



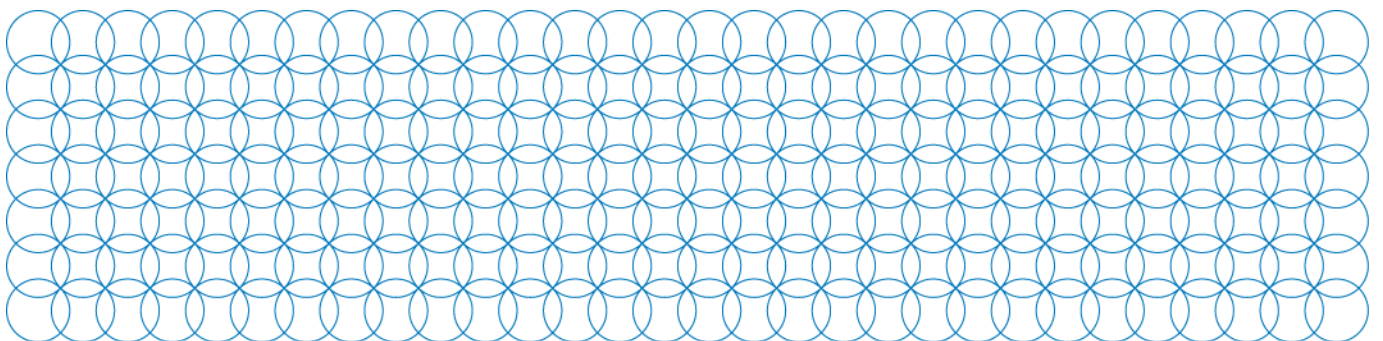
# **European Commission proposed Regulations on matrimonial property regimes and the property consequences of registered partnerships**

## Response to public consultation

**Response to Consultation**

CP(R) 8/2011

28 November 2011



Department of  
**Finance and  
Personnel**

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







Ministry of  
**JUSTICE**

## **European Commission proposed Regulations on matrimonial property regimes and the property consequences of registered partnerships**

### **Response to public consultation**

**Response to consultation 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 exercise which was initiated by the issue of a paper (CP 8/2011) entitled '*Matrimonial Property Regimes and the property consequences of registered partnerships – How should the UK approach the Commission's proposals?*' on 15 April 2011. 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 **Jamal Ali** at the address below:

Justice Policy Group  
Ministry of Justice  
6<sup>th</sup> Floor,  
102 Petty France  
London SW1H 9AJ

**Telephone: 020 3334 5529**

**Email: [european.policy.unit@justice.gsi.gov.uk](mailto:european.policy.unit@justice.gsi.gov.uk)**

This report and the initiation document are also available online at [www.justice.gov.uk/index.htm](http://www.justice.gov.uk/index.htm).

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

## Executive Summary

The initiation paper “*Matrimonial Property Regimes and the property consequences of registered partnerships – How should the UK approach the Commission’s proposals?*” was published on 15 April 2011. It addressed the issue of whether it was in the national interest for the UK to seek to participate in the Commission’s proposals.

As the proposals are matters of civil judicial cooperation, the UK’s Protocol to Title V of the Treaty on the Functioning of the European Union applied. This meant that the UK’s participation depended upon the UK notifying the EU of its wish to take part in the adoption and application of the proposals (known as opt in) within three months of their publication.

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, it was necessary on this occasion to depart from the Code of Practice on Consultation issued by the Cabinet Office. A shorter exercise was therefore conducted between 15 April 2011 and 20 May 2011.

More than 100 people or organisations were contacted and 16 formal responses were received. A list of respondents to the consultation is at Annex A to this paper.

In general, 13 commented specifically on the opt-in, of which 11 recommended that the UK should not opt-in. These responses, together with issues raised by respondents, were considered carefully before a final decision was made on whether to opt in to the proposals or not. The Government’s final decision was made in conjunction with the European Affairs Committee and Ministers in the Devolved Administrations in Scotland and Northern Ireland.

On 30 June 2011 a Written Ministerial Statement was made to Parliament confirming that the UK would not be opting in to these proposals.

## Part 1: Introduction

### Background

1. It is the European Commission's view that, in relationships with an international connection, it is difficult for people to know which courts have jurisdiction and which laws apply to their personal situation and to their property when that relationship ends.
2. Therefore the Commission published its two proposals in March to regulate jurisdiction and applicable law as they apply both to the daily management of the property of spouses (matrimonial property regimes) and registered partners (including UK civil partnerships) and to how issues relating to the distribution of assets in cross-border situations are handled following the ending of a couple's relationship through divorce, separation or death. The Commission's proposed Regulations create rules on which court should have jurisdiction to deal with such issues, which law should apply (including in some circumstances an ability for couples to choose the law) and provide a mechanism for the recognition and enforcement of court judgments throughout the EU.
3. The Government's initial assessment was that it understood the Commission's reasons for proposing separate instruments for marriage and registered partnerships given the difficulty presented by the fact that not every Member State's law contains the concept of registered partnership, whereas marriage is part of the law throughout the Union. It accepted that the rules on jurisdiction, applicable law and recognition and enforcement follow the precedents of other instruments and, in general, may be helpful in circumstances where property regimes exist in the Member States. It could see that certain benefits were likely to accrue to European citizens as a result of the proposals, in terms of the predictability of the law that will apply to a property regime, and the ability to ensure recognition and enforcement of decisions on property matters that previously was a matter for the private international law rules of each Member State and could lead to extensive delay and expense in enforcing property rights. However it identified a number of difficulties from a UK perspective.
4. These stem mainly from the fact that the concept of matrimonial property regimes (or the equivalent for civil partnerships) does not clearly exist in England and Wales and Northern Ireland as regards legal relationships during the currency of the marriage or registered partnership. Similarly the concept does not apply in the laws of England and Wales or Northern Ireland after the relationship ends. Courts in these jurisdictions have wide distributive discretion when considering ancillary relief which arises on divorce, or dissolution of a civil partnership. Prior to divorce or dissolution, the general law of property applies to the couple's property and in particular to their relations with third parties. While the law in Scotland is different (on divorce, and dissolution of a civil partnership, the law in Scotland lays down key principles for the court to follow and provides that matrimonial property should in general be valued at the relevant date and shared equally) the Government considered that these proposals would create problems for all UK jurisdictions given that they did not cover all aspects of financial provision on divorce or dissolution. Courts in each of the UK jurisdictions take account of a wider range of issues than matrimonial property regimes in other Member States usually cover – e.g. maintenance (needs and resources), the division of capital, including gifts and jointly owned companies (both of which are excluded from the scope of the Commission's proposals), and matters such as pension sharing and

5. As a result the Government considered that under the Commission's proposals it was possible that courts in different Member States could take jurisdiction to deal with different aspects of financial provision on divorce or dissolution, thus potentially splitting the resolution of the issues for one couple between different jurisdictions and different applicable laws. This would be contrary to the intentions of the proposals and could increase costs and delays to parties where the case had a UK connection and cause confusion. Costs were also likely to increase as courts in the UK do not normally apply foreign law in family cases. If the UK was to participate in these proposals experts would be required to prove foreign law.
6. Problems were also identified with succession issues. A lack of clarity as to what constitutes matrimonial property meant that some aspects of succession law may fall within the scope of the matrimonial property proposal even though it excludes "the succession rights of a surviving spouse". Also as the jurisdiction rules were not fully aligned with those in the proposed Succession Regulation it was thought this could lead to an unwelcome fragmentation of succession proceedings with different proceedings taking place in different jurisdictions. In addition as there is no exclusion from the scope of these proposals of certain property law rights and in particular joint property interests which pass by survivorship on death the application of foreign law on such interests could disrupt the operation of this area of law with wide-reaching and unpredictable consequences for the transmission of immovable property in the UK jurisdictions.
7. Finally if the UK was to participate in these proposals the Government believed that a requirement to disclose the relevant applicable law or a system of registering it would be necessary as otherwise third parties would have reduced certainty about the law applying to their legal relationship with the couple. While corporate entities such as banks might be more able to establish the existence of the relevant applicable law, the Government considered that ordinary individuals entering into a legal relationship with the couple would be more at risk of not understanding the implications.

## **Devolution and Gibraltar**

8. The UK consists of three separate jurisdictions: England and Wales, Scotland and Northern Ireland. The responsibility for the law in this area is devolved to each jurisdiction. Gibraltar, although 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

9. There were 16 formal responses to the consultation. The proposals were also considered by the Lord Chancellor's Advisory Committee on Private International Law. The 16 formal responses can be aggregated to the following groups:

- 2 were from the academic sector (12.5%);
- 1 was from another Government Department (6.25%);
- 2 were from members of the judiciary or judicial representative bodies (12.5%);
- 2 were from legal practitioners (12.5%); and
- 9 were from professional bodies/representative bodies (56%)

10. Not all respondents chose to answer all questions. The questions posed were as follows:

**Q1. Is it in the national interest for the Government, in accordance with Protocol 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice annexed to the Treaty on the Functioning of the European Union, to opt in to negotiations on the Commission's proposed Regulations? Please explain the reasons for your decision.**

**Q2. What are your views on the specific issues raised in this paper concerning the proposals being made by the European Commission in their draft proposals?**

**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?**

## Part 3: Responses to specific questions

### Question 1

**Is it in the national interest for the Government, in accordance with Protocol 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice annexed to the Treaty on the Functioning of the European Union, to opt in to negotiations on the Commission's proposed Regulations? Please explain the reasons for your decision.**

11. Thirteen out of the sixteen responses commented specifically on the opt-in, of those, eleven believed that it was not in the national interest for the UK to participate in the Commission's proposals. Each of the 11 cited at least one of the concerns that the Government raised in its consultation document. Three respondents considered that one consequence of this decision might be that the UK could become a target for increased "forum shopping" as the laws for financial provision after divorce or dissolution of a civil partnership could be perceived to be more favourable to the vulnerable party than would be the case in other Member States. However, for two of those respondents, this did not change their conclusion that the UK should not participate.
12. Two respondents stated that the Government should opt-in to the proposals. One thought that the concerns listed in the consultation paper had been overplayed and that there was much to be gained from the UK opting in to the proposals and helping to influence their shape. This respondent highlighted advantages to international couples finding themselves before the courts of the United Kingdom, including greater certainty as to which law would apply to their property regime, and fulfilment of reasonable expectations they may have had at the outset of, and during their marriage/partnership as to the law that would apply to their matrimonial property. Further, this respondent took the view that an opt in to the proposals would not have very much effect on the UK systems of resolving financial matters at the end of a marriage or civil partnership, because most of the matters that UK courts resolve would be categorised as "maintenance" in EU terms and so outside of the scope of the proposals. The other thought the proposals would be of particular benefit to those in succession cases.

### Question 2

**What are your views on the specific issues raised in this paper concerning the proposals being made by the European Commission in their draft proposals?**

13. Most respondents referred in some way to the issues that had been raised in the Government's consultation paper under this question. The responses have been broken down in relation to each of these issues:

#### Application of foreign law

14. Eleven respondents expressed concerns about the use of foreign law in UK courts in cases to which these proposals applied. In general these respondents

thought that the application of foreign law would give rise to increased costs as there would be a need to train judges and lawyers and experts would be required to give evidence about the relevant foreign law. This was seen to be of particular concern if applied in the lower courts. This was thought likely to create problems for lawyers when giving advice to clients on such matters. There was also some criticism of the hierarchy of connecting factors to the applicable law contained in Article 17 of the matrimonial property proposal, with concerns that it would not reflect the reality of the couple's marriage.

15. While most respondents preferred the law of the forum to continue to apply, three reported that foreign law was used in some family cases in Scotland, with one of those saying that it had been used in some English family cases as well. One respondent, while welcoming the ability of parties to choose the law that should apply to their case, suggested that jurisdiction should follow the applicable law. Another respondent understood that applying foreign law could be difficult but did not understand why that difficulty was any more acute in the field of matrimonial property than in other areas. The same respondent agreed that it was expensive and time consuming to apply foreign law but thought that it would only be applied in cases where a party chose to plead it and was prepared to pay the extra costs. If foreign law was not applied that could lead to English courts ignoring foreign marital contracts which the parties had had a reasonable expectation would be binding.

#### Scope and jurisdiction

16. Ten respondents expressed concerns, to different degrees, about the scope of the proposals and eleven raised concerns about jurisdiction. Most highlighted the issues raised in the Government's consultation such as the exclusion of certain aspects of financial provision, particularly maintenance obligations and gifts and companies set up between spouses. It was thought that such exclusions could lead to fragmented jurisdiction of different aspects of a case. However one respondent thought that the exclusion of maintenance meant that most cases would not fall within scope because maintenance, to which English law would continue to apply, would exhaust the property of the spouses in most cases.
17. A number of respondents mentioned the need to include domicile as one of the connecting factors. Others were concerned about the uncertainty about the types of business interests that might be included and how gifts, trusts, pensions and joint property rights might be dealt with under the proposals and the consequences, including possible tactical litigation. Several respondents were concerned about the lack of alignment of jurisdictional grounds with those for divorce under Brussels IIA, especially given the practice of our courts whereby financial provision is ancillary to the divorce petition. In particular, it was thought that there should not be a requirement for the spouses to agree before a divorce court could also exercise matrimonial property jurisdiction.
18. There was repeated support for the Government's concerns about the interaction with the proposed succession Regulation with one respondent in particular referring to the potential for controversial overlap and confusion with the demarcation between these topics being difficult to achieve. However another respondent thought the problem was overstated, that the two sets of rules were not dependent on one another and could operate in tandem. In the view of another there would not be fragmentation of succession proceedings as all the proposals seemed to be aligned. This respondent thought there would be no impact on joint ownership rights.

Effects on Third Parties

19. Five respondents expressed concerns with the Commission's proposals in relation to the effect on third parties, in particular the legal uncertainty that could arise and the possible affect this might have on the willingness of banks to lend. One respondent thought that this could result in third parties having to intervene in the litigation in some cases.

**Question 3**

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

20. Nine respondents answered this question. Five broadly agreed with the Government's impact assessment. However, two thought that the impact assessment may have overplayed some of the potential benefits of the proposals to couples in terms of having a clearer and swifter regime for recognition and enforcement of decisions. They believed such benefits would likely apply to only part of a case and in their view existing conflict of law rules already provided the same benefits. One respondent also queried whether there would be any benefits in terms of greater predictability of the law that would apply. The same respondent thought that extra costs associated with the use of foreign law in courts would not accrue to the same extent in Scotland where foreign law could already be applied in such cases. Another respondent highlighted that the impact assessment did not specify the cost implications for the additional training that would be required for barristers, judges and court staff applying foreign law in family courts, although another queried whether the impact on lawyers generally would be significant. Finally one respondent commented that the "do nothing" option did not take account of the impact on succession where they thought the current system creates many problems and uncertainty for UK residents and citizens.

**Question 4**

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

21. Other issues raised by respondents included the need for married couples and registered partnerships to be treated equally as far as possible. In particular there were concerns that registered partners were unable to make any choice of applicable law. Another respondent was concerned about the possible future automatic recognition of judgments if that would allow property registers and the land registry to be updated without further procedures in other Member States. They also wanted public policy exemptions to apply in relation to applicable law and jurisdiction regarding third countries. The same respondent was also concerned about the lack of mutual recognition of notarial documents – while such documents from other Member States would have to be recognised in the UK, UK documents would not be recognised in other Member States in the same way.

## **Part 4: Conclusion and next steps**

22. In the light of the responses to this consultation the Government decided that it was not in the UK's interests to opt in to either proposal. This decision was confirmed to Parliament by way of a Written Ministerial Statement on 30 June 2011.
  
23. Given the significant differences between the legal systems of the UK and most other Member States the Government believes it is unlikely that the negotiations could be influenced to a sufficient extent to make the terms of any amended proposals acceptable to enable UK participation post-adoption. However the negotiations will be monitored to ensure that the interests of the UK are protected.

## **Consultation co-ordinator 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 5.

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.gsi.gov.uk](mailto:consultation@justice.gsi.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. Association of Her Majesty's District Judges
2. Bar Council of England and Wales
3. Charles Russell LLP
4. Faculty of Advocates
5. Family Law Bar Association
6. John Wilson QC
7. Liverpool Law Society
8. Lord Justice Thorpe
9. Northern Ireland Court Service
10. Professor Chris Clarkson, University of Leicester
11. Professors Elizabeth Crawford and Janeen Carruthers, University of Glasgow
12. Resolution
13. Society of Trust and Estate Practitioners
14. Stonewall
15. The Law Society of England and Wales
16. The Law Society of Scotland