

HOUSE OF LORDS

SUB-COMMITTEE E (LAW AND INSTITUTIONS) INQUIRY:

**AREA OF FREEDOM, SECURITY AND JUSTICE: THE IMPACT OF THE
REFORM TREATY**

Memorandum of Evidence

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on Legal Affairs**

A. Introduction

1. In 1997, when policies relating to visas, asylum, immigration and other policies relating to the free movement of persons were moved to the Community pillar, the United Kingdom and Ireland obtained a Protocol covering Title IV EC.¹ This Protocol grants both Member States an unprecedented level of flexibility, compared for with previous differentiation in the areas of EMU or the "Social chapter".² It not only constitutes an "opt-out" but also contains a mechanism to selectively "opt-in" at various stages of the procedure. It is possible to opt-in either (a) within three months after a proposal or initiative has been presented to the Council or (b) at any time after the adoption of the relevant measure by the Council.³ If the United Kingdom or Ireland opt into a

¹ Article 69 EC; Protocol (No 4) annexed to the EU and EC Treaties on the position of the United Kingdom and Ireland (1997), Consolidated Treaties of 29/12/2006, OJ C 321 E/198, p.198 (hereinafter, "the 1997 Protocol"). The Protocol became applicable on 1 May 1999, on entry into force of the Amsterdam Treaty. Available at: <http://www.dianawallismep.org/UnitedKingdom/resources/sites/82.165.40.25-416d2c46d399e8.07328850/Rome%20I/protocol.doc>

² Jörg Monar, Wolfgang Wessels, *The European Union after the Treaty of Amsterdam* (Continuum, 2001), page 285.

³ 1997 Protocol, Articles 3(1) and 4 respectively.

proposal but agreement cannot be reached in Council "after a reasonable period of time", the remaining Member States can go ahead and pursue the negotiations between themselves and adopt the measure which would not bind the excluded Member State.⁴ Finally, Ireland alone has the possibility to unilaterally terminate its participation in the Protocol.⁵

2. This submission examines the impact of this mechanism in relation to the critical area of judicial cooperation in civil matters, a field often overlooked which comprises matters as diverse as small claims, the recovery of maintenance, and uniform rules on the law applicable to contractual and non-contractual obligations, all relevant to the daily life of citizens throughout the EU and having implications as to the homogeneity and good functioning of the Internal Market.⁶
3. The Protocol on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice adopted by the Lisbon IGC on 18 October 2007 considerably widens the material scope of the 1997 Protocol.⁷ However, it does not alter in any significant way the situation in relation to judicial cooperation in civil matters. I will argue that the experience acquired over the last decade in the application of the Protocol to the area of civil law⁸ reveals shortcomings in the process that already affect the United Kingdom as such, but also its long-term relationship with other Member States. It is all the more important to draw from existing experience in the light of the expanding scope of the mechanism.

⁴ *ibid.*, Article 3(2)

⁵ *ibid.*, Article 8

⁶ See inter alia the Commission's website:

http://ec.europa.eu/justice_home/fsj/civil/fsj_civil_intro_en.htm#

⁷ Presidency of the IGC, Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community - Protocols, CIG 2/1/07, 5 October 2007, at page 60 (Horizontal amendment 20).

⁸ The author was Parliament's *rapporteur* on the "Brussels I" and "Rome II" Regulations. She also negotiated the "Rome I" regulation on behalf of her political group, and drafted an opinion for the Legal Affairs Committee on the proposal concerning Maintenance Obligations.

B. Experience of the Protocol in relation to judicial cooperation in civil matters

4. Back in 2004, Professor Steven Peers wrote that "in practice, the United Kingdom has opted into to all proposals concerning asylum and civil law and nearly all proposals concerning illegal migration."⁹ This statement unfortunately no longer holds true, at least in the field of civil law.

5. The United Kingdom Government has recently made near-systematic use of the 1997 Protocol by not opting in at the outset to three important legislative instruments (on the law applicable to contracts - hereinafter "Rome I" - on matters relating to maintenance obligations and to divorce¹⁰), arguing that it still has the possibility to accept the instrument once it is adopted.¹¹ This seems to represent a political trend which we can expect to be continued and indeed expanded to other policy areas if the Treaty of Lisbon enters into force. Such an approach is problematic for several reasons.

(i) Fragmentation of the Internal Market

6. Firstly, it overlooks the fact that these civil justice issues have their roots in the Internal Market, and their unequal operation across that market threatens both its homogeneity and good functioning, to say nothing of the implications on 'access to justice' for European citizens and enterprises. Indeed, an explicit link with the Internal Market even exists in the legal base for action in the field of judicial cooperation in

⁹ Article written on 25 October 2004 for Statewatch, available at: <http://www.statewatch.org/news/2004/oct/eu-immig-opt-outs.pdf>

¹⁰ COM(2005) 650 final, 2005/0261 (COD); Brussels, 15.12.2005, COM(2005) 649 final, 2005/0259 (CNS); Proposed Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters. See also: House of Lords 52nd Report of Session 2005-06, Rome III—choice of law in divorce, HL Paper 272.

¹¹ The UK Government, although not having a right of vote in Council, significantly influenced and participated in the negotiations leading up to the first reading agreement on Rome I, and has now signalled that it considers it may opt in to the legislation under Article 4 of the 1997 Protocol once the Regulation is finally adopted, subject to consultations at domestic level.

civil matters.¹² The use of the Protocol undermines the homogeneity of the Internal Market and will prevent UK citizens from using instruments specifically designed to make their lives easier, in particular when they take advantage of their freedom to move or to trade across the EU and are then faced with a problem, such as a divorce, a spouse unwilling to pay maintenance or a debtor refusing to pay up. The United Kingdom's half hearted commitment to civil justice at a European level thus not only leads to a fragmented area of justice but also to a fragmented Internal Market. Indirectly but equally detrimentally, such an approach also threatens to limit the influence of the common law on the future development of European civil and commercial law; this is arguably a loss both for the United Kingdom and for the European Union as a whole.

7. To take a concrete example, the United Kingdom's opt-out of the "Rome I" proposal was potentially a very detrimental move for many British consumers who may not have benefited from the additional modern safeguards which it is scheduled to introduce. Conversely, a French consumer may well have decided not to bother with British traders because of the lack of coherent consumer protection regime; and ditto for consumers across all the other Member States. Business likewise would be left in a complicated position dealing with different regimes dependent on where they are trading.
8. Whilst it is accepted that the initial decision not to opt into this particular instrument may have been guided by perceived national interests centring around the so-called 'mandatory rules' and the interests of the City of London, it is unfortunate and unacceptable that the decision was not made with greater openness and transparency so that all aspects of the proposal could have been weighed in the balance. This particularly bearing in mind that the issue concerning mandatory rules

¹² Article 61(c) refers to Article 65 EC: "(...) in so far as necessary for the proper functioning of the internal market (...)". Note that Article III-269 of the Constitutional Treaty and similarly Article 2(66) of the Reform Treaty delete this condition.

was solved fairly early on in the discussions, but then many interest groups in the United Kingdom continued to behave as though we were still a full player in the process, which was not the case and definitely perceived in this way by other Member States in Council. Perhaps the greatest irony was that the concerns of most interest groups centred around the disputed effects of the proposed Regulation on the Internal Market.

(ii) Loss of Influence and Credibility

9. Second, making use of the 1997 Protocol with a view to opting into an act once the UK's concerns have been addressed may appear tempting. This is however only part of the picture. The United Kingdom loses the right to vote in the Council of Ministers on a measure (although of course British MEPs retain theirs) and thus considerably weakens its negotiating position vis-à-vis other Member States, who remain bound by the final result. The United Kingdom participates actively in the negotiations in Council, but all parties know that it is not bound by the final result. Its European partners are of course in a different position, having no choice but to apply the act once it is adopted.¹³

10. This underlying inequality is arguably not conducive to enhanced trust between Member States, and there is no reason why the United Kingdom could not deal with its concerns through the legislative process, rather than from the sidelines, from where the shrill complaints from some interest groups make it increasingly unpopular with its partners who become less likely to take such input seriously. This is definitely not the way to make friends and influence people in Europe. How many more times will Member States and future Presidencies make all possible efforts to render a text as a whole, or

¹³ 1997 Protocol, Article 3(1) second indent.

even very specific points of it¹⁴, satisfactory to the United Kingdom? I would therefore submit that systematic recourse to the 1997 Protocol is counter-productive, particularly in the long term.

11. The democracy of such a procedure also has to be highly questionable, not only in respect of the transparency of the initial opt-out decision. In addition, if for example, after having had observer status for several years, the Government finally decides to opt into an instrument like Rome I after it is adopted, what kind of message does this send back home? This really appears to be control by Brussels, with the UK in real danger of becoming something like the "fax democracies" of Norway and Iceland, having to merely accept what the rest of the EU has already decided on.

(iii) An Untenable Situation for British Members of the European Parliament

12. Thirdly, British MEPs are put in an increasingly untenable situation. On the one hand, they are courted by British ministers and business who wish to influence the final outcome, but on the other hand, they are essentially making legislation for others and not, most peculiarly, for the constituents by whom they are directly elected. It is noteworthy that neither Danish nor Irish MEPs participate in the work of the Legal Affairs Committee of the European Parliament¹⁵. By contrast to the United Kingdom, Denmark possesses a civil law system and in many respects already has a common system with the other Nordic countries, so the detriment is potentially not so great, and indeed it is interesting to note that they are now contemplating a wholesale opt-in in this area. Where the Irish have occasionally exercised their opt-out, although not in relation to civil law, their MEPs decline to vote on the issues in Parliament's plenary. For the first time, MEPs from other countries

¹⁴ For instance, to pursue the Rome I example, the question whether the voluntary assignment or contractual subrogation may be relied on against third parties (Article 13(3) of the Commission's proposal, COM(2005) 650 final).

¹⁵ This is the Committee having responsibility for civil and commercial issues in the European Parliament.

have now started openly questioning why British MEPs should debate and vote (let alone act as *rapporteur*) on legislation the United Kingdom Government has potentially refused by use of the opt-out. It may well become difficult to resist the logic of this argument.

(iv) "*Protecting the Common Law*"

13. Fourthly, I would like to examine an argument that is often put forward in justifying retention of the Protocol; that is by doing so we are somehow protecting or saving the common law from any further encroachment from Europe. Firstly, surely a legal system should be there to protect the interests of all of its citizens; to promote and dispense justice across society as a whole.

14. However, the courts of England and Wales (especially London) are increasingly being presented as the optional preserve of wealthy commercial litigators with little or no access for 'small' claimants. The cry of those who wish to preserve the common law seems mainly to stem from the intention to provide a "Rolls Royce system" at high cost to parties from the US or elsewhere. In other words, it is about providing an "export service" rather than a system of justice. Our civil courts and legal services have become big business and some say they literally fear a "European" system that will return lucrative business to the US courts rather than to London. Such an argument is unattractive, in that it is a perverted view of what a justice system should be about, and untrue in the sense that at present any 'European' system is likely to be an optional '28th' regime which will have to survive on its own competitive merits vis-à-vis the US or any other internal or external domestic system. Furthermore, might it not be more attractive to promote our courts as part of a European system?

15. Perhaps more importantly as a country, we have up until now been in the vanguard of influencing the development of European law in a manner helpful to the common law, which others have great respect

for. There is increasing evidence of a tendency on the part of the European Commission to reduce common law participation in various schemes and partnerships, no doubt on the basis of our own non-participation and negative attitude to various justice instruments. This circular negativity can only be destructive to the very common law influences we seek to protect and nurture in the longer term. With all respect to both Member States, how will we feel if the defence of the common law in the EU is left to Malta and Cyprus?

(v) Lack of Democratic Accountability

16. Fifthly, opting out, or more accurately failing to opt in, as happens at present, fosters a culture of secrecy. Given that the decision is made by just allowing a date to pass by, there is no public debate or consultation. Only the most vociferous elements are able to influence government decision-making behind closed doors. In the event that the Government avails itself of Article 4 of the 1997 Protocol (ie. the ex post opt-in), the procedure becomes a way of avoiding parliamentary scrutiny of the EU legislative process, both at national and European level. This will become increasingly apparent with the additional powers conferred to national parliaments by the Reform Treaty.¹⁶

C. Conclusion

17. If this is the direction we want to choose, it means less democracy, less justice, less common law influence on European law, and a real threat to the Internal Market. Under those circumstances, the central trading relationship, that one piece of the European Union that Britain was meant to be keen on, will be endangered. Open markets have to be balanced by an effective fully functioning system of justice. At present we are failing to do this, as the European Parliament's Equitable Life

¹⁶ See for instance: Protocols 1 and 2 to be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union; Presidency of the IGC, Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community - Protocols, CIG 2/1/07, 5 October 2007, at pages 3-10.

inquiry highlighted¹⁷; there should be no mobility across the Internal Market without concurrent liability and clear access to justice. At the end of the day, it will be United Kingdom citizens and enterprises that loose out when they try to go about their daily lives and work in Europe's Internal Market. Added to which, as other Member States increasingly wake up to the impact on their own citizens and the distortions of competition, they too will be less and less tolerant of an idiosyncratic British position. Accordingly, the continued use of the opt-out in relation to justice could be pivotal for the UK-EU relationship, but not for the reasons relating to criminal law that have featured prominently in the lead up to the signing of the Reform Treaty, but rather for those relating to civil law which are too often overlooked. It is hoped that this submission will go some small way to correcting that balance.

¹⁷ The report of the inquiry, as adopted by the European Parliament in June 2007 and all evidence submitted to it can be accessed at:
http://www.europarl.europa.eu/comparl/tempcom/equi/default_en.htm