EXPLANATORY MEMORANDUM TO

THE CIVIL JURISDICTION AND JUDGMENTS (AMENDMENT) (EU EXIT) REGULATIONS 2019

2019 No. 479

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Act.

2. Purpose of the instrument

2.1 This instrument, the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, is made under the European Union (Withdrawal) Act 2018 (the Withdrawal Act) to ensure a functioning domestic statute book in the event the UK exits the European Union (EU) without a post-exit agreement on civil judicial cooperation. It relates to cross-border civil and commercial disputes, specifically questions about the court in which disputes should be adjudicated and the recognition and enforcement of judgments. These matters are currently regulated under a series of EU instruments and treaties collectively known as 'the Brussels Regime', which operate in a reciprocal manner between EU Member States, and that reciprocity will no longer apply in relations between the EU Member States and the UK after exit. This instrument addresses changes required to retained EU law in order to avoid inappropriate or unworkable unilateral application of these rules by the UK following exit, as well as making provision for cases which are ongoing as at exit day. It also repeals the Decision that currently allows the UK to cooperate on civil and commercial matters in the European Judicial Network.

Explanations

What did any relevant EU law do before exit day?

2.2 The Brussels Regime (so called because it dates back to the Brussels Convention of 1968) comprises a series of EU legislative instruments and treaties. The principal EU instrument is the "Brussels Ia Regulation, Regulation (EU) No 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 (recast) ("Brussels Ia"). The two most significant treaties in the regime are the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark, signed on behalf of the European Community on 30th October 2007 ("the 2007 Lugano Convention"), which has very similar scope and rules to the Brussels I Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000) which is the predecessor to Brussels Ia and applies between the European Union and the European Free Trade Area (EFTA) States of Norway, Switzerland and Iceland (it also applies between Denmark and those EFTA states); and the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, of 19 October 2005 ("the EU/Denmark agreement"), which applied first the Brussels I Regulation, then the

Brussels Ia Regulation between EU Member States and Denmark. This regime has established:

- a system of uniform jurisdictional rules to identify the appropriate court in which to bring a civil or commercial claim. Broadly, and subject to limited exceptions, the rules apply only where the defendant is domiciled in the European Union (Brussels Regulations) or a state bound by the 2007 Lugano Convention. The basic rule is that a defendant domiciled in such a state may be sued only in that state, subject to closely defined exceptions where the case has another specified European element; and
- a simplified mechanism to recognise and enforce the judgments of EU Member State/EFTA state courts in civil and commercial cases, with a view to reducing costs for litigants and increasing efficiency. The possibility for such simplified and almost automatic treatment of the judgment of one such state in another is based on the "mutual trust" that each state will have applied the uniform rules of jurisdiction.

Why is it being changed?

2.3 The Brussels regime operates almost entirely on a reciprocal basis. Its effectiveness is founded upon mutual cooperation between states (EU or EFTA) in terms of the limits the rules place on the jurisdiction of each participating state's national courts to hear cross-border matters to which the rules apply and in the largely automatic recognition of, and preparedness to enforce, the judgments of each state's courts.

2.4 In the event the UK exits the EU without a future agreement on the continued operation of the Brussels regime, this reciprocity will be lost. The EU instruments will cease to apply to the UK and the UK's participation in the 1968 Brussels, 2007 Lugano and EU-Denmark treaties will cease as this participation depends upon the UK's status as an EU Member State. The EU and EFTA states will cease to recognise the UK for the purposes of the jurisdiction and recognition and enforcement rules. The UK cannot legislate to restore the lost reciprocity.

2.5 Having assessed the legislative options available to the UK, the Government has determined that the most preferable course is to repeal the Brussels regime and revert to the rules on jurisdiction and the recognition and enforcement of judgments which currently apply to cross-border disputes where the Brussels regime does not apply. With the exception of those countries with which there is a specific agreement on such matters, those rules do not rely on reciprocal treatment by the other country of judgments from courts of a part of the UK. The Government's rationale for taking this approach is set out in paragraphs 7.17-7.21 below.

What will it now do?

2.6 Post exit, the Brussels Regime will cease to apply in the UK. Determination of jurisdiction and the recognition and enforcement of judgments in cross-border matters involving EU and EFTA state parties will fall to be determined by the rules which are already applicable to non-EU, non-EFTA cases (so, those where the Brussels Regime does not currently apply), and the Hague 2005 Convention on Choice of Court Agreements, where it applies, to which, post exit, the UK is acceding as a Contracting State. The exceptions to this approach relate to cases involving consumers domiciled in a part of the United Kingdom, employees who work or have worked in a part of the United Kingdom, and retention of the definition of domicile of companies or other

legal persons or associations of natural or legal persons for the purposes of jurisdiction in certain civil cases. The instrument has adopted and restated the approach to jurisdiction in consumer and employment matters taken by the Brussels Ia Regulation. The rules continue the particular protections offered to consumers and employees domiciled in the UK by the Brussels Ia Regulation, including a right to be sued in relation to a consumer, or employment, dispute only in the part of the UK in which they are domiciled (regardless of the domicile of the other party), and a right to sue the other party in such a dispute in parts of the UK with relevant connections – all of which largely obviates the need for the consumer, or employee, to sue abroad in such cases (with the attendant expense and difficulty for this category of economically weaker parties which having to sue outside their own forum brings). These rules operate both as between the different parts of the UK (England and Wales, Northern Ireland, Scotland) and where the dispute has an international connection.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

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 or revokes retained EU law with varying territorial application, including provision applying to Northern Ireland and Scotland. In each case, this instrument amends or revokes 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 or revokes retained EU law with varying territorial extent, including provision extending to Northern Ireland and Scotland. In each case, this instrument amends or revokes 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 Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 are compatible with the Convention rights".

6. Legislative Context

6.1 As noted in paragraph 2.2 above, the Brussels regime comprises a series of EU legislative instruments and treaties that deal with:

- the allocation of jurisdiction as between the courts of EU Member States and EFTA states in civil and commercial matters; and
- the recognition and enforcement of judgments emanating from those courts in such matters.

6.2 As indicated at paragraph 2.2, the principal EU legislative instrument is the Brussels Ia Regulation. Brussels Ia governs the allocation of jurisdiction between EU Member State courts (except Denmark) in civil and commercial matters, as well as the recognition and enforcement of their judgments. Brussels Ia has been amended by subsequent EU Regulations ((EU) 514/2014 and (EU) 2015/281) making minor amendments (the former to enable the Regulation to apply to common courts, specifically the Unified Patent Court and the Benelux Court of Justice, the latter to amend Annexes I and II). It recasts and supersedes Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I). The Brussels I Regulation has some residual application in relation to cases commenced before 10 January 2015 (after which date the Brussels Ia Regulation applies) and for ongoing maintenance enforcement for decisions prior to the application of the Maintenance Regulation (from June 2011). Relations in this area between Member States and Denmark are governed by the EU/Denmark agreement, which essentially applies the rules of the Brussels Ia Regulation to Denmark by virtue of an international agreement. Denmark does not participate in the European Union Area of Freedom, Security and Justice, in accordance with Protocol 22 on the Position of Denmark in the Treaty on the Functioning of the European Union.

6.3 In addition to the two key treaties mentioned at paragraph 2.2 (the 2007 Lugano Convention and the EU/Denmark agreement) there are certain older treaties which retain some relevance as follows:

- The Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (including the Protocols annexed to that Convention) opened for signature at Lugano on 16 September 1988 and signed by the UK on 18 September 1989 ("the 1988 Lugano Convention"). This Convention (which mirrored the Brussels Convention in the same way as the 2007 Lugano Convention mirrors Brussels I) was superseded by the 2007 Lugano Convention; however, it may still be relevant for transitional cases, including recognition and enforcement of maintenance decisions given before the application of the 2007 Lugano Convention.
- The Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Brussels on 27 September 1968 ("the Brussels Convention"). The Brussels Convention was superseded by Brussels I, which was an updated and improved version of the rules of the Convention. However, the UK remains a Contracting State to the Brussels Convention (and to its 1968 and 1971 Protocols) which remains in force in relation to certain Dutch and French overseas territories. It may also still be relevant in relation to enforcement of decisions predating the entry into force of Brussels I (March 2002). This treaty was an intergovernmental treaty between the then Member States, and was updated in certain respects by the accession treaties as new Member States joined. The Court of Justice has jurisdiction to interpret the treaty for the Member States by virtue of the 1971 Protocol.

6.4 The principal EU legislative instruments and treaties are supplemented by a number of tertiary EU instruments (in the main, EU Council Decisions relating to the signature and approval on behalf of the Union of the 2007 Lugano Convention and the EU/Denmark agreement and also the EU Council Decision that establishes the European Judicial Network which facilitates civil judicial cooperation between Member States).

6.5 Domestically, the Brussels regime was implemented and its application facilitated by a number of instruments, including in particular –

- The Civil Jurisdiction and Judgments Act 1982. This provided necessary implementing legislation for the Brussels Convention (and associated accession conventions), and formerly the 1988 Lugano Convention. It has been amended over the years to facilitate the application of, or make provision relevant to, a number of instruments, including the Brussels I Regulation; the Maintenance Regulation (Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations); the 2007 Lugano Convention; the Brussels Ia Regulation; and the 2005 Hague Convention on Choice of Court Agreements.
- The Civil Jurisdiction and Judgments Order 2001 (SI 2001/3929), the principal domestic legislation relating to the Brussels I Regulation, amended in relation to the EU/Denmark Agreement by the Civil Jurisdiction and Judgments Regulations 2007 (SI 2007/1655) and in relation to the Brussels Ia Regulation by the Civil Jurisdiction and Judgments (Amendment) Regulations 2014 (SI 2014/2947);
- The Civil Jurisdiction and Judgments Regulations 2009 (SI 2009/3131), in relation to the 2007 Lugano Convention;
- The Civil Jurisdiction and Judgments (Authentic Instruments and Court Settlements) Order 2001 (SI 2001/3928);
- The Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997/302);
- The Civil Jurisdiction and Judgments Act 1982 (Provisional and Protective Measures) (Scotland) Order 1997 (SI 1997/2780 (S.174)).

6.6 On 29 March 2019 the United Kingdom will cease to be a Member State of the EU. The EU legislative instruments, the rights etc., deriving from the EU treaties and the domestic implanting legislation will become "retained EU law" under sections 2, 3 and 4 of the Withdrawal Act. As retained, however, the instruments will cease to operate on a reciprocal basis and the UK alone is not able to legislate to restore that reciprocity. In addition, they will also contain numerous EU exit-related deficiencies that will render them largely unworkable.

7. Policy background

What is being done and why?

7.1 This instrument:

- revokes the Brussels Ia Regulation (and the two EU Regulations that amend the Brussels Ia Regulation), the Brussels I Regulation and the tertiary EU

instruments referred to in paragraph 6.4), as those instruments are retained in UK law by virtue of section 3 of the Withdrawal Act;

- revokes the Council Decision establishing the European Judicial Network in civil and commercial matters;
- extinguishes the rights, powers, liabilities, obligations, restrictions, remedies and procedures that are derived from the Brussels Convention and Protocols (and subsequent accession Conventions), 2007 Lugano Convention, 1988 Lugano Convention, and the EU-Denmark Agreement;
- preserves the operation of the Brussels Ia and Brussels I Regulations, the Brussels Convention, 2007 and 1988 Lugano Conventions and the EU-Denmark Agreement, and the domestic legislation that implements these instruments and treaties, for transitional purposes so they continue to apply in England and Wales, Northern Ireland and Scotland to determine jurisdiction for proceedings commenced in the UK before exit day; in relation to the recognition or enforcement of a judgment or decision given by a court of an EU Member State or EFTA state where that court was seised before exit day; and in relation to recognition or enforcement of a court settlement concluded before a court of, or authentic instrument registered in, an EU or EFTA state before exit day;
- amends domestic primary and secondary legislation to reflect the fact that the Brussels regime will no longer apply in the UK after exit day;
- retains and restates rules contained in the Brussels Ia Regulation relating to jurisdiction in cases brought by and against UK domiciled consumers, by employees who work or have worked in the UK, and against employees domiciled in the UK, in the form of new provisions in the Civil Jurisdiction and Judgments Act 1982 (see regulation 26 of these Regulations);
- retains and restates rules on the domicile of corporations or associations for the purposes of the retained and restated rules on jurisdiction in cases brought by and against UK domiciled employees and consumers, and of section 16 of the Civil Jurisdiction and Judgments Act 1982 (allocation within the UK of jurisdiction in certain civil proceedings) – see regulation 42 of these Regulations.

7.2 The effect of the above will be to remove the Brussels regime rules from domestic law, save for the retained provisions on jurisdiction in consumer and employee matters, and the rules on domicile of corporations and associations. In its place, jurisdiction and the recognition and enforcement of judgments will be determined by a combination of the existing common law and statute which currently applies to cases to which the Brussels regime does not apply, and (where it applies) the Hague 2005 Convention on Choice of Court Agreements to which the UK is acceding as an independent Contracting State post exit (this is the subject of a separate statutory instrument, the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018 (S.I. 2018/1124)).

7.3 While businesses and individuals will still be able to litigate in cross border matters with parties in an EU Member State, there are some significant differences between the Brussels regime rules and the common law and statute rules that will replace them. The following is a broad overview of the main distinctions.

Jurisdiction

7.4 The primary basis for the application of the Brussels jurisdictional rules is the domicile of the defendant in an EU Member State or a state bound by the 2007 Lugano Convention (save in the case of "exclusive jurisdictions", for example jurisdiction over certain rights in land situated in a particular state). The primary rule of jurisdiction is that a defendant must be sued in the Member State or state bound by the 2007 Lugano Convention in which he or she is domiciled. This general rule may be displaced by specific rules which allow a claimant to sue an EU or Lugano state-domiciled defendant in another such state, based on a defined close connection between the court of the latter state and the claim (for example, it is the state where the accident giving rise to the claim happened). The Brussels rules are designed to be of uniform, inflexible application - crucially, their application is mandatory. There is in general no discretion for a court on which jurisdiction is conferred by the Brussels regime to decline to hear the case on the basis that it considers that the court of another stateis better placed to decide the matter. If competing proceedings are commenced in two Member State or 2007 Lugano Convention state courts, the court where the proceedings are commenced second in time must decline jurisdiction in favour of the court in which proceedings were commenced first (the lis pendens rules), subject to an exception where the latter court was chosen under a choice of court agreement.

7.5 By contrast, in the private international law of England and Wales and the private international law of Northern Ireland, jurisdiction in cases where the defendant is not domiciled in the UK is generally founded on the service of the claim form on a defendant present within the jurisdiction (or, where it occurs, the fact of the defendant proceeding to fight the merits of the case without protesting the court's jurisdiction ("submission to the jurisdiction")). The effective service of a claim form in such a situation will give the court jurisdiction, but crucially, this may then be challenged by the defendant, because the court can stay, or dismiss the proceedings if it thinks that it necessary to prevent injustice, in contrast to the Brussels regime rules where it must take jurisdiction if the rules grant it jurisdiction In addition, where a party is seeking to invoke a court's jurisdiction in respect of a defendant who is outside of the UK, the court's permission to "serve out of the jurisdiction" is required. In deciding whether permission should be granted, the court will need to be persuaded of a number of matters, including that the case is connected to England and Wales in one of a number of specified ways (these are presently listed in Practice Direction 6B supporting Part 6 of the Civil Procedure Rules 1998) and that England and Wales is the most appropriate place to hear the dispute. The courts in Northern Ireland will have similar considerations. By granting permission to serve the defendant outside the UK, the court is indicating that it is prepared to accept jurisdiction. It is important to note that this permission is discretionary, and in particular, subject to the court's ability to decline jurisdiction on a *forum non conveniens* basis if satisfied that the courts of another country would be a manifestly more appropriate place for the case to be heard. It is these considerations that will usually apply, in the exercise of discretion whether to decline jurisdiction, where a case is commenced both in England and Wales and in another foreign court. This is another important contrast with the Brussels regime where, as described above, the "first come first served" approach of *lis pendens* rules applies. Further, if the courts of England and Wales do take jurisdiction in an international case, they may use "anti-suit" injunctions to try to limit the ability of a party to pursue competing proceedings in another country. These are

historically not permitted under the Brussels regime because they are said to interfere with the application of the Brussels rules of jurisdiction by the other court.

7.6 In Scotland, the jurisdictional rules are those set out in Schedule 8 to the Civil Jurisdiction and Judgments Act 1982, which are currently applied in cases to which the Brussels regime rules do not apply. The general jurisdictional rule in these cases more closely replicates the Brussels rules and provides that subject to certain exceptions persons shall be sued in the courts of the place where they are domiciled. Similar to the power the courts of England and Wales have to use "anti-suit" injunctions, the Scottish courts have a common law power, known as an anti-suit interdict, to limit a person in Scotland from taking any action in another country.

Recognition and Enforcement

7.7 There are also differences between the Brussels and common law rules for recognition and enforcement of judgments. Under the Brussels rules, there is near-automatic recognition and enforcement of judgments, and the assumption that the issuing court had jurisdiction. There are only limited defences to enforcement. The rationale is that this is possible because all participating states must apply uniform rules of jurisdiction, which means that the court asked to recognise or enforce the resulting judgment can trust that jurisdiction was taken properly and on an appropriate basis.

7.8 By contrast, under common law, separate proceedings must be commenced to enforce a foreign judgment (it is treated as if it were a debt), and a particular difference is that the jurisdiction of the issuing court must be established according to the rules of English private international law. Similarly, in Scotland proceedings are required to enforce a foreign judgment and such a judgment will not be recognised in Scotland unless the issuing court is regarded under Scots law as being one which had jurisdiction. Those differ quite significantly to those under the Brussels regime and are substantially more restricted. They are also not based on any kind of reciprocation with other countries. There is a separate statutory regime under the Administration of Justice Act 1920, and an updated approach to that regime under the Foreign Judgments (Reciprocal Enforcement) Act 1933, which apply to particular countries which have made equivalent provision in their own law to ensure recognition and enforcement of UK judgments to the provision made in UK law under those Acts, thereby supplying a slightly more advanced system of recognition and enforcement, and one which is reciprocated between the UK and those countries. Many countries participate in this system but the coverage of EU Member States and 2007 Lugano Convention states is limited.

Choice of court agreements

7.9 As indicated in the explanatory memorandum to the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018[1], the UK remains committed to participating in the Hague Convention on Choice of Court Agreements 2005 after exit day. Where the UK applies that Convention after that date, the rules of that Convention will apply to any case within its scope and concerning a participating state. For cases which do not come within that Convention (because the subject matter of the case is not covered by the Convention, or the case concerns a state which does not participate in it), the domestic private international law rules of the relevant UK jurisdiction will apply. Broadly, the

[1] http://www.legislation.gov.uk/uksi/2018/1124/memorandum/contents

courts will take jurisdiction whenever a valid choice of court agreement has been made selecting the courts of England and Wales, and will also readily recognise and enforce a foreign judgment from a foreign court validly selected under such an agreement. This is therefore quite similar to the position under the Brussels regime, although clearly these rules will not be applied reciprocally by the courts of EU Member States and of those states bound by the Lugano Convention following exit day. Likewise, paragraph 6 of Schedule 8 to the 1982 Act (referred to above) indicates that Scottish courts will take jurisdiction pursuant to a valid choice of court agreement selecting those courts.

Consumer and employment contracts

7.10 In relation to jurisdiction of the courts of England and Wales, Northern Ireland and Scotland to hear consumer and employment contract cases, these Regulations retain to a large degree the consumer- and employee- friendly approach of the Brussels regime. The domestic rules for England and Wales and Northern Ireland discussed above, which will apply upon the revocation of the Brussels regime make little or no special provision for these types of cases. The domestic rules for Scotland do currently make provision for these cases, but those rules will be superseded by the provision made in this instrument. The following paragraphs explain the general effect of these rules.

7.11 These Regulations provide that, in cross-border civil and commercial cases involving UK domiciled consumers, a consumer can sue the other party to a consumer contract either in the part of the UK where that other party is domiciled or in the courts for the place where they themselves are domiciled. If it is the other party who brings proceedings, they can only do so in the courts of the part of the UK in which the consumer is domiciled.

7.12 For contracts of employment, an employee may sue the employer in one of three places: (i) in courts for the part of the UK where the employer is domiciled; (ii) in the courts for the place in the UK where the employee regularly, or most recently, carried out their work; or (iii) where the employee did not habitually work in one place, in the courts for the part of the UK where the business which engaged the employee is situated. An employer may only sue an employee domiciled in the UK in the part of the UK in which he or she (the employee) is domiciled.

Domicile of corporations or associations

7.13 The definition of "domicile" of a company "or other legal person or association of natural or legal persons" contained in Article 63 of the Brussels Ia Regulation has been retained and restated for the purposes of certain civil proceedings by regulation 42 of these Regulations. That definition has been applied in the Brussels regime since the advent of the Brussels I Regulation, and incorporated into the Brussels Ia Regulation and the 2007 Lugano Convention. It has applied in practice in all cases concerning the UK to which the Brussels regime applies since the application of the Brussels I Regulation (1st March 2002). It will apply in determining when a corporation or association is domiciled in the UK for the purposes of jurisdiction under the provisions of sections 15A to 15E of the Civil Jurisdiction and Judgments Act 1982 (see regulation 26, inserting these new provisions in relation to consumer and employment cases as described above), or the rules of section 16(1)(b) of that Act, relating to jurisdiction in other civil proceedings. It differs from the rules that would apply under section 42 of that Act most significantly in adding to the list of

alternative connections that a company (etc) must have with the UK that its principal place of business is in the UK.

European Judicial Network

7.14 Regulation 83 revokes Council Decision of 28 May 2001, establishing a European Judicial Network in civil and commercial matters. This network enables co-operation between EU Member States, including their judiciary, to facilitate cross border civil and judicial co-operation. The UK will no longer be included in that network following exit day and therefore the retention of this Decision under the Withdrawal Act is revoked. The inability of the UK to continue to take part in this network is as a result of EU Exit, this SI simply reflects that new status.

Savings

7.15 The approach to savings is broadly to apply the law as if it were that in place before the UK's exit from the EU. So regulation 92 of these Regulations deals with cases in which (a) the proceedings commenced before exit day but have not yet been concluded; (b) a judgment was obtained in proceedings commenced before exit day in an EU Member State or a state applying one of the other Brussels regime instruments (whether or not the judgment itself was given before exit day), and a party wishes to obtain recognition or enforcement of that judgment in a part of the UK after exit day; or (c) the parties have come to a court settlement, or registered an "authentic instrument", before exit day and one party now wishes to obtain recognition and enforcement after that date in a part of the UK. In these particular situations, regulation 92 provides for the courts in the UK to continue to apply the Brussels regime rules (and relevant domestic legislation) that would have applied immediately before exit day to these cases until they are concluded, despite the revocations of those rules in UK laws by this instrument. Regulation 93 makes various modifications in order to enable courts to apply these provisions effectively in situations where there may be some difficulty with how the rules have been applied in other participating states in light of EU exit. In particular, regulation 93(2) provides a very limited discretion for a court to decline jurisdiction (which it would otherwise be unable to do because of mandatory jurisdiction under the application of the Brussels regime approach) after exit day where there are competing proceedings in an EU Member State or a state bound by the 2007 Lugano Convention. The rationale is explained below.

7.16 Regulation 94 makes specific saving provision for cases where an application is made for a European Enforcement Order, or a European Order for Payment before exit day, or where a European Small Claims procedure is commenced before that date. This is necessary because certain provisions of the Brussels Ia Regulation (or the Brussels I Regulation) are applied by the relevant Regulations and it is necessary to continue the application of those (Brussels regime) provisions for these transitional cases. The main provision in relation to the three Regulations in question is contained in the European Enforcement Order, European Order for Payment and European Small Claims Procedures (Amendment etc.) (EU Exit) Regulations 2018 (S.I. 2018/1311).

Rationale for the approach taken

7.17 The effect of sections 3 and 4 of the Withdrawal Act is to retain in UK law the EU rules and treaties which form the Brussels regime. However, there is a substantial deficiency raised by this outcome because the rules of that regime operate in a manner

that is largely reciprocal, and in particular, the current ease of recognition and enforcement of judgments from one participating state in another is *entirely* predicated on the fact that all states apply uniform jurisdictional rules and do so in the same manner. The EU Member States and states bound by the 2007 Lugano Convention will no longer treat the UK as a participating state after exit. They will not apply the uniform jurisdictional rules when a defendant is domiciled in the UK, nor the rules regulating competing proceedings (*lis pendens* rules described above), nor indeed the virtually automatic recognition and enforcement of decisions from courts in England and Wales, Northern Ireland and Scotland . Instead, they will treat the UK as a third state outside the regime, and therefore apply their own domestic private international law rules (which will vary from state to state). In terms of legislating, the UK could only ensure the Brussels rules are applied unilaterally, by UK courts, to cases involving parties domiciled in EU Member States or EFTA states. EU Member State and EFTA state courts would be under no obligation to apply those same rules to cross-border cases involving UK domiciled parties and almost certainly will not, and the UK cannot itself legislate to change that result. Attempting to apply the Brussels regime rules unilaterally with those states which are party to the regime will therefore result in a significant imbalance, favouring those states in a way that will not be reciprocated to the benefit of UK litigants. It would also produce a distinction of treatment vis a vis cases involving countries which do not apply the Brussels regime, without the existence of any international agreement (with those states which do apply it) in order to justify that difference of treatment, which could well result in different treatment in access to justice as between litigants from the EU or EFTA States compared to those from other countries.

7.18 The common law and statutory rules of England and Wales, Northern Ireland and Scotland are well developed and are well understood by practitioners and courts, because they have continued to apply to cross-border matters where the Brussels regime does not apply throughout the whole history of the Brussels regime and indeed before. In short, this is an existing, tried and tested regime of private international law rules already applied in the courts for non-Brussels regime cases. Further, by following the logic of treating EU Member States and states bound by the 2007 Lugano Convention in the same way as these third states after Exit, no difference of treatment arises and therefore no risk of unfairness in access to justice according to the origin of the parties or the case can arise.

7.19 The rationale for retaining and restating the approach to jurisdiction in consumer and employment cases contained in the Brussels Ia Regulation (as described above) reflects the protective nature of these rules towards parties who are traditionally seen as economically weaker and perhaps less legally aware than their opponents (so, suppliers and sellers, and employers). The rules ensure that the consumer or employee should in general not have to sue, or be sued, in a jurisdiction which is unfamiliar to him in terms of, for example, language. These rules applied not only to suppliers or sellers, and employers, domiciled in the EU, but also those who were not so domiciled, and this approach is continued. These protective rules are not available in the common law and statutory provision of England and Wales and Northern Ireland, and only to a more limited extent in Scotland, apart from the Brussels regime, and so the Government has chosen to retain them.

7.20 In terms of the adoption of the Brussels Regime definition of domicile of corporations and associations, the rationale is that this definition better reflects modern economic conditions, in which it is very common for a company or other such body to retain its

management and control, and incorporation or statutory seat, outside of a country to which it sells or in which it does business. The adoption of this definition allows courts in England and Wales, Northern Ireland and Scotland to take jurisdiction (where predicated on domicile) against corporations and associations with a significant business presence in the UK but which have structured their business in such a way as to retain that structure outside of the UK. This has been the position for many years in the UK by virtue of the application of the Brussels regime, and does not raise any particular issues of lack of reciprocation from other participating states.

7.21 Regarding the savings provisions in Part 6 of these Regulations, the policy is to minimise the disruption to litigants arising from a "no deal" exit in cases which "straddle" exit day in as far as possible, given that the UK can only legislate for what happens in such cases within the UK itself. Therefore, it is intended that, where a case has commenced in the courts of England and Wales, Northern Ireland or Scotland before exit day, the Brussels regime rules should continue to apply until that case is concluded. Equally, where a case commenced in an EU Member State or a state bound by the 2007 Lugano Convention is concluded by a court settlement before exit day, or results in a judgment before or after exit day, courts of England and Wales, Northern Ireland or Scotland will recognise and enforce the outcome as if Brussels regime rules still applied. This is intended to make outcomes as predictable as possible for litigants in these categories of cases. There is one small adjustment to the operation of the Brussels regime in relation to competing proceedings (the lis pendens rules), contained in regulation 93(2). Where a court of England and Wales, Northern Ireland or Scotland is seised before exit day, and a court of an EU Member State, or a state bound by the 2007 Lugano Convention is seised at a point after the court in the UK in question has been seised, the court in the UK has a discretion, exceptionally, to decline jurisdiction despite being first seised. This is designed purely to enable that court to avoid an injustice, which could occur in particular if the second seised court refuses to stay the case and decline jurisdiction because the UK is no longer bound by the Brussels regime, notwithstanding that the court in the UK was seised first in time. This could result in litigants facing parallel proceedings in more than one court, both of which consider themselves bound, mandatorily, to hear the case. To avoid this result, this regulation provides some discretion to an otherwise mandatory rule.

7.22 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. 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.

10.2 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 a number of 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-brexit-deal/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal).

10.3 Those stakeholders recognised the difficulty of continuing to apply measures that require reciprocity to operate effectively. The Government's rationale for the policy given effect by this instrument is set out in paragraphs 7.17 to 7.21 of this memorandum.

11. Guidance

11.1 There are no plans to publish guidance with this instrument.

12. Impact

12.1 There is no, or no significant, impact on 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 is available from the Ministry of Justice, 102 Petty France, London SW1H 9AJ and is published with this Explanatory Memorandum alongside this instrument on https://legislation.gov.uk.

12.4 The government objective in the event of 'no deal' is to minimise disruption. Therefore, we have considered the impact of this instrument both against the current arrangements with the EU and the effect of making no changes to retained EU law at the point of the UK's exit.

12.5 Broadly we have concluded that while in certain respects the common law may operate less efficiently than the existing Brussels regime to which the UK is party as a result of EU Membership, there would only be negligible costs arising from this SI relative to leaving legislation on the statute book that ceases to operate effectively in the absence of reciprocity after the UK leaves the EU.

12.6 It is the Government's view that removing deficient retained EU law and associated domestic legislation from domestic law will clarify the rules that apply to determine jurisdiction and recognition and enforcement of judgements post EU Exit. This has the benefit of making UK legislation more transparent and therefore protecting its reputation. This will also ensure the same rules apply to cross-border matters involving EU and non-EU countries.

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 Brussels regime rules on jurisdiction and recognition and enforcement of judgments continue to apply to matters commenced under the EU Regulation and treaties but not finalised before exit, in order to provide as much predictability regarding the position as possible. The decision to revert to existing common law and statutory regimes applied in non-Brussels regime cases also bolsters predictability for such businesses because these are existing and tested rules.

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 Mark May at the Ministry of Justice. Telephone: 07580 907240 or email: Mark.May@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) 2018 Act

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 Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 do no more than is appropriate".

1.2 This is the case because these Regulations do no more than correct EU exit-related deficiencies primarily by repealing provision for, or in connection with, reciprocal arrangements between the UK, member States of the EU, and EFTA states with which the UK applies the 2007 Lugano Convention ("the Brussels regime rules"). These arrangements will no longer exist owing to the loss of that reciprocity as a result of EU exit. By repealing the retained rules of the Brussels regime, the Regulations further ensure that the existing common law and statutory rules on jurisdiction and the recognition and enforcement of judgments in cross-border civil and commercial cases, which currently apply to cases to which the Brussels regime rules do not apply, will in future also apply to cases involving EU Member State or EFTA state domiciled parties. The instrument also retains (in restated form) the EU rules on jurisdiction which currently apply in consumer and employment contract cases which are already universally applicable to all States regardless of domicile of the defendant, and those on the meaning of domicile of a corporation or association (referred to in the EU instruments as "a company or other legal person or association of legal or natural persons"). It is appropriate to retain these rules for the reasons explained in paragraphs 7.17 to 7.21 the explanatory memorandum. These rules can function effectively without reciprocation from other states.

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 draft instrument, and I have concluded they are a reasonable course of action".

2.2 Existing rules on jurisdiction and the recognition and enforcement of judgments in cross-border matters involving parties domiciled in EU Member States or EFTA states (the Brussels regime rules) will, on exit, cease to operate effectively primarily because of a lack of reciprocity from those other states, as referred to in paragraph 1.2 above. For the reasons detailed in section 7 of the body of this explanatory memorandum, repeal of the Brussels regime rules and their replacement by the existing common law and statutory rules of the different parts of the UK, as well as retaining the EU consumer and employment jurisdictional rules and the interpretation of the domicile of a corporation or association is a reasonable course of action.

3. Equalities

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

"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.

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 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."

4. Explanations

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