

EXPLANATORY MEMORANDUM TO
THE EUROPEAN ENFORCEMENT ORDER, EUROPEAN ORDER FOR PAYMENT
AND EUROPEAN SMALL CLAIMS PROCEDURE (AMENDMENT ETC.) (EU
EXIT) REGULATIONS 2018

2018 No. 1311

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Act.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument is being made using powers in the European Union (Withdrawal) Act 2018 (the Withdrawal Act) in order to address failures in retained EU law to operate effectively and other deficiencies arising from the withdrawal of the United Kingdom from the European Union.
- 2.2 This instrument revokes the following three Regulations once they have become retained EU law, and variously amends and revokes related EU amending measures and domestic legislation:
 - Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (the EEO Regulation);
 - Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (EOP Regulation); and
 - Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (ESCP Regulation).
- 2.3 Separate statutory instruments will revoke relevant associated court rules for England and Wales and Northern Ireland and Scotland.

Explanations

What did any relevant EU law do before exit day?

- 2.4 The three EU Regulations established procedures for the national courts of EU Member States (other than Denmark, which does not apply the measures) to deal with cross-border civil and commercial claims, providing standard, simplified procedures for obtaining and/or enforcing orders or judgments in certain types of claims. Specifically:
 - The European Enforcement Order (EEO) procedure is a simplified way of enforcing judgments from 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.

- The European Orders for Payment (EOP) procedure is a simplified procedure for pursuing uncontested EU cross-border monetary claims.
- The European Small Claims Procedure (ESCP) is a simplified procedure for making cross-border claims with a value of up to €5000, which is designed for claimants to be able to use without needing to instruct lawyers.

Why is it being changed?

- 2.5 Each of the three EU Regulations operates on a reciprocal basis, requiring co-operation between relevant national courts in participating EU Member States. Absent this cooperation, which will cease if the UK exits the EU without a deal, none of the three measures will work effectively in the UK. The UK Parliament cannot legislate to restore the necessary reciprocity, and while the UK could attempt to apply the regulations unilaterally we do not consider it would be appropriate to do so, as explained in more detail at paragraph 7.3 of this memorandum.

What will it now do?

- 2.6 The European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendment etc.) (EU Exit) Regulations 2018 revoke the retained EEO, EOP and ESCP Regulations and variously revoke and amend related EU amending measures and domestic legislation (other than the relevant court rules which will be the subject of separate SIs). EEOs, EOPs and ESCP judgments issued by EU Member State courts will no longer be recognised or enforceable in the UK (other than for transitional purposes, explained in detail at paragraph 7.5). UK courts will be unable to certify judgments as EEOs, issue EOPs or ESCP judgments. It will still be possible to make claims which would have been capable, pre-exit, of being pursued in the UK under the EOP or ESCP Regulations, but these will need to be made in the appropriate court as ordinary civil claims, and recognition and enforcement of judgments and orders will need to be sought in the courts of the State where enforcement is intended to take place, in accordance with relevant national laws or any other applicable international frameworks.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The EU Exit Sifting Committees have reviewed this instrument and confirmed they agree with the Government's assessment that it should be subject to the negative resolution procedure. This instrument was presented to the EU Exit Sifting Committees on 5th November 2018, and the process was completed on 20th November

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

5.1 Lucy Frazer QC MP has made the following statement regarding Human Rights:

“In my view the provisions of the European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendment etc.) (EU Exit) Regulations 2018 are compatible with the Convention rights.”

6. Legislative Context

6.1 The EEO, EOP and 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 deals with civil judicial co-operation in cross-border matters.

6.2 The EEO, EOP and ESCP Regulations and their related EU amending and implementing measures will become ‘retained EU law’ and form part of domestic law on and after EU Exit day under section 3 of the Withdrawal Act.

6.3 Section 8 of the Withdrawal Act provides the vires for a Minister of the Crown, by regulations, to make such provision as he or she considers appropriate to prevent, remedy or mitigate any failure of retained direct EU law to operate effectively, arising from the withdrawal of the UK from the EU (section 8(1)). Section 8(2)(c) provides that deficiencies which may be remedied include where the Minister considers that the retained EU law makes provision for, or in connection with, reciprocal arrangements between the UK or any part of it, or a public authority in the UK, and a Member State or public authority in a Member State which no longer exist or are no longer appropriate. Section 20 defines “public authority” by reference to section 6 of the Human Rights Act 1998 which in turn provides that it includes a court or tribunal.

6.4 Paragraph 21 of Schedule 7 to the Withdrawal Act provides that a power to make regulations under the Act may be exercised so as to modify retained EU law or make different provision for different cases or descriptions of case, different circumstances, different purposes or different areas, and includes power to make supplementary, incidental, consequential, transitional, transitory or saving provision (including provision restating any retained EU law in a clearer or more accessible way).

7. Policy background

What is being done and why?

7.1 This instrument repeals the EEO, EOP and ESCP Regulations and the related retained EU law that has amended the EEO, EOP and ESCP Regulations over time, and amends other retained EU law to remove provisions relevant to the EEO, EOP and ESCP Regulations. It also amends and repeals domestic UK legislation that refers to the EEO, EOP and ESCP Regulations or EEOs, EOPs and ESCP judgments generally. EEOs, EOPs and ESCP judgments issued by EU Member State courts will no longer be recognised or enforceable in the UK (except in transitional cases). UK courts will be unable to certify judgments as EEOs, issue EOPs or ESCP judgments.

7.2 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 continued civil judicial cooperation, the

continued, reciprocal, recognition and enforcement between them of EEOs, EOPs and ESCP judgments issued by UK and EU courts will cease. Reciprocal recognition and co-operation between EU and UK courts is essential if the three procedures are to function effectively.

- 7.3 The retained regulations could be amended using the powers in section 8 of the Withdrawal Act to enable the regulations to be applied unilaterally by the UK post exit. However, while the UK can legislate to ensure that EU-issued EEOs, EOPs and ESCP judgments would be recognised and enforceable in the UK over assets in the UK, the UK cannot legislate to restore reciprocity by ensuring that EEOs, EOPs and ESCP judgments that emanate from the UK will be recognised and enforceable in EU Member States over assets in those States. This would require fresh legislative action either at the EU level or at national level in each of the EU Member States that participate in the Regulations. Furthermore, unilateral application of the EEO, EOP and ESCP Regulations would result in different procedures applying to judgments and orders (covered by the three regulations) issued by EU Member States to those that would apply to judgments and orders issued by non-EU countries, with little justification remaining post-Exit for such differential treatment.
- 7.4 Therefore, it is the Government's view that attempting to apply the regulations unilaterally, without reciprocity, is undesirable. Moreover, repealing the three regulations is preferable to leaving ineffective and inoperable legislation on the statute book, thereby avoiding any potential confusion as to their applicability.
- 7.5 The transitional and savings provisions of Part 5 of the instrument ensure that the relevant EEO, EOP and ESCP provisions continue to apply to matters commenced under those three EU Regulations prior to exit where enforcement is sought in the UK. Exit-related deficiencies in those provisions are corrected so that they will operate effectively on a transitional basis once the UK is no longer an EU Member State. This will allow for a smooth winding down of cooperation in cases live at the point of exit.
- 7.6 Where a statement of opposition is lodged in accordance with the Article 16 of the EOP Regulations in relation to a EOP which is covered by the saving provisions in Part 5 of this instrument, and those proceedings are transferred to continue as ordinary civil proceedings (in accordance with Article 17 of the EOP Regulations), those proceedings will fall to be considered against the transitional provisions in the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2018 (the Civil Jurisdiction and Judgments Regulations). This interaction between this instrument and the Civil Jurisdiction and Judgments Regulations is explained in the Explanatory Note to the instrument.
- 7.7 This instrument applies to private international law which is a transferred matter for Northern Ireland under section 4(1) of the Northern Ireland Act 1998. The UK Government remains committed to restoring devolution in Northern Ireland. This is particularly important in the context of EU Exit where we want devolved Ministers to take the necessary actions to prepare Northern Ireland for exit. We have been considering how to ensure a functioning statute book across the UK including in Northern Ireland for exit day absent a Northern Ireland Executive. With exit day less than six months away, and in the continued absence of a Northern Ireland Executive, the window to prepare Northern Ireland's statute book for exit is narrowing. UK Government Ministers have therefore decided that in the interest of legal certainty in Northern Ireland, the UK Government will take through the necessary secondary

legislation at Westminster for Northern Ireland, in close consultation with the Northern Ireland departments. This is one such instrument.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. The instrument is also made using the power in paragraph 21 of Schedule 7 in the European Union (Withdrawal) Act 2018. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

9.1 There are no current plans to consolidate the legislation amended by this instrument.

10. Consultation outcome

10.1 A formal consultation on these legislative amendments has not been carried out.

10.1 The Government's basic approach to repealing civil judicial cooperation measures that rely on reciprocity to operate effectively, such as those referred to in this instrument, has been discussed with members of the legal profession in the context of the overall approach to a no deal exit as outlined in the Civil Judicial Cooperation Technical Notice that was published on 13 September 2018 (<https://www.gov.uk/government/publications/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexite-deal/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexite-deal>).

10.2 Those stakeholders recognised the difficulty of continuing to apply measures that require reciprocity to operate effectively. The Government's rationale for repealing the regulations in this instrument is set out in paragraph 2.5 of this memorandum.

11. Guidance

11.1 The Government does not intend to provide guidance on this statutory instrument.

12. Impact

12.1 A full impact assessment has not been published for this instrument as no, or no significant, impact on the private, voluntary or public sector is foreseen.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is to ensure, through savings and transitional provisions, that the EEO, EOP and ESCP Regulations continue to apply to matters commenced under the EU Regulations prior to EU Exit where enforcement is sought in the UK. This will allow those matters to be resolved without imposing additional costs on small businesses involved in the disputes. Equally our approach in repealing the ineffective regulations will provide greater legal clarity as to the law post-exit which the Government believes will be of general benefit to the business community.

14. Monitoring & review

- 14.1 There are no plans to monitor or review this legislation as it repeals retained EU law (other than for transitional purposes).
- 14.2 As this instrument is made under the EU Withdrawal Act 2018, no review clause is required.

15. Contact

- 15.1 Paul Norris at the Ministry of Justice Telephone: 07547 972245 or email: paul.norris2@justice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Kristen Tiley, Deputy Director of Europe Division, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Parliamentary Under Secretary of State, Lucy Frazer QC MP, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/ESIC
Appropriateness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and 23(1) or jointly exercising	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s.2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s.2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Sifting statement(s)

- 1.1 The Parliamentary Under Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
- 1.2 “In my view the European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendment etc.) (EU Exit) Regulations 2018 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure)”.
- 1.3 This is the case because although these Regulations are made under section 8(1) of the EU (Withdrawal) Act, they do not fall into the category of regulations identified in Schedule 7 Part 1 paragraph 1(2) as requiring approval in draft by resolution of both Houses of Parliament. Accordingly, Schedule 7 Part 1 paragraph 1(3) specifies that this instrument is subject to annulment in pursuance of a resolution of either House of Parliament. In addition, the instrument revokes retained EU procedural regulations that would no longer be operable in the absence of reciprocal agreements with the EU post exit.

2. Appropriateness statement

- 2.1 The Parliamentary Under Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
- 2.2 “In my view the European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendment etc.) (EU Exit) Regulations 2018 does no more than is appropriate”.
- 2.3 This is the case because, by repealing and amending the retained EU law and related domestic legislation associated with the EEO, the EOP procedure and the ESCP, these Regulations do no more than is appropriate to remedy the deficiency in that retained EU law – such deficiency primarily being that it makes provision for reciprocal arrangements between UK and Member State courts which, post-exit, will no longer exist. This is set out in more detail in paragraphs 7.2 to 7.4 of this memorandum.

3. Good reasons

- 3.1 The Parliamentary Under Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
- 3.2 “In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action”.
- 3.3 This instrument repeals retained direct EU legislation and associated domestic legislation that makes provision for, or in connection with, reciprocal arrangements between UK and Member State courts, namely the EEO, EOP, and the ESC

procedures, which, post-exit, will no longer exist. Revoking those Regulations and the related instruments will clarify that they will cease to have legal effect in the UK post EU Exit, avoiding the potential for confusion over their applicability which may arise if they were left on the statute book.

4. Equalities

- 4.1 The Parliamentary Under Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement(s):
- 4.2 “The draft instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.”
- 4.3 The Parliamentary Under Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
- 4.4 “In relation to the draft instrument, I, Lucy Frazer QC MP, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

5. Explanations

- 5.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.