



The Scottish Parliament  
Pàrlamaid na h-Alba

Published 16 November 2018  
SP Paper 425  
15th Report, 2018 (Session 5)

## **Justice Committee Comataidh a' Cheartais**

# **Consent notifications considered by the Justice Committee, 13 November 2018**



**Published in Scotland by the Scottish Parliamentary Corporate Body.**

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# Justice Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice.



<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/justice-committee.aspx>



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# Introduction

1. At its meeting on 13 November, the Justice Committee considered three UK statutory instruments (SIs) related to the European Union (Withdrawal) Act 2018. This report summarises the Justice Committee's consideration of:
  - The European Enforcement Order, Order for Payment and Small Claims Procedure (Amendment, Revocation, Transitional and Savings Provisions) (EU Exit) Regulations 2018;
  - The Inquiries and Coroners (Amendment) (EU Exit) Regulations 2018; and
  - The Service of Documents and the Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provision) (EU Exit) Regulations 2018.
2. The Committee received submissions from Dr Kirsty Hood QC and Professor Janeen Caruthers, University of Glasgow. These are included as annexes. The Committee is grateful to them for their views.
3. The Official Report for this session, which contains the full discussion of the instruments, is available on the [Justice Committee's webpage](#).

## Background

4. The European Union (Withdrawal) Act 2018, passed by the UK Parliament, allows the UK and Scottish parliaments to begin considering regulations to convert non-domestic European Union (EU) law into UK law.
5. As part of the process by which the UK leaves the EU, consideration must be given as to whether current UK law needs to be amended to the UK's new status as a non-EU member. For example, there are currently many references in regulations to EU bodies and the EU itself that will no longer be applicable after the UK has left the EU.
6. Some of the necessary changes to the statute book will be done through Scottish Statutory Instruments (SSIs) in the usual way. However, a number will be done through Statutory Instruments (SIs) passed in the UK Parliament with the consent of the Scottish Parliament which itself is based on the recommendation of the Scottish Government (these are called SI notifications). Consent will be sought as these SIs will make changes to devolved powers and/or executive competences. Such changes should be broadly technical in nature. Protocols governing arrangements for both of these processes have been agreed to with the Scottish Government (see below).

## Protocol agreement between the Scottish Government and the Scottish Parliament

7. In order to prepare devolved legislation for UK withdrawal from the European Union, Scottish Government and Scottish Parliament officials developed a protocol

governing UK Statutory Instruments. The protocol is intended to ensure the Scottish Parliament can scrutinise the Scottish Government's approach to instruments it considers are better dealt with by the UK Government.

8. In a [letter](#) to the Conveners of the Finance and Constitution Committee and the Delegated Powers and Law Reform Committee, Michael Russell, Cabinet Secretary Government Business and Constitutional Relations wrote that, "This [process] is not about the question of where devolved powers will be exercised after EU withdrawal. Instead it is about the technical task of ensuring that important schemes and regulations can continue to operate despite withdrawal."
9. He continued, "Where the policy outcome being sought is consistent across administrations, then it could be appropriate and in Scotland's interests to agree a UK-wide approach to statutory instruments (for example, to avoid duplication of effort, or where only technical or minor amendments are required). Where a different way of dealing with EU withdrawal, or a different policy outcome, is required in Scotland, we will pursue our own statutory instruments in the Scottish Parliament."
10. Under terms of the protocol, Scottish Ministers will notify the Scottish Parliament of any proposal to consent to the UK Government using its powers in devolved areas. Lead committees are then invited to scrutinise the proposal to consent, and report to Parliament with a recommendation as to whether consent should be given to the consideration of instrument in question taking place at Westminster.

# The European Enforcement Order, Order for Payment and Small Claims Procedure (Amendment, Revocation, Transitional and Savings Provisions) (EU Exit) Regulations 2018

11. This Statutory Instrument will be laid in the UK Parliament on 20 November 2018. The Scottish Government notification of the instrument can be found on the [Justice Committee's website](#).
12. The European Enforcement Order (EEO), European Order for Payment (EOP) and European Small Claims Procedure (ESCP) Regulations form part of a group of EU measures, adopted under the articles of the Treaty establishing the European Community (which preceded Article 81 of the Treaty on the Functioning of the EU), which deal with civil judicial co-operation in cross border matters.
13. The EEO, EOP and ESCP Regulations and their related EU amending and implementing measures will become “retained direct EU legislation” and form part of domestic law on and after EU Exit day under section 3 of the EU (Withdrawal) Act 2018.
14. The EEO, EOP and ESCP Regulations establish procedures for national courts of participating EU Member States to deal with cross border debt claims. Specifically:
  - Regulation (EC) No 805/2004 (the EEO Regulation) creates the European Enforcement Order (EEO) for uncontested claims. The EEO procedure is a simplified way of enforcing uncontested debt claims (i.e., claims where the debtor has admitted liability or not responded to the claim or not appeared at court having initially responded) across different EU Member States.
  - Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 (the EOP Regulation) creates the European payment order procedure (EOP procedure). The EOP is a simplified procedure for pursuing uncontested EU cross-border monetary claims for a specific amount which are due at the time the application for the order is submitted.
  - Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 (the ESCP Regulation) establishes the European Small Claims Procedure. The ESCP is a simplified, uniform EU procedure for civil and commercial cross border claims of less than E5000 which is designed for claimants to be able to use without needing to instruct lawyers.
15. Each of the procedures operates on a reciprocal basis, requiring co-operation between relevant national courts in participating EU Member States. Post exit, absent an agreement between the UK and the EU for the continued, reciprocal, recognition of the EEO, EOP and ESCP procedures by the UK and the EU, co-operation between EU and UK courts will cease as will mutual recognition of EEOs, EOPs and ESCP judgements. The Scottish Government has said that reciprocal



recognition and co-operation between EU and UK courts is essential if the three procedures are to function effectively. The Scottish Government considers that it is not possible for the UK or Scottish Parliament to legislate for the necessary reciprocity.

16. The proposed Regulations will therefore revoke the directly applicable retained EEO, EOP and ESCP Regulations and the retained EU instruments that have amended the EEO, EOP and ESCP Regulations over time, and amends other retained direct EU legislation to remove provisions relevant to the EEO, EOP and ESCP Regulations.

## **Justice Committee scrutiny**

17. The Committee had no comments to make on the instrument.

# The Inquiries and Coroners (Amendment) (EU Exit) Regulations 2018

18. This Statutory Instrument is due to be laid in the UK Parliament in late November 2018. The [instrument and explanatory notes](#) can be found online.
19. The Inquiries Act 2005 established a statutory framework for the conduct of public inquiries in the UK. From time to time events occur where it is in the public interest to establish an inquiry to examine what happened and make recommendations, with a view to ensuring that lessons are learned to prevent recurrence. The 2005 Act extends to the whole of the UK, and governs the establishment of inquiries by Scottish Ministers, as well as UK Ministers. Section 28 of the 2005 Act limits the terms of reference of an inquiry established by the Scottish Ministers to “Scottish matters”, i.e. a devolved matter which relates to Scotland. Before exit day a person can rely on an EU obligation or an enforceable EU obligation under the sections listed below within the Inquiries Act 2005.
20. The proposed Regulations amend references to “EU obligation” and “enforceable EU obligation” in the relevant sections of the Inquiries Act 2005, to ensure reference is now made to “retained EU obligation” and to “retained enforceable EU obligation” following the United Kingdom’s withdrawal from the European Union.
21. The proposed Regulations also amend section 43 (interpretation) of the Inquiries Act 2005 to provide a definition of “retained enforceable EU obligation” for the purposes of the 2005 Act. The term “retained EU obligation” is already defined in the Interpretation Act 1978 as a result of amendments made by the EU (Withdrawal) Act 2018.
22. The references to EU obligations and enforceable EU obligations need to be amended to ensure retained EU law continues to apply to these Acts once the UK leaves the EU. If the references to EU obligations and enforceable EU obligations are not amended then the relevant provisions will no longer operate correctly because those terms will no longer have a clear meaning. The terms need to be amended to refer to the new terminology relating to retained EU law to be introduced by the EU (Withdrawal) Act 2018. The proposal is not that these Regulations amend any underlying policy in relation to the conduct of inquiries, but rather that existing policy continues to be effectively delivered in statute.

## Justice Committee scrutiny

23. The Committee had no comments to make on the instrument.

# The Service of Documents and the Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provision) (EU Exit) Regulations 2018

24. This Statutory Instrument is due to be laid in the UK Parliament on 20 November 2018. The [instrument and explanatory notes](#) can be found online.
25. The civil judicial cooperation framework within the EU includes two regulations:
  - Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (“EU Evidence Regulation”); and
  - Council Regulation (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (“EU Service Regulation”).
26. The EU Service Regulation and EU Evidence Regulation establish frameworks for the transmission and fulfilment of requests for cross-border service of documents and the taking of evidence in civil and commercial matters between EU Member States. The procedures set out in both instruments are designed to provide an efficient, effective and speedy system of facilitating requests from one EU Member State to the authorities of another.
27. The EU Service Regulation and the EU Evidence Regulation are reciprocal procedural measures, supporting civil judicial cooperation between EU Member States. Post EU-exit, as a third country, the United Kingdom will not have access to the civil judicial cooperation framework, and consequently post EU-exit these reciprocal EU Regulations will cease to have effect in relation to the UK. The UK cannot legislate to restore the necessary reciprocity. The UK is party to two alternative Hague Conventions on service and the taking of evidence. The proposed Regulations repeal of the EU Service Regulation and EU Evidence Regulation and domestic implementing legislation. This is necessary to ensure the UK can fully participate in the two Hague Conventions post EU Exit and to clarify that the EU Service Regulation and EU Evidence Regulation will cease to have legal effect in the UK post EU Exit.
28. Most other EU Member States are also party to the Hague Conventions on service and the taking of evidence: the 1965 Convention on the Service Abroad of judicial and extra judicial documents in civil or commercial matters (“Hague 1965”); and the 1970 Convention of the taking of evidence abroad in civil or commercial matters (“Hague 1970”), although the EU Service Regulation and EU Evidence Regulation apply as between EU Member States.
29. Upon the EU Regulations ceasing to have effect in the UK, the UK will be able to fall back on the provisions of Hague 1965 and Hague 1970.

30. The EU Service Regulation and the EU Evidence Regulation are modelled in large part on the provisions of the Hague Conventions, but contain a more modern approach to the transmission of requests for service and taking of evidence across borders, including the imposition of time limits for confirming and responding to requests.
31. The Scottish Government has stated that the Hague Conventions are potentially less effective and efficient in procedural terms, and not all EU Member States have ratified the Conventions, meaning that alternative procedures will need to be employed for those States.
32. The Scottish Government believes, however, that the Conventions provide an appropriate international framework to enable requests to be transmitted and fulfilled which the UK can participate in.

## Justice Committee's Scrutiny

33. The Committee noted that Ireland, Belgium and Austria are not party to the 1970 Convention (also Austria and Belgium). The “alternative procedures” for Ireland (and these other countries) are not specified in the SI notification.
34. The Committee agreed to write to the Scottish Government for more information on the impact these countries not being signatories will have on the issues covered by this instrument.

# Recommendation

35. The Committee is content for the Scottish Government to give its consent for the UK Ministers to lay a Statutory Instrument in the UK Parliament on the following instruments:

- The European Enforcement Order, Order for Payment and Small Claims Procedure (Amendment, Revocation, Transitional and Savings Provisions) (EU Exit) Regulations 2018;
- The Inquiries and Coroners (Amendment) (EU Exit) Regulations 2018; and
- The Service of Documents and the Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provision) (EU Exit) Regulations 2018.

# Annex: Submission from Dr Kirsty J Hood QC

## **THE EUROPEAN ENFORCEMENT ORDER, ORDER FOR PAYMENT AND SMALL CLAIMS PROCEDURE (AMENDMENT, REVOCATION, TRANSITIONAL AND SAVINGS PROVISIONS) (EU EXIT) REGULATIONS 2018**

As is correctly narrated in the *Notification to the Scottish Parliament*, the EEO, EOP and ESCP Regulations are EU measures regarding civil judicial co-operation in cross-border matters. The effect of these EU measures is fairly summarised in para. 4 of the *Notification*.

By virtue of the *EU (Withdrawal) Act 2018*, on EU Exit these EU measures (and related implementing measures) would become retained EU legislation and remain part of Scots law (and the law of the other parts of the UK). However, as the *Notification* correctly recognises, all of these EU measures involve reciprocal arrangements, and thus in the absence of an agreement for ongoing EU/UK co-operation after EU Exit (and any transitional period leading in to such an agreement), the measures will not operate with the same effect as presently. As is correctly stated in para. 9 of the *Notification*, “[i]t is not possible for the UK or Scottish Parliament to legislate for the necessary reciprocity”. That being so, it is being proposed by the Government that this retained EU legislation be revoked.

If the retained EEO, EOP and ESCP Regulations are revoked, I would agree that amendments to domestic UK legislation (e.g., revocation of the *European Communities (European Order for Payment) (Scotland) Regulations 2009*) are simply an inevitable, and logical, consequence.

I would also agree that transitional (and savings) provisions will be required – and what is proposed in this regard does not seem particularly controversial.

It is correct to state that there are alternative procedures in Scots law which may be used to secure enforcement of foreign court orders in Scotland. I would agree, however, that the alternative procedures will be more cumbersome than the procedures under the EEO, EOP and ESCP.

I would agree that the impact of the removal of the EEO, EOP, and ESCP, procedures will fall directly on foreign creditors wishing to enforce their claims in Scotland (although it should always be borne in mind that a perceived difficulty in enforcing claims in a country in the event of non-payment by, or a dispute with, its citizens, could eventually make others less willing to do business with consumers/businesses in that country). This impact is indeed not specific to Scotland, and will be the same across the whole of the UK. It is correct that Scottish creditors will no longer be able to take advantage of these streamlined EU procedures to enforce their claims in other EU Member States – although that will be a result of EU Exit itself, rather than the proposed SI.

## **THE SERVICE OF DOCUMENTS AND THE TAKING OF EVIDENCE IN CIVIL AND COMMERCIAL MATTERS (REVOCATION AND SAVING PROVISION) (EU EXIT) REGULATIONS 2018**

The effect of the EU Service Regulation, and the EU Evidence Regulation, is fairly summarised in the *Notification to the Scottish Parliament*. It is correct to state that these measures support civil judicial co-operation between EU Member States - and that post EU Exit (and in the absence of any future EU/UK arrangement, and transitional arrangements leading into that) the UK, as a 'Third Country', will not benefit from participation in these. The *Notification* correctly recognises that "[t]he UK cannot legislate to restore the necessary reciprocity".

If the retained EU measures are revoked (including revoking the parallel arrangements with regard to Denmark), I would agree that amendments to domestic UK legislation are simply an inevitable, and logical, consequence.

I would also agree that transitional (and savings) provisions will be required – and what is proposed in this regard does not seem controversial.

I would agree that in the absence of the EU Service Regulation, Scotland (and the rest of the UK) will have to fall back upon the 1965 Hague Convention. It is correct to note the similarity of the two instruments – but that the Hague Convention involves transmission through Central Authorities, instead of directly to Sheriff Officers and Messengers at Arms (as with the EU Service Regulation). I would also note that there is one EU Member State which does not appear currently to participate in the 1965 Hague Convention.

I would agree that in the absence of the EU Evidence Regulation, Scotland (and the rest of the UK) will have to fall back on the 1970 Hague Convention. Again it is correct to note the similarities between the two instruments – but that the Hague Convention involves Central Authorities, unlike the EU Evidence Regulation. Furthermore, not all of the EU Member States currently participate in the 1970 Hague Convention.

### **THE INQUIRIES AND CORONERS (AMENDMENT) (EU EXIT) REGULATIONS 2018**

The proposed SI would make a technical, but necessary, change (arising from the UK exiting the EU). I have no further comments to offer on the proposed SI.

*Dr Kirsty J Hood QC*

*7 November 2018*

## **Annex: Submission from Prof. Janeen Caruthers**

### **The Service of Documents and the Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provision) (EU Exit) Regulations 2018**

### **The European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendment etc.) (EU Exit) Regulations 2018**

I have read the draft Statutory Instrument pertaining to the EU Evidence Regulation (Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters) and the EU Service Regulation (Council Regulation (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters), the Explanatory Memorandum and the Notification to the Scottish Parliament. I very strongly support the UK Government's proposal to bring forward this legislation in preparation for the UK leaving the EU.



It is necessary to address the failure of retained EU law to operate effectively (i.e. in a fully reciprocal manner) upon the withdrawal of the United Kingdom from the European Union, and to make provision for cases of a transitional nature. That being so, it is important to revoke the two Regulations referred to above, as well as the Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil and commercial matters, and two associated Scottish Statutory Instruments relating to the Service Regulation (SSI 2001/172 and SSI 2008/372).

The fall-back position of relying on the 1965 Hague Convention on the service abroad of judicial and extra judicial documents in civil or commercial matters and the 1970 Hague Convention on the taking of evidence abroad in civil or commercial matters, whilst not equivalent in coverage to the existing European regime (insofar as not all EU Member States are Contracting States to the two Hague Conventions) is an acceptable alternative.

With regard to The European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendment etc.) (EU Exit) Regulations 2018, whilst I have not had sight of the draft Statutory Instrument nor any Explanatory Memorandum, I am happy to add my support to the UK Government's proposal to bring forward relevant legislation in preparation for the UK leaving the EU. In the absence of any deal with EU27, the European Enforcement Order, European Order for Payment and European Small Claims Procedure Regulations will be repealed in view of the failure of retained EU law to operate effectively upon UK withdrawal from the EU.

I think it is wholly appropriate, for reasons of cost, simplicity and efficiency, that Scotland is included in each of the proposed statutory instruments.

Professor Janeen M Carruthers

