EUROPEAN COMMISSION

LEGAL SERVICE

Brussels, 18.10.06
JUR(2006) 70608

*Opinion of the Legal Service**

MR. J. FAULL
DIRECTOR GENERAL DG JLS

Subject: **Interpretation of the Protocol on the position of the United Kingdom and Ireland: U.K. and Ireland opt-out from the Rome III proposal**

Ref.: **Your note JLS.C 1/[redacted] – D/06/5078 du 18.03.2006**
SJ CONS (06)3510

The purpose of this note is to formalise the oral reply to the above note which was given to your services in April.

1. It is clear, and not in dispute, that the U.K and Ireland are entitled to avail themselves of the above Protocol and thus do not participate in the above proposal unless they opt-in insofar as it covers an area which does not fall within the scope of an existing instrument, *in casu* rules on applicable law in divorce matters.

2. As regards the question whether the Protocol permits the U. K. and Ireland to decline to opt in to the proposal insofar as it merely amends Regulation 2201/2003, it is not clear from your note whether those Member States wish to avail themselves of this possibility. Should they wish to do so, the Legal Service shares your view that the Protocol does not apply and that this would therefore not be possible.

The language used in Article 1 of the Protocol on the position of the United Kingdom and Ireland ("shall not take part in the adoption…of proposed measures pursuant to Title IV") taken in conjunction with Article 3 ("may notify…that it wishes to take part in the adoption and application of any such proposed measure") does not explicitly deal with this situation. However, it is clear that the purpose of the protocol is to give the UK and Ireland the option of not participating in a legislative project. It is not to allow them to opt in to a project and subsequently to refuse to be bound by what is, effectively, merely an amendment to an existing instrument. This would clearly run counter to the principle of the uniform application of Community law and could lead to a legally chaotic

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situation. There is an analogy between this principle and the AETR principle applicable in external relations law: once the Member States in question have ceded their competence to the Community by opting in to a particular instrument, they cannot frustrate the subsequent exercise of that competence by refusing to participate in later measures insofar as they merely amend the instrument in question.

The U.K. and Ireland may not therefore refuse to participate in the proposal insofar as it merely amends Regulation 2001/2003.

3. Finally, as regards the question whether it is legally possible to maintain intact a proposal in respect of which the U.K. and/or Ireland may refuse to opt in to one part (in the instant case the rules on applicable law), the Legal Service considers that once it becomes clear that either of these two Member States intends not to opt in, there is no option other than to split the proposal into two parts. Splitting would also be necessary if the UK or Ireland were to opt in but the act could not be adopted within a reasonable time and recourse to Article 3(2) of the Protocol was thus envisaged.

The mechanics of voting on the proposal mean that there is no other solution. In Council, Member States vote on a proposal as a whole rather than on separate Articles. However, Article 1 and Article 3 (1) and (2) of the Protocol provide for special rules on voting. They contain rules applicable in the one case whenever either of these Member States decides not to opt-in and in the other case when it has opted in but the act cannot be adopted after a reasonable period of time. These special rules, like the Protocol as a whole, do not apply to an act merely amending an instrument to which the UK or Ireland had opted in. It would be impossible to reconcile the two methods of voting if a "mixed" proposal were to be maintained.

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cc. [redacted]