

HOUSE OF LORDS
MINUTES OF EVIDENCE
TAKEN BEFORE
THE SELECT COMMITTEE ON THE EUROPEAN UNION
(SUB-COMMITTEE E)

THE EU'S REGULATION ON SUCCESSION

WEDNESDAY 16 DECEMBER 2009

LORD BACH and MR OLIVER PARKER

Evidence heard in Public

Questions 126 - 173

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WEDNESDAY 16 DECEMBER 2009

Present

Bowness, L (Chairman)
MacLennan of Rogart, L
O’Cathain, B
Renton of Mount Harry, L
Rosser, L
Wedderburn of Charlton, L
Wright of Richmond, L

Witnesses: **Lord Bach**, a Member of the House, Parliamentary Under Secretary of State, and **Mr Oliver Parker**, Ministry of Justice, gave evidence.

Q126 Chairman: Lord Bach, good afternoon. Thank you very much for coming. Could I just say at the outset that two of our Members, Lord Renton and Baroness O’Cathain are involved in the debate which is just about to finish, so I am hopeful that they will be joining us. For the record, can I just state that you have got on the table a list of the interests which have been declared by Members. I declare my interest as a solicitor and notary public. The session, as you know, is on record. It is being broadcast and it will be available on the website. As you know all too well, you will get a transcript which you can correct if necessary. Perhaps I could ask you to introduce your officials, and I understand you would like to make an opening statement as well.

Lord Bach: If I may, thank you very much, my Lord Chairman, a very brief one. Thank you for the invitation to come here today. We are delighted that the Committee has focused on what is a very complex and important dossier. We look forward very much to seeing the results of your inquiry and the help you can give us. Can I introduce Oliver Parker. He is a senior lawyer in the Ministry of Justice with particular responsibility for private international law matters and so will be the main legal adviser in relation to this dossier and someone who

will negotiate for this country in the negotiations. Both he and I have been before this Committee together before, as I think some Members will remember. I will be asking, with your permission, my Lord Chairman, to ask Oliver to respond not just on some of the more technical matters but clearly on those. I think that would be much more use to the Committee than if I were to hold forth on those. My Lord Chairman, the Government did earlier today announce by way of written ministerial statement that the UK will not be opting in to this dossier at this stage, which means, of course, that the UK will not be bound by it. The eight week period from publication of the decision, of the document, has passed. It passed last Wednesday, on 9 December. Officials had been given to understand that the Committee would not in fact be expressing an opinion as to opt in or opt out. Certainly there was no intent at all, as I think you know, to pre-judge the Committee's view, but I have to tell the Committee that given the level of interest expressed on this proposal, as demonstrated by the very high response to our consultation – which I know you may ask me about in a minute – and having regard to the possibility of what we consider might be very unhelpful media speculation over the quite quiet Christmas and New Year period, we did think there were some advantages in making an announcement in Parliament before the recess. What we would very much like to do, though, is to take the Committee's opinion in its report into account during what will undoubtedly be incredibly difficult and complex negotiations. My Lord Chairman, hundreds of thousands of UK citizens, as the Committee knows well, live and work in other EU Member States and millions of others enjoy holidays in the EU. The diversity of rules and the systems that apply to succession in different Member States can make for considerable complications where a person owns property across borders. In principle, therefore, efforts to simplify and clarify the rules which apply to international successions we feel could produce benefits, huge benefits even, for UK citizens and we are supportive of the project in principle, but there are potentially significant problems, as the

Committee has heard in evidence, identified with the proposal which the Commission has published. These were set out in the public consultation. The consultation document highlighted two key problems. The first and most difficult of these was, of course, claw back. We believe the introduction of this into the UK could create major practical difficulties, particularly for the recipients of such gifts, including charities. The second key concern was the proposal's reliance on habitual residence as the sole connecting factor. This, we feel, could lead to unforeseen and unfair outcomes. I know we will be discussing both of these issues today. I should tell the Committee now that there are other issues of concern and at this early stage of deliberation there may be issues which emerge only later, but these two issues are clearly major concerns and that view was confirmed by our public consultation. So in summary, the Government has concluded that the potential benefits of this proposal are outweighed by the risks and has decided that the best course of action is not to opt into the proposal and not to be bound by the outcome. We do intend – and I hope the Committee agrees with this when it comes to write its report – to engage fully with the forthcoming negotiations between Member States on this proposal with the aim of removing the points which currently cause concern and to deliver further improvements for citizens with links and assets in more than one country. If that can be achieved, the Government could then decide to seek to adopt the final regulation. This will obviously be consulted upon and considered as appropriate at that time. As I have already said, our negotiating strategy will be informed and influenced by the conclusions of this Committee's inquiry. Thank you for letting me make that statement.

Q127 Chairman: Thank you very much indeed. Can I say that I am sure we understand the position, Minister, and I think we are all learning this new opt-in procedure, as outlined by Baroness Ashton when she was Leader of the House, and of course we understand the decision. It may be that we have not got the date right. We are grateful to you for telling us,

in any event, of your decision and that you are going to participate in the negotiations. Can I ask you, have you a view about how many other Member States are likely to prove to be allies of ours in dealing with matters which are of principal concern to the UK? You have already highlighted claw back as one of them.

Lord Bach: I think that is a very difficult question, my Lord Chairman, to answer with certainty at this very early stage. Obviously the proposal is not long published and the working group of national experts in Brussels has not yet concluded a first reading of the text of the regulation. I believe the working group meets on January 4, the day before we come back, for its second meeting. Mr Parker will be there. The great majority of the Member States which do not have to form a view against the deadline of the opt in process, unlike us, are still consulting on and considering the detail of the proposal. Then we will be able to have a clearer view on the many issues. It is not possible to assess with any accuracy the extent to which Member States will be prepared to take flexible positions, particularly on claw back, and accordingly be accommodating in relation to our difficulties. What is clear – and you have heard this in the great expert evidence – is that most Member States start from a very different position from us and claw back is well-established in their own laws and cultures even though, as I understand it, it is practised in different ways under different legal systems. The Committee will have seen, I think, the Comparative Law Report commissioned from Professor Paisley of the University of Aberdeen on the claw back regimes. We shared that report with the Member States in the hope that it will help a debate begin about the significant differences between those claw back regimes themselves and we hope that may set up an atmosphere in which helpful compromise may more easily emerge, but I am afraid the reality is likely to be that many Member States will be reluctant to see claw back removed from the proposal since they will want their own claw back regimes to be applied by other Member States. At this point I would not expect them to show their hands or to give any clear

indications as to what they might in the last resort be prepared to accept. Finally, as to the extent to which the stance of the Member States is likely to be affected by our decision not to opt in at the outset of the negotiations, again no clear answer, although a positive opt in would have secured us a vote in the Council and demonstrated our commitment to the outcome. I am also conscious that given the fact that we would be automatically bound no matter what the final outcome was, that fact could well have operated perhaps so as to reduce the incentive for other Member States to show the necessary flexibility to resolve our concerns, particularly about claw back, and so secure our participation in the adopted instrument. The fact that the voting arrangements in relation to this proposal will be on the basis of a qualified majority is also perhaps relevant too. I do not think anyone is in any doubt that it is in all Member States' interests, their own interests and the collective interest, to have the UK participate fully in the regulation and I am confident other EU governments share that view. We hope that is a factor that will be persuasive in helping us to find what we are looking for, which is an acceptable solution on our issues of concern. The shared interests for all of us in UK participation is clear to see, but alas as things stand at the moment we have no choice but not to opt in to this proposal.

Chairman: Thank you.

Q128 Lord Rosser: If a unitary system of applicable law is desirable – that is one of the many things which have been said to us – why is it not found in our present domestic law?

Lord Bach: I am going to ask Mr Parker to deal with this particular question, if I may.

Mr Parker: It is true that under the current rules of private international law in the United Kingdom a distinction is drawn between movable and immovable property. Foreign succession law will be applied to property of the former kind if the deceased died domiciled abroad. However, regardless of the deceased's domicile at death, only the succession law of the country where the immovable property is situated will be applied to that property. This

means that only English succession law is currently applied to immovable property situated in England and Wales. The basis for this long-established distinction is historical and as regards immovable property appears to reflect the law before 1926 when intestate succession to land was subject to rules different from intestate succession to movable property. It also appears to have its basis in the fact that in the eighteenth century the English courts of common law possessed exclusive jurisdiction to determine the title to English law and their practice was, with few exceptions, to administer English law and only that law. The current distinction, known as scission, has been widely criticised by academic commentators as a “historical anomaly” and by the judiciary in some decided cases on the basis that it constitutes an unjustified complexity which can give rise to artificial and inappropriate results. None of the consultation which we have recently received on the Commission’s proposal has sought to defend this aspect of our current system and the Government’s view is that in principle its removal in favour of a unified system of rules on applicable law would constitute an improvement in our law. It is also fair to say that the practical problem associated with a scission-based approach to applicable law, one which makes a distinction depending on the type of property, had not arisen with sufficient frequency to prompt the necessary law reform at the national level within the United Kingdom. Perhaps I could say that of course if we do not eventually apply the regulation within the United Kingdom it would be open to us to make that law reform at the national level should we choose to do so.

Q129 Lord Rosser: What you are saying is that the pressure has never been there up to now for us to make the change as far as our domestic law is concerned?

Mr Parker: Not entirely. I think you will find amongst all the learned commentators on private international law this distinction is widely criticised and there is a number of cases, not many, three or four I think, where judges have criticised the way in which the distinction can operate in practice. It can mean that in certain cases an heir can be entitled to more than

he should get, or less, depending on the facts of the particular case. So although this is not an area where the popular voice is engaged, I think it is true to say there is a wide degree of criticism amongst commentators.

Q130 Lord Wright of Richmond: Minister, you said rightly that most of our colleagues do not have the option of not opting in, but the Irish do. Do we know what the Irish have decided?

Lord Bach: I do not think we know for sure what the Irish have decided, no.

Q131 Lord Wright of Richmond: My second question is, if ultimately we remain opted out, to what extent are the thousands of English and Welsh nationals living elsewhere protected by our opt out?

Lord Bach: That is an extremely good question, but again it is an extraordinarily difficult one to answer at this stage. I think it will depend very much on how any agreement is reached after negotiations. It is because of the uncertainties associated with that that we would actually much rather there was a serious negotiation and that we could in the end opt in because, as I said, we do see with Europe as it is at the present time that there is a need for some measure like this. The problem with this measure is that it would affect British citizens, we think, so adversely and just take away our traditions in terms of succession and wills, which of course should not be defended just because they are traditions but should be defended because they work pretty well for us.

Lord Wright of Richmond: Thank you.

Q132 Lord MacLennan of Rogart: As a Scot with immovables in Scotland, movables in London and uncertain about domicile and residence, I can see that there are some difficulties in our present domestic situation. This is a historical question: have those problems been

referred to our two Law Commissions in Scotland and England for consideration or have they suggested anything about it?

Mr Parker: I am not aware that the Law Commission in either jurisdiction has considered this point.

Q133 Lord MacLennan of Rogart: Is that, do you think, because there has not been pressure to do so?

Mr Parker: Sufficient pressure.

Q134 Lord Wedderburn of Charlton: This cuts across the boundaries of what we have already discussed in asking questions, but I think it is perhaps a way of achieving a little brevity on what has been said. Habitual residence obviously is a test of great importance. We prefer “domicile” at the moment in England, having not taken the step of making “domicile” simpler to understand, which our Scottish cousins, or brothers in my case, have achieved. How far would a definition of “habitual residence” be able to solve the problems with the question of habitual residence? I may say that we had some chartered accountants’ evidence, which you may have seen, setting a list of exam questions on habitual residence which I found as difficult to answer as problems on domicile, which is saying a lot! How far would a definition of “habitual residence” solve our problems? I have moved on opt out.

Mr Parker: Lord Wedderburn, there are a number of difficult issues connected to the connecting factor and how it should feature in the regulation. What I was proposing to do was to give an overall answer which embraced all those difficulties. Would you prefer me to do that or just to answer your specific question?

Lord MacLennan of Rogart: I apologise if I have taken the answers off course.

Q135 Chairman: No. Please give the answer to the question.

Mr Parker: Perhaps I could begin by saying that under English law the connecting factor of habitual residence does not currently apply in the succession context. In broad terms we assess that it operates satisfactorily in the family law context but, as I shall explain, the latter context cannot easily and satisfactorily be transposed in relation to succession. Domicile is a well-established concept in the laws of the United Kingdom. Although its practical application in English law is perhaps not entirely without difficulty, its underlying basis, namely a concern to identify the country where an individual intends to settle permanently, seems correct and any problems should not be overstated, in our view. Over the years a significant and broadly helpful body of jurisprudence has developed to guide practitioners in the context of international succession cases. The primary reason for the Government's concern that the regulation uses the undefined connecting factor of habitual residence is that the deployment of such a concept on its own would be liable to subject the estates of individuals, either on short-term employment secondments overseas or otherwise without an adequately substantial connection of a particular legal system to that system's law of succession. An example might be a British diplomat who is posted abroad for two or three years but who would inevitably expect to be posted another country or to return to this country at the end of his secondment. If he unexpectedly dies during his relatively brief secondment, the concern is that the succession law of the country to which he was seconded might be held to govern the distribution of his estate. The Government considers that outcomes of this kind would be inappropriate and would not accord with the reasonable expectations of individuals and their families. This contrasts with the underlying rationale behind the currently applied connecting factor in the UK, namely where an individual is domiciled at the time of his death. As I have already noted, the purpose of this connecting factor is broadly to identify the jurisdiction where an individual intends to settle on a permanent basis. The Government's view is that this concept correctly requires a substantial

degree of connection and would therefore exclude individuals on short-term work secondments or in analogously transitory situations. We are open to exploring different ways in which the connecting factor could be made fit for purpose. I should observe now that we accept that domicile could not be retained under the regulation of the main connecting factor for the UK and other common law countries, it could not be applied to other Member States and its retention for a minority would therefore fail to secure the high degree of uniformity of application which is considered to be essential under the regulation. So “domicile” in the common law sense I think is a non-starter, I am afraid. Other options are likely to stand a better chance of securing agreement. One is that “habitual residence” could be defined in some way to require a substantial degree of connection. However, we are aware that such an approach might encounter significant opposition among other Member States on the basis that any such detailed definition could have undesirable repercussions in other areas of the law, for example in the area of international child custody where “habitual residence” plays a pivotal role and unless a substantial degree of connection is generally thought appropriate. Another possible approach to the connecting factor would be to leave the concept of “habitual residence” undefined but to use it in combination with other requirements such as a minimum period of actual factual residence by the deceased. This was the underlying basis of the solution adopted in the 1989 Hague Succession Convention and it may not be likely to provoke the degree of opposition which the first approach could well encounter. However, it must be accepted that the actual provision adopted in that Hague agreement was undoubtedly very complex and we would be seeking a more straightforward solution. Another potentially useful component in any satisfactory connecting factor would be some fall-back rule to cater for certain difficult borderline cases, for example where an individual divides his time more or less equally between two countries, for example in the case where a retired person from the United Kingdom retreats to southern Europe for the winter months or where he has such a

peripatetic way of life that it is impossible to determine with any ease where he is habitually resident. Finally, the Government also has concerns in this context with the lack of legal certainty inherent in any freestanding connecting factor which is undefined in any way. We accept that this is the position under regulation 201 of 2003, the so-called Brussels II bis regulation where undefined habitual residence plays a crucial role in resolving international child custody disputes within the Community. However, in one important respect such family disputes differ from the succession context. The former will often and inevitably involve highly emotional litigation between parties, particularly parents, who are unable to agree on the outcome. This will necessarily involve determinations by senior judges who are experienced in applying the concept. However, the great majority of succession cases are, and surely should continue to be, non-contentious in nature. It is vital to the success of the regulation, so we believe, that that should remain the case and that solicitors on the high street should be able to provide the necessary advice with a high degree of competence on the application of the connecting factor on the facts of the great majority of cases.

Chairman: That has taken us deeply into domicile and habitual residence.

Lord Wedderburn of Charlton: I think actually my fox has been shot!

Chairman: Is there anything further you want to ask?

Lord Wedderburn of Charlton: No, I think not.

Q136 Chairman: Can I then go on to this question of personal representatives? Some witnesses have attached great importance to that and perhaps you could indicate, Minister, how you think the proposal would affect the UK system of using PRs to administer a succession rather than heirs, which seems to be the alternative?

Lord Bach: Yes. I am going to, with your permission, again hand over to Mr Parker on this. Just to open up the discussion, it would be a substantial change for us in the United Kingdom

which would have quite considerable consequences, it seems to us, on our use of the personal representative.

Q137 Chairman: Perhaps when Mr Parker is answering, are there other countries which have got the same system, having drawn our system from history, Ireland presumably, Malta maybe, Cyprus maybe?

Mr Parker: Cyprus, certainly; Malta, I think not. There are some other countries, Scandinavian countries, which use the concept of personal representatives but in a slightly different way. They are more representatives of the heirs rather than temporary owners. It is slightly different.

Lord Bach: But it is our personal representatives who have the obligation to deal with what is left. That is, I think, substantially unique.

Q138 Chairman: I suppose I ask that really in addition to the question to try and get an idea of what somebody in another country which has got the same system is going to have to cope with because they have not got the benefit of being able to opt out.

Lord Bach: We have spoken, as you can imagine, my Lord Chairman, with a number of other countries, not least other countries which touch on the common law – it is not always possible to call them common law countries – about issues of this particular kind and I have no doubt we will be doing that again very shortly.

Mr Parker: My reply is slightly more technical in nature, so please bear with me. I will be referring to one or two provisions in the regulation. To open, the Government generally welcomes the effect of Article 21.2 of the proposed regulation, which provides that the application of a foreign law of succession is to be no obstacle to the application of the law of the Member State in which the property is located where the latter “suggests the administration and liquidation of the succession to the appointment of an administrator or

executor of the will via an authority located in this Member State.” So we understand the broad effect of this is in principle to preserve the institution of personal representatives in this country. The effect should be to preserve the UK’s current arrangements which are based on the routine transfer of the deceased’s property to personal representatives pending the administration of the estate and the eventual distribution of the assets or creditors and those entitled under the will. This is significant because under the succession laws of many Member States the property of a deceased person transfers directly to his or her heirs. Any importation to the United Kingdom of such a system of direct transmission of property would undoubtedly cause major problems for us, not least in the area of taxation and in particular the collection of Inheritance Tax which is currently payable by the personal representatives on behalf of the estate. We will be returning to this later on, I think. However, Article 21.2 (the provision I have already referred to) also provides that, “The law applicable to the succession shall govern the determination of the person, such as the heirs, legatees or administrators of the will, who are likely to be appointed to administer and liquidate the succession.” The effect of this provision seems to be that where particular personal representatives are nominated to act under the law applicable, then such nominations must automatically be effected in other Member States, such as the UK, where estate property is located. This is not currently the general position in the United Kingdom, where such individuals must be approved to act as personal representatives in order to deal with UK located assets. While we are still assessing the acceptability of this proposal, we are at least at first glance cautious given that under the regulation the succession law of any country in the world could be applicable. There appear to be concerns about situations where, for example, under the law applicable an executor could be validly appointed who would not, for some reason, be regarded under our law as being qualified to act in that capacity within the United Kingdom. Although in principle foreign appointments of personal representatives could be accepted

here, it may well be that those appointments should also have to be valid under our law in order to be effective in our jurisdiction. Finally, I must refer to another provision here. This is Article 19.2(g) of the regulation. The applicable law is stated to include “the powers of the heirs, the executors of the will and other administrators of the succession, in particular the sale of property and the payment of creditors.” We understand this to mean that although the existence of personal representatives will remain a requirement in relation to UK located property, their powers are to be determined in accordance with the applicable foreign law rather than the law of the place where the assets are located. This is not the position under English law. We are still assessing the acceptability of this proposal. Once again, in view of the fact that this regulation will have universal application we must, I think, be cautious about the potential of this rule to create problems in some cases. We are also concerned about potential problems for creditors and others who deal with English property on the secure basis that the latter are operating in accordance with English law. The fact that they may in future be operating in accordance with some foreign law, the contents of which creditors, et cetera, would be unfamiliar with, would appear to have the potential to cause some confusion and could disrupt the smooth administration of estates in some cases.

Q139 Lord Maclellan of Rogart: May I come back, Minister, to the issue of claw back, which you have already alluded to? In a wider general statement you indicated that you could see that there is an ideal, if you like, to which we might strive with this area of the law because of the mobility of people, British subjects and citizens, in the European Union and other examples you gave. You singled out for particular concern the issue of claw back and said there were historical reasons why it was so deeply involved in our present domestic law and would be very difficult. Many other countries in the European Union have claw back, different systems in different countries, different situations. Why should it be that in this country it is peculiarly difficult to deal with that? Claw back in a sense is rather clear on what

the consequences will be for those who are heirs and as clarity would seem to be very much in the general interest I am slightly puzzled by this reluctance to tackle the problem frontally.

Lord Bach: It would mean, if we were to accept claw back – and I am afraid of using the title because it is probably used in different ways in every different system employed by our EU partners – that the cultural difference there clearly is, which is the basis of all this, and historic difference too would be completely abolished and that would not be easily done, I do not think, in this country. There is one common thread in whatever claw back system there is, namely that the laws of succession require that a usually substantial portion of the deceased's estate should be available for distribution to that individual's family heirs. Details vary from country to country. All these systems prevent the so-called "forced heirship" provision from being circumvented by the terms of the deceased's will. It goes further than merely limiting freedom of testamentary disposition. They also limit by means of claw back procedure the ability of an individual – and this is crucial in English law – to give away his or her assets during their lifetime, or at least significant periods leading up to their death, with the certainty (particularly from those who receive those assets) that they could not be challenged at a later time when the deceased died. That is one of the reasons why, in the Consultation Paper I have referred to, of the 99 responses we have so far opened all but two were against us opting in and many dealt with the issue of claw back. You will not be surprised to hear that many of those were charities, who are the recipients under our system of these, while living, *inter vivos* gifts. The amount of uncertainty there would be for these charities and other donees if we were to go to some kind of claw back system would be profound. Why does that not happen in other European countries, I think is what you are hinting at, my Lord MacLennan. We have asked that question and I think there is more research to be done on it, but the answer is that charitable giving does seem to play a larger part in our cultural heritage than it does for some of our European partners. I think in some other countries the state actually provides some of

the role that charitable giving provides in this country and that is why there is this first basic difficulty in accepting claw back as the basis of succession and wills. There are, we think, possible ways in which it may be possible to find a compromise with our European partners on this issue. Unfortunately, the “compromise” proposal put forward by the Commission – and both Jack Straw and I as a junior minister have discussed this with the present Commissioner, M. Barrot – is one that I think is called party autonomy. It is an element of choice for individuals, who can decide at the time they make their wills under which system of law they want their wills to be adopted. The problem with that, as I think the Committee has already heard from other witnesses, is that there are only 30 per cent in general terms of UK citizens who make wills at all, and of course if there is no will made then depending on where the deceased dies it will be completely up to the law of the country in which they die. That is why that is not a satisfactory solution for us. There may be others that will develop, but I do not think any British Government could accept the concept of claw back as being a change that was worth making in terms of our own historical laws on succession and wills. That is some kind of answer, I hope.

Q140 Lord MacLennan of Rogart: Our culture then, would you say, is really to prioritise not the interests of the heirs but the wishes of the testator or the person who died intestate?

Lord Bach: You have said in one sentence what I took about five minutes to say! It is exactly that. The wishes of the testator, as I understand it, historically in English law have always been paramount and it gives a degree of certainty to the donees, whether charities or anyone else.

Q141 Lord MacLennan of Rogart: Whereas if the testator is completely gaga and leaves it to some bizarre organisation there can be injustice?

Lord Bach: Of course, but our system is, if I may say so, practical enough to be able to deal with that situation, as I think recent court cases have shown, but it is the exception rather than the rule.

Q142 Baroness O’Cathain: I do apologise for coming in so late. I have been lobbied very strongly by colleagues of mine who operate in charities. I also have to declare that I personally was in the forefront of trying to get charities to say to donors, “Have you made a will?” The rate was 30 per cent. I am told it is 35 per cent and I think the five per cent are those who have been lobbied by charities. There was a time when charities just would not even talk about legacies to donors, but the problem with the charities now is that there is a reduction in the amount that is going into charities, for obvious reasons, and that they do not feel they have got a double whammy here with this problem. I took a lot of heart from the fact that you said you did not think the British Government would actually get involved in this, because of that, I guess, but the uncertainty is there, Minister. I just wonder outwith this, or as part of this whole thing, can we just make the very strong recommendation that we just do not touch it?

Lord Bach: It is for the Committee to decide.

Chairman: The Minister did tell us when he arrived that the decision has already been made not to opt in at this stage.

Q143 Baroness O’Cathain: Oh, great! Thank you.

Lord Bach: I am grateful that Baroness O’Cathain has asked me, but it is not just charities, of course, it is any donee and that effectively can be a third party, who again will, as it were, have this uncertainty over the asset they have been given. I do not know if Mr Parker wants to add to that?

Mr Parker: At the moment we share all your concerns about the legal uncertainty that could be introduced into the law if we were to import claw back. I think at the moment we start from the position where we would regard claw back claims as being suitable for excluding from the scope of the regulation altogether. That would be effectively the status quo, so for those Member States which have already enforced each other's claw back claims that would remain the case, but of course it would not apply to us. I have to say, I do not think the issue of claw back will be resolved in any way early in the negotiations. I am sure that this will be very much the final basket of issues which have to be resolved before the final adoption.

Q144 Lord Wright of Richmond: At the risk of going back on something you have already answered, I just want to get my mind around the extent to which this is really a British problem and not a problem for any of our allies or colleagues. We asked about the likelihood of getting allies in the negotiations. To what extent have you either at ministerial or official level so far sensed that there is a degree of unease among our colleagues, partners, at the claw back provisions?

Lord Bach: Again, it is difficult to be precise. I think there is an understanding among some half of the European partners of ours that this is a real issue for us, because they, too, have long legal traditions which are different, quite, quite different, and do involve claw back, but I think they realise, because a lot of effort has gone in already before the negotiations begin to try and put our position, that this is an important matter for us and hopefully I can put it this way: it is in their interests as much as it is in ours to find a way through it.

Lord Wright of Richmond: I cannot remember the exact quote, but in the regulation there is a reference to the fact that this will not affect national laws, or words to that effect. It seems to me very unlikely that it would not affect our national laws.

Q145 Baroness O'Cathain: You mean it is very likely that it would?

Lord Bach: It would be wonderful if it was not to affect our national law.

Lord Wright of Richmond: I think I probably misquoted the regulation.

Q146 Chairman: I think Lord Wright is referring to a piece of paper which was produced by the Commission for information and the question was posed, “Would it replace or amend national laws?” and the categorical answer would be “No.”

Mr Parker: I think it was very much a kind of private international law type of answer. This is a regulation which will operate at the international level, so it will not directly affect substantive domestic laws on succession; not directly, but of course by extending the rules of applicable law throughout the European Union it will indirectly have effects, of course. What we are aware of – and that was thrown up by the comparative law study – is that there is a huge variety of claw back regimes and there are some countries like the Netherlands and Austria, for example, which have it but only have it on a very restricted basis and what we are hoping is that this study will draw their attention to what they may be facing from certain other countries and perhaps make them more susceptible to our blandishments for a compromise. We think there is a chance of that and of course the other thing is that when this regulation comes into force it will greatly enhance the profile of this whole area of the law. It will encourage lawyers, I think much more actively than they do at the moment, to regard this as an area where they can sell their services.

Q147 Lord Wright of Richmond: We did ask Director General Faull last week whether any other parliaments were engaging in a similar inquiry and were told “No.” I just wonder whether that reflects a lack of interest or concern among our partners?

Mr Parker: We certainly know that those systems in the Member States that rely upon notaries, particularly in the succession context, are very, very keen on this because it is an important way in which their influence can be extended throughout the Union.

Q148 Lord Renton of Mount Harry: I apologise, like Baroness O’Cathain and for the same reason, for arriving late. I heard you say, Minister, that you felt that Ireland is going to opt out not opt in at the moment?

Lord Bach: I was actually very careful to say I do not know what the position was and I think that is very important.

Q149 Lord Renton of Mount Harry: I apologise. Do you know about other countries? Do you know what other countries are going to do?

Lord Bach: We do not know, but –

Mr Parker: The opt in does not apply to them. We are the only ones.

Q150 Lord Renton of Mount Harry: We are the only ones who positively are not opting in?

Mr Parker: The Danes are automatically excluded.

Lord Bach: So they are out and then it is Ireland and us.

Q151 Lord MacLennan of Rogart: Still on the subject of claw back, we did have evidence from Professor Matthews about the possibility of claw back affecting transactions undertaken in the City of London. Has that been a consideration? Have you had any of those points made?

Lord Bach: The proposal as it stands would certainly be likely to make less attractive the creation of lifetime trusts, the contents of which might subsequently be rendered subject to claw back. Many of these trusts, of course, are drafted by law firms in the City of London and we do not know for sure but we feel that that aspect of their legal business could be prejudiced with the likelihood of it transferring elsewhere, offshore, to the Channel Islands or elsewhere. That is the first point to make. The second is that of course claw back could have

far more reaching and perhaps another word I think is “chilling” effects on the functioning of trusts within the City. This was not raised in the consultation, let me make that clear, as far as we are aware but we are live to the possibilities of broader problems arising here. As I think you know, Professor Matthews has been advising us as well as advising you, the Committee, and we are going to go on consulting with him on this issue.

Q152 Lord Wedderburn of Charlton: I have not a document available, at least I have not found it, but my recollection is in reading the very detailed descriptions of various claw back systems, some of which go back decades, to bring assets into what we would call the estate, that none of them has produced the bona fide purchase of a value without notice, although one edged up to it, but in fact the problem relates to him particularly, does it not, with claw back, as they see it? It is not just the donee but the third party who takes from the donee?

Mr Parker: That is right. I think again this demonstrates the very wide variety of claw back systems and some might think are only, as it were, focused on the original donee but some absolutely, as you say, do enable property to be clawed back from third party recipients and that, of course, makes them even more threatening from our point of view.

Lord Wedderburn of Charlton: Yes. Thank you.

Q153 Chairman: Minister, I asked you about the effect on personal representatives and I think you have possibly answered this, but you may want to add to it, the impact of the proposals on the payment of tax and the protection of creditors. Is there anything you want to add? You have already told us that is the responsibility of the personal representatives.

Mr Parker: Yes, to pay off the creditors, including the tax creditor, indeed.

Q154 Chairman: We just never quite see the taxman the same as the other creditors, I suppose!

Mr Parker: I am sure he takes the same view.

Q155 Chairman: Leaving that, are there any issues particularly in relation to registered property, such as land or shares, which give rise to concerns?

Mr Parker: The main problem which arises in relation to registered property relates to registered land and the application of claw back to land situated in the United Kingdom. The potential problems in relation to share registers are under consideration but they would not appear to be of such a serious nature. The essential problem is that the possibility of claw back is inconsistent with the guarantee of title currently afforded by UK Land Registries in relation to registered land. This problem arises both in relation to land registered in the name of the original donee of the property or in the name of some third party recipient of the property, or some legal interest in it. The latter situation can arise. For example, in the claw back regimes in certain Member States claims can be raised in relation to property which has been transferred or charged by the original donee in favour of a third party. There are two possible outcomes to this difficulty. Neither of them would be satisfactory. The first would be to exclude the potential effect of claw back from the Land Registry's guarantee of title. This would create significant legal uncertainty in relation to the title, which in turn would be likely to inflate the costs of conveyancing. This is because of the perceived need to purchase insurance to cover such a risk. Because of the uncertainty inherent in risks of this kind, the necessary insurance might well be difficult and expensive to obtain. Additional costs would also be likely to be generated by the additional research which might need to be undertaken in order to assess the degree of risk inherent in the particular transaction. The second alternative outcome would be to leave the Land Registry's indemnity budget to bear the increased costs of claw back. Because this indemnity is financed out of the Registry's fee income, this would inevitably push up the general cost of registration, which would have to be borne by all those

who used the Registry's services. So we see this as a serious problem. It is an aspect of the claw back difficulties.

Q156 Chairman: Have you any assessment of how much?

Mr Parker: Not yet, but certainly it is likely to be significant.

Q157 Lord Rosser: Evidence we have heard from two of our previous witnesses has been that the Commission should in fact have taken a step by step approach, i.e. not done as much as they are proposing at the moment and started with a single rule of applicable law. Do you think that would have been the better approach?

Lord Bach: Being frank, yes, we do. We do think this was something that would have been better done on a step by step basis and it is that very comprehensive solution which the Commission has put forward which has caused us the difficulties we have tried to outline today.

Mr Parker: Sadly, I think the possibility of a more limited solution really is now history and that we have to work with what we have got. Although it would have been more manageable, I think, just to deal with applicable law, we could, I think, still get to a satisfactory result with a very comprehensive solution, but it just makes the task more difficult.

Q158 Lord Rosser: Do you actually think rules on the conflict of jurisdiction are necessary or desirable?

Mr Parker: I think certainly not essential. One principle which is guiding our thinking on this at the moment is as a starting point to try and align jurisdiction with the law applicable so that the court upon which jurisdiction is conferred under the regulation should in principle be applying its own national law.

Q159 Lord Rosser: What should jurisdiction follow then?

Mr Parker: The two should be aligned in principle. We think in this very technical area that is likely to be a good starting point and in fact one of the provisions which deals with the transfer of cases, Article 5, is an instance where we think we should try and increase the degree of alignment so that where a deceased individual has validly chosen a particular law, the law of his nationality, and a court is seised under Article 4, the law of his habitual residence – so there is a distinction there between jurisdiction and choice of law – we think in that situation it would be better to bring them together and it should be possible for the court with jurisdiction to be required to transfer the case to the country whose law had been chosen to produce this helpful alignment.

Q160 Chairman: In a sense it is easy to say, is it not, that it would all be better if we had only applied for applicable law, but would we not still be stuck with all the problems about habitual residence, or whatever, that we talked about earlier? Are there not still an awful lot of problems?

Mr Parker: You would still have the problem of claw back in the connecting factor. What you would not have is the clash of legal cultures depending on whether the system in question depends upon notaries. That is a problem which really only arises when you deal with jurisdiction, recognition and enforcement.

Q161 Chairman: Before we pass on to that area, perhaps we could just talk about the special succession regimes and the number of exceptions that there appear to be under Article 22, because that seems to have the potential to drive a coach and horses through whatever you decide?

Mr Parker: Yes, indeed. We understand the need for that provision was suggested by the existence of certain special agricultural property regimes in various southern European countries. It is a provision which did appear, I have to say, in the Hague Succession

Convention, so it was not completely dreamt up just by the Commission. But you are right, of course, it would be a big exception to the choice of law, the generally prevailing choice of law regime, and there is a degree of uncertainty about what it actually means. The only thing perhaps to be said in favour of it is that it may open up the prospect of perhaps a special deal for those countries which do not have claw back. Here some special regime is being created in choice of law terms. It is being created for certain Member States. Maybe we could have a slice of a slightly different cake to help us.

Q162 Chairman: Thank you. Can we go on to Chapter V in the Article about authentic instruments and the European Certificate of Succession, and perhaps you could help us with the specific issues as you see them regarding the recognition and enforcement of the authentic instruments and what are the problems?

Lord Bach: Again, this is a very important matter and also quite a deeply technical one. We do feel, as I said at the start, there are other issues apart from claw back and habitual residence which concern us a great deal. This is certainly one of them.

Mr Parker: Perhaps I could say at a recent meeting, in fact a meeting last week of the Brussels Working Group, it became apparent for the first time that there was a major problem for us in the area of authentic instruments. The Commission confirmed that none of the rules relating to jurisdiction would apply to notaries and therefore to the regulation of competence as regards authentic instruments. This was contrary to our previous understanding of Article 3 of the regulation and its reference to “non-judicial authorities”. The proposal’s rules on jurisdiction are closely modelled on those in the Brussels I regulation and their overall effect is to regulate strictly the jurisdiction of national courts in the area of succession. However, the failure to provide any equivalent rules in relation to notaries would create a situation which would, in our view, heavily discriminate in favour of notarial legal systems as against other systems such as the systems in the British Isles, Scandinavia and Cyprus, which operate

without notaries in this context. The overall effect would, we believe, be to damage significantly the degree of mutual trust between the different legal systems in the EU, which is an essential pre-condition to establishing machinery for the recognition and enforcement of authentic instruments. Our concern about the un-level nature of the playing field is not merely a matter of principled objection but rather reflects its worrying potential for creating serious problems in practice. This may be illustrated by an example; others could certainly be envisaged. My case is that there are contested succession proceedings taking place in London, in a court properly seised with jurisdiction under the regulation. A disgruntled party to those proceedings could seek an authentic instrument from a notary in another Member State. Under the regulation that notary would be entirely at liberty to deal with the case. For example, the fact that the London proceedings may be at an advanced stage would be irrelevant. Under the regulation he would not have to concern himself in any way with the issue of regulation. It would, of course, be for the notary to make his own decision also on the issue of applicable law. He might not even be made aware of the contested succession proceedings in London. The likelihood is that any resulting authentic instrument would issue quickly before any judgment could be delivered by the London Court, and the effect of that would be to ensure the circulation of that instrument around the EU in such a way as to disable to a great extent the effect of any subsequent London judgment. This is because successful challenges to the validity and applicability of an authentic instrument must be brought in the instrument's home Member State. Recognition and enforcement of an authentic instrument is automatic in all the other Member States unless it can be proved to be a breach of public policy in the enforcing state. This is likely to be very difficult to achieve in practice in the great majority of cases. In conclusion, our assessment is that this problem on its own is of the same general order of importance as those already identified in relation to claw back and the connecting factor.

Q163 Chairman: As they say, we will read Hansard and come back to it tomorrow. The Certificate of Succession. One of our witnesses interpreted Article 36 as meaning that if you have a European Certificate of Succession you would still have to obtain a grant of probate before being able to deal with the UK property. I do not want to put any words into the mouths of the Members of the Committee, but I think it is fair to say that when we first looked at all this we thought this might be something which would be advantageous to people in the ordinary course of their business, in that they could have something they could use precisely without doing what Mr Frimston suggested. Do you agree that if you have got an ECS you would need a grant of probate here to deal with the UK property?

Mr Parker: I think the truthful answer at the moment is that we do not know. We have not yet discussed this chapter in the Brussels working group. This end of the regulation I think is particularly obscurely drafted and there are, as we see it, conflicting indications in different provisions as to whether or not Richard Frimston is right. In any event, whatever is desired needs to be, I think, explained more clearly in the text. So we will certainly be seeking greater clarity. For our part, we think the retention of probate is very important actually. We think it is important generally and it should not be able to be circumvented on the production of a certificate from another Member State. Just to give you one example, to return to the question of taxation, it is most important, I think, that tax should be payable by the estate before probate is granted and the assets then distributed to the heirs abroad. If that requirement can be got around on the production of a certificate, then I think we would be into major tax problems. In any event, I think the smooth administration of estates in this country depends upon retaining probate, but there are many other obscurities about exactly what the certificate does in terms of national procedural arrangements on succession and we have to still, I think, get to the bottom of all those and iron them out.

Q164 Chairman: So the same would apply to other Member States really as to what procedures were needed?

Mr Parker: I think so.

Q165 Chairman: Have you any view about what should be in that Certificate of Succession to make it practical?

Mr Parker: I think this is still very much a work in progress. I hope you will bear with us. It is only that we have not yet worked out exactly how the certificate might be best used. I think in any event it will need to reflect the relative complexity of English law, particularly English land law, and it will need to be susceptible to listing only those assets which it is appropriate to list. It is important, for example, that if we get a compromise on claw back it should not be possible to circumvent that by means of the certificate listing assets which would otherwise fall outside the scope of a succession in this country. So there are all kinds of issues which I think still need to be nailed down here.

Q166 Lord Maclellan of Rogart: This is not on this issue. Really two related questions. To what extent has this process involved representatives of the Scottish legal system and will it continue to do so? Secondly, you mentioned, I think, Minister, that you have had 99 responses to the consultation. I wonder if the consumer interests could be said to have been consulted. I can understand that very many specialists, experts, and so on, have given indications of difficulties but I wonder if the consumer voice has been heard in all of this. By that I do not mean necessarily the consumers' legal representatives because, as you point out, a very small number of people actually make wills. I would like to know, for example, if the Consumer Association has given any current response and whether they were consulted, because it does seem to me that the difficulties of the present situation are to some extent

underestimated and that it is worth considering in our continuing negotiations whether we can address some of those problems which an ever more mobile society faces?

Lord Bach: Yes. As far as Scotland is concerned, I do not know the details but I know that Professor Beaumont of Aberdeen University, who is an expert in this field, has been advising both us here, the UK Government, and also the Scottish Executive as well.

Mr Parker: Our consultation paper went very widely in Scotland and although it was issued down here it went to Scottish interests and quite a lot of them responded and in fact the Scottish Government organised a day where people were brought together to discuss the proposal. So they did quite a good job on this, actually.

Lord Bach: Your second question is a very interesting one. I do not know whether you would count charities, who are the donees of quite a lot of those deeply affected by this proposal, whether you would count them as part of the consumer interest here or not. If so, they were very widely represented in terms of their response to the consultation. As to consumer organisations as such, I do not think we have. The magazine *Which?* was consulted. We can give more information about this in our response to the consultation, which I think is due out in the New Year, and will do so, but I take your point very much. It would be a great mistake for those outside the Committee – I am sure the Committee will not make this mistake – to see the fact that we are not opting in at the present time as somehow hiding our faces away from the fact that there is a real issue here with two and a half million citizens of the United Kingdom living in EU countries and many, many – what do they say? -- that London is the fifth largest French city. So the Government is well aware that these are issues which, if we can resolve, we need to resolve but we are also certain that at the present time not to opt in to this is the right thing to do for the British people.

Q167 Chairman: We would probably also quite like to know at some time your views about the Commission's estimate of the number of cases that have caused a problem, which was in their impact assessment, and just how robust that is.

Lord Bach: We did notice your questioning of Mr Faull last week on that issue and I think we have our own views on that, and perhaps we could let you know on that.

Chairman: Thank you.

Q168 Lord Renton of Mount Harry: You have half answered my question, Minister. I was really going to say, what actually do you think is going to happen next and over what sort of period of time?

Lord Bach: The working party will get together again on January 4th, with Mr Parker representing our interests, and presumably the working party will have – Mr Parker can probably answer this better than me – many, many sessions. How long the negotiating process will take is a very good question. I have heard an estimate of at least two years being bandied about. Who knows? Of course, the Members of the European Parliament themselves are, at committee level, I believe, going to be discussing in detail this proposal. I have had some conversations with some Members of the European Parliament actually on different sides of the political fence on this issue, UK MEPs, and they are starting the detailed work on this in committee in the New Year too, but Mr Parker can probably give you a better timescale than I can.

Mr Parker: I think it is very hard to tell at this point. As I say, issues are still emerging and I think there may be some important disagreements between the Council, Ministers and the European Parliament, and of course that would delay matters, but I think two years sounds about right as an overall timescale for the negotiations.

Q169 Lord Renton of Mount Harry: From your point of view and from the work you have to do, it goes on almost as if we had opted in?

Mr Parker: Well, we hope so. We hope that, as happened, for example, with the negotiations on the Rome I regulation, representatives in other Member States will park the fact that we have not opted in, will accept our contribution and the full role we play and will judge our arguments on the bases of their merits rather than the fact that we did not opt in at the beginning. We hope we can achieve that again.

Q170 Lord Rosser: Can I just ask, in light of an answer you gave a moment ago, to comment on a view expressed by one of our witnesses who said he thought it was the ordinary folk who needed this regulation and they would not be troubled by claw back because they are not giving millions of pounds to somebody or other. What is your comment on that?

Lord Bach: I am sure it is ordinary folk, whatever that expression actually means, who could gain by a proper agreement on this, but I think those same ordinary folk, even if they had not got very much to give to charity, if they had given something to charity during their lives, for example, their relatives might well resent the fact that what they wanted to do when they were alive was somehow taken away from them once they were dead. I think that, of course, it does not matter in the end about us, or academics, discussing the merits of this, but it does matter how this will actually work out for ordinary people across Europe. I do not think we should say that the principles of succession and wills that we have had for many, many years should just be thrown away, because I think ordinary people have gained from them as well as those who are better off.

Mr Parker: Yes, and of course claw back applies on the basis of a proportion of the total estate. It does not have to be a particularly large estate. If there is enough to be worth litigating about, then you are into these problems.

Baroness O’Cathain: That is right.

Q171 Lord Wright of Richmond: One of our witnesses, in fact probably the only witness who actually was in favour of opting in, used the argument that it would strengthen our hand in negotiations. Perhaps I can particularly ask Mr Parker, in your discussions in the Brussels group to what extent do you actually think your hand has been weakened by the decision to opt out?

Mr Parker: Of course, nobody knows that yet in Brussels because it has only been taken today. We were in an ambiguous situation last week, but when it is known I hope that they will not react badly, that they will regard this as a genuine clash of legal cultures and it is always much more difficult to harmonise private international law rules where the substantive law rules are so different. It is much easier in an area like contract or tort because there is much more congruence of the substantive laws underlying the agreement. So I hope it will be seen not as a kind of knee-jerk or Eurosceptic reaction but an understandable one.

Lord Wright of Richmond: The clash of cultures may lead our partners to say, “Well, you would say that, wouldn’t you?” and really ignore your arguments?

Baroness O’Cathain: They probably do anyway!

Q172 Lord Wright of Richmond: Perhaps I am too negative.

Mr Parker: We just have to hope that over time the value of our arguments and the value of the compromises that we offer will be sufficient to get us home, but we are under no illusions. This is going to be very difficult, more difficult than the Rome I dossier, I think.

Lord Wright of Richmond: If I may speak on behalf of the Committee, I think we wish him good luck.

Q173 Chairman: Deep sympathy! If there are no other questions, Minister, is there anything you want to add?

Lord Bach: Just to thank the Committee for the work it is doing, if I may say so, and that we really do want to go on working with you and we hope your Committee will have this on its agenda in the months ahead because we really do need to have your input in these negotiations.

Chairman: Thank you very much, Minister. Thank you for your evidence. Thank you, too, Mr Parker, for your answers. We are grateful to you for your assistance, particularly on the last day of – not term –

Baroness O’Cathain: Session.

Chairman: Not even the last day of the session.

Baroness O’Cathain: The last day before Christmas and we wish you a Happy Christmas!

Chairman: Thank you so much, the last day before the commencement of the recess and we wish you a Happy Christmas!