EUROPEAN COMMISSION

LEGAL SERVICE

Brussels, 3 May 2007
JUR(2007) 70096 - [redacted]

*Opinion of the Legal Service**

NOTE TO M. J. FAULL
DIRECTOR GENERAL DG JLS

Subject : **The position of the UK and Ireland under the Protocol with regard to amendments of existing instruments**

Ref.: **Your note JLS.C.1[redacted] – D/2007/255 dated 22.02.2007**
Our note JUR(2006) 70608 dated 18.10.06

The Legal Service thanks you for your above-mentioned note and takes note of the arguments which you put forward in support of the contention that the UK and Ireland have no choice but to opt-in to proposals which merely amend existing measures.

As to your specific question, the Legal Service does not consider that it is appropriate to seise the Court of Justice, pursuant to Article 68(3) EC, of a request to interpret the relevant parts of the UK and Ireland Protocol.

In the first place, it is not entirely clear whether such a request would be admissible. Although the wording of Article 68(3) is very general, it is important to bear in mind the context in which the provision was inserted, namely the extremely restricted possibility for courts in Member States to refer a question for a preliminary ruling. This limitation could lead to differences in interpretation which, since only a small proportion of cases would reach the supreme courts in the Member States, would be difficult for the Court of Justice to iron out. The intention of the facility granted by Article 68(3) was to allow the Council, Commission and Member States to seise the Court directly if such divergences were to manifest themselves. It cannot therefore be guaranteed that the Court would accept that it had jurisdiction to entertain such a request in the circumstances that you envisage.

In the second place, even if the Court were to hold the request to be admissible, the Legal Service does not consider that either the Rome III or the Maintenance Obligations proposal represent an appropriate case to test the Commission's theory in court. Both

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proposals contain a section on applicable law (in the case of Rome III this section represents the overwhelming majority of the proposal) which indubitably constitutes a new "measure" within the meaning of the Protocol in respect of which there can be no doubt that the UK and Ireland may refuse to opt-in. It would be difficult to convince the Court of the Commission's contention that those Member States must opt in to a particular proposal when the Commission, in putting forward that proposal, a section in respect of which they are clearly entitled not to. Indeed in its note JUR(2006) 70608 of 18 October 2006, the Legal Service advised that, when the UK or Ireland refuse to opt in to a proposal in respect of part of which they are entitled not to opt in, there is no alternative to splitting the proposal. This has not been done and either of the Member States concerned could exploit this factor by putting forward obfuscatory arguments.

These two proposals therefore represent weak cases to test the Commission's thesis. Since, on the substance, the Legal Service is in agreement with your arguments, it naturally remains open to examining whether or not a future proposal might represent a more suitable casus belli to put these arguments before the Court of Justice either pursuant to Article 68(3) or by way of an action for annulment pursuant to Article 230 EC.