EC of the European Parliament and the Council establishing a European Small Claims Procedure and Regulation 1896/2006/EC of the European Parliament and of the Council creating a European order for payment procedure (16749/13), 2007.

Insolvency Regulation

2.28 In 2000, the Council adopted Regulation 1346/2000 on insolvency proceedings with the stated aim of facilitating the efficient and effective operation of proceedings that have cross-border elements. The Commission recently proposed that this Regulation be amended, and the UK has opted in to this proposal. This Regulation and the amending proposal are the policy responsibility of the Department for Business, Innovation and Skills.

Rome I

2.29 In 2008, the Council and the Parliament adopted Regulation 593/2008 (known as 'Rome I'), replacing the 1980 Rome Convention on conflict of laws in contract (though the Rome Convention continues to apply to all contracts agreed before 17 December 2009).

2.30 Rome I applies to civil and commercial contractual matters and its first principle is the premise that contracting parties are free to designate the law that should apply to their contract. The Regulation only designates the applicable law if a contract does not provide for choice of law, subject to special rules for certain kinds of contract.

2.31 The UK was an original signatory state to the Rome Convention, which was a result of intergovernmental agreement only and not a legislative measure proposed by the Commission. The UK did not initially opt in to the Rome I proposal because of concerns about the effects it would have, including legal uncertainty in complex, multi-party international contracts, which might mean a significant loss of business for the City of London. As the issue of most concern was resolved during negotiations, the UK opted in to the Regulation in 2009.

2.32 The case study below sets out how UK businesses can use the EU measures to resolve cross-border disputes.

Case Study One

A clothes manufacturer in Manchester orders and pays for cotton from a supplier in Greece. When the order arrives, the manufacturer discovers that the quality of the cotton is not of the standard agreed in the contract. The supplier refuses to accept any liability and the manufacturer decides that he must seek redress through the courts.

The first question to be determined is where the case should be heard. In the absence of any prior agreement as to which country's court should have responsibility for determining a dispute, the jurisdiction rules of the Brussels I Regulation should be used. These state that, in matters relating to a contract, the court with jurisdiction will generally be in the place of performance of the obligation in question. In the case of the sale of goods, that is the place where the goods were delivered or should have been delivered. In this case, that is England. It is for the court rules in England and Wales to determine which court can be used.

The second question is which law should apply to the case. The Rome I Regulation provides rules which help to provide the answer. If the contract includes a choice of law provision, that provision would generally apply. However, if no such choice is made, the law governing the contract for a sale of goods is generally that of the country where the seller is based.

As there was no agreement on jurisdiction or choice of law in the contract in question, the clothes manufacturer can bring his case in a court in Manchester and the dispute will be determined under Greek law.

As with all court proceedings, it is important that there are rules on how details of the court action are to be brought to the notice of the defendant. Where notification needs to be made in another Member State the rules are provided by the Service Regulation. The court documents in this case will be sent to the Greek authorities for them formally to serve on the defendant.

Where evidence needs to be obtained to help the court determine the dispute, information can be taken from a witness or expert in another country using the Taking of Evidence Regulation. Here, the manufacturer claims he sought the advice of a local trader in Greece when sourcing the cotton and he wants this person's testimony to be provided. In such a case, the English court can request the Greek authorities to question the witness and send a transcript of his response back to England or it can make a request to take the evidence directly via video conference.

The case itself proceeds in the English court with an expert witness used to advise on Greek law. If the court finds for the clothes manufacturer, he can use the Brussels I Regulation to have the judgment recognised for enforcement in Greece.

Rome II

2.33 The Council and Parliament also adopted Regulation 864/2007 (known as 'Rome II') which addresses conflict of law issues in non-contractual cases such as negligence claims or other actions based in tort law. There are a number of kinds of cases that are excluded, such as company law disputes or disputes based in trust law.

Bilateral Agreements on Conflict of Law Rules with Third Countries

2.34 Regulation 662/2009 establishes a procedure for Member States to negotiate and conclude agreements with third party countries concerning choice of law in contractual and non-contractual matters. This Regulation was agreed in the wake of the Lugano Opinion (see paragraph 2.15 above) in order to provide a mechanism for Member States to enter into bilateral agreements with other countries. Many such agreements already existed when the Lugano Opinion was issued.

Family Law Instruments

2.35 Although national family law remains the sole competence of Member States, the EU has adopted, on the basis of the special legislative procedure, a number of measures under Article 81 concerning civil judicial cooperation in cross-border family cases.

2.36 These measures include rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, the reciprocal enforcement of maintenance decisions, and measures to support the return, under the 1980 Hague Child Abduction Convention, of a child who has been abducted or wrongfully retained away from their country of habitual residence.

Brussels IIa

2.37 The most significant EU legislation in the family law area is Regulation 2201/2003 (known as 'Brussels IIa' or 'Brussels II bis' or 'Brussels II Revised' because it repealed and replaced the earlier Regulation 1347/2000 which was known as 'Brussels II'). Brussels II had established rules for the determination of jurisdiction over 'matrimonial proceedings' (principally divorce), and provided for mutual recognition and enforcement of the judgments from such proceedings. It also covered jurisdiction, and mutual recognition and enforcement of orders relating to parental responsibility (in EU terms this includes residence and contact) but only for the children of married parents in divorce proceedings. Brussels IIa covers these matters, but also includes all other parental responsibility proceedings and orders regardless of the marital status of the parents. This Regulation is currently subject to review by the Commission, which may lead to a revision in due course.

Brussels IIa and the Hague Conventions

The Hague Conference on Private International Law is a global intergovernmental organisation which has existed since 1893 and works 'for the progressive unification of the rules of private international law'.[5] This goal is achieved by the negotiation and agreement of multilateral treaties known as 'Hague Conventions'. Hague Conventions deal with civil and family law on procedural and substantive law matters. The Conventions dealing with maintenance obligations, civil aspects of international child abduction and inter-country adoption are among the most widely ratified Conventions. 74 States (including the EU and the 28 Member States) are currently members of the Hague Conference. 69 States which are not members of the Hague Conference are party to one or more Hague Conventions.

2.38 Brussels IIa also provides rules on the return of children abducted to, or wrongfully retained in, other Member States. These rules supplement the 1980 Hague Child Abduction Convention (to which EU Member States are also parties) which provides a mechanism for the return of children wrongfully removed or wrongfully retained away from their country of habitual residence, usually by one parent. On the basis of the provisions of Brussels IIa,

[5] Please see further information on the Hague Conference at: http://www.hcch.net/index_en.php, accessed on 3 February 2014.

the Commission has asserted exclusive external competence to conclude agreements for the acceptance of the accession of further States to the Convention.[6] While not accepting the assertion of exclusive external competence, the UK has opted in to these proposals to preserve its negotiating position.

Case Study Two

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

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

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

2.39 Aspects of Brussels IIa are also similar, but not identical, to certain provisions of the 1996 Hague Child Protection Convention which deals with a wide range of child protection measures from recognition and enforcement of orders concerning parental responsibility and contact, to public measures of protection or care between Contracting States, to the protection of children's property in order to protect the child. It does not make substantive child law provision, but provides rules about which country's courts should hear the case concerning the protection of the child, which country's law should apply, and how measures taken in one Contracting State can be enforced in another.

2.40 Brussels IIa does not contain rules on applicable law in children matters, but the 1996 Hague Convention does. The EU has exclusive external competence in the majority of the subject matter of the 1996 Hague Convention by virtue of the provisions of Brussels IIa, but Member States share competence with the EU in relation to the applicable law elements of the Convention, since that is not covered in Brussels IIa.

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

Maintenance Regulation

2.41 In 2008, the Council adopted Regulation 4/2009 which provides rules for determining which country's court has jurisdiction in maintenance disputes, for determining which law will be applied, and for the recognition and enforcement of maintenance decisions from other Member States. Following public consultation, the UK did not originally opt in, on the basis that the choice of law provisions would have caused UK courts to apply foreign law in some maintenance cases. The UK eventually did opt in because it successfully negotiated a change so that the choice of law provisions are now in the Hague Protocol on the Law Applicable to Maintenance Obligations of 23 November 2007, not in the Maintenance Regulation. They do not apply in the UK.

2.42 It is generally accepted that by virtue of this Regulation, the EU has exclusive external competence in the matters covered by the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.

Case Study Three

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

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

Alternatively under the EU Maintenance Regulation the mother can apply, through the two Central Authorities, to a court in Italy for an order for maintenance. The Central Authorities will deal with any translation requirements. Enforcing an Italian order might be more effective than seeking enforcement of an English order.

Mutual Recognition of Protection Measures in Civil Matters

2.43 Regulation 606/2013 (the European Civil Protection Order) was agreed in June 2013 and will come into force in January 2015. Those at risk of domestic violence or harassment will be able to apply for an order in one Member State and have its terms recognised and, if necessary, enforced in any other participating Member State.

Bilateral Agreements in the Area of Family Law

2.44 Regulation 664/2009 establishes a procedure for Member States to negotiate and conclude agreements with non-EU countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations. This Regulation was agreed in the wake of the Lugano Opinion (see paragraph 2.15 above) in order to provide a mechanism for Member States to enter into bilateral agreements with other countries in these matters. Many such agreements already existed when the Lugano Opinion was issued.

Instruments covering both Civil and Family Law

Service Regulation

2.45 In 2000, the Council adopted Regulation 1348/2000 on the service of documents in Member States, in order to facilitate the service of claim forms and other legal documents in judicial proceedings that involved parties in more than one Member State. In 2007, the Council and Parliament adopted Regulation 1393/2007, which repealed the prior Regulation and replaced it with a revised set of rules which largely maintain the system but which deal, among other matters, with certain ambiguities in the earlier text. Like its predecessor, Regulation 1393/2007 aims to expedite proceedings by providing, for example, for designated government agencies through which the service of documents can be effected, and for related rules about timing, refusals, further attempts at service and alternative methods of service etc.

2.46 The Regulation is based on the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters to which most Member States (including the UK) are parties, together with a number of non-EU countries. Regulation 1393/2007 prevails over the Hague Convention where service matters arise between Member States. The Commission reviewed the use of the Regulation in 2013 and concluded that, in general, it was working well and achieving its objectives.[7]

Taking of Evidence Regulation

2.47 In 2001, the Council adopted Regulation 1206/2001 providing for cooperation between courts in the taking of evidence in civil and commercial matters. It applies when the court of one Member State needs evidence from another Member State and asks the court of that Member State to obtain that evidence, or asks that its courts be permitted to collect the evidence. The Regulation establishes a regime of mutual recognition of the evidence obtained, subject to limited exceptions.

2.48 The Regulation is based on the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters to which most EU Member States (including the UK) are parties together with a number of non-EU countries. Again, Regulation 1206/2001 prevails over the Convention where relevant matters arise between Member States. The Commission reviewed the use of the Regulation in 2007 and concluded that, in general, it was working well and achieving its objectives.[8]

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[7] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation 1393/2007/EC of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents).

[8] Report from the Commission of the Council, the European Parliament and the European Economic and Social Committee on the application of Council Regulation 1206/2001/EC.

Case Study Four

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

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

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

1) She can sue the German company in an English court and obtain a judgment which she can then have enforced in Germany under the procedures for recognition and enforcement of judgments which are set out in the Brussels I Regulation.

2) If, during the English court process, the German company does not respond to the claim, the English consumer could apply in England for a European Enforcement Order to enable automatic recognition of the English judgment in Germany.

3) On the basis that the German company has never responded to her request, the consumer could assume that the claim will be uncontested and decide to apply to a court in England for the more streamlined European Order for Payment designed for such cases. A European Order for Payment will be directly enforceable in another Member State.

4) If the value of the television and any other costs arising from the claim is below €2000, the consumer can choose to apply to an English court using the European Small Claims Procedure. This is another simplified procedure and can apply where the defendant contests the claim. Judgments from this procedure are also directly enforceable in another Member State

Legal Aid Directive

2.49 The Legal Aid Directive (Directive 2003/8/EC) has applied since November 2004 and seeks to improve access to justice by establishing common minimum standards for the grant of legal aid in cross-border disputes. Eligibility to claim legal aid is determined under the rules of the Member State where the legal aid is to be claimed. The Commission published a report on the application of the Directive in 2012, the main conclusion of which was that both Member States and the Commission need to improve promotion of the Directive.[9]

Mediation Directive

2.50 The Mediation Directive (Directive 2008/52/EC) has applied since May 2011. Its objective is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation in cross-border civil and commercial matters.

[9] European Parliament, *Report on Improving Access to Justice: Legal Aid in Cross-Border Civil and Commercial Disputes* (2013).

Main Adopted Instruments to which the UK has not Opted In

Succession Regulation

2.51 Regulation 650/2012 was adopted in July 2012. It establishes rules for recognition and enforcement, jurisdiction and conflicts of law for those whose property on death is connected with more than one jurisdiction. Following a public consultation, the UK did not opt in because the proposal contained provisions which would have created legal uncertainty or results that were not compatible with concepts in the UK's legal systems for estate matters. For example, the measure would have required the UK to apply a legal device that applies in many other Member States called 'clawback' in which gifts made during a person's lifetime can be recouped to their estate after their death.[10]

Rome III

2.52 Regulation 1259/2010 (known as 'Rome III') provides rules on which country's law should apply in divorce proceedings. It enables parties in one country to decide to have their divorce decided in that country's court in accordance with another country's law. The UK did not opt in to this proposal because of concerns about the practical difficulty and expense of applying foreign law in UK family courts. As there was no consensus in the Council about this proposal, the Commission agreed to the request of a number of Member States to take forward work in this area under the 'enhanced cooperation' procedure which allows only those Member States that wish to apply the procedure to agree a way to proceed amongst themselves. The Regulation has applied in the participating Member States since June 2012.

Future Instruments

2.53 There are proposals which are currently being negotiated or which are due to be agreed soon. The UK position is set out below.

European Account Preservation Order

2.54 In July 2011, the Commission issued a proposal to create a European Account Preservation Order to enable creditors to apply to freeze a debtor's account in another Member State if there is danger that the debtor might try to make enforcement more difficult by transferring or withdrawing assets from a bank account. The UK decided not to opt in to the proposal because it believed that the Commission had failed to balance properly the rights of claimants to recover debts with necessary safeguards for defendants. This concern has been shared by a number of other Member States. The UK is participating fully in the negotiations to try to amend the proposal to enable a decision to be made about whether to opt in post-adoption.

Matrimonial Property Regimes

2.55 There are two proposed Regulations on jurisdiction, applicable law and the recognition and enforcement of decisions regarding matrimonial property regimes and the property consequences of registered partnerships (for example, UK civil partnerships). Such regimes refer to the legal rules relating to the financial relationships of spouses or same sex registered partners resulting from their marriage or registered partnership, both with each other during the marriage or registered partnership, on divorce/dissolution or on death and with third parties (in particular, creditors). Such statutory schemes are common

[10] Concerns with the Regulation including the issue of clawback were stated in the House of Lords EU Committee (Sub-Committee on Law and Institutions), 6th Report of 2009/10, *HL Papers 75*: The EU's Resolution on Succession (2010).

in most other Member States with codified legal systems. As none of the UK jurisdictions has codified regimes relating to ownership of property by couples, the proposals raise difficulties and, following public consultation, the UK is not participating in either.

Proposed Regulation Establishing the Justice Programme (2014-2020)

2.56 This proposal aims to establish a funding scheme for 2014 to 2020 to promote judicial cooperation in civil and criminal matters and to facilitate access to justice. This includes projects to facilitate the training of judges and lawyers in EU civil judicial cooperation instruments. The UK did not opt in to this proposal on the basis that it was not persuaded that it represents good value for money.

European Judicial Network in Civil and Commercial Matters

2.57 The UK has also opted into the European Judicial Network.[11] This is a mechanism for ensuring compliance with, and evaluation of, legislation. This was established by a Council Decision and has existed since December 2001 with the aim of improving cooperation between judicial and legal authorities in the Member States in civil, commercial and family matters. Its contact points help to resolve problems that arise in particular cases; it brings together experts to help evaluate existing instruments; and maintains a website which provides information to the public and legal practitioners in their own language on the civil and family justice systems and civil and family law in each Member State.

[11] More information on the European Judicial Network in civil and commercial matters is available at http://ec.europa.eu/civiljustice/index_en.htm, accessed on 3 February 2014.

Chapter 3: Impact on The National Interest – A Summary of Responses

3.1 This Chapter draws on all the evidence submitted during the Call for Evidence period. This includes 34 written submissions, oral evidence from over 90 stakeholders who attended workshops held in London, Brussels and Edinburgh, and stakeholder meetings, as well as previously published and documented material and statistics. Those who made written and oral submissions included legal practitioners specialising in civil or family work, academics, legal professional bodies and organisations, and individuals including MEPs. We do not seek to comment on the evidence as stated but rather to summarise the views we received on how EU action in judicial cooperation in civil and family matters impacts on the UK.

3.2 There were a number of common themes in the evidence submitted. As a result, this Chapter looks at:

- EU Civil Judicial Cooperation – the different EU measures that have been adopted and what this means for UK citizens and businesses;
- EU Civil Judicial Cooperation and the role it plays in the Single Market – whether this Cooperation supports or hinders the functioning of the Single Market;
- The Opt-in – the way the UK has deployed this measure and the consequences; and
- The EU's powers to act internationally and whether the UK benefits from action and, if so, whether at an EU or a wider international level.

EU Civil Judicial Cooperation

3.3 As EU membership has grown and EU citizens and businesses exercise their rights within the Single Market, different relationships have formed – business to business relationships, business to consumer relationships and family relationships. As cross-border activity grows and more relationships are formed, the potential for disputes also increases. The EU civil judicial cooperation measures aim to provide the means for UK and EU citizens and businesses to resolve cross-border disputes efficiently and effectively. The case studies in Chapter 2 give some examples of how consumers, businesses and families can use the EU measures to resolve their cross-border disputes.

3.4 As an international law firm observed, cross-border disputes in commercial, civil and family matters are not new. Historically, the UK has addressed these issues through intergovernmental cooperation including bilateral and multilateral conventions. A number of participants said that the EU measures adopted by the UK are more effective than the previous system of intergovernmental cooperation, since they are seen as providing

greater certainty on dispute outcomes. They included the Law Society of England and Wales, Clifford Chance, Philip Cordery, STEP and the Law Society of Scotland from the legal sector, the academic Dr Mills, and from the political sector, the Liberal Democrat Home Affairs, Justice and Equalities Parliamentary Party Committee (Liberal Democrats Home Affairs Committee) as well as participants at our London workshop on 20 June 2013. They stated that to return to a system of bilateral and multilateral agreements would be a retrograde step for the UK for the following reasons. Firstly, they submitted that it could lead to patchwork arrangements which would undermine the certainty and uniformity which such agreements seek to provide. Secondly, in their view it was not to be presumed that all other Member States would agree to enter into bilateral arrangements and, even if they did, it would arguably be more time-consuming and would create greater uncertainty to negotiate so many agreements. Thirdly, these respondents argued that if the UK sought to enter into bilateral agreements with Member States in the future, those Member States would be likely to wish to enter only into agreements that replicated the provisions of the relevant EU-wide instrument, notwithstanding the fact that the UK would not have had any influence over the content and impact of those EU-wide measures.

3.5 Two participants; the TaxPayers' Alliance and Christopher Walker, said there was no need for such EU measures or were against UK participation in them. The TaxPayers' Alliance said that bilateral and multilateral agreements, rather than signing up to the EU measures, would allow the UK greater flexibility in the future. The UK could continue to negotiate agreements which would, in the TaxPayers' Alliance's opinion, achieve similar objectives to those of the EU measures, but allow the UK to retain its independence, its ability to address any problems more swiftly and avoid greater harmonisation which might impact adversely on the UK's legal systems.

EU Legislative Measures

3.6 This section explores the views of participants in our Call for Evidence about Article 81 TFEU (from which the EU derives its competence), civil and family measures adopted under the Article, the impact of the measures for UK citizens and businesses and the role of the ECJ.

Article 81 of ECJ

3.7 Four of the written responses, and participants at the Brussels and London workshops and stakeholder meetings made observations about the remit and wording of Article 81 (see Chapter 2, paragraph 2.2 for the text of Article 81).

3.8 Participants at the Brussels and London workshops and stakeholder meetings said that the remit of Article 81 was appropriate. Other comments centred on the changes in wording from that of Article 65 TEC which, as discussed in Chapter 2 (paragraph 2.4), made a stronger link with measures in this area being necessary for the proper functioning of the internal market. The evidence shows that some participants were concerned that the new wording in Article 81 could give rise to a wider interpretation by the EU of its competence in this field, which in turn might lead to the Commission proposing measures that would affect purely domestic (and not cross-border) law. Professors Carruthers and Crawford and the General Council of the Bar of England and Wales (the Bar Council) stated that the new wording was 'ambiguous' thereby 'arguably opening the door to the EU regulation of domestic law' or 'reduced or removed the cross-border requirement'.

3.9 Participants at the Brussels workshop also commented that there was 'a worry that the interpretation of Article 81 could be too wide'. The Law Society of England and Wales stated that many measures such as the European Small Claims Procedure 'are best suited to having a cross-border application and raise practical difficulties if extended to domestic level' although it also noted that limiting EU legislation to cross-border disputes 'can create additional complexities in the case of businesses and individuals who are required to be aware of different domestic and cross-border regimes'. Many respondents commented that the EU should only legislate where there is a cross-border element and not seek to extend EU measures to domestic legislation.

3.10 As indicated in Chapter 2 (paragraphs 2.11-2.13), the UK has resisted the Commission's proposals under Article 81 which, in the UK's (and other Member States') view, concern purely domestic matters, and has supported the Council's strict interpretation of 'cross-border implications'. A position which Professors Carruthers and Crawford and the Bar Council stated they supported in their evidence. The Bar Council stated 'the Bar Council broadly supports the premise of Article 81 TFEU, and the way 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 Member States through the Council, and to the ECJ, to insist upon this element. We would not welcome any relaxation to this approach'.

Civil and Commercial Law

Brussels I

3.11 16 of the written responses, and many participants at the workshops we held, commented on the Brussels I Regulation, its impact on UK individuals and businesses and the UK's role as a leading centre for dispute resolution. A number of written responses, including the Law Society of Scotland, the Law Society of England and Wales, Clifford Chance, the Bar Council, the Faculty of Advocates, academic Dr Mills, Catherine Bearder MEP, the Liberal Democrats Home Affairs Committee, the Scottish Government and individuals Zafar Gondal and James Watson, said that the Regulation was an important measure which protected UK citizens and businesses engaged in cross-border shopping and trade. In their evidence, respondents from the legal and academic sectors stated that, whilst some of the ECJ's decisions in relation to the Regulation had given them cause for concern, the recent amendments to the Regulation had addressed many of them and improved the Regulation. There was also some debate as to whether or not the Regulation impacted adversely on the UK's standing as a centre for international dispute resolution. There were arguments on both sides but the balance of opinion concluded that the Regulation was one of the factors which encouraged individuals and businesses to use the UK's legal systems.

3.12 On a general note, Rebecca Taylor MEP, the Bar Council, the Law Society of England and Wales and the participants at the Brussels workshop stated that the mutual trust, recognition and enforcement provisions contained in the Regulation were beneficial to the UK. For example, the Law Society of England and Wales stated that the Regulation 'provides a broadly reliable, understandable and predictable set of rules for determining jurisdiction over certain disputes across Member States'. A position which was also noted by Professors Carruthers and Crawford in their response. STEP, in its response, noted that whilst 'not perfect', the Regulation was an 'improvement on the previous position'.

3.13 A number of respondents from the legal sector said that the adoption of uniform jurisdictional rules promoted 'certainty'. The Law Society of England and Wales also said that Brussels I ensured 'English jurisdictional clauses that are used for example in many international finance, shipping and corporate contracts are respected by other Member States' and 'contributes to making England and Wales the jurisdiction of choice for so many international disputes'. Christopher Walker put the contrary view from within the legal sector, saying that the Regulation was unnecessary since 'most contracts included jurisdictional clauses'. However, other legal practitioners said that where no such clauses were in place, the Brussels I Regulation provided certainty and protection for businesses and consumers and encouraged cross-border trade.

3.14 Brussels I also makes provision for the recognition and enforcement of judgments between Member States. Allen & Overy stated that 'the enforcement of English judgments across Member States and EEA States has been made much easier under the Brussels I Regulation/Lugano Convention than was previously the case'. The Law Society of England and Wales also noted this in its response and said that enforcement was a concern for litigants in cross-border disputes. It added that the free movement of judgments made England and Wales an attractive jurisdiction for dispute resolution, a point also noted by Allen & Overy. The Bar Council considered that the Regulation facilitates the free movement of judgments. The Edinburgh workshop participants and the Law Society of England and Wales also stated that businesses would be more likely to pursue claims due to the enforcement provision in the Regulation than under the previous system.

3.15 A few of the participants at the Edinburgh workshop stated that although it was in the main now easier for judgments to be enforced, the different enforcement systems in Member States (in some Member States the Government is responsible for enforcing judgments, in others the enforcement is contracted out to the private sector) could lead to delays, as could the inability to trace the individual or business concerned. These participants stated that such issues are not just issues between Member States; domestically, it can still be difficult to trace those who are the subject of a judgment.

3.16 Eight of the respondents, who commented on the Regulation, raised concerns about the ECJ's rulings in relation to the current Regulation. Three of the ECJ decisions were cited repeatedly in respondents' evidence as being detrimental to the UK (Case C-116/03 Gasser, Case C-281/02 Owusu and Case C-185/07 West Tankers). Those respondents considered that these decisions had caused practical difficulties for businesses, the English courts and the UK's role as an international centre for dispute resolution respectively.[1] They therefore 'welcomed' the changes; practitioners and the legal representative bodies said that the new Regulation 'improves the Regulation in a number of key areas'.

3.17 The revised Brussels I Regulation will come into force in 2015. It seeks to improve the application of certain of its former provisions following a number of ECJ decisions like those cited above. The main changes to the Regulation are as follows:

- The abolition of the procedure by which a judgment from one Member State is recognised for enforcement in another, known as exequatur (in the UK, this process is known as registration for enforcement);

[1] The impact of these decisions was also highlighted in the House of Lords EU Committee (Sub-Committee on Law and Institutions), *21st Report of 2008/09, HL Paper 148: Green Paper on the Brussels 1 Regulation* (2009).

- The creation of a clear exception to the mechanism by which the correct court is chosen when cases on the same dispute are brought in more than one court to ensure that, where parties have designated a particular court or courts, priority will be given to the chosen court to decide on its jurisdiction, regardless of whether it is the first or second seized of the dispute; and
- The reinforcement of the exclusion of arbitration from the scope of the Regulation.

Gasser

Case C-116/03 – The ECJ decision in this case means that exclusive jurisdiction clauses (choice of court agreements) are subject to the Regulation's lis pendens rules. So, if proceedings are started first in a Member State other rather than the jurisdiction designated in the agreement, then the courts in the Member State specified in the clause are unable to progress proceedings because Brussels I gives priority to the proceedings before the court first seised. This difficulty was exacerbated by the delay in some Member States in resolving issues of jurisdiction.

The recast Brussels I will ensure that priority is given to the chosen court to decide on its jurisdiction, regardless of whether it is the first or second court seised of the dispute. Any other court will have to stay its proceedings until the chosen court has either confirmed its jurisdiction or declined jurisdiction.

Owusu

Case C-281/02 – The ECJ decided that the Brussels I regime of jurisdiction applies even where the claimant and the defendant are resident in the same Member State, other defendants are not resident in a Member State and there is no connecting factor with any other Member State. This decision restricts the circumstances in which English courts can use their discretion to decide on the appropriate forum for disputes that contained a link to a non-EU State, a discretion that is guided by a wide range of factors aimed at balancing the overall interests of justice.

The recently recast Brussels I provides courts in EU Member States with a measure of discretion to decline jurisdiction in favour of a non-EU country.

West Tankers

Case C-185/07 – Arbitration has traditionally been excluded from the scope of civil judicial cooperation. However, the scope of this exclusion has been called into question by this ECJ judgment arising from a case where a party had initiated court proceedings in another jurisdiction despite there being a valid arbitration agreement. As a result, it had become possible for abusive litigation to take place with the intention of destabilising an arbitration agreement by bringing court proceedings that could result in potential delays of years in the resolution of cases. The Commission suggested that exclusive jurisdiction could be created in the Member State where the arbitration would occur. Provisions governing arbitration would have risked creating EU external competence in an area where competence rested with the Member States and would have had a significant impact on those Member States (such as the UK) which have a strong arbitration tradition.

The recast Brussels I clarifies what the exclusion of arbitration from the Regulation means. This should remove the risk of the type of litigation described above, and of the creation of exclusive EU external competence in this area.

3.18 A key priority for the Government when the recast Brussels I Regulation was being considered was that the change would not impact on the UK's importance and attractiveness as a centre for dispute resolution. This is something that the Government has been keen to promote over the last few years. The legal sector contributed £20.9bn to the UK economy in 2011, £4bn of this derived from exports and the Government is keen to consolidate the UK's international standing in what is becoming an increasingly competitive market.[2] In May 2011, the Government launched its '*Plan for Growth*: *Promoting the UK's Legal Services Sector*'.[3] That report cited the enforcement of judgments (provided for in Brussels I and other instruments such as the European Enforcement Order) as being one of the factors which made English judgments attractive to international litigants. In March 2013, the Government launched a new action plan '*UK Legal Services on the International Stage: Underpinning growth and stability*' which aims to build on the earlier '*Plan for Growth*' to promote further the use of UK legal services and the role of effective legal services on the international stage.[4]

3.19 There was a difference of opinion between some academics and respondents from the legal sector about whether the EU legislation made the UK, and specifically London, a less attractive centre for dispute resolution. One legal practitioner said that the inability to obtain anti-suit injunctions to support jurisdiction or arbitration agreements was damaging to London as an international dispute resolution centre. Some academics considered that for commercial reasons it was essential that the EU measures did not impact on the attractiveness of the UK as the jurisdiction of choice for the resolution of international disputes. Some respondents from the legal sector, including international law firms Allen & Overy and Clifford Chance, said that Brussels I ensured that jurisdictional clauses in disputes were recognised and respected in other Member States and contributed to making the UK courts attractive to international litigants. They also considered that the revised Regulation addressed the concerns around jurisdiction or arbitration agreements.

Rome I and II

3.20 Ten of the written responses commented on choice of law provisions in contractual matters in the Rome I Regulation and in non-contractual matters in the Rome II Regulations. Whilst a number of respondents supported the introduction of the measures, there was some debate as to whether or not they were actually necessary.

3.21 Clifford Chance, Allen & Overy, the Law Society of England and Wales, the Bar Council and the Faculty of Advocates said that knowing which law would apply in a dispute, taken together with the provisions of Brussels I, provided certainty for individuals and businesses about how their disputes would be dealt with. Clifford Chance said that, in its opinion, Rome I worked well in practice and its provisions meant that there was a consistency of approach within the EU which 'enhances commercial certainty and reduces costs to business since it is necessary to take legal advice in fewer countries'. Allen & Overy said that Rome I provided 'reasonable certainty' over the law to be applied. It also said that Rome I provided that the grounds on which the chosen law could be overridden were narrow, which was 'valuable from a commercial perspective', and reduced costs

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2 ONS, *Pink Book* 2012, table 3.9, available at: www.ons.gov.uk/ons/rel/bop/united-kingdom-balance-of-payments/2012/index.html, accessed on 4 February 2014.

3 Ministry of Justice, *Plan for Growth: Promoting the UK Legal Services Sector* (2011). Available at: www.justice.gov.uk/downloads/publications/corporate-reports/MoJ/legal-services-action-plan.pdf, accessed on 4 February 2014.

4 Ministry of Justice, *UK Legal Services on the International Stage; Underpinning growth and stability* (2013). Available at: www.justice.gov.uk/downloads/publications/corporate-reports/MoJ/legal-services-action-plan-0313.pdf, accessed on 4 February 2014.

to parties. The reduced costs' point was also noted by the Law Society of England and Wales. The Bar Council stated that there was 'a persuasive' case that it was good for UK citizens and businesses by increasing certainty and reducing forum shopping (that is the practice adopted by some litigants of having their case heard in the court thought most likely to provide a favourable judgment) by applying a uniform set of rules for Member States to follow. There was a contrary view from within the legal sector that Rome I and Rome II were unnecessary and the common law rules worked perfectly well.

3.22 Of the academics who commented, one said that the Rome I and Rome II Regulations were 'more detailed and precise' and an 'improvement on the pre-existing UK law'. Others said 'it could be argued that the pre-existing rules were adequate' but did state that the benefit of choice of law rules were that they reduced forum shopping. At the workshops the predictability of the Regulations were also mentioned as being beneficial.

3.23 Allen & Overy stated that Rome II 'establishes that parties can agree to submit non-contractual obligations to the law of their choice which was a valuable commercial development'. The Bar Council also said that the choice of law was 'important' in non-contractual matters where there was a 'huge variation in substantive law'. The variation in substantive law was a point noted in the Law Society of England and Wales' evidence when they stated that before the Rome II Regulation, parties had to investigate the position regarding the governing law for non-contractual obligations in the different Member States – a process which was generally costly, confusing and time-consuming.

3.24 HM Land Registry stated that 'many UK citizens are buying land and property in other countries, particularly in other EU member states'. This they said can be problematic and the project in which they are involved, the *Cross Border Electronic Conveyancing Project* and, which they cited in their evidence, aims to establish a relatively simple process for buying property in another Member State.[5] Rome I and Rome II will enable parties involved in these transactions to choose the applicable law of the contract and any non-contractual matters. The intention is that this project will increase the confidence of buyers and should something go wrong it will be easier to find a remedy due to the choice of national law provisions and mutual recognition and enforcement of civil and commercial judgments.

3.25 The Bar Council and a number of academics stated that, at a practical level, there were some factors that meant the legal certainty that the Rome I and Rome II Regulations sought to provide might not be realised. The first factor was how the law would be interpreted by the court in question. Courts in different Member States could interpret the law differently – for example, the court in another Member State could interpret English law differently from an English court. The second factor was that some Member States have retained the freedom to apply international Conventions rather than Rome II in certain circumstances. The Bar Council proposed that these were issues which the Government may wish to keep in mind when the Regulations are reviewed.

Family Law

3.26 EU family measures cover divorce and parental responsibility matters and were cited in 17 written responses. They were also discussed at most workshops, including one workshop dedicated to family law issues. The evidence concentrated on the Brussels IIa Regulation (see Chapter 2, paragraphs 2.37-2.40) and the certainty it provides, its interaction with the Hague Conventions and the Maintenance Regulation and the practical difficulties with the EU Regulations.

[5] More information on the Cross Border Electronic Conveyancing Project is available at: www.elra.eu/elra-european-land-registry-association/crobeco/, accessed on 4 February 2014.

3.27 Four respondents said that the impact of Brussels IIa had been positive. Participants at the Brussels workshop also reported that the EU measures in family law were useful.

3.28 Many family practitioners stated that EU family law measures operated smoothly as a result of the co-operation of the judiciary and the courts in the different Member States. The Law Society of England and Wales, the Law Society of Scotland, the Bar Council and the academic Dr Lamont said that training was also important for lawyers and the judiciary and facilitated implementation of the family measures.

Brussels IIa

Divorce

3.29 A number of respondents from the legal sector, including the Bar Council, the Law Society of England and Wales and Resolution, stated that the advantages of Brussels IIa were that it provided uniform jurisdictional rules in divorce proceedings, and that judgments given in one Member State were recognised and enforced in another. The advantages and benefits identified by the legal sector were also stated by a number of academics, and the Liberal Democrats Home Affairs Committee.

3.30 The Law Society of England and Wales; Resolution; and participants at the London workshop on 3 June 2013 said that the jurisdictional certainty provided by the Regulation had reduced the number of disputes over where divorce proceedings were heard. They said that, as a result, the distress and expense normally associated with these types of dispute had been reduced. For example, Resolution stated: 'the clarity of the law has also made it easier for parties to reach agreement about certain issues, especially choice of jurisdiction. The resulting savings in legal costs, court administration costs and support service costs have been significant'.

3.31 Some respondents, including the legal sector and academics, said that, in addition to the benefits, there was also a difficulty with the current Regulation, namely the 'rush to issue proceedings' in divorce cases.

3.32 The Regulation sets out alternative grounds of jurisdiction, rather than a hierarchy of jurisdiction, in most instances, and provides that if two parties issue proceedings in two different Member States, the court first seized of the dispute will have jurisdiction. The effect is that parties often 'rush to issue proceedings' in the jurisdiction that they perceive as more favourable. Legal representative bodies stated this 'rush to issue proceedings' also created a disincentive to parties to consider mediation or other forms of dispute resolution – something that many Member States, including the UK, were actively trying to encourage. It was also, in the view of practitioners, at odds with best practice, which encouraged parties to notify others before proceedings were issued in order to reduce hostility. Both the Faculty of Advocates and the Law Society of Scotland stated that if the court were permitted to stay proceedings whilst mediation or other forms of dispute resolution were ongoing it would be an improvement on the current provisions. The Law Society of England and Wales noted that the Regulation was due for review which might be an opportunity to amend the Regulation to address the 'rush to issue proceedings' point.

Children

3.33 As with the divorce provisions, a number of respondents, including the Bar Council, the Law Society of England and Wales, David Hodson, Reunite, Rebecca Taylor MEP and the academic Dr Lamont stated that an advantage of the Brussels IIa provisions in relation to parental responsibility/children was that they set out the jurisdictional rules and provided for

the mutual recognition and enforcement of judgments. This provided certainty in matters concerning children; and the need for clear rules was raised in the Edinburgh workshop and the London workshop on 20 June 2013.

3.34 The Law Society of England and Wales commented that the Regulation was 'flexible' since it allowed for the transfer of jurisdiction by a court to the court of another Member State with which the child has a 'particular connection', if the other court would be better placed to hear the case. It also reported that practitioners 'supported the fact that return orders and access orders can also be quickly and easily enforced between Member States'. Philip Cordery, also from the legal sector, stated that the Regulation allowed for 'quicker determination' of matters involving children.

3.35 The Bar Council stated that where a child is abducted from one Member State to another Member State, Brussels IIa provided 'important further measures' beyond those in the 1980 Hague Child Abduction Convention. These included the Regulation's enforcement provisions and the provisions which encouraged the views of the child to be taken into account in abduction cases. This was a view shared by the Law Society of England and Wales, David Hodson, the Scottish Government, Reunite and Dr Lamont. Participants at the London workshop on 20 June also said that Brussels IIa was a more reliable instrument than bilateral agreements would be when it came to child abduction.

3.36 Respondents did also set out some concerns associated with the Regulation. Reunite and the workshop participants commented that there could be inconsistent application of the Regulation between Member States. The Law Society of England and Wales reported that some practitioners considered that 'the requirement for exequatur to enable placement of a child in institutional care or with a foster family in another Member State raises difficulties, including delays which can be detrimental to the children involved'. It also stated that the lack of a definition of 'habitually resident' could cause cases to become more complex.

Maintenance Regulation

3.37 Seven of the written responses, and participants at the Edinburgh and London workshop on 20 June 2013 commented on the EU Maintenance Regulation. Most comments came from the legal sector, including the Bar Council, the Faculty of Advocates, the Law Society of England and Wales, David Hodson and Resolution who stated that the benefits or advantages to the Regulation were similar to Brussels IIa, namely the provision of jurisdictional rules and the mutual recognition and enforcement of judgments. A point also noted by the academic Dr Lamont.

3.38 Resolution, the Bar Council and the Law Society of England and Wales said that the Regulation was still new and not widely understood. However, some concerns with the Regulation were raised in the evidence we received. Firstly, the Faculty of Advocates, Resolution and the Law Society of Scotland said that the different jurisdiction and enforcement regimes operated by Brussels IIa and the Maintenance Regulation were problematic. Cases could arise where divorce and financial provision issues might be considered by the court of one Member State while maintenance might be considered in the courts of another. In some cases, the hearings might be split between the different UK jurisdictions. For example, it could occur that Scotland could have jurisdiction for the divorce in a particular case but not have jurisdiction to deal with maintenance. They said that an extension of provisions for transfer between jurisdictions, modelled on Brussels IIa provisions in respect of children (see paragraph 3.34 above), would be an improvement to the Maintenance Regulation.

3.39 Secondly, the Bar Council, the Law Society of England and Wales, David Hodson and Resolution stated that the effect of the jurisdiction provisions appeared to be that courts in England and Wales no longer have powers to make needs-based orders on sole domicile jurisdiction alone, even where the cross-border dispute involves a non-EU country. That is, domestic law has historically allowed an individual to make a maintenance claim in a court in England and Wales on the basis of need, if that person's domicile was England and Wales even if her or his habitual residence was in another country. That recourse may no longer be available under the Maintenance Regulation if the claimant's sole basis of jurisdiction in England and Wales courts is her or his domicile.

3.40 Thirdly, the Law Society of England and Wales noted that there were similar 'rush to issue proceedings' problems with the Maintenance Regulation as there were with Brussels IIa and that the choice of jurisdiction could be a disadvantage for the economically weaker party.

Other EU Measures

3.41 Seven of the written responses commented in less detail on other EU measures which the UK has opted in to. Some of these measures were also discussed at stakeholder meetings and workshops. They included the Service and Taking of Evidence Regulations, the European Small Claims Procedure, the European Order for Payment, the European Enforcement Order and the Mediation Directive.

3.42 The Law Society of England and Wales stated that the Service Regulation made 'the service of legal documents easier and assists parties litigating in the UK courts'. Resolution also reported that the Service Regulation was beneficial but the process was sometimes slow, a point also noted by Allen & Overy. Participants at the London workshop on 3 June 2013 commented that they did not share the Commission's view that the Service Regulation was wholly successful in achieving its objectives.

3.43 The Law Society of England and Wales also reported that 'practitioners commended the Taking of Evidence Regulation for simplifying matters'. The Bar Council stated that it 'endorses the adoption of procedural Regulations like the Service and Taking of Evidence Regulations'. Professors Carruthers and Crawford said that where used, the Regulations were of assistance to UK citizens and businesses.

3.44 The Law Society of England and Wales stated that it 'supports the European Small Claims Procedure for use in cross-border cases' and that it was a helpful tool. The Liberal Democrats Home Affairs Committee said that the Procedure allowed 'creditors to seek judgments in an e-client manner'. Rebecca Taylor MEP stated that the Procedure 'improved access to justice by simplifying cross-border small claims litigation in civil and commercial matters and reducing costs'. In stakeholder meetings, participants said it was difficult to get data to ascertain whether the Procedure was useful and improvements needed to be made to the measure. At the Brussels Workshop, participants said that the limit of €2,000 discouraged its use and the limit should be revised.

3.45 The Law Society of England and Wales said it 'recognises the value of' the European Enforcement Order and the European Order for Payment. The Liberal Democrats Home Affairs Committee said that they 'help keep British businesses protected while they expand'. Professors Carruthers and Crawford stated that demarcation between the two Orders was 'difficult'. The Law Society of England & Wales also stated that the Mediation Directive had received 'mixed reviews' and many practitioners were not yet aware of it.

3.46 At the Brussels workshop, someone proposed that an awareness raising exercise should be undertaken in the UK to promote these measures. Both the Bar Council and Law Society of England and Wales made similar comments around the raising of awareness of the measures in their evidence. For example, the Bar Council said that it 'shares the view of many that resources need to be committed to raising awareness of the existence of measures among the public and legal professions and on training to maximise the potential' of measures like the European Small Claims Procedure, European Order for Payment and European Enforcement Order and for more recently adopted instruments.

3.47 There are no comprehensive statistics around awareness, usage and experience in respect of all of the measures mentioned above. By its nature it is not easy to obtain comprehensive statistics on the work in this area because we will not know how many UK citizens and businesses have sought redress using the measures in the courts of different Member States. However, there is some data available which provides an indication of the awareness, use and experience of some of those measures discussed above. This is set out below.

Awareness of the European Small Claims Procedure and European Order for Payment

A survey of 26,691 EU citizens on experiences with cross border civil and commercial disputes found:

European Small Claims Procedure: Only 1% had heard of the procedure and used it and only 7% had heard of it but not used it. Among UK citizens, only 5% had heard of it.

European Payment Order: No one surveyed had heard of and used the orders. 6% had heard of the order but not used one. Amongst UK citizens only 3% had heard of the order.[6]

Experience of European Small Claims Procedure

A 2012 survey of EU citizens' experiences with cross-border small claim disputes found that 67% of those who had used the procedure were satisfied with the process and found it relatively straightforward to use.[7]

Actual use of European Small Claims Procedure, European Order for Payment and European Enforcement Order

The actual use of these EU instruments is relatively low given the extent of cross-border trade. For example, in England and Wales between 2009 and 2012, there were around 6,000 court applications either for a European Enforcement Order or for enforcement of such an order; around 1,000 applications either to issue or to enforce a European Order for Payment; and around 1,200 applications to issue or enforce a European Small Claims Procedure.[8]

3.48 Finally, although not a policy area that falls to the MOJ, a number of the legal sector respondents said that the Insolvency Regulation had been beneficial by improving the efficiency and effectiveness of cross-border insolvency matters.

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6 European Commission, *Special Eurobarometer 351: EU Civil Justice* (2010), available at: http://ec.europa.eu/public_opinion/archives/ebs/ebs_351_sum_en.pdf, accessed on 4 February 2014.

7 European Commission, *Special Eurobarometer 395: European Small Claims Procedure* (2013), available at: http://ec.europa.eu/public_opinion/archives/ebs/ebs_395_en.pdf, accessed on 4 February 2014.

8 HMCTS. Data provided by HM Courts & Tribunals Service (HMCTS), 2012.

ECJ

3.49 8 of the written responses, and participants at all four workshops commented on the ECJ, focusing mainly on the Court's judgments and the implications for the UK, particularly in civil and commercial matters.

3.50 The Law Society of England and Wales and academics Dr Lamont and Dr Mills stated that there was a need for a court to be able to provide interpretation of the meaning of EU instruments, including key terms within them, and to take action against those Member States which were non-compliant.

3.51 The evidence submitted also commented on the operation and rulings of the ECJ. Professor Hartley, Allen & Overy, the Law Society of England and Wales and participants at the London workshops said that the ECJ had been slow to resolve problems on commercial issues and that this had been problematic for the parties involved.

3.52 In relation to the decisions made by the ECJ, the Faculty of Advocates, Allen & Overy and the Law Society of England and Wales said that some of the decisions had been 'uncommercial', 'surprising' and 'caused practical difficulties' in relation to the Brussels I Regulation. Professors Carruthers and Crawford's evidence said that the ECJ favoured the EU institutions in its rulings, which had resulted in some 'regrettable consequences' in respect of Brussels I. The concerns with key ECJ decisions were discussed in more detail earlier in this Chapter.

3.53 Those respondents and participants set out in their evidence ways in which the ECJ might improve its speed and quality of decision making. These included more specialist Advocates General; more judges from private law, rather than public law, backgrounds; and/or by setting up a specialist chamber to deal with private international law matters. The Law Society of England and Wales and participants at the Brussels workshop noted in their evidence that there had been an 'improvement' in recent years and more resources had been allocated although the ECJ's caseload was still very significant for the number of judges and Advocates General to deal with.[9]

3.54 The Law Society of England and Wales, the Bar Council, Dr Mills and participants at the London workshops stated that another way in which the ECJs decision-making could be improved was for the UK to intervene more frequently in cases before the ECJ. Of those respondents, the Law Society of England and Wales, including those practitioners who responded to its own consultation, said that the UK should intervene to ensure the 'commercial context was understood'. The other respondents said that intervening would allow the 'common law perspective to be represented'. At the Edinburgh and Brussels workshops, participants stated that some of the criticism over the rulings had arisen because the judgments have been misunderstood or people had failed to understand the context in which they had been made.

Civil Judicial Cooperation and the Single Market

3.55 Eighteen of the written responses and participants at all four workshops commented on the role of civil judicial cooperation in the Single Market. Eleven respondents said that civil judicial cooperation was necessary for the smooth functioning of the Single Market. Christopher Walker, from within the legal sector, put the opposite view. The Law Society of England and Wales said that civil judicial cooperation would become of increasing

[9] The workload of the ECJ was considered in the House of Lords EU committee (Sub-Committee on Justice and Institutions), 14th Report of 2010/11, *HL Paper 128*: The workload of the Court of Justice of the European Union, Green Paper on the Brussels I Regulation, 2011. It was also considered in 16th Report of 2012-2013, HL163: The workload of the Court of Justice of the European Union: Follow up report (2013).

importance assuming the population increases and UK and other Member States' citizens and businesses exercise their free movement rights. Rebecca Taylor MEP stated that the civil judicial cooperation measures had more scope to affect UK citizens than criminal measures as they exercised their rights within the Single Market.

3.56 Our Call for Evidence showed that UK goods and services' exports to the EU stood at around £234bn (around 47% of the UK's total exports) with Germany, the Netherlands and France being the largest markets for UK exports.[10] The UK has recorded a trade surplus with the EU since 2004, growing to record a net surplus of £15.9bn in 2011.

3.57 According to the Free Movement of Goods' Call for Evidence, around 132,000 UK companies imported goods from the EU and around 112,000 companies exported goods to EU destinations.[11]

3.58 In relation to consumer activity, our Call for Evidence also reported on a Eurobarometer Survey on the European Small Claims Procedure which showed that around one in ten people living in the EU ordered or bought goods or services from sellers based in other EU countries; around one in five people made recent purchases while in another EU Member State on a holiday or business trip; and three in ten citizens purchased offline and online goods from businesses based in other Member States.

3.59 The Faculty of Advocates' response stated that 'as a general proposition, EU civil judicial cooperation, in the context of the Single Market, may be regarded as a practical necessity. In order for the principle underpinning the Single Market to be given practical expression effective mechanisms for the resolution of cross-border disputes in which businesses and consumers can have confidence, are essential'. The need for civil judicial cooperation measures to facilitate the smooth or proper functioning of the Single Market was mentioned in a number of the other responses, including those from the Law Society of Scotland, Professors Carruthers and Crawford, David Hodson, the Liberal Democrats Home Affairs Committee, and the Scottish Government. The Law Society of England and Wales also made reference to the European Small Claims Procedure as a measure which simplified access to redress for consumers shopping across borders.

3.60 A number of different respondents stated that the civil judicial cooperation measures provided certainty and predictability over how disputes would be dealt with. They included the Law Society of Scotland, the Law Society of England and Wales, Philip Cordery, STEP, Clifford Chance, the Bar Council, the Faculty of Advocates, academic Dr Mills, Catherine Bearder MEP, the Liberal Democrats Home Affairs Committee, the Scottish Government and individuals Zafar Gondal and James Watson. That certainty and predictability of outcome, they said, encouraged consumers to shop and businesses to trade across borders. For example, Clifford Chance stated that without the measures 'trade would be more costly since more enterprises would seek to protect their contracts' before having the confidence to trade. Zafar Gondal stated that the civil judicial cooperation measures gave 'UK businesses and individuals the confidence and trust to expand their businesses'. Christopher Walker, also from the legal sector, put forward an opposite view that civil judicial cooperation 'is not and never has been necessary for the functioning of the Single Market' and that the advantages to business were 'very little to none'.

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[10] Ministry of Justice, *Call for Evidence: Civil Judicial Cooperation* (2013).

[11] HM Revenue and Customs, Department for Business, Innovation and Skills: *Call for Evidence: Review of the Single Market: Free Movement of Goods* (2013).

3.61 In family law, as people exercise their free movement rights, there is more scope for family law disputes with a cross-border element to arise in the future. The Free Movement of Persons' Call for Evidence estimated that, in 2010, there were 2.3m citizens from other EU Member States living in the UK and 1.4m UK nationals resident in other Member States (out of around 4.7m UK nationals living in total outside the UK).[12]

3.62 There is no exact data on the number of relationships that exist or have existed within the EU since, unless formalised by marriage or registered partnership, they are unlikely to be recorded. There are some indicative statistics from the Commission, which stated in its EU Citizenship Report 2010 that around 16m marriages (13% of all marriages within the EU) have a cross-border dimension.[13] That same report said that in 2007, of the 1m or so divorces that took place in the EU, 140,000 (13%) had a cross-border dimension.

3.63 The Law Society of England and Wales, the Bar Council, the Law Society of Scotland, David Hodson, Resolution, Reunite and the Faculty of Advocates said that civil judicial cooperation measures provided families with the confidence to move within the EU in the knowledge that, should disputes arise about divorce, maintenance and parental responsibility, there were mechanisms in place to allow them to be resolved and orders enforced efficiently and effectively.

3.64 A number of respondents, across all sectors, noted that before the EU measures were in place, cross-border disputes were dealt with through bilateral agreements or under the relevant national law, the latter of which could be complex and costly. Different sets of procedural law were not seen as conducive to the smooth functioning of the Single Market and, in the opinion of those respondents, could act as barriers to the free movement of persons, goods and services. The TaxPayers' Alliance, however, stated that some of the measures '[…] relating to jurisdiction, may well have appropriate objectives, even if it is a mistake to create a central authority around them' and that the UK could reach a number of these agreements bilaterally which would allow the UK greater leeway in the future. It could then consider, on a case by case basis, which agreements would benefit UK citizens and businesses.

Strategic Issues – the Opt-In

3.65 Of the written responses received, 25 commented on the opt-in in civil justice matters and its use. The opt-in was also discussed at all the events and meetings held during the Call for Evidence period. 17 of the responses contained evidence which stated that the opt-in is a key safeguard for the UK in civil justice matters and should be retained. Only two respondents disagreed with the way in which the opt-in has been used. There were some differences of opinion among respondents about when the UK should opt in to EU proposals. A number of respondents raised concerns that the opt-in might adversely affect the UK's influence in future negotiations and the wider EU.

3.66 The Government has undertaken that all JHA proposals will be assessed on a case-by-case basis. It has stated that it will put the national interest and the benefits to UK citizens and businesses at the heart of its decision-making. Each proposal is assessed against criteria identified in the Coalition Agreement, including the impact on the integrity of the UK's legal systems.

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[12] Home Office and Department for Work and Pensions, *Call for Evidence. Single Market: Free Movement of Persons* (2013).

[13] European Commission, *EU Citizenship Report 2010: Dismantling the Obstacles to EU citizens' Rights p5,* (2010). http://ec.europa.eu/justice/policies/citizenship/docs/com_2010_603_en.pdf.

3.67 The Scottish Government reflected the views of a number of participants in its response where it stated that it 'considers it important to maintain a safeguard in this area, and therefore supports the principle of the opt-in which the United Kingdom currently enjoys'. Responses from the legal sector, including Allen & Overy, Clifford Chance, the Law Society of Scotland, the Law Society of England and Wales, the Bar Council, Sir Mathew Thorpe and David Hodson, contained similar statements about the opt-in and the protection this provided for the UK. Academics, including Professors Carruthers and Crawford, Professor Hartley, Dr Mills, Dr Lamont, and Dr Heidemann shared those views, as did other respondents, including Zafar Gondal and Catherine Bearder MEP.

3.68 The reason for the strength of feeling is that, as the majority of Member States operate civil law systems, many of the EU measures are drafted from a civil law perspective and as such may not be compatible with the common law system operating in England and Wales or, as the Scottish Government noted, the mixed common and civil Scots system. Those respondents said that one of the advantages of the opt-in is that it allows the UK, in the words of the Faculty of Advocates, 'to evaluate each measure on its merits' or to stand aside from any instrument the proposed content of which does not appear to benefit UK citizens or which is not compatible with the UK's legal systems. Chapter 2 sets out some of the EU proposals to which the UK has not opted in and the reasons – for example, the Succession Regulation (see paragraph 2.51), where the proposal contained provisions that were not compatible with the UK's legal systems.

3.69 The Bar Council said in its evidence that an advantage of the UK opt-in was that 'it can choose whether or not to take part in an EU measure in this field. It is not reliant, as other Member States are (Ireland and Denmark excepted – where Ireland has its own opt-in and Denmark's Protocol does not allow it to participate), on achieving a blocking minority in Council in order to block a measure it does not want to see become law'. The Bar Council, the Law Society of England and Wales, academics Dr Lamont, Professors Carruthers and Crawford, and Reunite also stated that the opt-in provided a degree of 'flexibility' since the UK has two opportunities to opt in to a measure, either within three months of the Commission's proposal or once the proposal has been adopted. If the UK does not initially opt in, it can still participate in the negotiations, which it often does, meaning that it can influence those negotiations and secure amendments to the resulting measures.

3.70 Respondents commented on the way in which the UK had exercised the opt-in. Terms used in the evidence included 'skilfully and successfully' 'effectively' and 'to gain the best possible outcome for the UK'. Participants at our workshops in London also stated that the opt-in had been used wisely.

3.71 The Law Society of England and Wales, for example, supported the UK's decision to opt in to the recast Brussels I Regulation, when proposed by the Commission. By opting in to negotiations at the start, the improvements made to the proposed Regulation were the result, it said, of the influence the UK was able to exert by remaining engaged (or being seen to be fully engaged) in the negotiations. The Law Society of England and Wales also supported the UK's decision to wait and actively negotiate improvements to the Rome I Regulation before opting in to the measure, a position shared by Allen & Overy, Clifford Chance and Professor Hartley.

3.72 Nine written responses stated in their evidence that there may be potential risks for the UK in how it exercises the opt-in power in this area in the future. Participants at the Brussels and Edinburgh workshops also stated similar risks.

3.73 A number of respondents said there may be a risk of the UK losing its influence in the negotiation of future civil judicial cooperation measures if it decides not to opt in to a measure when first proposed or at the end of negotiations. The Bar Council and the Faculty of Advocates said that Member States may be less willing to accommodate common law measures in future Regulations.

3.74 The Law Society of England and Wales, the Bar Council, David Hodson, Dr Mills, Rebecca Taylor MEP and participants at the Brussels workshop stated that there was a perception among Member States that the UK's default position is 'not to opt in'; and resentment towards the UK, as a result of the advantages which other Member States perceive the UK to have because of the opt-in, may mean they are less willing to accommodate the UK's proposals in future negotiations. The Law Society of England and Wales stated the opt-in should be used 'as truly necessary and as sparingly as possible'.

3.75 The Law Society of Scotland, the Faculty of Advocates and participants at the Edinburgh workshop said that a partial opt-in could be confusing for practitioners, since it might not be obvious which EU measures the UK had opted in to. Finally, both the Bar Council and the Law Society of England and Wales stated that an unintended consequence of the UK's decision not to opt in has been the adverse impact on UK MEPs, making it more difficult for them to participate in influential dossiers considering civil and family justice measures in the European Parliament, or that they may be deterred from seeking to participate in the future.

3.76 Allen & Overy, the Bar Council, the Law Society of England and Wales and Professor Hartley said there was a possibility that, in future, the EU may seek to circumvent the opt-in by introducing measures under Article 114 covering aspects of internal market law and civil judicial cooperation, rather than under Article 81. An example cited was the Common European Sales Law proposal. This would create a uniform law on the sale of goods which would apply to cross-border sales in certain circumstances if both parties agreed. If the parties agreed that the Common European Sales Law would apply, choice of law would no longer be relevant.

3.77 The UK's decisions not to opt in to the Succession Regulation and the Justice Programme 2014-2020 were commented on by a few respondents. Whilst a number of respondents agreed with the UK's reasons and decision not to opt in to the Succession Regulation, the Law Society of England and Wales and Rebecca Taylor MEP said the decision could adversely affect UK citizens who retire to live in other Member States, and that the UK could have less influence over further EU developments relating to succession and inheritance.

3.78 The Bar Council said that it disagreed with the UK's decision not to opt in to the Justice Programme. Its view was that, as a result, there will be fewer opportunities for UK legal professionals, including the judiciary, to contribute to judicial training and the exchange of best practice, to the detriment of the knowledge base of judges and mutual trust between judges, courts and the legal systems of the Member States. As stated earlier (paragraph 3.28), respondents said that the development of good relationships between the judiciary of Member States promoted the smooth implementation of EU measures.

3.79 The TaxPayers' Alliance said that the UK had opted in to too many EU measures 'we conclude that the UK approach to its JHA opt outs is one of general and generic policy surrender, sanctioned at the highest levels, rather than informed case by case cooperation'. Christopher Walker saw no reason for an opt-in which 'will secure Brussels' role in this policy area under Lisbon […] and will be treated as the signal for further activity in this area from Brussels' or the EU measures more generally 'EU civil judicial cooperation offers no discernable advantage. It has complicated English commercial law and has produced no practical benefits'

International Issues

3.80 19 of the written responses commented on international measures. The main topics were the impact of the EU's exclusive external competence and the impact of action being taken at an international rather than EU level in civil and family matters.

EU External Competence

3.81 Ten respondents said that the EU 'acting as a single bloc had more bargaining power', could secure 'better deals than the UK and other Member States acting on their own' and 'claim equal consideration with the USA, China and Russia as a major international force'. Professors Carruthers and Crawford suggested that the UK only benefited if it agreed with the EU's negotiating position; another academic Dr Heidemann said that whilst the UK acting alone might not 'achieve the best solution it may be preferable in terms of quality of outcome'. From the legal sector, the Law Society of England and Wales and STEP said the UK should actively seek 'to influence the EU's negotiating position'. At the Edinburgh and Brussels workshops, some participants said that the EU's ability to negotiate on the international stage was most useful in family law and the measures could reach more people.

3.82 Allen & Overy and the Law Society of England and Wales stated that they hoped that EU Regulations, like the recast Brussels I, would be used as a model regulation by the Hague Conference and that the EU would encourage other non-EU countries to follow suit. Dr Lamont, the Law Society of Scotland and the Faculty of Advocates said that it was helpful that the EU had competence in respect of the 1996 Hague Child Protection Convention.

3.83 However, respondents also raised concerns about the wider impact of the EU's exclusive external competence on the UK and its international standing. Christopher Walker stated that there was no advantage for the UK and it would be 'bound by international arrangements negotiated by the EU and which the UK would not participate in left to its own devices'. Professors Carruthers and Crawford stated negotiation and voting by the EU en bloc was a 'challenge and threat' and that the UK was 'seen in many areas as a part of the EU and had lost its independent identity' which may 'prejudice certain non-EU alliances the UK enjoyed and impact more widely on its international standing in dispute resolution'. The Law Society of England and Wales said that 'where the EU asserts exclusive competence, the UK loses influence in negotiation at the Hague Conference with non-EU states'. Zafar Gondal also said that the UK may lose its individual strength in international affairs. Resolution and David Hodson stated that EU competence can restrict or stop the UK entering into bilateral arrangements with non-EU countries with which it has close ties – for example, Australia.

3.84 A number of respondents, mainly from the legal sector, including Sir Mathew Thorpe, the Law Society of England and Wales, Resolution, David Hodson, the Bar Council, and academics Professors Carruthers and Crawford, made observations in their evidence about the Commission's assertion that the EU had exclusive external competence to decide on whether to accept the accessions of new States to the 1980 Hague Convention. The UK and other Member States dispute this assertion and the matter is currently before the ECJ. The legal sector said that the delay caused by this dispute is frustrating for legal practitioners because it is preventing acceding non-EU States from being able to operate the Convention with any of the EU countries and preventing the UK and other Member States individually accepting the accessions of non-EU countries with which they wish to enter into force. Resolution stated that the UK should be 'free to act unilaterally' in respect of the 1980 Hague Convention. The Bar Council said the position was 'highly undesirable'.

3.85 Participants at the Brussels workshop also said that, even in areas where the EU's exclusive external competence is not disputed, the EU has caused delay in the ability of applicants and practitioners to use the Hague Conventions, such as the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. The UK and all other Member States are waiting for the EU to ratify the instrument before they can apply it.

EU v International

3.86 The evidence suggested that there were mixed views as to the most appropriate level for UK international action in civil judicial cooperation. Some respondents like Reunite said that they were 'more supportive of action at international level such as the Hague Conference, because this organisation encompasses many more states than just EU Member States'. David Hodson also stated that more should be done at an international level due to the connection the UK has with other common law jurisdictions and Commonwealth countries.

3.87 The Law Society of England and Wales and the Bar Council stated that it might be difficult to achieve the same level of cooperation, which existed at EU-level, at a wider international level. They also pointed out that the Hague Conference has no enforcement mechanisms to ensure that countries properly undertake their responsibilities with regard to the Hague Conventions, unlike the EU. At the London workshops some family practitioners also argued that bilateral agreements with non-Hague countries were less effective in children's cases due to the lack of similar jurisdiction and enforcement measures to those contained in Brussels IIa.

3.88 Dr Mills, Philip Cordery, the Law Society of England and Wales and the Bar Council stated that the Hague Conference was not necessarily an alternative to the EU measures but should be seen as complementary. The Bar Council said that the more legislation there is, the more scope there is for practical difficulties to occur when implementing the measures and for confusion to arise in identifying the governing measure and it would be desirable to iron out the complexities which the multi-tier system causes.

Conclusions Based on the Evidence

3.89 In their evidence, 18 respondents and participants at workshops stated that the EU measures were an improvement on the previous system of intergovernmental agreements and/or provided UK citizens and businesses with a greater degree of certainty over how cross-border disputes will be resolved. Many of these respondents said that the certainty and protection encouraged cross-border shopping and trade. The available statistics were less conclusive about the impact of the measures. The opt-in in civil justice matters was seen as a key safeguard for the UK since it allowed the UK to assess the impact and merit of each EU measure before deciding whether to participate or not or negotiate for changes beneficial to the UK. The respondents also observed there were some practical problems with the existing measures and offered possible solutions urging the UK to negotiate improvements as the opportunity arose. The respondents said that the Hague Conference was not an alternative to the EU measures but that there was benefit in a continuing relationship between the EU, Member States and international organisations. Respondents were supportive of the UK's resistance to any extension of competence on the part of the EU which it considers is not justified. Only two respondents were against the EU measures or did not consider the measures were needed.

Chapter 4:
Future Options and Challenges

4.1 The statistics in Chapter 3 show that UK and EU citizens are exercising their rights to freedom of movement by living and working in other Member States and buying goods and services across borders. They also show that the EU is an important trading partner for the UK.

4.2 A range of respondents, as indicated in Chapter 3, stated that the current EU civil judicial cooperation measures provided a measure of certainty and predictability for the adjudication of cross-border disputes, helped facilitate the Single Market and have proven useful to UK businesses, individuals and families. Some noted areas where improvement was needed, and the risk of encroachment into domestic affairs. Looking to the future, respondents identified areas where they said the UK might benefit from the EU either doing less or more in this field, and potential challenges that lie ahead for the UK.

Where Would the UK Gain from the EU Doing Less?

4.3 The legal sector, including Allen & Overy and David Hodson, and participants at the London workshop on 20 June said they would prefer the EU to focus on assessing, improving, consolidating and simplifying the current measures rather than on introducing new measures.

4.4 EU instruments are generally reviewed after they have been operational for a certain period of time (usually five to seven years). These reviews provide an opportunity for Member States to negotiate amendments to the instruments. For example, Clifford Chance said the reviews meant that 'where there are problems in the EU's legislation, those problems can therefore be corrected'. In such circumstances, the Government will usually seek stakeholders' views. These views then inform the UK's negotiating position. The Law Society of England and Wales has commended the Government for securing changes during the negotiations on the recast Brussels I Regulation. It stated that the UK should maintain its proactive approach and ensure common law principles are taken into account in the development of legislation. The Law Society of England and Wales and family practitioners said that the upcoming review of Brussels IIa might be an opportunity for the issues raised in respect of both divorce and children in Chapter 3 to be addressed. The Government will ensure that the comments received inform its work on the review of this Regulation

4.5 As indicated in Chapters 2 and 3, respondents expressed concern over the EU seeking to bring forward proposals under Article 114 of the TFEU. As a result of those concerns a number of respondents, including the Law Society of England and Wales, the Bar Council, participants at the Brussels workshop, and Professor Hartley, stated they wanted the EU to bring forward fewer proposals under Article 114 of the TFEU.

4.6 At the Brussels workshop, participants also debated whether or not the EU is seeking to move towards harmonisation of substantive family law. The Bar Council said that caution was needed since substantive family law was seen as evolving according to the social and cultural context and norms of each country.

4.7 Respondents, including the Law Society of Scotland, David Hodson and other family practitioners who attended our workshops, said that there was increasing pressure from the EU to impose a more civil law centred regime on the UK, undermining common law principles, and that this was an area where the UK would benefit by the EU doing less. Some family law practitioners stated that the UK should continue to resist what they saw as moves from the EU to make the UK apply foreign law in UK courts because they believed that there would be additional costs and burdens associated with securing the appropriate legal expertise.

Where Would the UK Gain from the EU Doing More?

4.8 As discussed in Chapter 3 a number of respondents from the legal sector and participants at the Brussels workshops said that the UK and EU should be doing more to raise awareness of some of the instruments that already exist and setting out the benefits for potential users at an individual and business level.

4.9 Some respondents stated they wanted more information or engagement from the Commission about new proposals. Some academic respondents and some participants at our workshops stated that the Commission needs to explain why it is introducing a new measure; assess and set out clearly the additional costs and burdens for the Member States; and properly assess the impact on and the relationship of the new proposal to existing EU measures. They said that more reliable and comprehensive EU-level data is needed for such an assessment. Allen & Overy said that the Commission's approach to the introduction of new proposals was cumbersome, not particularly effective and the Commission should engage more with those from a commercial background.

4.10 At the Edinburgh workshop, participants said that there was a lack of transparency around the negotiation of EU proposals, and that the UK Parliament is more transparent about its legislative processes and the debates that inform the different pieces of legislation. They stated that it is not possible to follow proposals from the EU in the same way and that they would find it helpful for these processes to be easier to identify and more transparent. Currently, negotiations between Member States are confidential and any move for greater transparency would be a matter for the EU to consider.

4.11 A number of respondents, including the Law Society of England and Wales, the Law Society of Scotland, the Bar Council, and Dr Lamont, also said that it was important for lawyers and the judiciary to have access to training and the EU should encourage the development of cooperation between Member States to facilitate implementation of EU measures. Resolution also said that the EU could sponsor more educational and liaison programmes particularly in the field of family law.

Challenges

4.12 A number of future challenges for the UK have been identified in the evidence received. These include the future enlargement of the EU; future ECJ rulings on EU instruments; the use of the opt-in and the EU's assertion of exclusive external competence. These are discussed in more detail below.

EU Enlargement

4.13 Respondents from the legal sector, including the Bar Council, Allen & Overy, David Hodson, Philip Cordery, the Law Society of England and Wales and the Law Society of Scotland, stated that there are benefits from both a civil and family law perspective to EU enlargement. This is a position shared by James Watson, Zafar Gondal, Catherine Bearder MEP, Reunite and participants at the Edinburgh and London workshops. On the civil side, the main benefit stated by respondents was that more countries would apply the EU measures in relation to the mutual recognition and enforcement of judgments. Others saw the business potential of trading with more countries, underpinned by the protections and certainty provided by the EU measures. On the family side, the practitioners and organisations with an interest in family matters also saw the benefits for children and families of more countries being subject to the EU's jurisdictional and enforcement measures.

4.14 Some respondents, including the Law Society of England and Wales and Allen & Overy, said that EU enlargement could lead to additional workload pressures for the ECJ and the UK courts. Professors Carruthers and Crawford, Resolution and some participants at our Edinburgh and London workshops said that, in family matters, unanimity of decision-making could be more difficult to achieve. Professor Carruthers and Crawford were uncertain about the impact of countries joining whose legal systems are founded on religious principles, although practitioners said that they were less concerned on the latter point.

ECJ Rulings

4.15 Chapter 3 (paragraph 3.52) discussed some of the concerns that the legal and academic sectors had about the decisions of the ECJ in civil law matters. Whilst they agreed that their main concerns have been addressed in the recast Brussels I Regulation, some of those respondents said that the ECJ's decisions, in respect of that Regulation, favoured the EU regime and that future rulings could cause similar practical difficulties for the UK. They said that some changes were needed to improve the ECJ's decision-making, including a new chamber to deal with private international law matters. They also said that the UK should intervene more in cases brought before the ECJ to ensure the common law perspective is heard and to minimise any adverse impact of the rulings on the UK. The UK has intervened in cases and will continue to do so, if it is in the national interest.

Opt-in

4.16 A further challenge for the UK in the future is the continuing use of the opt-in and how this could adversely affect the UK. The risks of using the opt-in are set out in more detail in Chapter 3 (paragraphs 3.72-3.76). Respondents noted that the opt-in was essential to protect UK interests, but its use was a matter of debate. Some respondents, such as the Bar Council and the Law Society of England and Wales also stated that wider decisions such as the 2014 criminal law 'opt-out' decision could further reduce the UK's influence in civil matters and, if the Commission sought to bring forward new proposals under Article 114 rather than Article 81 to circumvent the opt-in, that could impact adversely on the UK's legal systems. The Government notes the risks identified by respondents and the

concerns around the legislative basis for any legislative proposals. It will continue to ensure that the impact of EU proposals is properly assessed and that it is in the interests of UK citizens and businesses to opt in to those proposals. It will also continue to ensure that the Commission issues proposals under the correct Treaty base and argue strongly for the use of Article 81 where it believes it is appropriate.

Competence

4.17 As discussed in Chapters 2 and 3, there have been occasions when the EU has sought either to propose that some instruments should apply to domestic as well as cross-border disputes or asserted it had exclusive external competence (as is the case with the 1980 Hague Child Abduction Convention). Respondents, such as the Bar Council, have said that whilst they see the logic of the EU measures, they are concerned that the EU will seek to extend its powers to domestic legislation or on the international stage. The Government has in the past taken action to resist any move by the EU to assert competence where it was not justified, and will continue to do so.

Further Suggestions

4.18 There were some areas which respondents said the Government might wish to take note of for future engagement with the EU. First, Clifford Chance said that the EU rules were drafted to apply only to cross-border situations, the result being that there may need to be two sets of rules – one set purely for domestic cases and one set for cross-border cases. For insolvency cases, there may need to be a third layer of rules to deal with international cases involving non-EU states. As an international firm, they therefore suggested that the UK may wish to consider whether, in some circumstances, it might be prudent to enact legislation that mirrors the EU's external legislation.

4.19 The Faculty of Advocates noted that the UK is in a unique position, given the different jurisdictions that operate within it, and that one of the challenges is ensuring that the measures adopted work in these different jurisdictions. Some of the EU instruments included provisions expressly dealing with the fact that the UK has more than one legal system. The Faculty of Advocates said it would be helpful for instruments to contain provisions which make absolutely clear that the allocation of cases to a particular jurisdiction within the Member State is a matter for the domestic law or laws of the Member State in question. In their opinion the UK could then take a considered view on whether the EU measure should simply be transposed into the domestic legal orders for intra-UK cases, or whether there might be particular reasons for adopting different rules within the UK.

4.20 The Government notes with interest the suggestions and challenges that have been identified. They will help inform its future interaction with the EU.

Annex A:
Submissions to the Call for Evidence

The following formal responses to the Call for Evidence were received:

Allen and Overy LLP

Austrian Ministry of Justice

Catherine Bearder MEP

Prof. Janeen Carruthers and Prof. Elizabeth Crawford, University of Glasgow

Clifford Chance

Philip Cordery, New Park Court Chambers

Crown Dependencies

European Commission

Faculty of Advocates

General Council of the Bar of England and Wales

Zafar Gondal

Prof. Trevor Hartley, London School of Economics

Dr Maren Heidemann, University of Glasgow

HM Land Registry

David Hodson, The International Family Law Group LLP

Insolvency Lawyers' Association

Dr Ruth Lamont, University of Liverpool

Law Society of England and Wales

Law Society of Scotland

Liberal Democrat Home Affairs, Justice and Equalities Parliamentary Party Committee

Dr Alex Mills, University College London

Rev. Donald Prentice

Resolution International Committee

Reunite

Scottish Government

Society of Trust and Estate Practitioners (STEP)

TaxPayers' Alliance

Rebecca Taylor MEP

The Rt Hon. Sir Mathew Thorpe

Christopher Walker, Vinsons & Elkins LLP

James Watson, Weber Shandwick

WWF-UK

Two individual respondents

Annex B: Engagement Events

A number of engagement events were held during the duration of the Call for Evidence period to explore the issues raised in the Call for Evidence. These events included:

Four stakeholder events, two in London on 3 and 20 June, one on 25 June in Brussels and one on 23 July in Edinburgh; stakeholder meetings on 21 May, 6 June and 1 July.

Speakers at the events included:

Prof. Sir David Edward QC

Dr Jonathan Fitchen, University of Aberdeen

John Fotheringham, bto solicitors

Richard Frimston, Russell-Cooke LLP

Mark Harper, Withers LLP

Prof. Jonathan Harris, King's College, London

Marie Louise Kinsler, 2 Temple Gardens

Alexander Layton QC, 20 Essex Street

Prof. Paul Matthews, King's College, London

Carolina Marin Pedreno, Dawson Cornwell

Felicity Toube QC, South Square Chambers

Organisational and individual participants included:

29 Bedford Row Chambers

Allen & Overy

Arthur Cox Solicitors

Paula Atienza

Omar Abdel Aziz

Prof. Paul Beaumont, University of Aberdeen

Kema Alexis Foua Bi

British Institute of International and Comparative Law (BICCL)

Peter Burbidge, University of Westminster

Richard Butler

Prof. Janeen Carruthers, University of Glasgow

Circle Scotland

Clifford Chance

Commercial Bar Association

Prof. Elizabeth Crawford, University of Glasgow

Dr Carla Crifo, University of Leicester

Jose Maria Del Rio Villo

Department for Work and Pensions

Faculty of Advocates

Families Need Fathers Scotland

Foreign and Commonwealth Office

Freshfields Bruckhaus Deringer

General Council of the Bar of England and Wales

Dr Lorna Gillies, University of Leicester

Nerea Goyoaga

James Hannant

Dr Maren Heidemann, University of Glasgow

International Association of Conference Interpreters

The International Family Law Group LLP

International Swaps and Derivatives Association

Isle of Man Government

George Jamieson

Judicial Office for England and Wales

Maria Kanellopoulou

Linda Kaucher

Law Society of England and Wales

Law Society of Scotland

Legal Affairs Committee, European Parliament (JURI)

Myriam Mailly

Mental Health Tribunal Scotland

Dr Alex Mills, University College London

Monckton Chambers

No5 Chambers

Fernando Rui Paulino Periera, Council Secretariat

Practical Law

Rev. Donald Prentice

Marzena Rembowski

Reunite

Russell-Cooke LLP

Christoph Schmon

Scottish Government

States of Guernsey

Sarah Stephanou

Prof. Peter Stone, University of Essex

Taylor Hampton Solicitors

TH Law

Thompsons Scotland

Arnold Toutain

UKRep Brussels

Welsh Government

Senior Master Whitaker

Wilsons Solicitors

Annex C: Overview of Legislation and Opt-In

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

Instrument	Description	Has the UK opted in?
Civil law instruments		
Brussels I	Foundation instrument in the area of civil judicial cooperation. It sets the rules for determining which Member State's courts will hear a cross-border dispute and facilitates recognition and enforcement of judgments issued in other Member States.	Yes. The UK has also opted in to a Regulation agreed in December 2012 that amends Brussels I. This is due to come into force in 2015.
Council Decision (2007) on the signing by the EU of the 'Lugano Convention'	Extends the Brussels I rules to Iceland, Norway and Switzerland.	Yes
European Enforcement Order	Allows creditors with uncontested judgments from one Member State to obtain an EEO certificate to allow the enforcement in any other Member State of their court judgment or other confirmation of entitlement to a sum of money.	Yes.
European Order for Payment	A simplified procedure to enable a creditor to obtain an enforceable order against a defendant for a specified sum of money where the claim remains uncontested. These orders are recognised automatically in all participating Member States.	Yes
European Small Claims Procedure	Enables creditors to seek judgments on claims not exceeding €2000. The judgments are recognised automatically in all participating Member States.	Yes
European Account Preservation Order	Will enable creditors to apply to freeze a debtor's account if there is danger that the debtor might transfer or withdraw assets from a bank account.	Did not opt in on the basis that the Commission's proposal had not sufficiently balanced the rights of the claimants with necessary safeguards for defendants. The UK is, however, participating fully in negotiations.
Rome I	Adopted by the Council to replace the 1980 Rome Convention that Member States had agreed between themselves. Regulates choice of law issues in contract matters.	Yes
Rome II Regulation	Addresses conflicts of laws in non-contractual matters, such as claims of negligence i.e. it sets out which country's law will apply in cases with cross-border elements.	Yes
Succession Regulation	Established rules for recognition and enforcement, jurisdiction and conflicts of law for those whose property on death is connected with more than one jurisdiction.	No
Regulation on Insolvency Proceedings (BIS Lead on policy)	Provides a regime for the coordination and administration of cross-border insolvencies where the debtor has their 'centre of main interests' in the EU.	Yes The UK has also opted in to the recently published proposals to revise this Regulation.

Instrument	Description	Has the UK opted in?
Family law instruments		
Brussels IIa	Concerns jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility. Sets out the criteria for a court to determine if it has jurisdiction under the Regulation and provides a mechanism for court decisions from one Member State to be recognised and enforced in another.	Yes
Proposals for Council Decisions on the acceptance by Member States of eight accessions to the 1980 Hague Child Abduction Convention	The 1980 Hague Convention provides a civil law mechanism to seek the return of children wrongly removed or retained away from their country of habitual residence, usually by one parent The EU proposals assert EU competence for accepting accessions to this Convention. There is no directly equivalent EU instrument which provides such a mechanism so the Member States apply the rules of the 1980 Convention between themselves and other contracting states. Brussels IIa provides enhanced provisions for EU Member States for use with this Convention.	Yes, but stated that it disputes the EU's assertion of exclusive competence.
Council Decision authorising certain Member States to ratify or accede to the 1996 Hague Protection of Children Convention	The 1996 Hague Convention established rules for protection measures for children from parental responsibility orders and contact to public measures of protection and care, representation and protection of children's property in order to protect the child. It is accepted that the EU has exclusive competence for the majority of the subject matter of this Convention but that Member States share competence with the EU in relation to the applicable law elements of the Convention.	Yes
Maintenance Regulation	Provides rules for determining which country's courts have jurisdiction in maintenance disputes, for determining which law will be applied, and for the recognition and enforcement of maintenance decisions from other Member States.	Yes
Council Decision on the approval of the 2007 Hague Convention on International Child Support and other Family Maintenance	The EU is due to ratify the 2007 Hague Convention which will apply between EU Member States and other contracting states for the enforcement of (currently) child and spousal maintenance obligations. It is accepted that the EU has exclusive competence to ratify this Convention.	Yes
Rome III Regulation	Provides rules on which country's laws should be applied in divorce proceedings. This measure does not apply in all Member States.	No
Proposals on matrimonial property regimes and property consequences of registered partnerships (e.g. UK civil partnerships)	Two proposals currently being negotiated to establish a framework of rules regulating jurisdiction, applicable law, recognition and enforcement of judgments relating to property consequences for spouses/partners resulting from their marriage and partnership both with each other and third parties and following the end of the marriage or partnership on divorce or dissolution or death in cross-border situations.	No
Regulation on the mutual recognition of protection measures in civil matters	Recently adopted. Those at risk of domestic violence or harassment will be able to apply for an order in one Member State and have its terms recognised and, if necessary, enforced in any other Member State.	Yes

Instrument	Description	Has the UK opted in?
Civil and family instruments		
Regulation on the service of documents	Provides procedures to enable parties to litigation in another Member State to receive and respond to documents and then to respond to or otherwise defend proceedings.	Yes
Regulation on taking of evidence	Ensures there are rules governing how evidence for use in court proceedings in one Member State can be obtained from another Member State.	Yes
Legal Aid Directive	Establishes common minimum rules for the grant of legal aid in cross-border disputes.	Yes
Mediation Directive	Facilitates access to alternative dispute resolution and to promote the amicable settlement of disputes through the use of mediation in cross-border disputes.	Yes
European Judicial Network in Civil and Commercial Matters	Aims to improve cooperation at official level between judicial and legal authorities in the Member States in civil, commercial and family matters. It helps to eliminate obstacles to the resolution of cross border disputes.	Yes
Regulation establishing the Justice Programme in 2014-2020	Proposes a funding scheme with the stated objectives to promote judicial cooperation in civil and criminal matters, to facilitate access to justice and to prevent and reduce drug supply and demand.	No