

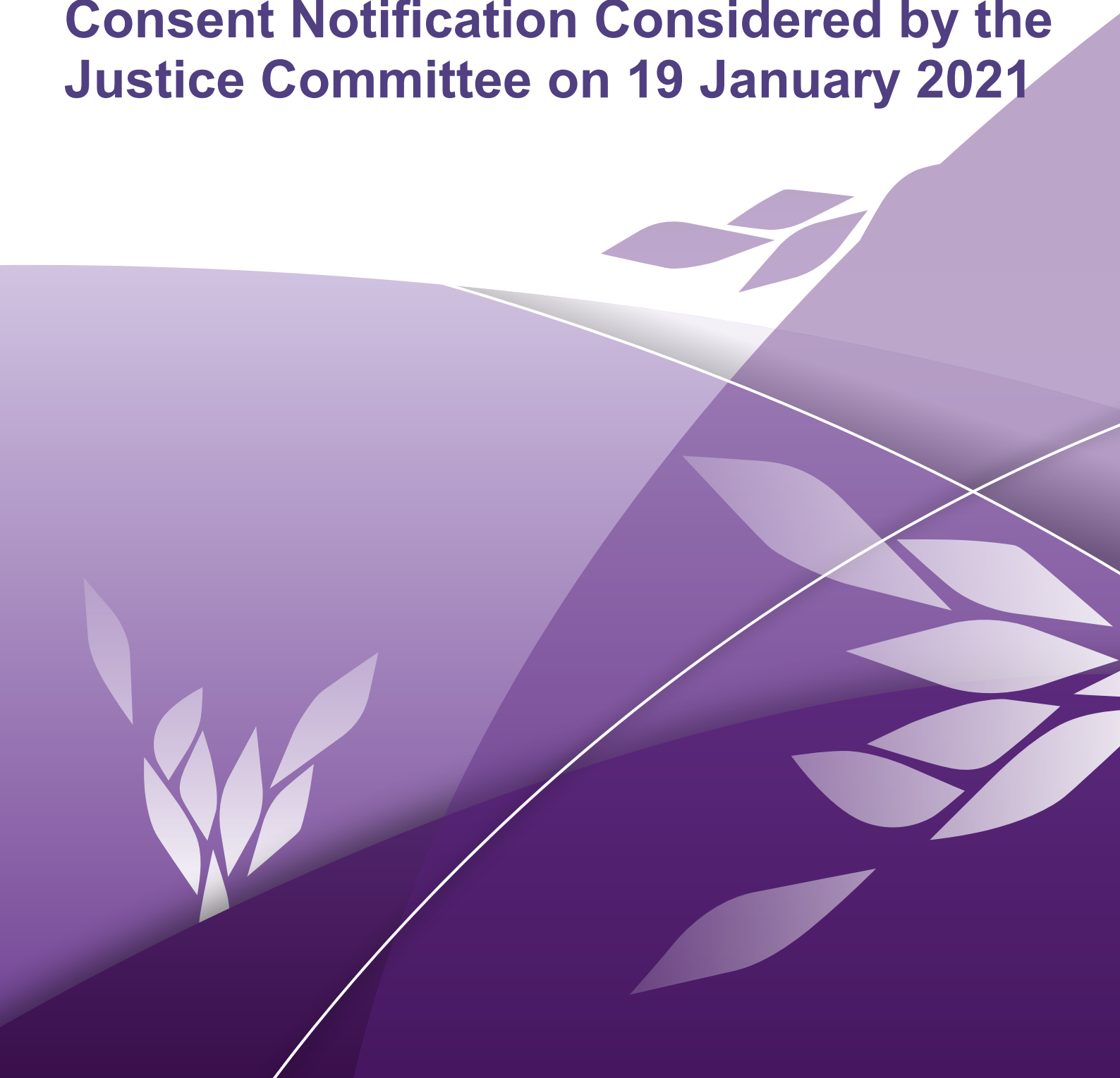


The Scottish Parliament
Pàrlamaid na h-Alba

Published 21 January 2021
SP Paper 914
3rd Report, 2021 (Session 5)

Justice Committee Comataidh a' Cheartais

Consent Notification Considered by the Justice Committee on 19 January 2021



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Justice Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.



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Introduction

1. At its meeting on 19 January 2021, Members considered the following SI notification (**see Annexe A**) from the Scottish Government:
 - The Civil Jurisdiction and Judgments (Lugano Convention 2007) Regulations 2020.
2. The Official Report for this session can be found on the Committee's [webpage](#).

Background

3. The European Union (Withdrawal) Act 2018 (the 2018 Act) sets out the process for the UK and Scottish parliaments to consider regulations to convert non-domestic EU law into UK law.
4. The process by which the UK leaves the EU requires consideration to be given as to whether the current body of law within the UK needs to be amended to reflect the fact that the UK will no longer be a member of the EU after exit day. At present, there are many references in regulations, for example, to EU bodies and the EU itself that will no longer be applicable after the UK has left the EU.
5. 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 based on the recommendation of the Scottish Government (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.

Consideration by the Justice Committee

6. The Committee considered the SI notification at its meeting on 19 January 2021. Members had no comments or questions on the notification.

7. The Justice 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 Civil Jurisdiction and Judgments (Lugano Convention 2007) Regulations 2020.

Annex A

A explanation of law that the proposals amend

These Regulations are being made under the power conferred by section 2 of the Private International Law (Implementation of Agreements) Act 2020 (“the 2020 Act”). The 2020 Act provides for the implementation in domestic law of international agreements on Private International Law (PIL). PIL agreements consist of the principles and rules for dealing with certain cross-border legal disputes to ensure reciprocal treatment, avoid parallel legal proceedings in different countries and to streamline cross-border cooperation. The UK has entered into PIL agreements in its own right in the past but recently has done so through its membership of the European Union (EU).

Section 2 of the 2020 Act provides a delegated power for the implementation through secondary legislation of future international agreements on PIL to which the UK will be a party in its own right. This can be used to implement any future international agreements in the area of PIL which the UK enters into, both with the EU and other international partners. The 2020 Act received Royal Assent on 14th December and section 2 came into force on that date. Sections 1 and 3(1) and Schedules 1 to 5 come into force on IP completion day. The 2020 Act can be found [here](#).

PIL is a devolved matter and under section 2 of the 2020 Act, the Secretary of State, acting with the consent of the Scottish Ministers can exercise the power to implement international agreements on PIL in relation to Scotland in domestic law via secondary legislation.

The Regulations provide for the domestic implementation of the 2007 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (the “Lugano Convention”) in the United Kingdom (for example, money judgments, including costs orders, the enforcement of non-money judgments such as injunctions and interim orders made by a court of a contracting party). The Regulations do so by amending various pieces of primary and secondary legislation, in particular the [Civil Jurisdiction and Judgments Act 1982](#), and including giving the Convention provisions the force of law in the UK.

The Lugano Convention originally had effect in the United Kingdom by reason of the United Kingdom’s membership of the EU, and continued to do so under the terms of the EU withdrawal agreement until 31 December 2020. The UK ceased to be a party to the Lugano Convention from 11pm on 31 December 2020.

The UK has applied to accede to the Lugano Convention in its own right as an independent contracting party and is awaiting the outcome of that application which must be unanimously approved by all the existing contracting parties to the Lugano Convention - the EU (including Denmark), Switzerland, Norway and Iceland. The EU had indicated that it is not willing to consider the application until the future relationship negotiations have concluded.

Summary of the proposals

The Regulations will implement the Lugano Convention in the UK if the United Kingdom’s application to join the Lugano Convention as an independent contracting party is accepted. The Lugano Convention will enter into force for the United Kingdom on the first day of the

third month following the deposit of its instrument of accession. The instrument of accession can, however, only be deposited after the implementing legislation has been put in place. To ensure the Lugano Convention can enter back into force in the UK as quickly as possible after the UK has been notified that its application to re-join the Convention has been accepted, these Regulations have been prepared in advance so that they can be laid in draft and complete the scrutiny procedures of the UK Parliament as soon as possible, enabling the instrument of accession to then be deposited. This will minimise the gap between the UK leaving the Lugano Convention on 31 December 2020 and once again becoming bound by it.

The Lugano Convention

The Lugano Convention applies to all civil and commercial matters (including family maintenance) whatever the nature of the court or tribunal. It does not extend to revenue, customs or administrative matters nor does it apply to personal status, matrimonial matters, wills and succession, insolvency and arbitration.

It provides rules on jurisdiction for legal proceedings within the scope of the Convention. This means that between contracting states the rules can be relied on to determine in which country's court a legal action should be raised. The basic principle in the Lugano Convention is that a defendant should be sued in their country of domicile, although there are certain exceptions and alternative grounds on which the court can take jurisdiction in prescribed cases. The Convention also provides that the resulting judgment can then be recognised and enforcement across all contracting states. This provides legal certainty and predictability and helps prevent multiple court cases taking place on the same subject matter in different countries and reduces the costs and expenses for the parties involved.

The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (“the CJJ Regulations”)

The CJJ Regulations address deficiencies in retained EU law relating to private international law, specifically the rules on jurisdiction and recognition and enforcement of judgments in civil and commercial matters. The CJJ Regulations do this by revoking retained EU law subject to savings and transitional provisions including the principal EU instrument in this regime, Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (known as “Brussels IA”), and the other regulations and conventions which form part of the “Brussels regime”, which includes the Lugano Convention. Specifically, in relation to the Lugano convention, the CJJ Regulations:

- Extinguish the rights, powers, liabilities, obligations, restrictions, remedies and procedures that are derived from the Lugano Convention. These are retained in domestic law by section 4 of the European Union (Withdrawal) Act 2018 and so any such retentions are removed by the SI for the avoidance of doubt;
- Amend domestic legislation to remove references to the Brussels regime and, where appropriate, replace these with references to domestic legislation so that legislation will work effectively post transition period (31 December 2020);
- Preserves aspects of the Brussels regime and the domestic implementing legislation for transitional purposes so they continue to apply to determine jurisdiction for proceedings instituted in the UK before exit day and in relation to the recognition or

enforcement of a judgment given, court settlement concluded or authentic instrument registered in a EU or EFTA State before the end of the transition period.

Broadly, the effect of the CJJ Regulations is to remove the Lugano Convention from domestic law since the UK will cease to be a party to the Lugano Convention from 11pm on 31 December 2020 by virtue of no longer being a member of the EU – the contracting party to the Lugano Convention.

The CJJ Regulations were made with the consent of the Scottish Ministers. The proposal to consent was notified to the Scottish Parliament. The CJJ Regulations will come into force at the end of the transition period. The notification relating to that SI provides further detail on the law in this area. The Justice Committee published its [report](#) recommending approval 7 December 2018.

The Regulations

The amendments contained in these Regulations are required in order to give effect to the Lugano Convention (again) in domestic law subject to the UK's application to accede to the Convention in its own right as an independent contracting party being approved. They include providing that the provisions of the Lugano Convention have the force of law in the United Kingdom. Broadly, the amendments these regulations will make to domestic legislation is to reinstate provisions which will be revoked by the CJJ Regulations from 31 December 2020.

The Regulations will amend various pieces of primary and secondary legislation that apply to Scotland including, in particular:

- The Civil Jurisdiction and Judgments Act 1982;
- Social Security Administration Act 1992;
- Civil Partnership Act 2004;
- The Civil Jurisdiction and Judgments Act 1982 (Provisional and Protective Measures)(Scotland) Order 1997 (SI 1997/2780);
- The Employment Tribunals (Enforcement of Orders in Other Jurisdictions) (Scotland) Regulations 2002 (SI 2002/2972);
- The Armed Forces (Service of Process in Maintenance Proceedings) Regulations (2009/1093);
- The Armed Forces (Forfeitures and Deductions) Regulations 2009 (2009/1109);
- The International Recovery of Maintenance (Hague Convention 2007 etc.) Regulations 2012 (SI 2012/2814).

The amendments are made by Parts 2 and 3 of the Regulations and generally re-instate provisions which existed in the instruments being amended during the previous period in which the Lugano Convention applied in the United Kingdom, but which were repealed or revoked, by the CJJ Regulations. They also amend domestic legislation dealing with family maintenance in order to ensure the Lugano Convention provisions on jurisdiction and recognition and enforce of judgments in cross-border maintenance cases are given full effect (where previously the EU Maintenance Regulation applied).

An explanation of why the change is considered necessary

The Regulations are required in order to implement the Lugano Convention in domestic law which will enable the UK to accede to the Convention as an independent contracting party (rather than as a member of the EU contracting party).

Scottish Government categorisation of significance of proposals

Category 'A' - requiring the lowest level of scrutiny. This category is considered appropriate because the amendments are intended to re-instate provisions which previously existed. They will ensure the continued smooth running of the law in this area and there has been no significant policy decision for Scottish Ministers to make.

Impact on devolved areas

Domestic implementation of private international law conventions is within the devolved competence of the Scottish Parliament.

The Regulations will not change the current policy position and there is no change in relation to the powers which are currently devolved.

There are no impacts specific to Scotland.

Summary of stakeholder engagement/consultation

The Scottish Government has not undertaken any formal consultation on the draft SI. However, the legal profession has been vocal in its advocacy for the UK's accession to the Lugano Convention. Under schedule 6 of the 2020 Act the Secretary of State is required to consult such persons as thought appropriate before exercising the power under section 2 to implement international agreements.

The UK Government has consulted with the International Law Committee (a body consisting of senior judiciary, other legal practitioners, academics and business representatives) about the merits of rejoining Lugano and with the Lord Chancellor's Advisory Committee on Private International Law (which includes retired and serving senior judiciary from all the jurisdictions of the UK, plus legal practitioners and academics with specialist knowledge and expertise in private international law) about the detailed drafting. The UK Government has also very recently written to the Heads of the Judiciary throughout the UK to seek their views. This includes the Lord President in Scotland.

A note of other impact assessments, (if available)

The Scottish Government has considered and decided that an impact assessment is not necessary as these Regulations will reinstate a private international law convention which is in force in Scotland until 31 December 2020. On implementation under the Regulations the Lugano Convention will apply between the UK and EU member states where previously Brussels IA took precedence. The Lugano Convention can also apply to maintenance cases where previously the EU Maintenance Regulation applied. As the provisions in the Lugano Convention are similar to Brussels IA and the EU Maintenance Regulation the Scottish Government did not consider this change meant an impact assessment was necessary.

There is no change to policy or the underlying applicable rules.

Summary of reasons for Scottish Ministers' proposing to consent to UK Ministers legislation

The Regulations relate to the devolved matter of aspects of private international law. The Scottish Ministers believe the changes in the Regulations are necessary to implement the Lugano Convention in the UK. The measures are technical in nature and are necessary to give full effect to the Lugano Convention. There is little, if any, policy choice since the Regulations are a necessary consequence of the UK's accession to the Convention. The UK Government has consulted the Scottish Government about the proposed Regulations and officials have worked with UKG to ensure the drafting delivers for Scotland's interests and respects the devolution settlement.

It is a pragmatic and consistent approach to continue to legislate in this area by implementing the Lugano Convention on a UK wide basis. It is a continuation of the approach taken in relation to the CJJ Regulations which were brought forward in the UK Parliament for the UK with the consent of the Scottish Ministers.

Intended laying date (if known) of instruments likely to arise

The Regulations are subject to affirmative procedure. The UK Government intend to lay the Regulations in the UK Parliament by 18 January, in the event that the other contracting parties to the Lugano Convention approve the UK's accession by then. We would welcome a view from the committee as soon as possible, however the Scottish Parliament will have 28 days for consideration if needed under the agreed protocol to consider the proposal to consent to the SI.

If the Scottish Parliament does not have 28 days to scrutinise Scottish Minister's proposal to consent, why not?

The Regulations may be laid in the UK Parliament before the 28 days period for Scottish Parliament scrutiny has passed. However, the UK Government has informed the Scottish Government that the SI will not be debated in the UK Parliament until the Scottish Parliament has scrutinised the Scottish Ministers' proposal to consent.

Information about any time dependency associated with the proposal

The Regulations will need to be in force on the first day of the third month following the deposit of the Lugano Convention instrument of ratification to enable continued certainty in civil and commercial disputes which have a cross-border dimension.

Are there any broader governance issues in relation to this proposal, and how will these be regulated and monitored post-withdrawal?

None

Any significant financial implications?

The reinstatement of the Lugano convention into domestic law will have no significant financial implications.

