

EXPLANATORY MEMORANDUM TO
THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS AND NON-
CONTRACTUAL OBLIGATIONS (AMENDMENT ETC.) (EU EXIT)
REGULATIONS 2019

2019 No. [XXXX]

1. Introduction

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

2. Purpose of the instrument

- 2.1 The purpose of this instrument is to ensure that the European Union (EU) rules that determine the law applicable to contractual and non-contractual obligations continue to operate effectively in domestic law after the UK's exit from the EU. Those EU rules are contained, in particular, in Regulation (EC) No 593/2008 on the law applicable to contractual obligations ("Rome I") and Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations ("Rome II").

Explanations

What did any relevant EU law do before exit day?

- 2.2 Rome I establishes the rules applicable to EU Member States (except Denmark) that determine which country's laws apply to contractual obligations raising cross-border issues. Rome I replaced the rules in the 1980 Rome Convention on the law applicable to contractual obligations, with effect from 17 December 2009, although the 1980 Rome Convention continues to apply to certain contracts entered into before Rome I entered into force. Rome II establishes the rules applicable to EU Member States (except Denmark) that determine the law applicable to non-contractual obligations raising cross-border issues.

Why is it being changed?

- 2.3 Upon the UK's exit from the EU, Rome I and Rome II, and the domestic legislation that gave effect to these EU Regulations, will be retained under the European Union (Withdrawal) Act 2018 (the "2018 Act") but will contain deficiencies that need correcting in order for the rules on applicable law to continue to work effectively as UK domestic law after exit day. The UK will also cease to participate in the 1980 Rome Convention, meaning the Convention's rules will no longer apply to the UK as a matter of international law. Amendments are needed to the Contracts (Applicable Law) Act 1990, which incorporated the 1980 Rome Convention into domestic law, in order to preserve the substantive rules of the Convention so that they will continue to apply to existing contracts entered into between 1 April 1991 (the date on which the Rome Convention came into force) and 16 December 2009 (after which Rome I replaced the Convention in the relevant EU Member States).

What will it now do?

- 2.4 As a result of these Regulations, from exit day, the substantive rules in Rome I, Rome II and the 1980 Rome Convention will continue to apply (as amended) as domestic law in all parts of the United Kingdom to determine the law applicable to contractual and non-contractual obligations.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument was laid for sifting by the Sifting Committees on 10th December 2018. The European Statutory Instruments Committee accepted that the changes made by the instrument are an inevitable consequence of the UK no longer being an EU Member State. However, the Committee was concerned about the significance of changes to primary legislation made by the instrument and the cumulative impact of these changes. It recommended that the affirmative procedure is appropriate for the instrument on the ground that it is of political and legal importance.

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 The territorial application of this instrument varies between provisions.
- 3.3 This instrument amends retained EU law with varying territorial application, including provisions applying to Northern Ireland and Scotland. In each case, this instrument amends that provision in respect of its full territorial application.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument varies between provisions. This instrument amends retained EU law with varying territorial extent, including provisions extending to Northern Ireland and Scotland. In each case, this instrument amends that provision in respect of its full territorial extent.
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5. European Convention on Human Rights

- 5.1 The Parliamentary Under-Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement regarding Human Rights:

“In my view the provisions of The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 Rome I and Rome II will, as direct EU legislation, form part of domestic law from exit day under section 3(1) of the 2018 Act. The domestic legislation that was made under section 2(2) of the European Communities Act 1972, that gave further effect to Rome I and II, will, as EU-derived domestic legislation, continue to have effect in domestic law on and after exit day under section 2(1) of the 2018 Act.

- 6.2 Rome I replaced the 1980 Rome Convention in 2009 for those EU Member States to which Rome I applied, however, that Convention remained in force and continues to apply in particular to contracts entered into between 1 April 1991 and 16 December 2009. It was incorporated into domestic law by the Contracts (Applicable Law) Act 1990 (“the 1990 Act”), which constitutes EU-derived domestic legislation that will continue to have effect under section 2 of the 2018 Act from exit day. The UK’s status as a contracting party to the 1980 Rome Convention (which was only open for signature by states party to the Treaty establishing the EEC) will terminate as a matter of international law, after the UK has left the EU and the Convention will no longer be binding on the UK.
- 6.3 Both the direct EU legislation and EU-derived domestic legislation dealing with the law applicable to contractual and non-contractual obligations are “retained EU law” within the meaning of the 2018 Act, and contain deficiencies that mean that the rules will no longer operate effectively in the UK after exit day. Section 8(1) of the 2018 Act empowers a Minister of the Crown to make regulations to prevent, remedy or mitigate any failure of retained EU law to operate effectively, or any other deficiency in it, arising as a result of the UK’s withdrawal from the EU. This power is being used to address those deficiencies in these Regulations.

7. Policy background

What is being done and why?

- 7.1 The current EU Regulations, Rome I and Rome II, establish uniform rules on the law applicable to contractual and non-contractual obligations, which apply across the EU, with the exception of Denmark¹. The rules apply to situations where there is a foreign element and identify factors that connect the situation to the legal system of a particular country to determine which country’s law applies. For the most part, Rome I and Rome II provide a set of rules that are capable of continuing to be applied in the UK after exit day, as they do not depend on membership of the EU. They have universal application i.e., the law determined to be applicable need not be that of an EU Member State. The Government’s decision to retain the rules in Rome I and II was set out in the Government’s August 2017 position paper “[Providing a cross-border civil judicial cooperation framework: a future partnership paper](https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper)”²
- 7.2 The majority of corrections that these Regulations make to retained EU law deal with those aspects of the EU Regulations that are no longer relevant after the UK has left the EU. These include deleting provisions imposing requirements on EU Member States to notify matters to the European Commission, and provisions imposing obligations on the European Commission to review the EU Regulations. Other provisions are amended to take account of the UK ceasing to be an EU Member States, for example to replace references to “Member State” with “relevant state” (defined to mean either the UK and all the EU Member States or, where necessary, the UK and only the Member States bound by the EU Regulations, - which currently excludes Denmark) and to replace references to “Community law” with references to “retained EU law”. The Regulations also update cross-references in Rome I to definitions in other EU instruments where those instruments have been replaced, in

¹ Denmark does not participate in internal EU measures adopted in the field of Justice and Home Affairs as a result of its opt out under Protocol 22.

² Available at <https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper>

order to make the retained version of the Regulation easier to read (for example references to old insurance directives have been replaced with the corresponding references to the Solvency II Directive (Directive 2009/138/EU) which has now replaced them).

- 7.3 In the case of most of the rules being retained, the effect is that courts in the UK will continue to apply the same rules immediately after exit day as those being applied after exit day by national courts in the remaining EU Member States that continue to apply the EU Regulations (unless and until those EU rules are amended). In certain cases, however, due to the way in which the provisions of the EU Regulations are drafted, it will be the case that a determination of the applicable law by a national court of a remaining EU Member State applying the EU Regulations could lead to a different outcome from that of a court in the UK applying the retained version of the EU Regulations (as amended by these Regulations).
- 7.4 This could be the case, for example, in relation to Article 3(4) of Rome I and Article 14(3) of Rome II (the rules that give effect to non-derogable provisions of Community law in cases where elements relevant to a situation are located in one or more Member States) and the rules in Article 7 of Rome I on insurance contracts covering “non-large” risks located in EU Member States (such as household insurance – the term “large risk” is defined in the Solvency II Directive and includes risks relating to e.g. aircraft, ships etc). The rule in Article 6(3)(b) of Rome II (dealing with the law applicable to obligations arising from unfair competition affecting the market in more than one country) may also be applied differently. This is because the remaining EU Member States will no longer read references in the text of the EU Regulation to “Member State” as including the UK, but the amendments that are being made by these Regulations will, in effect, ensure that the rules can continue to be applied by a UK court, as if the UK were still a Member State.
- 7.5 In the case of insurance contracts, the amendments mean that the rules that restrict the freedom of the parties to choose the applicable law in the case of “non-large” risks located in the EU (which aim to protect policy holders who are seen as weaker parties to an insurance contract), will continue to apply in the UK to insurance contracts dealing with risks located in the UK (as well as the EU) but they would not be applied in relation to UK located risks by a national court of remaining EU Member State which was dealing with a dispute concerning such a contract.
- 7.6 The Ministry of Justice considers that it is appropriate as far as possible to preserve the existing rules as they currently apply in the UK immediately after exit day, despite the inconsistencies that may arise in the application of the rules as between UK courts and courts of EU Member States, in the case of the provisions described in paragraph 7.4. This is in line with the approach the Government set out in the March 2017 White Paper [*“Legislating for the United Kingdom’s Withdrawal from the EU”*](#), that, in order to provide maximum certainty and stability for businesses and individuals and avoid any diminution in rights, the same rules should, as far as possible, apply in the UK on the day after we exit the EU, and that it would not be appropriate to use these Regulations to amend the rules to address the inconsistencies.
- 7.7 Rome II also makes provision in Article 8(2) for determining the law applicable to non-contractual obligations arising from infringements of unitary EU intellectual property rights (EU IP rights). Unitary EU IP rights include EU Trade Marks, EU Design Rights and EU Plant Variety Rights. These unitary EU IP rights will no longer apply in the UK after exit day and UK courts will no longer hear proceedings relating

to such rights after exit day. These Regulations retain the rule in Article 8(2) of Rome II, however, for the purposes of any pending proceedings which are on-going in a UK court on exit day.

- 7.8 Although the Rome Convention will no longer bind the UK as a matter of international law after exit day, the substantive rules in that Convention, which continue to apply to certain contracts (entered into between 1 April 1991 and 16 December 2009), are being retained by these Regulations. However, the Regulations replace the obligation in section 3 of the 1990 Act on UK courts to determine any question about the meaning of the Convention in accordance with the principles laid down by decisions of the Court of Justice of the EU (CJEU), with the obligation set out in section 6 of the 2018 Act (which applies to the interpretation of retained EU law more generally). They also remove the ability of the UK courts under the Convention to refer questions of interpretation of the 1980 Rome Convention to the CJEU.

- 7.9 Private International Law is a transferred matter for Northern Ireland under section 4(1) 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 2018 Act 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. 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 This instrument has not been the subject of consultation.
- 10.2 The Government signalled its commitment to retaining Rome I and Rome II in domestic law in its position paper on civil judicial cooperation in August 2017 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639271/Providing_a_cross-border_civil_judicial_cooperation_framework.pdf).
- 10.3 A draft of this instrument was published by deposit in the House of Commons library on 8 March 2018. A small number of comments were received in response to this

publication which have been taken into account in the drafting of the instrument, in particular raising in the issue of the inconsistent application of Article 3(4) of Rome I and Article 14(3) of Rome II by courts in the UK and remaining EU Member States (see paragraphs 7.4 and 7.6 above).

- 10.4 The Government's basic approach of retaining the Rome Regulations, has also been discussed with members of the legal profession in the context of the overall approach to a no deal exit from the EU 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-brex-it-deal/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brex-it-deal>)
- 10.5 There has been wide-spread support from the legal profession to retaining Rome I and Rome II in domestic law and no comments opposing or criticising the Government's decision to retain Rome I and Rome II (and the Rome Convention rules) have been received.
- 10.6 The Government engaged with representatives of the insurance industry over the amendments to the special rules applicable to choice of law for contracts concerning non-large insurance risks. Comments received guided the Government's policy decision on, and drafting of the amendments to, these rules.

11. Guidance

- 11.1 The Ministry of Justice has no plans to issue guidance in relation to these Regulations.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has been prepared for this instrument and will be published shortly. This has concluded that the impact on business, charities, voluntary bodies and the public sector will be negligible. The amendments to retained EU law and domestic legislation in this instrument merely correct EU exit related deficiencies so that Rome I and Rome II (and for the purposes of certain old contracts, the Rome Convention rules) will continue to apply, as domestic law, post exit.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 No specific action is proposed to minimise regulatory burdens on small businesses.
- 13.3 The basis for the final decision on what action to take to assist small businesses is that the impacts on small business will be minimal as the applicable law rules for contractual and non-contractual matters will not significantly change other than the extent necessary to reflect the UK's exit for the EU.

14. Monitoring & review

- 14.1 As this instrument is made under the 2018 Act, 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 for 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 for Justice, 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/Sifting Committees
Appropriate-ness	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	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising 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) Act 2018

1. Appropriateness statement

- 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:

“In my view the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 do no more than is appropriate to address deficiencies in retained EU law arising from the UK leaving the EU.”

- 1.2 This is the case because: it is appropriate that provisions in the EU Regulations concerning reporting matters to the European Commission, and review by the European Commission are revoked as they are no longer relevant after the UK has left the EU. It is also appropriate to amend references in the retained rules to “Member State” so that the rules can continue to apply to the UK. It is also appropriate to amend the rules on the law applicable to non-contractual obligations arising from infringements of Community unitary IP rights because those EU IP rights will no longer apply in the UK after exit day. Finally, it is also appropriate to amend the provisions of the 1990 Act to deal with the termination of the 1980 Rome Convention for the UK, whilst preserving its substantive rules (which continue to apply to certain pre-Rome I contracts).

2. Good reasons

- 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:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action.”

- 2.2 These are: the reasons detailed in paragraph 7 of the Explanatory Memorandum. In particular, it is reasonable to take the approach of preserving the current EU applicable law rules as far as possible in domestic law after exit day in order to provide maximum stability and certainty for businesses and individuals.

3. Equalities

- 3.1 The Parliamentary Under-Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement:

“This 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”.

- 3.2 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:

“In relation to this instrument, I, Lucy Frazer, 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. This Act does not extend to Northern Ireland, but as the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 extend to Northern Ireland, I have given equivalent due regard to the need to eliminate discrimination, harassment and victimisation in relation to Northern Ireland.

4. Explanations

- 4.1 The explanations statement has been made in section 2 of the main body of this Explanatory Memorandum.