

EXPLANATORY MEMORANDUM TO

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

2018 No. 1257

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 Statutory Instrument is being made using powers in the European Union (Withdrawal) Act 2018 (the EU (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. It revokes the following Regulations once they have become retained EU law:
 - Regulation 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 (the Service Regulation); and
 - 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 (the Evidence Regulation).
- 2.2 The instrument also provides for the cessation of the rights, etc. deriving from the Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil and commercial matters (the Denmark Service Agreement) and revokes two Scottish Statutory Instruments relevant to the Service Regulation and two EU Council decisions relevant to the Denmark Service Agreement. It also makes provision for savings and transitional matters.

Explanations

What did any relevant EU law do before exit day?

- 2.3 The Service Regulation establishes a fast, secure and standardised procedure for judicial and extrajudicial documents in civil or commercial matters to be transmitted for service between parties located in different EU Member States via designated “transmitting agencies” and “receiving agencies” (as well as providing for other means of service, such as service by postal services). The first of the two Scottish Statutory Instruments designates the Scottish transmitting and receiving agencies and central body, and the second makes updating amendments to the first.
- 2.4 The Evidence Regulation establishes a procedure that enables evidence required by a court in one Member State (the requesting court) from a person in another Member

State to be taken, either directly by the requesting court or by a court located in the same Member State as the person from whom the evidence is sought, on the requesting court's behalf. The procedure enables requests for evidence to be made directly between the courts of two Member States.

- 2.5 The Denmark Service Agreement extends the Service Regulation to govern the service of judicial and extra-judicial documents in cross-border civil and commercial matters between Denmark and the other EU Member States.

Why is it being changed?

- 2.6 The Service and Evidence Regulations support civil judicial cooperation between EU Member States, and rely on reciprocity to operate effectively. Post EU-exit, these Regulations (and the Denmark Service Agreement), will cease to extend to the UK and reciprocity will cease. The UK Parliament cannot legislate to restore the necessary reciprocity. Absent reciprocity, the retained EU law versions of the Service and Evidence Regulations will cease to operate effectively.
- 2.7 Providing for the revocation of the retained Service and Evidence Regulations and associated instruments, and the cessation of the rights, etc. deriving from the Denmark Service Agreement is necessary to remove the deficient Regulations and related legislation from the statute book so as to clarify that the Service and Evidence Regulations will cease to have legal effect in the UK post EU Exit (other than for transitional purposes – see paragraph 7.4). It will also avoid any potential confusion over which frameworks govern the cross-border service of documents and taking of evidence in relation to parties in EU Member States (particularly as, in most cross-border cases involving EU Member States, the UK will apply already existing international conventions in these areas. This is discussed further in paragraphs 7.1 to 7.3).

What will it now do?

- 2.8 As the EU Service and Evidence Regulations that apply to the EU Member States will not extend to the UK, and as this instrument revokes the retained Regulations and related instruments, the UK will no longer transmit documents for service in EU Member States under the Service Regulation, and will no longer comply with requests made by EU Member States under that Regulation to serve documents on parties in the UK.
- 2.9 In relation to the taking of evidence, the UK will no longer issue requests under the Evidence Regulations for evidence to be taken from parties in EU Member States. Neither will the UK execute or consent to requests made by EU Member States under the Evidence Regulation to take evidence from parties in the UK.
- 2.10 The UK, like most EU Member States, is a contracting State to two Hague Conventions relevant to service and evidence:
- the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Service Convention); and
 - the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention).

- 2.11 Post EU Exit, requests for service of judicial and non-judicial documents and for taking of evidence in cross-border civil and commercial matters involving the UK and States that are party to the Hague Conventions (Contracting States) will be conducted under the two Hague Conventions (see also paragraph 7.2).

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 29th October 2018, and the process was completed on 13th November.
- 3.2 In considering this instrument for sifting, the Secondary Legislation Scrutiny Committee had two questions. The first question asked which EU Member States are not party to the 1965 Hague Convention (Service of Documents) or the 1970 Hague Convention (Taking of Evidence). Our answer on 6th November was that the 1965 Hague Convention has not been signed by Austria or Malta, and the 1970 Hague Convention has not been signed by Austria, Belgium or Ireland. The second question asked for clarification as to why the relevant Hague Conventions may not be as effective or efficient as the EU Service of Documents and Taking of Evidence Regulations. Our answer on 6th November was that The Hague Service of Documents and Taking of Evidence Conventions are now 50 years old and were introduced at a time when present day methods of communication could not have been foreseen. Though the EU Regulations are modelled substantially on the Hague Conventions they have been able to take advantage of advances in communications technology. The Regulations are currently the subject of further revision, designed to increase the use of electronic methods of cross-border service and taking of evidence. In that regard, the differences between the Hague Conventions and the revised EU Regulations will become more pronounced over time. .

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)

- 3.3 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 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 On 29 March 2019 the United Kingdom will cease to be a Member State of the EU. At that time the EU Service and Evidence Regulations, the two EU Council Decisions relating to the Denmark Service Agreement and the rights, etc. deriving from the

Denmark Service Agreement will become part of the United Kingdom's domestic legal framework as "retained EU law" under the provisions of the EU (Withdrawal) Act.

- 6.2 Section 8 of the EU (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 and 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.
- 6.3 Paragraph 21 of Schedule 7 to the EU (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 As explained in paragraph 2.6, the Service Regulation and Evidence Regulation rely on reciprocity to operate effectively. Because the UK is unable to legislate to restore this reciprocity so that the retained EU law versions of the Regulations operate effectively, they will remain deficient. Accordingly, the retained Regulations and their related instruments will be revoked.
- 7.2 The UK and most, though not all, other EU Member States are Contracting States to the Hague Service Convention and the Hague Evidence Convention. Following the loss of reciprocity necessary to operate the Service and Evidence Regulations effectively, cross-border requests for evidence and service of documents between the UK and EU Member States who are Contracting States will be made under those Hague Conventions. It is therefore desirable to revoke the retained Service and Evidence Regulations and related instruments (as opposed to leaving them on the statute books) to avoid any possible confusion over which instruments govern these areas.
- 7.3 The Service and Evidence Regulations 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. The Government recognises that the Hague Conventions are potentially less effective and efficient in procedural terms, and that not all EU Member States have ratified the Conventions. However, the UK is party to the Hague Conventions in its own right and, therefore, we can begin applying them as frameworks to govern cross-border service and taking of evidence with contracting states immediately after EU exit.
- 7.4 This instrument makes savings provisions which provide for the retained Regulations and their associated instruments to continue to apply to outstanding requests (which were received in the UK prior to exit day) for documents to be served or evidence to

be taken in the UK, so that those requests can be concluded in an orderly way following exit, and the Regulations transitionally disapplied, rather than outstanding requests simply not being complied with after exit.

- 7.5 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 one year 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 EU (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 EU. The instrument is also made using the power in paragraph 21 of Schedule 7 in the EU (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-brex-it-deal/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brex-it-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 paragraphs 2.6 of this memorandum.

11. Guidance

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

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 not been prepared for this instrument as no, or no significant, impact on the private or voluntary sectors 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 retained Service and Evidence Regulations continue to apply to documents received for service before EU exit in the UK by relevant bodies and to requests for the taking of evidence received before EU Exit in the UK by relevant bodies. This will allow requests made under the EU Regulations which are at a certain stage pre-exit to be completed in the UK post-exit without imposing additional costs on small businesses involved in the disputes.

14. Monitoring & review

- 14.1 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/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) 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:

“In my view the Service of Documents and Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provision) (EU Exit) Regulations 2018 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure)”.

- 1.2 This is the case because this instrument contains regulations under section 8(1) of the EU (Withdrawal) Act, but does not fall into the category of regulations identified in paragraph 1(2), Part 1 of Schedule 7 to the EU (Withdrawal) Act as requiring approval in draft by resolution of both Houses of Parliament. In addition, the instrument revokes retained EU law on the service of documents and taking of evidence 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:

“In my view The Service of Documents and Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provision) (EU Exit) Regulations 2018 does no more than is appropriate”.

- 2.2 This is the case because, by revoking the retained Service and Evidence Regulations and related instruments, and providing for the cessation of rights, etc. deriving from the Denmark Service Agreement, 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 the UK and EU Member States which, post-exit, will no longer exist.

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:

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

- 3.2 The retained Service and Evidence Regulations are deficient and inoperable, and their presence on the statute book will create confusion and uncertainty. Revoking those Regulations and the related instruments will clarify that the Service and Evidence Regulations will cease to have legal effect in the UK post EU Exit (other than for

transitional purposes). Further detail is provided at paragraphs 7.1 and 7.2 of this memorandum.

4. Equalities

4.1 The Parliamentary Under Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement(s):

“The 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”.

4.2 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 the instrument, I, Lucy Frazer QC MP, Parliamentary Under Secretary of State for Justice, 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.