

<b>Title:</b> <b>Impact assessment on the repeal and replacement of Regulation (EC) 44/2001 (Brussels I)</b>  <b>Lead department or agency:</b> <b>Ministry of Justice</b> <b>Other departments or agencies:</b> <b>Department of Business, Innovation and Skills</b> <b>HM Treasury</b> <b>Devolved Administrations</b>	<b>Impact Assessment (IA)</b>
	<b>IA No:</b>
	<b>Date:</b> 22.10.2010
	<b>Stage:</b> Consultation
	<b>Source of intervention:</b> EU
	<b>Type of measure:</b> Primary legislation
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## Summary: Intervention and Options

**What is the problem under consideration? Why is government intervention necessary?**

To consider whether the UK should exercise its right, under its Protocol to the Treaty on the Functioning of the European Union, to opt in to the European Commission proposal to repeal and replace Regulation (EC) 44/2001 (Brussels I) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The UK is already party to the current Regulation. Only the Government can decide whether it should participate in the proposed revised Regulation and request the agreement of the European Commission.

**What are the policy objectives and the intended effects?**

The revised Brussels I Regulation ("the Regulation") seeks to repeal and replace the current Regulation which appeals to a broad range of matters, covering not only contractual issues but also torts, delicts and proprietary claims. The Regulation lays down rules to settle conflicts of jurisdiction and facilitate the recognition and enforcement of judgments, court settlements and authentic instruments within the EU in civil and commercial matters. The Regulation aims to make cross-border litigation simpler, cheaper and improve general access to the EU courts.

From the UK perspective, a key consideration is the extent to which these provisions impact on the UK's role as a centre for international legal dispute resolution and a respected seat of international arbitration. There also broader considerations on the extent to which these provisions would deliver benefits to UK consumers and businesses, if the UK were to opt-in into the negotiations.

**What policy options have been considered? Please justify preferred option (further details in Evidence Base)**

The following options have been assessed against the base case of "no change". This would effectively mean the status quo continues with the UK exercising the right not to opt in to the revised Regulation and not participating in the negotiations :

Option 0 - Base Case ("Do Nothing"). A decision to not opt in at this stage would not necessarily preclude the UK from opting in at a later stage, but it would diminish the UK's influence in negotiations to shape the text, as the UK would not have any voting rights.

Option 1 - Exercise the right to opt-in to the Regulation and participate in the negotiations.

<b>When will the policy be reviewed to establish its impact and the extent to which the policy objectives have been achieved?</b>	It will be reviewed pending conclusion and analysis of responses to consultation
<b>Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review?</b>	Not applicable

**SELECT SIGNATORY Sign-off** For consultation stage Impact Assessments:

*I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.*

Signed by the responsible SELECT SIGNATORY: ..... Date:.....

# Summary: Analysis and Evidence

# Policy Option 1

**Description: “Opt – In” to the Draft Regulation**

To opt in to the Regulation from the outset.

Price Base Year	PV Base Year 2010	Time Period Years 25	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

### Description and scale of key monetised costs by ‘main affected groups’

There may be policy costs associated with increased enforcement/litigation volumes from the simplification of arrangements. The Government could also incur costs associated with implementation, for example new procedures, training and other requirements. It is not envisaged that there would be any additional costs on businesses, though some legal sectors (e.g. lawyers) may potentially lose revenue through the need for legal advice in fewer cases, although this is balanced by opportunities elsewhere.

### Other key non-monetised costs by ‘main affected groups’

There would be policy benefits from reduced litigation/enforcement volumes from the simplification of arrangements. Society as a whole would also benefit from greater legal certainty, in addition to enhancing the effectiveness within the EU and eliminating the incentive for abusive litigation tactics. The position of the UK as a centre of arbitration may also be strengthened. In addition, there may be re-distributional benefits from greater access to justice for employees and small businesses through simpler processes.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

### Description and scale of key monetised benefits by ‘main affected groups’

If the Government opts in, the amendments proposed to the Regulation could have the benefit of making cross-border litigation quicker and cheaper for parties involved in such matters. If the Government does not opt in, these benefits will not be achieved.

### Other key non-monetised benefits by ‘main affected groups’

If the Government opts in, the key benefits here would be improving access to justice; enhancing the effectiveness of choice of court agreements and improving the relationship between the court and arbitral proceedings. If the Government does not opt in, these benefits will not be realised.

### Key assumptions/sensitivities/risks

Discount rate (%)

If

If the Government opts in, there is a low-level risk that the European Court of Justice could adopt unexpected legal interpretations of the revised Regulation. However, this risk currently exists and indeed is the reason for some of the amendments being proposed to the Regulation now.

Impact on admin burden (AB) (£m):		Impact on policy cost savings (£m):		In scope Yes/No
New AB:	AB savings:	Policy cost savings:	Net:	

## Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?			Options UK and Gibraltar		
From what date will the policy be implemented?			To be confirmed		
Which organisation(s) will enforce the policy?			Not applicable		
What is the annual change in enforcement cost (£m)?					
Does enforcement comply with Hampton principles?			Yes		
Does implementation go beyond minimum EU requirements?			No		
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)			Traded: N/A	Non-traded: N/a	
Does the proposal have an impact on competition?			No		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			Costs:	Benefits:	
Annual cost (£m) per organisation (excl. Transition) (Constant Price)	Micro	< 20	Small	Medium	Large
Are any of these organisations exempt?	No	No	No	No	No

## Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on...?	Impact	Page ref within IA
<b>Statutory equality duties</b> <sup>1</sup> <a href="#">Statutory Equality Duties Impact Test guidance</a>	No	
<b>Economic impacts</b>		
Competition <a href="#">Competition Assessment Impact Test guidance</a>	Yes	
Small firms <a href="#">Small Firms Impact Test guidance</a>	Yes	
<b>Environmental impacts</b>		
Greenhouse gas assessment <a href="#">Greenhouse Gas Assessment Impact Test guidance</a>	No	
Wider environmental issues <a href="#">Wider Environmental Issues Impact Test guidance</a>	No	
<b>Social impacts</b>		
Health and well-being <a href="#">Health and Well-being Impact Test guidance</a>	No	
Human rights <a href="#">Human Rights Impact Test guidance</a>	No	
Justice system <a href="#">Justice Impact Test guidance</a>	Yes	
Rural proofing <a href="#">Rural Proofing Impact Test guidance</a>	No	
<b>Sustainable development</b> <a href="#">Sustainable Development Impact Test guidance</a>	No	

<sup>1</sup> Race, disability and gender Impact assessments are statutory requirements for relevant policies. Equality statutory requirements will be expanded 2011, once the Equality Bill comes into force. Statutory equality duties part of the Equality Bill apply to GB only. The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

## Evidence Base (for summary sheets) – Notes

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

### References

Include the links to relevant legislation and publications, such as public impact assessment of earlier stages (e.g. Consultation, Final, Enactment).

No.	Legislation or publication
1	<u>Council Regulation (EC) No 44/2001 (Official Journal of the EU L225, 16 January 2001)</u>
2	European Commission Report of April 2009 (COM 2009(174))
3	European Commission Green Paper of April 2009 (COM 2009(175))
4	House of Lords 21 <sup>st</sup> Report of Session 2008-2009 on the Green Paper on the Brussels I Regulation
5	UK Government Response to Commission Report and Green Paper of April 2009
6	UK Government Response to Commission Report and Green Paper of April 2009 – Response on intellectual property
7	European Commission proposal (published 14 December 2010)
8	

+ Add another row

### Evidence Base

Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form (recommended maximum of 30 pages). Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).

The spreadsheet also contains an emission changes table that you will need to fill in if your measure has an impact on greenhouse gas emissions.

#### Annual profile of monetised costs and benefits\* - (£m) constant prices

	Y <sub>0</sub>	Y <sub>1</sub>	Y <sub>2</sub>	Y <sub>3</sub>	Y <sub>4</sub>	Y <sub>5</sub>	Y <sub>6</sub>	Y <sub>7</sub>	Y <sub>8</sub>	Y <sub>9</sub>
<b>Transition costs</b>										
<b>Annual recurring cost</b>										
<b>Total annual costs</b>										
<b>Transition benefits</b>										
<b>Annual recurring benefits</b>										
<b>Total annual benefits</b>										

\* For non-monetised benefits please see summary pages and main evidence base section

# Evidence Base (for summary sheets)

## 1. Introduction and Background

### Scope of Impact Assessment

- 1.1 This Impact Assessment (IA) considers whether it is in the national interest for the Government, in accordance with the United Kingdom's (UK) Protocol on Title IV measures, to seek to opt-in to the European Commission's (from this point referred to as the Commission) proposed Regulation on '*Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*'. The IA accompanies the consultation document '*Revision of the Brussels I Regulation – How should the UK approach the negotiations – A public consultation*' ("the consultation document"). It assesses the costs and benefits of opting into the Regulation for the UK. It follows the procedures and criteria set out in the IA Guidance and is consistent with the HM Treasury Green Book.
- 1.2 The Government is supportive, in principle, of the Commission's aim to simplify rules and procedures related to cross-border jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The solutions that have emerged in the proposed revised Regulation seem to be sympathetic or compatible with the legal traditions of all Member States. An initial assessment of the proposed Regulation would seem to lend the Government's support, in principle, to the revised Regulation overall. However, the Government has identified two issues on which it wishes to give more thought or consult further before forming definitive positions. These relate to the provision concerning the extension of the jurisdiction rules to third State defendants and the inclusion within scope, albeit limited, of arbitration proceedings.
- 1.3 It is important to state at the outset that quantification of numbers, costs and benefits has not been possible at this stage. It is hoped that the results of the consultation exercise will assist both in developing this further and in underpinning the Government's decision on whether to participate in the Regulation or not. This impact assessment should therefore be treated as tentative.

### Objectives of Regulation

- 1.4 On 14 December 2010, the Commission published their proposed revised Regulation, 'on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters' (known as the Brussels I Regulation). The aim of the revised Regulation is to repeal and replace the current Regulation which applies to a broad range of matters, covering not only contractual issues but also torts, delicts and proprietary claims. The Regulation lays down rules to settle conflicts of jurisdiction and facilitate the recognition and enforcement of judgments, court settlements and authentic instruments within the EU in civil and commercial matters. It also includes rules to assist courts in resolving jurisdictional matters.
- 1.5 The proposed Regulation is the result of an extensive period of consultation by the Commission, including a Green Paper, which was issued on 21 April 2009. The Commission concluded that although the current Regulation was, in overall terms, considered to have been a success, a number of deficiencies were revealed which would need rectification. The reforms proposed hope to address these. The Commission propose:
- abolishing exequatur, with the exception of judgments in defamation cases and judgments given in collective proceedings;
  - extending the jurisdiction rules to disputes involving third country defendants; including regulating situations where the same issue is pending before a court inside and outside the EU;
  - enhancing the effectiveness of choice of court agreements;
  - regulating the interface between the Regulation and arbitration;

- improving the coordination of proceedings before the courts of Member States;
- improving access to justice for certain specific disputes; and
- clarifying the conditions under which provisional and protective measures circulate in the EU.

## Affected Groups and Sectors

- 1.6 The Regulation, if the Government elects to opt-in, would apply to all three separate UK jurisdictions: England and Wales, Scotland and Northern Ireland. Gibraltar, though a British Overseas Territory, is subject to EU Regulations in this field. The UK has responsibility on behalf of Gibraltar for the negotiation of relevant European instruments, and those instruments are directly applicable in Gibraltar if the UK decides to opt-in.
- 1.7 The following groups and sectors are likely to be affected by the Regulation, if adopted in the UK:
- *Judiciary*: When determining jurisdiction and recognising judgments in international cases. This would include the courts and all supporting elements.
  - *Legal profession*: Specialist lawyers or law firms working in international civil or commercial matters.
  - *Arbitration community*: Firms or individuals involved in cross-border dispute resolution. London is a reputable centre for international arbitration.
  - *Businesses* : These would be enterprises of all sizes which may be involved in international business transactions or those contemplating new business links with overseas traders. It would specifically include the financial sector where they are involved in international contracting for financial purposes, e.g. trading in stocks and derivatives, insurance, banking and related fields.
  - *Consumers* : The Regulation would affect any consumer involved in purchasing goods or services from abroad, including goods through the internet.
  - *Employees*: Those employed on contracts which involve working abroad.

## 2. Problem under Consideration

- 2.1 The Brussels I Regulation came into force on 1 March 2002 and applies in all Member States of the European Union (EU) including, by way of a special international agreement, to Denmark. Many of the policy aims and objectives of the Regulation are designed to contribute to the continual development of an area of freedom, security and justice and to the operation of the internal market. This includes facilitating the mutual recognition of judgments in civil and commercial matters through a system of predictable jurisdictional rules which are generally based on the defendant's domicile. Indeed, the regime established in the Regulation is founded upon the principle of 'mutual trust' between Member States in the administration of justice in each others' jurisdictions.
- 2.2 The scope of the regime provided by the Brussels I Regulation was extended to the Member States of the European Free Trade Association through the Lugano Convention which covers the same subject matters as the Brussels I Regulation. The Lugano Convention creates common rules regarding jurisdiction and judgments across a single legal space which consists of the Member States (including Denmark) and the European Free Trade Association States. The Lugano Convention was given effect in the United Kingdom in 1991. An amended Lugano Convention was agreed by the Community on 27 November 2008.

- 2.3 The revision of the Brussels I Regulation raises a number of technical legal matters with impacts, in particular, on London's role as a centre for international legal dispute resolution and as a respected seat of international arbitration. It is important for the Government to assess the impact, the benefits and likely costs of the proposed amendments and, in particular, give consideration to whether the amendments proposed adequately resolve UK concerns relating to actions brought by defendants who seek to exploit the Regulation's jurisdictional rules for their own means, particularly through undermining agreements that may have been reached previously between the parties (choice of court or arbitration agreements).

### **3. Cost Benefit Analysis**

- 3.1 This section sets out some potential costs and benefits of electing to opt-in to the Regulation or not as the case may be, the costs and benefits associated with each option, and any associated risks.

#### **Scope of CBA**

##### **Principles**

- 3.2 The IA aims to identify, as far as possible, the impacts of the proposed amendments to the Brussels I Regulation. In particular, it considers whether the amendments are likely to deliver a positive impact and take account of economic, social and distributional considerations.
- 3.3 Dependant on underpinning this IA, is the answer to two basic questions:
- whether the Commission has identified all the possible problems with the current Regulation; and
  - whether the amendments proposed are sufficient to resolve those problems. To establish a case for Government action (to opt-in to the Regulation or not), an assessment of the possible costs and benefits of Government involvement must be made to show that benefits are likely to outweigh the costs.
- 3.4 In addressing these questions, the IA has focussed mainly on non-monetised impacts, with the aim of understanding what the net impact might be from adopting the Regulation. It has not been possible to quantify costs at this stage. The IA indicates where further analysis might be done over the consultation period to inform the post-consultation IA.

##### **Policy Focus**

- 3.5 In the time available, it is not feasible to undertake a forensic assessment of the entire Regulation. As such the IA restricts itself to some broad elements of the Regulation, and in particular, to a basic assessment of whether the proposed amendments are sufficient to enable the Government to elect to opt into negotiations.

## Economic Problem

- 3.6 The standard approach to regulatory or policy intervention is based on efficiency or equity arguments. Government usually intervenes if there is something wrong (a “failure”) with the way particular markets, institutions or systems operate. This is especially the case for those areas under the existing Regulation. For example, the Government might consider intervening where existing or current laws are inadequate or where there is inefficient and/or unfair outcomes. Through such interventions it is hoped that society would be better off (welfare is increased) through greater efficiency. Government also usually intervenes in the interests of a more just society (“distributive justice”) or in the provision of goods and services to which it believes all individuals should have access (merit goods).
- 3.7 The policy problem set out under *Section 2*, concerns one of private international law in the area of jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The rules regulating such matters are currently covered by Regulation (EC) 44/2001, the current Regulation, which the Commission now seeks to revise. The “economic problem” under consideration is therefore best viewed from two overlapping perspectives – the EU and UK perspectives.
- 3.8 The underlying problem from the EU perspective is that current arrangements, with respect to civil and commercial litigation, impose significant uncertainty for consumers and businesses involved in cross border contractual arrangements and other transactions. This can originate from complex litigation and the varying national processes across the EU. In addition, procedures relating to access to courts across the Member States in respect of judgments and enforcement proceedings also impose significant transaction costs.
- 3.9 Three sources of these inefficiencies are highlighted by the Commission:
- a judgment in one Member State does not automatically take effect in another Member State. In order for such a judgment to be enforced it has to be validated and declared enforceable through a special intermediate procedure. Such procedures impose costs and often result in further delays;
  - access to the European courts in cases where defendants are not domiciled in a Member State vary according to the national laws of that particular Member State. This creates unequal access to justice and poses difficulties for companies wishing to do business in the internal market . This leads to less predictability of enforcement of Union law; and
  - the parties choice to bring disputes before a specific court or to arbitration can be disregarded, thus creating economic costs and delays as a result of abusive litigation tactics or parallel proceedings.
- 3.10 Eliminating these inefficiencies requires coordination at EU-level given there are many countries involved.
- 3.11 From the UK’s perspective, the question is whether the provisions set out in the Regulation is something that the UK Government should be concerned about. Addressing these questions demands an assessment on the impact, benefits and likely costs of the proposed amendments and, in particular, whether the amendments proposed adequately resolve UK concerns as well as bringing additional benefits to those who are likely to use or be affected by the Regulation.
- 3.12 The next sub-section assesses, from the UK perspective, the likely costs and benefits of the main provisions.



## Base Case (Option 0)

### Description

- 3.13 The Impact Assessment process requires that all options are assessed relative to a common “base case”. The base case for this Impact Assessment is to “do nothing”. By “doing nothing” the UK Government would exercise the right not to opt in to the revised Regulation proposed by the European Commission and would consequently not have voting rights throughout negotiations with the Member States. The UK Government can decide not to opt in at the start of negotiations but can request, after the Regulation has been adopted, for agreement to opt in.
- 3.14 Under the base there would be no changes to current UK practice. However, this would require at a minimum level steps to be taken to ensure that the current Regulation (EC) 44/2001 would still be applicable to the UK.
- 3.15 As the base case effectively compares itself against the net present value, this is therefore zero. However, the free movement of people within the EU has translated into a rising number of UK nationals travelling to or residing in other EU countries. If the UK was not to opt in to the Regulation all other EU Member States (with the possible exception of Ireland and Denmark) would have common provisions in this area. In so far as there are UK citizens living in those areas they would benefit from those provisions. This will mean that UK citizens resident in other EU Member States could benefit from the legislation without the UK incurring any additional costs.
- 3.16 Opting out of the Regulation is still likely to incur non-additional costs over time. Costs will occur, albeit minimal, for the legal profession and Government to familiarise themselves with the terms of the new Regulation and ensure procedures are in place to cover disputes where the new Regulation applies. In effect, it would be the costs of running parallel systems. However, these costs would not be additional to existing parallel systems that exist and in practice may even be lower due to greater harmonisation across the rest of the EU. Of greater consequence, however, is that the UK would be stuck with the results of both the *Gasser and West Tankers*’ cases, both of which have caused the UK particular difficulties. For example, the result of the *West Tankers*’ case has meant that English courts are no longer able to support arbitration proceedings by issuing anti-suit injunctions brought in another Member State. As arbitration is a key area of business for the UK, this is an area that the UK is keen to resolve. By opting out of the Regulation, there would be no improvement or resolution to the UK’s position in this area which would continue to create difficulty and concern for UK businesses.

## Option 1 – “Opt-In”

### Description

- 3.17 **Exercise the right to *opt-in* to the Regulation.** By participating in the Regulation from the outset, the UK will be bound by the terms of the Regulation once adopted. This will mean that a single set of rules will continue to apply in relation to jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Affected groups and sectors would benefit from any cost savings and advantages this would bring.
- 3.18 The Regulation seeks to facilitate cross-border litigation, the free circulation of judgments and improve the current legal framework to make it easier and less time consuming for European citizens and companies to litigate in another Member State to resolve their disputes. It also hopes to put to an end the possibility of tactical litigation to sabotage choice of court or arbitration agreements

## Abolition of Exequatur

- 3.19 A judgment given in one Member State does not automatically take effect in another Member State but has to be validated and declared enforceable in a special intermediate procedure known as “exequatur”. The European Commission argue that in an internal market without frontiers it should be possible to abolish exequatur in the enforcement of rights abroad. This would enable the genuine free circulation of judgments in the European Union.
- 3.20 Abolition of exequatur will be accompanied by procedural safeguards that will ensure that a judgment, in breach of the right to a fair trial and the right of defence, will not be recognised or enforced. This ensures compliance with Article 47 of the Charter of Fundamental Rights. In addition, exequatur will continue for cases of defamation in order to avoid impacts in relation to respect for private and family life (Article 7), protection of personal data (Article 8) and freedom of expression and information (Article 11).

### *Benefits*

- 3.21 The proposal would eliminate costs and delays. The extent of any benefits would depend on the complexity of the judgment:
- *Non-contested judgments* – there would be a saving for claimants in the vast majority of cases where the enforceability of a judgment is not contested by the defendant. This would mean that applicants would be able to save a significant proportion of the current costs of the procedure, for example in straightforward cases, both legal and court fees would no longer be incurred, translation costs would be minimised through the use of a standard form and the competent authority in the Member State of enforcement would only be entitled to request a translation of an extract of the judgment.
  - *Contested judgments* - In more complex cases, claimants would still incur legal and translation costs if the enforcement was contested by the defendant but with the introduction of standard forms this should reduce translation costs and lawyers’ fees. Under this scenario the additional benefits are therefore minimal.
- 3.22 According to the Commission’s impact assessment, the current costs to an applicant of the current exequatur procedure in the UK is around £3500 (which includes court and lawyer fees, costs for service of documents and translations). However, it is unclear whether the cost of the cases referred to by the Commission fall into the category of contested judgment or non-contested judgment. This will need to be established as the IA develops. Assuming that such cases fall into the uncontested judgment category, abolishing exequatur could result in significant cost savings.
- 3.23 In general the proposal may generate benefits for individuals and companies in terms of:
- improving and removing the remaining restrictions on access to justice for individuals and companies involved in cross-border disputes;
  - making it easier and less time consuming to litigate in another Member State if that is required to resolve a dispute; and
  - enhancing legal certainty for both choice of court and arbitration agreements and directly enforceable judgments.

3.24 The proposal may also have the incentive of reducing instances of bad faith by parties trying to circumvent existing agreements (especially choice of court agreements). This could generate benefits in two specific ways. First, it may eliminate or reduce the costs and delays currently borne by business as a result of bad faith attempts by contractual parties. This is particularly problematic where incomplete information exists. Secondly, it may incentivise businesses and consumers to engage in cross-border trade, in particular Small and Medium Enterprises (SMEs). The Commission cite that as a result of the *Centre for Strategy and Evaluation Services (CSES)* study<sup>2</sup>, 39% of SMEs state that they would be more inclined to be involved in cross-border transactions if the *exequatur* procedure was abolished. Similarly, the Commission believe that employees may also benefit in being able to enforce a judgment against their employer in another Member State. The latter is particularly important in terms of wider distributional issues.

### Costs

3.25 The changes may impose policy, procedural and implementation costs.

3.26 *Policy costs* - there may be policy costs associated with the increased volume of enforcement cases being handled by UK courts as judgments circulate freely. The extent of these costs to the UK judicial system would depend on the volumes (the UK courts could possibly attract revenue from this through fees). UK lawyers may also lose out from a reduction in their fee revenue as a result of no longer being required to provide legal advice on applying to enforce a judgment in another country.

3.27 *New procedures* – the main cost of the proposed Regulation may be through the introduction of any new procedures, notably for legal systems, the legal profession and enforcement agents. The Commission suggest, however that these costs could be limited if national procedures were modelled on those adopted for the European Enforcement Order and other European instruments which have abolished *exequatur* for certain types of claims.

3.28 *Legislation costs* - the adoption of the Regulation would require amendments to be made to primary legislation, in addition to court procedures and rules. Such a change would impose costs on Government in respect of changes needed to legal, operational and administrative processes in order to satisfactorily implement the Regulation, including the cost of training on new procedures for court staff and the judiciary.

### Risk / Outstanding Issues

3.29 An assessment is yet to be made whether, in abolishing *exequatur*, the proposed safeguards to be included in the revised Regulation are completely adequate, together with the retention of *exequatur* for defamation cases and certain multi-claimant cases. Further consideration is needed on whether it is appropriate:

- to require defendants to litigate only in the Member State of origin on those issues where there has been a failure to provide them with information about the proceedings, rather than allowing those issues, along with all the other alleged breaches of the safeguards, to be determined by courts in the Member State of enforcement;
- to delete the current safeguard of public policy in so far as that safeguard relates to substantive as opposed to procedural issues; and
- to treat defamation and certain judgments in collective proceedings differently from other judgments on the basis that such matters have been excluded because of the absence of harmonised EU choice of law rules in relation to such claims. Should other such matters not also be considered, for example in the field of real property?

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<sup>2</sup> CSES study

- 3.30 As a result of the queries above, and in addition to further work in other areas, an assessment will be required on:
- whether there will be additional costs to the legal system and enforcement agents resulting from the changes and if so, whether these could be lessened by adopting the same model as used for other European instruments where exequatur has been abolished;
  - whether the abolition of exequatur poses difficulties, particularly if the public policy safeguard is removed and whether there are enough assurances in the proposed Regulation that enable the UK and other Member States to comply with their obligations under the European Convention on Human Rights; and
  - whether the abolition of exequatur is likely to be of benefit to SMEs in terms of increasing the likelihood of their trading cross-border.

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

- 3.31 A key purpose of the Regulation is to determine in any given situation which is the competent court to hear a dispute. The current Regulation contains a number of rules designed to identify the court with jurisdiction to hear a case. The main jurisdiction rules which have been established by the Regulation (and the Lugano Convention) relate to defendants domiciled in a Brussels I (or Lugano) Member States. The main rule is that for such a defendant they must be sued in the court of the State in which he or she lives (domiciled). In addition, however, there are (in Articles 5-7 of the current Regulation) rules of “special jurisdiction” which allow a defendant to be sued in certain other Member States to which the dispute has a link. Other special rules also exist in favour of insured persons, consumers and employees as well as those which cover disputes about real property and those concerning the validity or dissolution of companies or associations.
- 3.32 As the rules on jurisdiction at national level vary where they concern third country defendants, the Commission argues that this creates unequal access to justice; poses difficulties for companies wishing to do business in the internal market which place barriers on competition; and, the protection of weaker parties is not ensured in the enforcement of European legislation. The new proposals are intended to improve access to justice and provide greater legal certainty and protection for EU citizens and companies in disputes connected with third States. The Commission believes the proposed reforms will result in full harmonisation of the rules on jurisdiction if implemented.

### *Benefits*

- 3.33 The main benefits to the UK may include the following:
- it may increase the possibilities for UK firms to litigate in the EU rather than abroad thereby reducing litigation costs and delays for these firms. In addition, the improvements to the legal framework may also encourage more UK companies to engage in cross-border transactions, particularly SMEs. The extent of these benefits would need further evaluation;
  - increased harmonisation of the rules in the EU relating to third country defendants may increase the legal certainty and predictability which, in turn may produce cost savings for UK firms involved in such matters. The new legal framework may also encourage more UK firms to engage in cross-border transactions;
  - there would be an assurance that weaker parties retain the protection granted to them by mandatory EU law; and finally
  - any improvement in cross border transactions between the UK, EU and the rest of the world would have benefits for the UK in facilitating trade and economic growth.

### *Costs*

3.34 There is likely to be minimum costs associated with educating the legal profession, the judiciary and court staff as well as minimal administrative burdens resulting from changes, for example, to court rules and procedures.

### *Risks / Outstanding Issues*

- 3.35 The jurisdiction rules of the current Regulation only apply when the defendant is domiciled in the EU. If the defendant is domiciled in a third State, the Regulation refers to national law. In other words, EU law only regulates part of the international jurisdiction of the Member States' courts leaving the remaining part to national law. The Commission state that as national rules on jurisdiction for third country defendants vary widely between Member States, this divergence leads to unequal access to justice in cases where the defendant is domiciled outside the EU.
- 3.36 To extend the current jurisdiction rules to cover disputes involving defendants domiciled outside the EU is something that the Government remains to be persuaded of. It believes that, as opposed to unilateral harmonisation in this area at EU level, solutions would be better found through multinational negotiations at the Hague Conference on Private International Law. An assessment is therefore needed of the overall benefits, costs and impacts of such a measure, with specific attention to:
- Articles 25 and 26 of the Commission's proposal, which creates new grounds of jurisdiction in relation to moveable property and a *forum necessitates*. Consideration is needed on whether this would be sufficient if the extension of jurisdiction to defendants domiciled outside the EU were to be accepted. In particular, the impact and effect resulting from the non-availability of the UK's current national grounds of jurisdiction and whether there is need to retain some national grounds in some form (in the Regulation) in order to protect the interests of claimants, in addition to ensuring that no judicial lacuna is created;
  - whether the retention of Member States' current national grounds of jurisdiction, notwithstanding that this would lead to some harmonisation of jurisdiction at EU level in respect of defendants domiciled outside the EU, would be sufficient if a compromise was needed here in terms of that proposed by the Commission;
  - the further restrictions to be imposed on commercial parties to insurance contracts in respect of valid choice of court agreements;
  - the exclusion of *forum non conveniens*, the procedural discretion mechanism deployed in UK courts to ensure the transfer of cases to other courts (in another jurisdiction) where it is felt that they would be more appropriately dealt with;
  - the proposed *lis pendens* rule to deal with concurrent proceedings in the court of a Member State and the court of a non-Member State

### **Choice of court agreements**

- 3.37 Parties to a contract are free to choose to pre-empt jurisdictional disputes by choosing a particular jurisdiction through a choice of court agreement which is also known as an exclusive jurisdiction clause (Articles 23 and 24 of Brussels I). It is also well known, however, that litigants can use the *lis pendens* rule as a mechanism to frustrate or undermine a choice of court agreement. Although the Regulation provides clear rules to prevent parallel proceedings and provides support for party autonomy, the only criterion which is applied is "which court was first seised". The rigid application of this criterion enables litigants to undermine the efficiency of proceedings and the efficacy of choice of court agreements.
- 3.38 The overwhelming majority of EU business involved in cross-border trade makes use of choice of court agreements (almost 70% of all companies and 90% of large companies). The Commission's objective here is to enhance the effectiveness of choice agreements, ensuring that any reform to the current Regulation facilitates the ratification by the EU of the Hague Convention on Choice of Court Agreements.

3.39 It would give full effect to the will of the parties in terms of their court of choice in any dispute that arose between them. This would improve the situation in terms of giving, through the Regulation, the chosen court priority to decide on its own jurisdiction. The amendments would mirror those adopted by the 2005 Hague Choice of Court Convention.

### *Benefits*

3.40 Improvements in the enforcement of out of court agreements may have the incentive of discouraging the use of tactical, pre-emptive claims which seek to undermine valid choice of court agreements. These would include the following benefits:

- incentivising parties to take part in more choice of court agreements, with corresponding positive impacts for the UK as the “choice of jurisdiction”. For those already engaged in choice of court agreements, it would eliminate the costs and delays which business incur today due to acts of bad faith that aim, through such acts, to circumvent choice of court agreements. This would give more certainty to businesses in the effectiveness of their contractual arrangements for dispute resolution; and
- the enforceability of contracts may have a corresponding deterrence effect, thereby eliminating the scope for abusive litigation tactics. This in turn is likely to reduce the inefficiencies, costs and delays associated with such parallel procedures.

### *Costs*

3.41 Improvements in the enforcement of choice of court agreements may incentivise and increase the use of such agreements. Whilst this would have a positive effect for UK businesses, it would also in turn lead to more agreements being made and the need for such agreements to be processed by the courts if a dispute arose between the parties. The extent to which this would increase the fee income of UK courts would depend on the additional volume of cases that resulted in dispute where the UK had been chosen by the parties as the court of choice in a choice of court agreement.

### *Risks / Outstanding Issues*

3.42 Further work will be done over the consultation period to assess the potential costs and benefits.

## **Interface between the Regulation and Arbitration**

3.43 The current Brussels I Regulation applies generally to civil and commercial matters. However, Article 1(2)(d) specifically excludes arbitration from its scope. Nevertheless, difficulties have been found in terms of the relationship between arbitration and court proceedings. For example, a party challenging the validity of an agreement to arbitrate can request the court to rule also on the merits of the case. This can lead to parallel court and arbitral proceedings with the risk of conflicting outcomes where the agreement is held invalid in one Member State and valid in another.

3.44 The Commission’s specific objective in its amendments here is to ensure the transparent and predictable coordination of court and arbitral proceedings thereby preserving or improving the attractiveness of the EU as a place of arbitration. The Commission have elected to enhance the effectiveness of arbitration agreements by providing that the court seised with a dispute involving an arbitration agreement would have to stay proceedings if an arbitral tribunal or court at the seat of arbitration was seised.

### *Benefits*

- 3.45 It would eliminate the risk of parallel proceedings and reduce the possibilities of abusive litigation tactics. This has the potential to improve the attractiveness of arbitration in the UK as a leading centre for arbitration in the EU.
- 3.46 Arbitration would become more effective thereby improving the parties' access to alternative means of dispute resolution as well as giving maximum effect to the will of parties who make arbitration agreements. In addition, it would improve access to justice for companies wishing to challenge (in good faith) an arbitration agreement because of the clear and transparent legal framework. As a result, both Articles 16 and 47 of the Charter of Fundamental Rights would be strengthened

#### *Costs*

- 3.47 Associated legislation costs and minimal implementation costs.

#### *Risks / Outstanding Issues*

- 3.48 Although the Government in principle shares the objectives of the Commission, the approach advocated by the UK at the Green Paper stage has not been adopted. The UK proposed that the current exclusion of arbitration from the scope of the Regulation should be reinforced. The Commission, however, have taken another route namely proposing that a court seised of a dispute should be obliged to stay its proceedings on the basis that certain conditions are fulfilled. These would include where proceedings contravene an arbitration agreement and where either an arbitral tribunal has already been seised regarding the dispute or court proceedings have begun in the Member State where the arbitration has its seat.
- 3.49 Arbitration is of great commercial significance to the UK. According to a recent study (2010) carried out by the Centre for Commercial Law Studies at the Queen Mary University in London, English law is frequently used as the law of choice by corporations in arbitration cases (in 40% of cases), compared to New York law (17%), Swiss law (8%) and French law (6%). In 2007 alone, over 10,000 disputes were resolved in the UK through arbitration and mediation. The majority of these disputes involved international parties. Albeit that London is a key player in the arbitration market, commercial competition in this area is increasing. As a result, the Government will need to consider, with the arbitration community, whether:
- the extension of the scope of the EU's competence in this area could pose any particular difficulties; and
  - whether the Government's previous suggestion, to reinforce the current exclusion of arbitration from the scope of the Regulation, remains preferable. That being the case, what benefits and costs would accrue from this in comparison to that proposed by the Commission.
- 3.50 Arbitration is a matter of great importance, particularly in the UK, as it is a way for companies to resolve their disputes out of court which has certain advantages over court litigation, particularly in terms of speed, confidentiality and the informality of proceedings. Arbitration is currently not covered by the scope of the current Regulation.

- 3.51 Whilst in general the arbitration exclusion of the Regulation has allowed arbitration in the Member States to develop on the basis of the New York Convention and national law, difficulties have been reported concerning the relationship between arbitration and court proceedings. This problem was highlighted in the *West Tankers* case where the parties to a commercial contract agreed to arbitrate in London. Nevertheless, a claim for damages was introduced into the Italian courts (where the damage had occurred) based on the argument that the arbitration agreement was invalid. The European Court of Justice held that if a party to an arbitration agreement introduced court proceedings on the merits in which the invalidity of the arbitration clause was raised as a preliminary question, such proceedings would fall within the scope of the Regulation. This means that the subsequent judgment circulates freely within the EU and can prevent the continuation of the arbitral award. The situation creates an incentive for a party wishing to escape from an arbitration agreement to claim (possibly in bad faith) that the agreement is invalid and to bring proceedings on the merits in a Member State where it is likely to obtain a favourable decision. This case revealed the real risk for abusive litigation tactics.
- 3.52 The Commission propose enhancing the effectiveness of arbitration agreements by including a rule which would guarantee that it would always be possible for the parties to an arbitration agreement to ensure that only the arbitral tribunal or the court at the seat of the arbitration hears the case. This would prevent parallel proceedings and the use of tactical litigation moves to sabotage the earlier agreement.
- 3.53 Arbitration is of great commercial significance to the UK. According to a recent study (2010) carried out by the Centre for Commercial Law Studies at the Queen Mary University in London, English law is frequently used as the law of choice by corporations in arbitration cases (in 40% of cases), compared to New York law (17%), Swiss law (8%) and French law (6%). In 2007 alone, over 10,000 disputes were resolved in the UK through arbitration and mediation. The majority of these disputes involved international parties. Albeit that London is a key player in the arbitration market, commercial competition in this area is increasing. As a result, the Government needs to consider, with the arbitration community, whether:
- the extension of the scope of the EU's competence in this area could pose any particular difficulties; and
  - whether the Government's previous suggestion, to reinforce the current exclusion of arbitration from the scope of the Regulation, remains preferable. That being the case, what benefits and costs would accrue from this in comparison to that proposed by the Commission

### **Better coordination of proceedings before the courts of the Member States**

- 3.54 A number of modifications have been proposed by the Commission all of which are aimed at improving the coordination of legal proceedings in the Member States. These amendments include:
- improving the general *lis pendens* rule by prescribing a time limit for the court first seised to decide on its jurisdiction. In addition, the amendment provides for an exchange of information between the courts seised of the same matter;
  - facilitating the consolidation of related actions by abolishing the requirement that consolidation can only take place if it is possible to do so under national law; and
  - in respect of provisional, including protective measures, providing for the free circulation of such measures which have been granted by a court having jurisdiction on the same substance of the case, including – subject to certain conditions, of measures which have been granted *ex parte*. Given the wide divergence of national laws on this issues, the effect of these measures should be limited to the territory of the Member State where they were granted, therefore preventing the risk of abusive forum shopping.



3.55 The Government is supportive of improving the general *lis pendens* rule by prescribing a time limit within which the court first seised must decide on its jurisdiction as it will ensure greater legal certainty. It is not supportive of the idea, however, that there should be an exchange of information by the courts on the same matter. Such a mechanism is unlikely to have any significant value in practice and could well lead to delay and expense for the parties. The Government also sees value in the proposal that in relation to the consolidation of related actions, the technical and unduly restrictive requirement that consolidation must be possible under national law should be abolished. The removal of this step would ensure greater legal certainty.

3.56 On provisional, including protective measures, the Government has noted the proposal that provisional measures ordered by a court without jurisdiction under the Regulation as to the substance of the dispute should not circulate within the EU for recognition and enforcement purposes. This, however, is contrary to the position under the current Brussels I Regulation. The Government needs to consider what the practical implications of this proposal would be.

### *Costs & Benefits*

3.57 No costs and benefits have been identified at this stage. Further work on this issue will continue during the consultation period.

### *Risks / Outstanding Issues*

3.58 The Government is supportive of improving the general *lis pendens* rule by prescribing a time limit within which the court first seised must decide on its jurisdiction as it will ensure greater legal certainty. It is not supportive of the idea, however, that there should be an exchange of information by the courts on the same matter. Such a mechanism is unlikely to have any significant value in practice and could well lead to delay and expense for the parties. The Government also sees value in the proposal that in relation to the consolidation of related actions, the technical and unduly restrictive requirement that consolidation must be possible under national law should be abolished. The removal of this step would ensure greater legal certainty.

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## **Improving access to Justice**

3.60 A number of amendments to improve the practical functioning of the jurisdiction rules have been proposed by the Commission which include:

- creation of a forum for claims of rights *in rem* at the place where moveable assets are located;
- the possibility for employees to bring actions against multiple defendants in the employment area under Article 6(1);
- the possibility to conclude choice of court agreements for disputes concerning the tenancy of office space for professional use; and
- the mandatory information of a defendant entering an appearance about the legal consequences of not contesting the court's jurisdiction.

3.61 These proposals are generally supported by the Government as they will bring greater legal certainty and clarity to the Regulation and will be of benefit to those using the Regulation.

## *Costs & benefits*

- 3.62 No costs and benefits have been identified at this stage. Further work will continue on this issue during the consultation

## *Risks/Outstanding Issues*

- 3.63 The proposals are generally supported by the Government as they will bring greater legal certainty and clarity to the Regulation and will be of benefit to those using the Regulation. However, further analysis will be needed to fully establish this.

## **4. Specific Impact Tests**

- 4.1 The Impact Assessment Guidance sets out a number of tests which need to be assessed. We have focused on those tests that may be relevant to the Regulation.

## **Competition Assessment**

- 4.2 The markets affected by the proposed Regulation will include the private sector. The potential impact on competition is difficult to assess at this stage although the reforms proposed by the Commission are designed to further enhance competition in the internal market. Further consideration will be given in developing a formal competition assessment during the consultation process.

## **Small Firms Impact**

- 4.3 The IA Guidance requires that new proposals are assessed on the extent to which they impose or reduce the cost on business requires. The Commission state that the revised proposal is likely to have beneficial impacts on small firms, although the extent of the benefits claimed are unclear at this stage. Further information on any particular impact on small firms, and the likely costs and effects to their business, will be considered during the consultation period.

## **Legal Aid and Justice Impact Test**

- 4.4 It is considered that the proposed Regulation is unlikely to have a significant impact on legal aid expenditure. Further consideration will be given to this if evidence emerges to the contrary.

## **Human Rights**

- 4.5 The proposed Regulation, if adopted, will be compliant with the Human Rights Act.

## **Equalities Impact Assessment**

- 4.6 A screening exercise for race, disability and gender shows no evidence to suggest that electing to opt-in or out of the Regulation would have any specific race, disability, gender or equality effects. Consequently, the Ministry of Justice has decided that a full equality impact assessment is not required.

## Rural Proofing

- 4.7 Rural proofing is a commitment by Government to ensure domestic policies take account of rural circumstances and needs. It is a mandatory part of the policy process, which means as policies are developed, policy makers should consider whether their policy is likely to have different impacts in rural areas, because of particular circumstances and if so adjust the policy where appropriate, with solutions to meet rural needs and circumstances. The initial assessment made suggests that there are no specific rural impacts from the proposals. However, further work will be done over the consultation period to fully assess any possible implications.

## Health Impact Assessment

- 4.8 The Ministry of Justice has concluded that a health impact assessment is not necessary. The proposed Regulation will not have a significant effect on human health or have an effect on the wider determinants of health. In addition, it will not impact on the lifestyle-related variables provided in the guidance or on health or social care services.

## Sustainable Development

- 4.9 The Ministry of Justice have concluded that there are any significant environmental impacts resulting from the proposed amendments to this particular Regulation.

## Enforcement and Implementation

- 4.10 The decision to participate in the Regulation from the outset or elect to participate in the Regulation at a later stage does not require any specific enforcement, sanction or monitoring mechanisms. The Regulation will be applied by the courts on a case by case basis.

## Annexes

Annex 1 should be used to set out the Post Implementation Review Plan as detailed below. Further annexes may be added where the Specific Impact Tests yield information relevant to an overall understanding of policy options.

### Annex 1: Post Implementation Review (PIR) Plan

A PIR should be undertaken, usually three to five years after implementation of the policy, but exceptionally a longer period may be more appropriate. A PIR should examine the extent to which the implemented regulations have achieved their objectives, assess their costs and benefits and identify whether they are having any unintended consequences. Please set out the PIR Plan as detailed below. If there is no plan to do a PIR please provide reasons below.

<p><b>Basis of the review:</b> [The basis of the review could be statutory (forming part of the legislation), it could be to review existing policy or there could be a political commitment to review]; Once implemented, the Regulation will be the subject of a review by the European Commission 5 years from the date of its adoption.</p>
<p><b>Review objective:</b> [Is it intended as a proportionate check that regulation is operating as expected to tackle the problem of concern?; or as a wider exploration of the policy approach taken?; or as a link from policy objective to outcome?] The review will take account of the application of the Regulation since coming into force and whether problems have occurred which need rectification.</p>
<p><b>Review approach and rationale:</b> [e.g. describe here the review approach (in-depth evaluation, scope review of monitoring data, scan of stakeholder views, etc.) and the rationale that made choosing such an approach] The European Commission will produce a report on the application of the Regulation which may be accompanied by a Green Paper proposing areas where the Regulation may be subject to amendment in future.</p>
<p><b>Baseline:</b> [The current (baseline) position against which the change introduced by the legislation can be measured] The current Regulation in force.</p>
<p><b>Success criteria:</b> [Criteria showing achievement of the policy objectives as set out in the final impact assessment; criteria for modifying or replacing the policy if it does not achieve its objectives]</p>
<p><b>Monitoring information arrangements:</b> [Provide further details of the planned/existing arrangements in place that will allow a systematic collection of monitoring information for future policy review]</p>
<p><b>Reasons for not planning a PIR:</b> [If there is no plan to do a PIR please provide reasons here] The application of the Regulation will be monitored by the European Commission.</p>