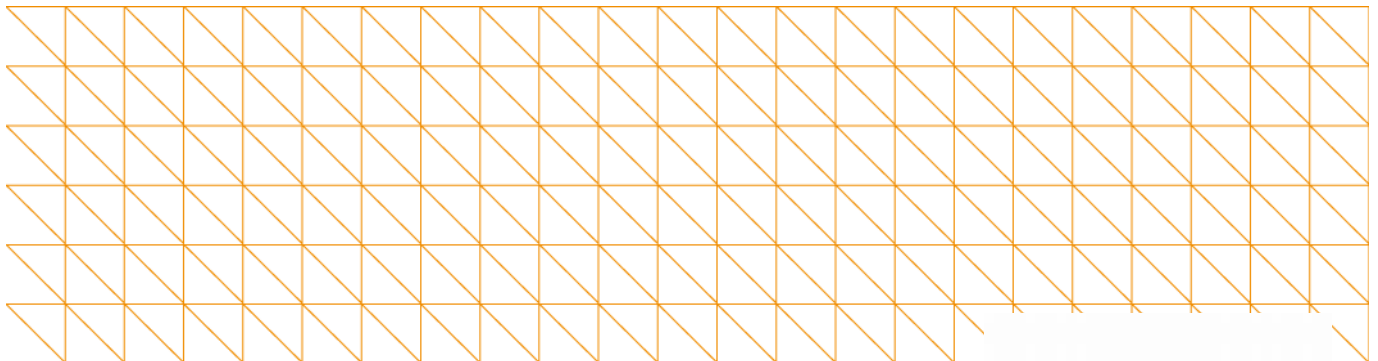


# Revision of the Brussels I Regulation – How should the UK approach negotiations?

**Response to Consultation/Call for Evidence**

CP(R) 18/10

12 December 2011



Department of  
**Finance and  
Personnel**

[www.dfpni.gov.uk](http://www.dfpni.gov.uk)





## **Revision of the Brussels I Regulation – How should the UK approach the negotiations?**

**Response to consultation/call for evidence carried out by the Ministry of Justice, the Department of Finance & Personnel, Northern Ireland and the Scottish Government.**

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## Foreword

This document is a report on the earlier consultation/call for evidence exercise which was initiated by the issue of a paper (CP 18/10) entitled '*Revision of the Brussels I Regulation – How should the UK approach the negotiations?*' on 22 December 2010. This paper covers:

- the background to the exercise;
- a summary of the responses received;
- reports on the responses to specific questions in the initiation document; and
- sets out the conclusions reached and the next steps.

### Extra copies

Further copies of this report and the initiation document can be obtained by contacting **Jean McMahon** at the address below:

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This report and the initiation document are also available online at <http://www.justice.gov.uk/index.htm>.

Alternative format versions of this publication can be requested from Jean McMahon who can be contacted using the details above.

## Executive Summary

The initiation paper “*Revision of the Brussels I Regulation – How should the UK approach the negotiations?*” was published on 22 December 2010. It addressed the issue of whether it was in the national interest for the UK to seek to participate in the revised Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The UK is party to the original Brussels I Regulation, which came into force on 1 March 2002.

As the proposal to revise the Brussels I Regulation is a civil judicial cooperation matter, the UK’s Protocol to Title V of the Treaty on the Functioning of the European Union applies. This means that the UK’s participation in the revised Regulation will depend upon the UK notifying the Community of its wish to take part in the adoption and application of the Regulation (known as opt in) within 3 months of the publication of the Commission’s proposal.

The Lord Chancellor and Secretary of State for Justice decided that with the limited period of time available in which the UK would be required to reach a decision on whether or not to opt in to the revised Regulation, it was necessary on this occasion to depart from the Code of Practice on Consultation issued by the Cabinet Office. A short call for evidence exercise was therefore conducted between 22 December 2010 and 11 February 2011.

An analysis of the responses received indicated that the majority (88%) of those who responded to the Government’s call for evidence agreed that it was in the national interest for the Government to opt in to the revised Regulation. The responses, together with issues raised by respondents, were considered carefully before a final decision was made on whether to opt in to the revised Regulation or not. The Government’s final decision to participate in the Brussels I Regulation was made in conjunction with the European Affairs Committee, the Minister for Justice (Northern Ireland) and the Cabinet Secretary for Justice in Scotland.

On 31 March 2011, the Permanent Representative to the United Kingdom in Brussels wrote to the Hungarian Presidency and Council giving notice of the UK’s intention to participate in the revised Brussels I Regulation.

As a result of the UK’s participation in the revised Regulation, it shall be binding and directly applicable in the UK (England, Northern Ireland, Scotland and Wales) and also to Gibraltar once adopted.

## **Part 1: Introduction**

### **Background**

1. The Brussels I Regulation came into force on 1 March 2002. Article 73 of that Regulation placed an obligation on the European Commission (the “Commission”) to present a report on its application within 5 years of the Regulation’s adoption. The Commission fulfilled that obligation by publishing their report on 21 April 2009. This was accompanied by a Green Paper which launched a consultation on possible ways to improve the operation of the Regulation.
2. In the light of views received to their consultation, the Commission published a legislative proposal to repeal and replace the current Brussels I Regulation. This proposal would be the subject of negotiation by the Council of Ministers (made up of the Member States) and the European Parliament.
3. The Brussels I Regulation is concerned with private international law matters that arise in the context of jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The Regulation contains uniform rules to settle conflicts of jurisdiction and to facilitate the mutual recognition and enforcement of judgments, court settlements and authentic instruments within the European Union (EU).
4. In general terms, the policy aims of the Regulation are designed to further the development of an area of freedom, security and justice and the operation of the internal market. This aim includes in particular the establishment of a system of predictable and appropriate jurisdictional rules which are generally based on the location of a defendant’s domicile. The machinery for the recognition and enforcement of judgments is founded upon the principle of mutual trust between the Member States.
5. Despite the significant benefits the Regulation has produced in providing legal certainty and effective redress, its operation has not been without problems. In particular, judgments of the European Court of Justice point to an interpretation of some of its provisions which the UK and other Member States consider unhelpful. Among other things, these have made it possible for unscrupulous litigants who think it in their interest to delay proceedings to launch them in a wholly unsuitable court. In some countries, courts can take years to determine that they do not



have jurisdiction, and this tactic has unfortunately become known as a “torpedo tactic”. The proposed revised Regulation seeks to address these issues head on, based on a very thorough review by the Commission.

6. The Commission published their legislative proposal to repeal and replace the current Brussels I Regulation on 14 December 2010. The legal basis for this measure is Article 67(4) in conjunction with Article 81(2)(a), (c) and (e) of the Treaty on the Functioning of the European Union. The Government’s initial assessment of the proposal was that it could broadly be welcomed as an improvement on the existing Regulation. However, there were three main areas that the Government had some concerns about (which are discussed later in this paper) but in effect concerned the abolition of exequatur, the extension of jurisdiction to third State defendants and arbitration.
7. On 22 December 2010, the Ministry of Justice published a joint consultation/call for evidence document (on behalf of the Ministry of Justice, the Scottish Government and the Department of Justice in Northern Ireland) seeking the views of interest groups on whether it was in the national interest for the Government to opt in to the revised Regulation. Specific views were sought from interest groups on the abolition of exequatur (specifically on the need to retain safeguards for judgment debtors and retaining public policy); the extension of the jurisdictional rules to third state defendants (how this would affect national laws in this area) and arbitration (whether a complete exclusion of arbitration from the scope of the Regulation remained the favoured option). The consultation/call for evidence exercise closed on 11 February 2011. A list of respondents to this is at Annex A to this paper.
8. As a result of the views received in response to its consultation/call for evidence exercise, the Government notified the European Commission and Council of its intention to participate in the Regulation on 31 March 2011. The impact assessment has now been updated as a result of the views received from those who responded. A copy can be found at Annex B to this paper.

## **Devolution and Gibraltar**

9. The UK consists of three separate jurisdictions: England and Wales, Scotland and Northern Ireland. The responsibility for jurisdiction and the recognition and enforcement of judgements in civil and commercial matters is devolved to each jurisdiction and, accordingly, the rules in this area devolved to the Scottish Justice Directorate and the Department for Justice (Northern Ireland).

10. Gibraltar, though a British Overseas Territory, is also subject to EU Regulations in this field. The UK has responsibility on behalf of Gibraltar for the negotiation of the relevant European instruments, and those instruments are directly applicable in Gibraltar if the UK decides to participate.

## Part 2: Summary of responses

11. There were **forty-six** responses received to the call for evidence which can be aggregated to the following groups:

- **20** from business sectors and individuals with interests in arbitration, commercial, employment, financial, insurance, media and trade issues (44%);
- **16** from the legal sector (35%)
- **7** from the academic sector (15%);
- **2** from the judiciary (4%)
- **1** from a Government Department (2%)

12. Although **46** responses were received, not all respondents chose to answer all questions: some only responded on particular questions (for example, Questions 2 and 4). The questions posed were as follows:

**Q1. Is it in the national interest for the Government, in accordance with its Protocol to Title V of the Treaty on the Functioning of the European Union, to seek to opt in to negotiations on the revised Brussels I Regulation? If not, please explain why.**

**Q2. What are your views on the specific issues raised in this paper which concern the changes proposed by the Commission in the draft Regulation?**

**Q3. Do you agree with the impact assessment? If not, please explain why.**

**Q4. Are there any other specific comments you may wish to make?**

13. Responses to the call for evidence were analysed to gauge the level of support for the various issues raised. Consideration was also given to evidence provided in relation to any impact that might arise for a particular sector or group if the Government were to elect to opt in to the Regulation. A number of respondents also raised specific issues that were not necessarily addressed by the initial call for evidence.

14. **Thirty three** respondents answered Question 1.

**Q1. Is it in the national interest for the Government, in accordance with its Protocol to Title V of the Treaty on the Functioning of the European Union, to seek to opt in to**

**negotiations on the revised Brussels I Regulation? If not, please explain why.**

- **29** respondents (88%) agreed that it was in the national interest for the Government to participate in the Regulation;
- **2** respondents (6%) disagreed; and
- **2** respondents (6%) were undecided either way.

15. In response to:

**Q2. What are your views on the specific issues raised in this paper which concern the changes proposed by the Commission in the draft Regulation?**

- **35** respondents commented on the Commission's proposals on the abolition of exequatur as follows:
  - (a) **33** respondents (94%) gave their support in principle to the abolition of exequatur, whilst
  - (b) **2** respondents (6%) believed that exequatur should continue in some form.
- **27** respondents commented on the Commission's proposals on the extension of the jurisdictional rules to defendants from third States. All who responded on the Commission's proposals (100%), expressed concern about the likely impact of these proposals.
- **28** respondents commented on the Commission's proposals on choice of court agreements as follows:
  - (a) **27** respondents (96%) were either supportive outright or supportive in principle to the Commission's proposed reforms in this area,
  - (b) **1** respondent (4%), however, disagreed.
- **24** respondents commented on the Commission's arbitration proposals as follows:
  - (a) **22** respondents (92%) were supportive in principle to the Commission's proposed reforms in this area (recognising that the Commission's proposals could resolve problems in this area),
  - (b) **2** respondents (8%), however, disagreed outright with the Commission's proposals,

- **21** respondents commented on the Commission's proposals aimed at ensuring better coordination of legal proceedings as follows:
  - (a) **17** respondents (81%) agreed that there should be a time limit in relation to the court first seised in making a decision on whether it has jurisdiction,
  - (b) **4** respondents (19%) disagreed with the principle of the Commission's reforms, indicating general scepticism about their effectiveness in practice.
- **16** respondents commented on the Commission's proposals in relation to provisional measures as follows:
  - (a) **9** respondents (56%) had no objection in principle to *ex-parte* orders granted by the court with jurisdiction over the substantive dispute being enforceable in other jurisdictions.
  - (b) **7** respondents (44%) had more specific concerns which are discussed further in the next Chapter.
- **16 respondents** commented on the Commission's reforms to improve access to justice as follows:
  - (a) **13** respondents could, in principle, support the reforms proposed;
  - (b) **3** respondents expressed some reservations about the proposals.

16. In response to:

**Q3. Do you agree with the impact assessment? If not, please explain why.**

- **13** respondents commented on the Ministry of Justice's interim impact assessment, as follows:
  - (a) **11 respondents** broadly agreed with the impact assessment.
  - (b) **2 respondents** considered that the impact of removing the jurisdictional gateways that currently exist under Practice Direction 6B PD3.1 needed to be considered further in terms of the impact on potential litigants.

17. In response to:

**Q4 Are there any other specific comments you may wish to**

**make?**

a number of respondents raised other issues that were not necessarily covered by the initial consultation/call for evidence. These included:

- ensuring that the Lugano and EC/Denmark Conventions are aligned with any final adopted Brussels I Regulation;
- that the Regulation deals more adequately with cases involving trusts.
- that Article 5(3) is improved to prevent a codification of the *Shevill* judgment.
- preventing libel tourism and preventing the Regulation from undermining future UK domestic legislation in this area.
- preventing the reintroduction of the doctrine of *forum non conveniens* or some equivalent mechanism to reverse the decision reached by the ECJ in *Owusu*.
- the lack of expertise, evaluation and regulation of first tier tribunal courts to evaluate the establishment of primary jurisdiction issues prior to a hearing, particularly in relation to employment matters.
- the lack of a solution in the Regulation on the issue created by the *Apostolides v Orams* judgment.

18. The issues covered in this summary are discussed in more detail in Part 3.

## Part 3: Responses to specific questions

**Q1. Is it in the national interest for the Government, in accordance with its Protocol to Title V of the Treaty on the Functioning of the European Union, to seek to opt in to negotiations on the revised Brussels I Regulation? If not, please explain why.**

19. Twenty nine respondents (**88%**) **agreed that it was in the national interest for Government to participate in the Brussels I Regulation.** The main reasons given were that on balance the potential benefits offered by the revised Regulation far outweighed any disadvantages. It was also felt that opting in would enable the UK to maximise its influence and place it in a more credible position to shape the debate in areas where it had concern. Not opting in was likely to bring disadvantages both politically and economically.
20. Two respondents (**6%**) **disagreed that the UK should opt in to the proposed Regulation.** In general terms, the view here was that the benefits to be gained did not outweigh the potential problems/difficulties that the Regulation could pose. The extension of the jurisdiction rules to defendants from third States was cited as the main problem. It was suggested that it may be preferable for the UK not to opt in now but participate in negotiations, adopting the Regulation at a later stage if suitable solutions could be found to UK concerns.
21. The remaining two respondents (**6%**), although considering the question of whether it was in the national interest to participate in the revised Regulation, **gave no clear indication either way of whether the UK should participate or not.**

**Q2. What are your views on the specific issues raised in this paper which concern the changes proposed by the Commission in the draft Regulation?**

22. Responses to Question 2 have been broken down in relation to the key areas of reform proposed by the Commission.

### Abolition of Exequatur

23. Thirty three respondents (**94%**) stated that they **could, in principle, support the proposals to abolish exequatur.** The general reasons given were that this would bring practical benefit to citizens and business (both in terms of reducing associated time and costs) as well as

supporting the open and transparent circulation and recognition of judgments across the European Union. Whilst supporting the abolition of any unnecessary intermediate process, however, many emphasised the need for some form of adequate protective measures to be in place to avoid certain injustices. These included safeguards to protect substantive public policy, ECHR principles and protection for defendants/debtors (in particular to ensure they had adequate warning of claims being made against them).

24. Two respondents (**6%**) **considered exequatur should continue in some form**, suggesting that there would be value in its retention to prevent fraud and should be used for claims above a particular value (in excess of £2 million was mentioned). Some respondents mentioned that exequatur should be retained for authentic instruments. Other respondents, however, did not necessarily agree with the Commission's recommendation that exequatur be retained in collective proceedings cases and defamation matters.

#### *The operation of the Regulation in the international legal order*

25. Twenty seven respondents (**100%**) **expressed concern about extending the jurisdiction rules to non-EU domiciled defendants**. The general view of respondents was that the need for such had not been established and there was general concern about the practical implications of any EU regulation in this area (some stating a preference for such matters to be dealt with at multinational/ global level). Concern was also expressed that extending jurisdiction to non-EU defendants would limit current national rules in this area, which could give rise to unfairness, tactical litigation and wasted costs.

#### *Proposed changes in relation to choice of court agreements*

26. Twenty seven respondents (**96%**) **were either supportive outright or supportive in principle to the Commission's proposed reforms** in this area. The main reason given was that the proposal would resolve the ECJ's decision in *Gasser* which had caused significant difficulties. Although there may be some technical issues which might need to be resolved in the detail of the proposal, the main practical problem would be resolved by the Commission's proposed solution.
27. One respondent (**4%**) **disagreed with the Commission's proposals** in this area. The reason given was that reliance should be placed more on the established Hague Convention.

#### *Proposed changes to improve the interface between the Regulation and arbitration*

28. Twenty two respondents (**92%**) **were supportive in principle to the reforms proposed**. That said, some (although recognising that the Commission's proposals would resolve the problems in this area) remained of the view that there should be a complete exclusion of arbitration from the scope of the Regulation (particularly maritime arbitrators).



29. Two respondents (**8%**) **disagreed outright with the Commission's proposals**. The reasons given were that the proposals were likely to create complexity and satellite litigation. The preference stated was for a complete exclusion of arbitration from the scope of the Regulation.
30. A number of drafting and technical amendments were suggested which would generally seek to ensure that the risk of any conflict between the Regulation and the New York Convention was eliminated and that the rule to provide priority to the courts at the seat of the arbitration was extended to disputes where there was an arbitration agreement with an arbitral seat outside the EU, at least where the seat was in a New York Convention country. Others suggested that further work was needed before mutual recognition was applied across the EU for arbitration and tribunal decisions and that complete assurance would need to be given that the administration of justice via such methods was as transparent and rigorous across the whole of the EU as it was in the UK.

*Proposals designed to ensure the better coordination of legal proceedings before the courts of Member States*

31. Seventeen respondents (**81%**) **agreed that there should be a time limit on the court first seised deciding on whether it had jurisdiction or not**. Some respondents, although favouring a time-limit, were unsure whether it would make much difference in practice. Others queried what the penalty would be for not meeting such a deadline and whether there would be an appeal process. Some respondents believed that the time limit should be combined with an obligation to take jurisdictional challenges as preliminary issues and should apply to any court facing a jurisdictional challenge whether it was the court first seised or not. In addition, some respondents supported at least in principle the requirement to provide for an exchange of information between the courts when dealing with the same matter. However, the majority of respondents were less in favour of this idea believing it had little if any practical benefit and was more likely to lead to delays and costs for litigants. There was also, in principle, support for the proposal to facilitate the consolidation of related actions as long as they did not open up the possibility of forum-shopping.
32. Four respondents (**19%**) **disagreed with the principle of the Commission's reforms to ensure the better coordination of legal proceedings**, indicating general scepticism about their effectiveness in practice and the likelihood of creating mechanisms that could pose additional delays for litigants. General points of concern included the requirement to obtain documents from abroad (which could hold up the legal process), assurance needed that intellectual property parties would be able to litigate in the country of their intellectual property right (save for community designs and trade marks) and uncertainty surrounding when the 6-month time limit would begin and what sanctions there would be for non-compliance of the time limit.
33. Nine respondents (**56%**) **had no objection in principle to ex-parte orders granted by the court with jurisdiction over the substantive dispute being enforceable in other jurisdictions**. The general view

expressed by respondents was that protection would be offered to the parties to a dispute but the proposals had the added benefit of not placing any unreasonable burden on Member States (i.e. Member States would not need to put in place measures and procedures that might be required to give effect to the different provisional and protective measures available in all other Member States). There was a degree of scepticism, however about the requirement that the court with substantive jurisdiction and any other courts seised with applications for provisional measures should seek information from one another.

34. Seven respondents (**44%**) **had no re specific concerns concerning provisional measures**. Overall, there was general disagreement that there should be a limitation on the circulation of provisional measures ordered by a court other than the court with jurisdiction over the substance as this could undermine their practical effectiveness. Limiting circulation could have the effect of narrowing the scope of such orders. Some respondents also disagreed with the exclusion of provisional measures granted by courts without substantive jurisdiction from the Regulation's recognition and enforcement rules. There was some uncertainty about what measures were covered by these provisions. In particular, whether provisional including protective measures ordered by a court having jurisdiction over the matter and measures ordered without the defendant being summoned to appear and which were intended to be enforced without prior service were intended to be mutually exclusive.

*Proposals aimed at improving access to Justice*

35. Thirteen respondents (**81%**) **could support, in principle, the proposed reforms aimed at improving access to justice**. Support was generally given to the creation of a jurisdiction rule to determine claims relating to rights in *rem* at the place where the moveable assets were located. This would allow courts in that jurisdiction to have control over that property. Clarification would be needed, however, in relation to the jurisdiction over a ship or cargo, which is usually established by virtue of the ship or cargo against which a claim is made being present in the jurisdiction. Some respondents also expressed the view that this provision should not cover intangible moveable assets, whilst others believed that a time limit was also needed here. Some respondents also expressed the view that commercial parties should be able to conclude choice of court agreements for disputes relating to commercial leases and that there should be the possibility of bringing actions against multiple defendants in the employment area.
36. Three respondents (**19%**), however, **had some reservations about the Commission's proposals in this area**. These generally focussed on: the inappropriateness of including intangible moveable assets within the scope of a special jurisdiction rule that was based on the principle of location, for the reasons set out in the Hague Securities Convention. In addition, concern was expressed about providing mandatory information to certain defendants which seemed to go too far in an area where there was already adequate protection for consumers. Concern was also expressed about separating personal obligations and real rights in

property and concern that the Regulation did not necessarily solve problems of exclusive jurisdiction over land.

**Q3. Do you agree with the impact assessment? If not, please explain why.**

37. Eleven respondents (**85%**) **broadly agreed with the impact assessment**. Some, however, made the point that although the impact assessment had identified the major issues, a number of areas would nevertheless require further work. Two respondents considered that the impact of removing the jurisdictional gateways that currently exist under Practice Direction 6B PD3.1 needed to be considered further in terms of the impact on potential litigants.

## Part 4: Some specific points raised by respondents being followed up

<b>Q4 Are there any other specific comments you may wish to make?</b>
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### Lugano Convention and Agreements with Denmark

38. Several respondents commented that there would be a need to ensure, in any revision to the Brussels I Regulation, that both the Lugano and EC/Denmark Conventions were brought into line with the final adopted recast of the Brussels I Regulation in order to avoid significant differences.
39. The Government has noted this point.

### Trusts

40. Some respondents suggested that there was a need to ensure that the Regulation dealt more adequately with cases concerning trusts. The revised Regulation does not include any proposed changes to the trust provisions - Articles 5(6), 23(4) and 23(5). Although the structure of the current rules here is considered to be broadly satisfactory, it was suggested that case law has revealed that they do not necessarily achieve their objectives. Some respondents believed that the drafting of these provisions could be improved. Other views expressed included the need to make consequential amendments to reflect changes made elsewhere in the Regulation that had not been picked up when the Brussels Convention was transposed to a Regulation.
41. In view of the proposed extension of the Regulation's rules to non-EU defendants, those commenting on trusts were of the view that it was now all the more important for trust issues to be addressed, not least because Article 5(6) of the Regulation would be the key rule of jurisdiction for trust litigation.
42. The Government is considering with trusts specialists what possible amendments are needed and whether these are likely to be acceptable to both the Commission and other Member States.

### Media interests and Libel Tourism

43. A number of respondents, particularly those representing media interests, expressed views in relation to Article 5(3) of Brussels I and the interpretation assigned by the European Court of Justice in the case of *Shevill v Presse Alliance SA* (1995).

44. In the *Shevill* case (which concerned the victim of a libellous article which had been published in a number of countries) the Court held that the expression "place in which the harmful act occurred" was to be interpreted in the case of libel to mean that "the victim may institute proceedings for damages against the publisher (either before the courts of the Contracting State of the place of establishment of the publisher of the defamatory publication competent to make good the totality of the prejudice resulting from the libel) or before the courts of each Contracting State in which the publication was distributed and in which the victim claims to have suffered injury to their reputation, competent to hear only the prejudice caused in the State of the court applied to".
45. UK press/media interests do not wish any legislative codification of the *Shevill* judgment as they are concerned that this could lead to forum shopping and could enable legal actions to be brought in multiple jurisdictions in proceedings which involve publications. They have suggested that the ideal result here would be for a claimant only to be allowed to bring one claim and that should be in the courts of the country where the media company was established or where the publisher was domiciled.
46. Attention was also drawn by a number of respondents to libel tourism (forum shopping in libel cases). With forthcoming changes to UK domestic defamation laws to provide greater protection for free speech and end UK courts being used in "libel tourism" cases, concern was expressed that changes made domestically may become defunct as a result of changes to the Brussels I Regulation.
47. The Government is aware that the Commission's proposal to extend the scope of the rules of jurisdiction to cover defendants domiciled in third countries; is likely to affect the UK's national law provision on libel tourism as this will become inconsistent with the new Regulation and will need to be repealed. The outcome would be likely to be the imposition of a rigid jurisdictional regime that would generally prevent UK courts from declining jurisdiction in favour of courts in third countries.
48. A possible way of avoiding this outcome would be to try to negotiate a specific carve-out from the proposed extension of jurisdiction for defamation cases so that Article 5(3) - the tort basis of jurisdiction - would continue to apply only if the defendant is domiciled within the EU. This would leave defamation jurisdiction in cases where the defendant is domiciled outside the EU still governed by national law and would thus enable the UK to retain its soon to be enacted provision on libel tourism.
49. The prospects of success here may well be enhanced by the fact that the Commission have already conceded that defamation judgments are particularly sensitive in nature and should continue to be dealt with under the present cumbersome, but relatively defendant-friendly machinery for the international recognition and enforcement of judgments. To that end they have proposed that defamation judgments should be exempted from their general policy to streamline the machinery for all other judgments (the proposed abolition of *exequatur*). This Commission

position could make it easier for the UK to argue that defamation cases also need special treatment at the jurisdiction stage.

50. However if such an exclusion could not be obtained for defamation cases, the likely consequence would be that Article 5(3) would probably not be open to amendment during the negotiations because it has not been proposed for amendment by the Commission. Under European institutional procedures, it is only those provisions which the Commission has proposed to amend that can be amended in any way by the Member States. Other provisions will fall outside the scope of the review, unless sufficient political pressure can be brought to bear on the Commission to persuade them to propose their amendment, are more likely not to be taken into account. From early discussions at working group level, the majority of other Member States do not seem to share the same concerns on libel tourism as the UK.
51. The Government will, nevertheless, try to continue to push for discussion on this matter to see what can be achieved here.

#### Forum non conveniens

52. One respondent sought to prevent the reintroduction of the doctrine of *forum non conveniens* or some equivalent mechanism to reverse the decision reached by the ECJ in *Owusu v Jackson*.
53. In the case of *Owusu v Jackson*, the European Court of Justice decided that the Brussels “regime” on jurisdiction applied, even in cases where the claimant and defendant were resident in the same contracting state, other defendants were not resident in a contracting state and there was no connecting factor with any other contracting state. This decision restricted the circumstances in which English courts could use their discretion to decide on the appropriate forum for disputes that contained a foreign element, a discretion that was guided by a wide range of factors aimed at balancing the overall interests of justice.
54. In terms of amendments proposed to the Brussels I Regulation, the Commission’s approach to jurisdiction would preclude entirely the operation of *forum non conveniens*. In overall terms, this would mean that there would be complete harmonisation in this area. .
55. The Government’s preference, however, is that there should only be minimum harmonisation in this area and this should be without prejudice to national grounds of jurisdiction. This view was iterated by a number of respondents to the consultation/call for evidence. Whether this outcome is achievable is yet to be seen as negotiations in Brussels are at a very early stage.

#### Employment issues

56. One respondent expressed concerns about the lack of expertise, evaluation and regulation of first tier tribunal courts to evaluate the establishment of primary jurisdiction issues prior to hearing, particularly in relation to employment matters.

57. The Commission have proposed an amendment to the current Brussels I Regulation to enable the possibility of consolidating actions in respect of contracts of employment against multiple defendants. The proposed adjustment is welcomed by the Government as it would remedy the current unfortunate gap in the Regulation and would enable employees, as claimants, to consolidate their claims against various employers in a single jurisdiction. This would place them in the same position as other claimants and ensure that they were not required to have to go to the trouble and expense of bringing separate proceedings against different employers in various Member States.

*Apostolides v Orams*

58. One respondent expressed concerns that the Regulation did not seem to provide a solution to the *Apostolides v Orams* problem. This landmark case argued in favour of the right for Greek Cypriot refugees to reclaim land in northern Cyprus, displaced after the 1974 Turkish invasion. The case determined that although Cyprus does not exercise effective control in northern Cyprus, cases decided in its courts are applicable through European Union law.
59. Amendments proposed by the Commission in the revised Regulation are the result of an extensive period of public consultation. It therefore seems right to presume that the Commission have not received or been lobbied to make changes to the Regulation as a result of this particular case. Under European institutional procedures, it is only those provisions which the Commission has proposed to amend that can be amended in any way by the Member States. Other provisions which fall outside the scope of the review, unless sufficient political pressure can be brought to bear on the Commission to persuade them to propose their amendment, they are more likely not to be taken into account. It is unlikely that sufficient political pressure could be brought on this matter at this stage.



## **Conclusion and next steps**

60. On 14 December 2010, the European Commission published a legislative proposal to repeal and replace the current Brussels I. The legal basis for this measure is Article 67(4) in conjunction with Article 81(2)(a), (c) and (e) of the Treaty on the Functioning of the European Union.
61. On 22 December 2010, the Ministry of Justice published a joint consultation/call for evidence document (on behalf of the Ministry of Justice, the Scottish Government and the Department of Justice in Northern Ireland) seeking the views of interest groups on whether it was in the national interest for the Government to opt in to the revised Regulation. Specific views were sought from interest groups on the abolition of exequatur (specifically on the need to retain safeguards for judgment debtors and retaining public policy); the extension of the jurisdictional rules to third state defendants (how this would affect national laws in this area) and arbitration (whether a complete exclusion of arbitration from the scope of the Regulation remained the favoured option). The consultation/call for evidence exercise closed on 11 February 2011.
62. As a result of the views received in response to its consultation/call for evidence exercise, the Government notified the European Commission and Council of its intention to opt in to the Regulation on 31 March 2011. By opting in to the Regulation, it shall be binding and directly applicable to the UK once adopted. The Regulation will apply to the UK (England, Northern Ireland, Scotland and Wales) and also to Gibraltar.

### **Next steps**

63. Negotiations on the revised Regulation began in February this year. There are, however, a number of issues which the Government will wish to address during the negotiations. These are set out in more detail below.

### ***Abolition of Exequatur and related matters***

64. Under the current Regulation “exequatur” is the term given to a key stage in the procedure for the recognition and enforcement of judgments within the EU. In effect it converts a foreign judgment into a domestic judgment for enforcement purposes. The Commission has made the point that in

an internal market without unnecessary barriers it should be possible to abolish exequatur, together with the inevitable litigation costs and delays which this imposes. It is suggested by the Commission that in the UK, in a reasonably straightforward case, it can cost a party as much as £3,450 to enforce a foreign judgment.

65. Although the Government agrees with the Commission's reasoning on why exequatur should be abolished, it nevertheless believes that it is important that the current protections for defendants should be retained. These protections are designed to ensure that defendants should not have foreign judgments enforced against them in circumstances where it would be unfair to do so. In light of this, the Government believes the following safeguards against enforcement advanced by the Commission should be retained:
- for cases where the defendant was not properly informed in a timely way about the original proceedings;
  - for cases where there were procedural defects in the original proceedings which have infringed the defendant's right to a fair trial; and
  - for cases where the judgment is irreconcilable with another judgment given either in the Member State where enforcement is sought or, in certain circumstances, in another country.
66. However, it is the Government's view that the safeguards proposed by the Commission need to be explored further to ensure they are fully adequate to protect the legitimate interests of defendants. For example,
- it will need to be considered in which courts it will be most appropriate for defendants to litigate about issues concerning the failure to provide them with sufficient and timely information about the proceedings or other alleged breaches of the safeguards, i.e. should such matters be determined by courts in the original Member State or the Member State in which enforcement is being sought; and
  - it would not be appropriate to remove, as the Commission proposes, the current safeguard of public policy in so far as that safeguard relates to *substantive* as opposed to *procedural* public policy (the Commission intends to cover the latter in terms of procedural defects in the original proceedings which have infringed the defendant's right to a fair trial). Issues relating to substantive public policy cover important matters, for example consideration of whether the contract in question was considered to have suffered from serious illegality under the law of the relevant part of the UK. It is important that all such public policy issues should continue to be able to be raised under the Regulation as a potential ground for resisting enforcement. In this context it is not sufficient to refer to the principle of mutual trust between the Member States as a justification for the removal of this ground.

67. The Government accepts the Commission's proposal to retain exequatur for judgments relating to defamation and related matters. There is a clear need for caution in this area where there are particular sensitivities in terms of the difficult balance to be struck between the rights to reputation and privacy on the one hand and freedom of expression on the other hand. It is also relevant that within the EU there is no uniform choice of law rules in this area. Exequatur should also remain for issues of collective redress, as this is an area which is currently under review by the Commission.

***Proposal relating to the operation of the Regulation in the international legal order***

68. The Commission have proposed extending the jurisdiction of the Regulation to cases where the defendant is not domiciled in the EU but in a third country. At the moment, courts in the UK use national rules to determine where these types of case should be heard. The Commission propose, however, that the Regulation should set out the only grounds of jurisdiction on which courts should make such decisions. The UK's current national rules are quite generous and if they were to be restricted by the Regulation it is possible that this might affect the amount of business which currently comes to the London commercial court.
69. The Government's initial stance on this matter has been to seek to negotiate a position that enables the retention of the national rules of Member States in this area, either by the removal of the Commission's proposed extension of jurisdiction altogether or ensuring that any such extension is accompanied by the retention of the relevant national laws. The aim of the latter option would be to ensure that the new rules of jurisdiction would operate in conjunction with Member States' existing national rules of jurisdiction. However, even if these early options fail, the Government will seek to negotiate the inclusion of rules the purpose of which would be to fill any major gaps created by the repeal of any existing national rules of jurisdiction. To this end, the Government will work closely with expert commercial users of these rules in developing satisfactory proposals to be deployed in the negotiations.
70. The Government will also seek to ensure that the rules clearly allow courts to refuse to hear defamation cases which should be heard by courts outside the EU, in order to limit libel tourism, which reflect provisions which are currently being proposed in the draft Defamation Bill.
71. In addition, the Commission have also made the following additional and related proposals in the context of jurisdiction:
- (a) the protective jurisdictional arrangements in relation to consumers, insured parties and employees which currently only operate within the current scope of the Regulation (and restrict the possibilities for

the parties to agree a jurisdiction of their choice) would be extended so as to cover defendants domiciled outside the EU;

- (b) there should be two additional and subsidiary bases of jurisdiction for disputes involving defendants domiciled outside the EU: first, a jurisdiction based on the location of assets belonging to the defendant, provided their value is not disproportionate to the value of the claim and there is “sufficient connection” to the dispute, and secondly, a *forum necessitatis*, that is a jurisdiction for exceptional cases where there is no other forum guaranteeing the right to a fair trial and the dispute has a sufficient connection to the Member State in question; and
- (c) a discretionary rule for concurrent proceedings where the court first seised is located outside the EU and the court in a Member State is then second seised.

72. The first proposal, which would involve an extension of the current jurisdictional protection available in certain circumstances to insured parties which are acting in a commercial capacity, seems unjustified. This protection, which is difficult to defend even within the current scope of the Regulation, would be even harder to defend on a world-wide basis. It would mean that the present ability of British insurance companies to make binding jurisdiction agreements in relation to certain insured defendants domiciled outside the EU would be restricted, where such defendants are not consumers. This outcome would not be in the commercial interests of these companies or indeed the UK as a centre for international dispute resolution. This issue has particular significance for the UK in the light of the size and importance of its insurance industry and the global nature of its business.
73. Whilst it remains the Government’s preference to try and remove the extension of jurisdiction in this area altogether through negotiation the chances of success may be limited as most Member States have much narrower national grounds of jurisdiction and less commercial interest. What may, however, be in the zone of negotiability is obtaining a rule that refers back to the existing national rules as far as possible so the net effect is eliminated or minimised. Alternatively, rules could be created which would, as far as possible secure the most important elements required under national law.
74. The second proposal, namely the introduction of two subsidiary grounds of jurisdiction in relation to non-EU domiciled defendants is broadly welcome in principle. The Government believes these grounds will be important if the UK’s current national grounds were to be repealed as the Commission envisages. The proposed *forum necessitatis* in particular can be accepted, subject to drafting issues. The proposed property-based jurisdiction needs further improvement, in particular the requirement that the value of the assets located in the Member State in question must not be disproportionate to the value of the claim appears both restrictive in policy terms and uncertain in its application.

75. The final proposal for an international rule where a dispute is the subject of ongoing or pending litigation is welcomed in principle by the Government, but will need to be significantly improved, particularly if the current national grounds of jurisdiction are to be repealed and with them the broad discretion operated by UK courts at the moment to decline jurisdiction in accordance with the doctrine of *forum non conveniens*. Under this doctrine courts may decline jurisdiction in favour of a non-EU court which it considers to be more appropriate to hear the case; this discretion is guided by a wide range of factors in the overall interests of justice. The underlying aim of the necessary improvements should be to make the proposed rule more flexible and therefore better able to deal satisfactorily with the complex realities of international commercial litigation. The present restrictions on its use, for example the requirement that the parties in both proceedings must be identical, would significantly limit its practical utility.
76. In addition to this rule the Government believes it should be possible for courts within the EU to decline to exercise jurisdiction in certain circumstances, even where there may be no proceedings afoot outside the EU. These are situations where the subject matter of the dispute mirrors the most significant of the exclusive jurisdictions which exist under the Regulation. These relate to certain property disputes in which the property in question is located within the jurisdiction of the non-EU court, where the dispute concerns certain company law matters or where the dispute concerns the validity of an intellectual property right which is registered under the law of the non-EU State in question. Under the current Regulation intra-EU jurisdiction in relation to disputes of this nature is allocated on an exclusive basis in the light of the particular subject matter in issue and it would be right to mirror that allocation, albeit on a discretionary basis, in relation to non-EU States.

### ***Proposals relating to choice of court agreements***

77. The Government strongly supports the Commission's proposals to overcome the problems caused by the ECJ's decision in Case C-116/02 *Gasser*. This gave automatic priority to the court that first starts to hear proceedings over an agreed exclusive choice of jurisdiction deriving from a valid choice of court agreement between commercial parties. This decision has encouraged abusive tactical proceedings to undermine such agreements (in particular the use of the so-called "torpedo action" – where action is taken in a court in a Member State which may take years to decide whether it is entitled to hear the case). It has produced uncertainty, additional expense and the settlement of disputes on inappropriate terms.
78. The Commission proposed two reforms in this area. First, where the parties have designated a particular court to resolve their dispute, priority should be given to the chosen court to decide on its jurisdiction, regardless of whether it is first or second seised of the dispute. Under this proposal any other court must stay its proceedings until the chosen court has either confirmed its jurisdiction or, in cases where the choice of

court agreement is invalid, declined jurisdiction. Second, the Commission proposed a harmonised conflict of law rule on the substantive validity of choice of court agreements. Both these proposals are useful and are supported by the Government.

### **Proposals relating to the interface between the Regulation and arbitration**

79. Significant problems have emerged as a result of the ECJ's decision in Case C-185/07 *West Tankers*. This decision reduced the ambit of the exclusion of arbitration from the scope of the Regulation and in turn encouraged parties wishing to escape from their commitments under an arbitration agreement to initiate court proceedings in a Member State other than the one where the seat of arbitration was located. The purpose of these proceedings was generally to destabilise in various ways the integrity of the arbitral process, in particular by seeking a court ruling that the arbitration agreement was void and then enforcing that ruling around the EU. These problems are broadly parallel to those which emerged as a result of the *Gasser* decision. The Commission's proposed solution is intended to resolve these problems and to this extent it is to be welcomed, particularly in the UK one of the major arbitration centres within the EU. The guiding principle in this context should be to prevent the deployment of abusive litigation tactics which have the effect of undermining the operation of the 1958 New York Convention on Arbitration to which all Member States are parties.
80. The Commission's proposal is for a specific rule on the relation between arbitration and court proceedings. This would oblige a court seised of a dispute to stay proceedings if its jurisdiction was contested on the basis of an arbitration agreement and an arbitral tribunal had been seised of the case or court proceedings relating to the arbitration agreement had commenced in the Member State of the seat of arbitration.
81. In consultation with UK arbitration experts, the Government has noted that they have broadly been supportive of the Commission's proposal in principle, but there have also been significant criticisms about those aspects of it which fail to resolve fully all the uncertainties generated by the *West Tankers* decision. For example it is considered essential that the proposal should explicitly cover proceedings where arbitration issues are raised incidentally and not as the principal issue in the proceedings. Similar clarity is required to ensure that there should be no international recognition and enforcement of any judgment that is contrary to an arbitration agreement. The Commission's proposal also fails to provide for the significant number of cases where the arbitration agreement does not explicitly locate an arbitral seat or where the seat is located in a non-EU State.
82. Concern has also been expressed that the Commission's proposals on this subject would generate some additional degree of external EU competence. This was felt likely to arise particularly in the context of the regulation of concurrent proceedings and the establishment of a rule to enhance the position of the courts of the Member State where the seat of

arbitration is located. Whilst the extent of any additional EU competence would be a small extension of competence, which in effect would leave the matter in the area of mixed competence, the Member State's share of competence would still remain much larger than that of the EU. It remained preferable to some arbitration experts, however, to be potentially awkward in an area of business which, for the purposes of international negotiations, had traditionally been regarded as falling solely within the competence of the Member States.

83. In light of concern about EU competence and the significant number of unresolved issues raised by the Commission's proposal, the Government's preferred opening position is to seek a complete reinforced exclusion of this topic from the scope of the Regulation. One benefit of such an approach would be that it would have the effect of restoring some competence to the Member States (for example the ECJ has held that the Member States are empowered under the Regulation to issue provisional measures in support of an arbitration in another Member State). The negotiability of this approach should be strengthened by strong support from other Member States. However if this approach ultimately proved not to be negotiable, then it is proposed that the Government should work with the Commission's proposal and seek to improve it so that, in its final form, it offers a generally satisfactory resolution of the relationship between arbitration and court litigation.

***Proposals relating to the co-ordination of legal proceedings before the courts of the Member States***

84. The Commission have proposed the following reforms:

- to improve the operation of the Regulation's rule to regulate concurrent proceedings in different Member States there should be a time limit within which the court first seised of the proceedings should decide whether it has jurisdiction. This requirement would be accompanied by a requirement for an exchange of information between the courts dealing with the same subject matter of the dispute;
- to facilitate the consolidation of related actions by a court the current technical requirement that such consolidation must be permissible under national law should be abolished; and
- various reforms concerning provisional measures – i.e. where action is taken before judgment to ensure, for example, that a debtor's assets are not moved or disposed of before a court has ruled on the dispute, i.e:
  - the free circulation within the EU of such measures providing that they have been granted by a court having jurisdiction on the substance of the case, including, subject to certain

conditions, the circulation of such measures granted in the absence of the defendant;

- the prevention of EU-wide circulation of measures ordered by a court without such jurisdiction (ie such measures would only operate within the Member State where they are ordered);
- in cases where proceedings on the substance are taking place before a court in one Member State and a court in another Member State is asked to order provisional measures, then both courts should be required to co-operate in order to ensure that all the circumstances of the case are taken into account when the provisional measure is granted.

85. The Government is generally supportive of the proposal that there should be a time limit within which a court first seised of proceedings should decide on its jurisdiction. This is properly directed at the mischief caused by “torpedo actions” where tactical proceedings are brought in courts which are notoriously slow to decide such issues, thereby preventing other courts within the EU from determining the case for the duration of this period. It has to be recognised that this provision contains no sanction for any breach of it, but realistically this is probably the most that is negotiable.
86. The proposal relating to the consolidation of related actions appears to offer a technical improvement in the context of a discretionary provision which is in principle well-attuned to the common law approach to such issues. The current limitation is unduly restrictive and, with its reference to the national laws of the Member States, it may be difficult for the parties to ascertain and therefore operate in practice.
87. The proposals on provisional measures appear generally sensible to the Government. The clarification relating to the EU-wide circulation of such measures, including, in principle, when ordered without notice given to the defendant, is to be welcomed. These measures are a key weapon in the armoury of commercial courts to prevent the dissipation of assets and other abusive practices designed to frustrate the proper administration of justice. It is proposed that the suggested prohibition of such circulation when ordered by a court without jurisdiction to resolve the substance of the dispute should be accepted. They are generally sought only for operation in the Member State in question and the Commission’s assertion that, given the wide divergence of national laws on this issue, there is a danger of abusive forum shopping cannot be entirely discounted.
88. The Government is not persuaded, however, by the Commission’s final proposal in this area, namely the suggested mandatory requirement for courts in different Member States to co-operate in the context of proceedings for provisional measures brought before a court without jurisdiction as to the substance of the dispute. UK Commercial Court users have objected that such a mandatory requirement could be expensive and disproportionate and also unduly time-consuming, a particular concern in the many cases where time will be of the essence.



### ***Proposals relating to access to justice***

89. The Commission has proposed the following changes:
- a new head of jurisdiction for the resolution of claims to rights *in rem* or possession of moveable property in the place where the property is situated;
  - the possibility to consolidate actions in respect of contracts of employment against multiple defendants;
  - the possibility to conclude choice of court agreements covering disputes relating to commercial leases; and
  - the provision of mandatory information for a defendant in a weaker position, such as a consumer, who enters an appearance before a court about the legal consequences of not contesting the court's jurisdiction.
90. The Government believes that these reforms should in principle be supported. Subject to improving drafting, the suggested new jurisdiction to determine claims relating to rights *in rem* in moveable property at the place where the property is situated should be both useful and appropriate on the basis that the courts of that place should in principle have control over that property. This jurisdiction might be particularly useful in relation to claims for the recovery of valuable leased moveable assets, such as aircraft.
91. The Government also believes that the proposed adjustment for proceedings in the employment area is to be welcomed on the basis that it would remedy an unfortunate lacuna in the existing Regulation and enable employees, as claimants, to consolidate their claims against various employers in a single jurisdiction. This would place them in the same position as other claimants and ensure that they are not required to have to go to the trouble and expense of bringing separate proceedings against different employers in various Member States.
92. The proposed extension of the ability of commercial parties to select a jurisdiction to resolve their disputes in relation to commercial property will also be supported. There appears no reason in principle why freedom of contract for such parties in this respect should be limited in the restrictive way imposed by the current Regulation (such disputes are subject to an exclusive jurisdiction in the Member State where the premises in question are situated).
93. The Government is agrees that the proposed requirement that information should be given to consumers and other weaker parties about the consequences for them of contesting court claims brought against them, but failing to contest the jurisdiction of that court to hear such claims appears sensible. It is generally in accordance with the

protective treatment of such parties under the Regulation. Consumers in this situation should be informed that in this kind of situation any resulting court judgments given against them will circulate for recognition and enforcement purposes around the EU and that they need to contest jurisdiction in order to maintain the jurisdictional protection afforded to them under the Regulation (consumers can generally only be sued in the Member State where they are domiciled).

## **Consultation Co-ordinator contact details**

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given on page 2.

If you have any comments about the way this Call for Evidence was conducted you should contact the Ministry of Justice Consultation Co-ordinator at [\*\*consultation@justice.qsi.gov.uk\*\*](mailto:consultation@justice.qsi.gov.uk).

Alternatively, you may wish to write to the address below:

**Consultation Co-ordinator  
Legal Policy Team  
Legal Directorate  
6.37, 6th Floor  
102 Petty France  
London  
SW1H 9AJ**

## **The consultation criteria**

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

**These criteria must be reproduced within all consultation documents.**

## **Annex A – List of respondents**

1. Allen & Overy
2. Bar Council of England and Wales
3. Professor Adrian Briggs, University of Oxford
4. British Bankers' Association
5. British Maritime Law Association
6. Richard Butler
7. Professors Janeen Carruthers and Professor Elizabeth Crawford, University of Glasgow
8. Carter-Ruck
9. Chamber of Shipping
10. Chartered Institute of Arbitrators
11. City of London Law Society
12. Clifford Chance
13. Professor Eric Clive, University of Edinburgh
14. Commercial Bar Association
15. Department for Business Innovation and Skills
16. Andrew Dickinson
17. Direct Selling Association
18. English Pen, Index on Censorship and Sense About Science
19. Faculty of Advocates
20. GC100 Group
21. Global Witness
22. Professor Jonathan Harris, University of Birmingham
23. Professor Trevor Hartley, London School of Economics
24. Mr Justice David Hayton

25. Herbert Smith
26. Intellectual Property Lawyers Association
27. International Group of P&I Clubs
28. International Swaps & Derivatives Association
29. International Underwriting Association
30. Joan Lardy
31. Law Society
32. Leigh Day & Co
33. Licensing Executive Society
34. Lloyd's
35. Lloyd's Market Association
36. Lloyd's Register
37. Loan Market Association
38. London Maritime Arbitrators Association
39. Media Lawyers Association
40. Newspaper Society
41. Professional Publishers Association
42. Publishers Association
43. Reed Smith
44. Senior Master of the Senior Courts of England and Wales, Queen's Bench Division
45. Shergroup Limited & related Trading Divisions
46. Professor Peter Sparkes, Southampton University