October 2018

Dear Margaret

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

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

THE INQUIRIES ACT 2005 AND THE CORONERS AND JUSTICE ACT 2009 (AMENDMENT) (EU EXIT) REGULATIONS 2018

EU EXIT LEGISLATION – PROTOCOL WITH SCOTTISH PARLIAMENT

I am writing in relation to the protocol on obtaining the approval of the Scottish Parliament to the exercise of powers by UK Ministers under the European Union (Withdrawal) Act 2018 in relation to proposals within the legislative competence of the Scottish Parliament.

As you know, the Cabinet Secretary for Government Business and Constitutional Relations wrote to the Convenors of the Finance & Constitution and Delegated Powers and Legislative Reform Committees on 11 September setting out the Scottish Government’s views on EU withdrawal. That letter also said that we must respond to the UK Government’s preparations for a No-Deal scenario as best we can, despite the inevitable widespread damage and disruption that would cause. It is our unwelcome responsibility to ensure that devolved law continues to function on and after EU withdrawal.

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

St Andrew’s House, Regent Road, Edinburgh EH1 3DG
www.gov.scot
I attach notifications which sets out the details of three Statutory Instruments (SIs) which the UK Government propose to make and the reasons why I am content that Scottish devolved matters are to be included in the SIs.

These SIs are being brought forward by the UK Government as preparation for the scenario of the UK leaving the EU without a deal being reached.

The SIs will make provision for a number of pieces of legislation relating to retaining EU law in the area of civil judicial co-operation. The SIs covers a range of reserved and devolved matters and it makes sense to make these largely technical fixes as part of a UK wide approach. The regulations will ensure a continuity of law and functioning statute book on exit from the EU.

I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee.

I look forward to hearing from you within 28 days from the date of this letter.

Best Wishes,

HUMZA YOUSAF
NOTIFICATION TO THE SCOTTISH PARLIAMENT

THE EUROPEAN ENFORCEMENT ORDER, ORDER FOR PAYMENT AND SMALL CLAIMS PROCEDURE (AMENDMENT, REVOCATION, TRANSITIONAL AND SAVINGS PROVISIONS) (EU EXIT) REGULATIONS 2018 ("the proposed Regulations")

Brief explanation of law that the proposals amend:

1. The European Enforcement Order (EEO), European Order for Payment (EOP) and European Small Claims Procedure (ESCP) Regulations form part of a group of EU measures, adopted under the articles of the Treaty establishing the European Community (which preceded Art 81 of the Treaty on the Functioning of the EU), which deal with civil judicial co-operation in cross border matters.

2. The EEO, EOP and ESCP Regulations and their related EU amending and implementing measures will become 'retained direct EU legislation' and form part of domestic law on and after EU Exit day under section 3 of the EU (Withdrawal) Act 2018.

3. 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 or any other deficiency in retained EU law, arising from the withdrawal of the UK from the EU.

4. The EEO, EOP and ESCP Regulations establish procedures for national courts of participating EU Member States to deal with cross border debt claims. Specifically:

   • Regulation (EC) No 805/2004 (the EEO Regulation) creates the European Enforcement Order (EEO) for uncontested claims. The EEO procedure is a simplified way of enforcing uncontested debt claims (i.e., claims where the debtor has admitted liability or not responded to the claim or not appeared at court having initially responded) across different EU Member States.

   • Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 (the EOP Regulation) creates the European payment order procedure (EOP procedure). The EOP is a simplified procedure for pursuing uncontested EU cross-border monetary claims for a specific amount which are due at the time the application for the order is submitted.

   • Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 (the ESCP Regulation) establishes the European Small Claims Procedure. The ESCP is a simplified, uniform EU procedure for civil and commercial cross border claims of
less than E5000 which is designed for claimants to be able to use without needing to instruct lawyers.

Summary of the proposals and how these correct deficiencies:

5. The proposed Regulations revoked the directly applicable retained EEO, EOP and ESCP Regulations and the retained EU instruments that have amended the EEO, EOP and ESCP Regulations over time, and amends other retained direct EU legislation to remove provisions relevant to the EEO, EOP and ESCP Regulations. The Regulations all involve reciprocal arrangements and in the absence of any agreement for on-going co-operation after Exit they will not operate effectively.

6. It is also proposed to make the necessary consequential amendments to domestic UK legislation associated with the EEO, EOP and ESCP Regulations. It is proposed that the European Communities (European Order for Payment) (Scotland) Regulations 2009 will be revoked. These Regulations provide that exclusive jurisdiction for the European Order for Payment lies with the sheriff court.

7. The proposals for transitional and savings are to ensure that the EEO, EOP and ESCP provisions continue to apply to matters commenced under the EU Regulations prior to EU Exit where the UK is the intended country of enforcement and correct Exit-related deficiencies in those provisions so that they will operate effectively on a transitional basis once the UK is no longer an EU Member State. However, post EU Exit, new matters will not be able to be commenced in the UK under the transitional provisions as EEOs, EOPs and ESCP judgments emanating from the UK will no longer be recognised and enforceable under the EEO EOP and ESCP Regulations in EU Member States.

8. Claims that, pre-EU Exit, would be able to be made under the EEO, EOP and ESCP Regulations will, post EU Exit, need to be made as civil claims in the relevant civil court (ordinarily the Sheriff Court).

An explanation of why the change is considered necessary:

9. Each of the procedures operates on a reciprocal basis, requiring co-operation between relevant national courts in participating EU Member States. Post exit, absent an agreement between the UK and the EU for the continued, reciprocal, recognition of the EEO, EOP and ESCP procedures by the UK and the EU, co-operation between EU and UK courts will cease as will mutual recognition of EEOs, EOPs and ESCP judgments. Reciprocal recognition and co-operation between EU and UK courts is essential if the three procedures are to function effectively. It is not possible for the UK or Scottish Parliament to legislate for the necessary reciprocity.
Scottish Government categorisation of significance of proposals:

10. Category A, with the following characteristics:

- Minor and technical in detail;
- Ensuring continuity of law;
- Clear there is no significant policy decision for Ministers to make;
- Proposals necessary for continuity where there may be a minor policy change, but limited policy choice and an “obvious” policy answer;

Impact on devolved areas:

11. The Scottish Government has responsibility for these court procedures which relate to devolved matters.

12. The impact of the removal of these procedures will be limited in that there are alternative domestic procedures that may be employed, albeit they may be more cumbersome. The impact will fall on foreign creditors who will no longer be able to take advantage of these procedures in Scotland (albeit they are not well used currently) and Scottish creditors who will be unable to take advantage of the streamlined procedures in EU Member States. The nature of this impact is not specific to Scotland and will be the same across the UK.

Summary of stakeholder engagement/consultation:

13. A formal consultation on these proposals has not been carried out. The proposal is to repeal EU legislation which provides for reciprocal effects between Member States. Since the United Kingdom will no longer be a Member State of the EU, these reciprocal effects will cease to apply and so there is limited scope for policy choice.

14. The Scottish Government considers that in the circumstances formal consultation is disproportionate and impractical given the timescales. We have however discussed the proposals with SCTS given that they will necessitate a change to court rules. The result of the proposals is that the associated Court rules will in effect become redundant but we do not believe that it is critical that remedial action is taken quickly.

A note of other impact assessments (if available):

15. The UK Government has conducted its own assessment for its proposed SI and does not judge there to be any significant, impact upon business, charities, voluntary bodies or the public sector.

Summary of reasons for Scottish Ministers’ proposing to consent to UK Ministers legislation:
16. As the UK Government is bringing forward legislation to address these deficiencies, the Scottish Ministers considers for reasons of efficiency that consent should be given to Scotland’s inclusion in the statutory instruments. The current legislative regime is broadly the same across the UK and the policy position is the same across the UK.

*Intended laying date (if known) of the UK Instrument arising from the notification*

17. These Regulations will be sent to the UK Parliament sifting committees on 9 November 2018 but will not be laid in the UK Parliament until the Scottish Parliament has had up to 28 days to consider the notification.

*If the Scottish Parliament will not have 28 days to scrutinise Scottish Minister’s proposal to consent, why not?*

18. N/A

*Information about any time dependency associated with the proposal:*

19. None identified.

*Any significant financial implications:*

20. None identified.
NOTIFICATION TO THE SCOTTISH PARLIAMENT

Name of the SI(s) (if known) or a title describing the policy area

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

A brief explanation of law that the proposals amend

The civil judicial cooperation framework within the EU includes two regulations:

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 (“EU Evidence Regulation”); and


The EU Service Regulation and EU Evidence Regulation establish frameworks for the transmission and fulfilment of requests for cross-border service of documents and the taking of evidence in civil and commercial matters between EU Member States. The procedures set out in both instruments are designed to provide an efficient, effective and speedy system of facilitating requests from one EU Member State to the authorities of another.

Summary of the proposals and how these correct deficiencies

The Service of Documents and the Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provision) (EU Exit) Regulations 2018 (“the Service and Evidence SI”) repeals the EU Service Regulation and the EU Evidence Regulation and the domestic legislation that gives effect to the Regulations. This includes the following Scottish legislation:

The European Communities (Service of Judicial and Extrajudicial Documents) (Scotland) Regulations 2001; and

The European Communities (Service of Judicial and Extrajudicial Documents) (Scotland) Amendment Regulations 2008

The Service and Evidence SI also provides for the cessation of any rights, powers, liabilities, obligations, restrictions, remedies and procedures which are derived from the Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters (“the Agreement”). Denmark opted out of both the EU Service
Regulation and the EU Evidence Regulation and a separate agreement was entered.

Savings and transitional provisions ensure the EU Service Regulation, the EU Evidence Regulation, the Agreement and relevant domestic legislation continue to apply to documents received for service by relevant UK authorities before EU Exit and to requests for the taking of evidence received by relevant UK courts and authorities before EU Exit. 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(2)(c) provides that deficiencies which may be remedied include where the Minister considers that the retained EU law makes provision for, or in connection with, reciprocal arrangements between the UK or any part of it, or a public authority in the UK, and a Member State or public authority in a Member State which no longer exist or are no longer appropriate.

**An explanation of why the change is considered necessary**

The EU Service Regulation and the EU Evidence Regulation are reciprocal procedural measures, supporting civil judicial cooperation between EU Member States. Post EU-exit, as a third country, the United Kingdom will not have access to the civil judicial cooperation framework, and consequently post EU-exit these reciprocal EU Regulations will cease to have effect in relation to the UK. The UK cannot legislate to restore the necessary reciprocity. The UK is party to two alternative Hague Conventions on service and the taking of evidence. Repeal of the EU Service Regulation and EU Evidence Regulation and domestic implementing legislation is necessary to ensure the UK can fully participate in the two Hague Conventions post EU Exit and to clarify that the EU Service Regulation and EU Evidence Regulation will cease to have legal effect in the UK post EU Exit.

Most other EU Member States are also party to the Hague Conventions on service and the taking of evidence: the 1965 Convention on the Service Abroad of judicial and extra judicial documents in civil or commercial matters (“Hague 1965”); and the 1970 Convention of the taking of evidence abroad in civil or commercial matters (“Hague 1970”), although the EU Service Regulation and EU Evidence Regulation apply as between EU Member States.

Upon the EU Regulations ceasing to have effect in the UK, the UK will be able to fall back on the provisions of Hague 1965 and Hague 1970.

The EU Service Regulation and the EU Evidence Regulation 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, including the imposition of time limits for confirming and responding to requests.
The Hague Conventions are potentially less effective and efficient in procedural terms, and not all EU Member States have ratified the Conventions, meaning that alternative procedures will need to be employed for those States.

However, the Conventions provide an appropriate international framework to enable requests to be transmitted and fulfilled which the UK can participate in.

**Scottish Government categorisation of significance of proposals**

Category A, with the following characteristics:

- Minor and technical in detail;
- Ensuring continuity of law;
- Clear there is no significant policy decision for Ministers to make; and
- Proposals necessary for continuity where there may be a minor policy change, but limited policy choice and an “obvious” policy answer.

**Impact on devolved areas**

The Scottish Government has responsibility for civil law and procedure which relates to devolved matters. In absence of these EU frameworks, the fall-back position will be the application of the Hague Conventions which are already implemented in Scotland. The impact will be across the UK and is not specific to Scotland.

**Summary of stakeholder engagement/consultation**

A formal consultation on this statutory instrument has not been carried out. This statutory instrument is designed to repeal EU legislation which provides for reciprocal effects between Member States. The changes proposed in this SI are necessary due to the fact that the required reciprocity will cease when the United Kingdom ceases to be a Member State of the EU.

The Scottish Government considers that in the circumstances formal consultation is disproportionate and impractical given the timescales.

**A note of other impact assessments, (if available)**

The UK Government has conducted its own assessment for this SI. This will be available when the SI is published by the UK Government.

Due to the timescales involved in bringing forward this legislation, the Scottish Government has not conducted its own assessment, but is cognisant that there are operational differences between the EU Regulations and the Hague Conventions. Namely, the EU Service Regulation is implemented with the transmitting and receiving agents being Sheriff Officers and Messengers at Arms. The 1965 Hague Convention operates a different system with requests transmitted through the Central Authority, which in Scotland is the Scottish Ministers. The EU Evidence Regulation provides for direct court to court requests between Member States.
Under the 1970 Hague Convention requests are received by the Central Authority which is the Scottish Ministers. Accordingly, requests are dealt with differently under the Hague Conventions with the result that the operational role of Sheriff Officers and Messengers at Arms is only engaged if it is requested that service is carried out by Sheriff Officers and Messengers at Arms rather than by postal service.

**Summary of reasons for Scottish Ministers’ proposing to consent to UK Ministers legislation**

As the UK Government is bringing forward legislation to address these deficiencies, the Scottish Government considers for reasons of efficiency that consent should be given to Scotland’s inclusion in the statutory instrument to make these minor and technical amendments. The current legislative regime is broadly the same across the UK and the policy position is the same across the UK.

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

These Regulations will be sent to the UK Parliament sifting committees on 29 October 2018. Sifting committees have 10 sitting days to consider the instrument starting the day after receipt. Due to a short recess in the UK Parliament from 6 to 12 November, this takes the sifting period to 15 November. The formal laying date will therefore be 20 November.

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

The Scottish Parliament will have 28 days to scrutinise the proposal to consent.

**Information about any time dependency associated with the proposal**

No associated time dependency.

**Any significant financial implications?**

None identified.
NOTIFICATION TO THE SCOTTISH PARLIAMENT

THE INQUIRIES AND CORONERS (AMENDMENT) (EU EXIT) REGULATIONS 2018

(“the proposed Regulations”)

Brief explanation of law that the proposals amend:

1. The Inquiries Act 2005 established a statutory framework for the conduct of public inquiries in the UK. From time to time events occur where it is in the public interest to establish an inquiry to examine what happened and make recommendations, with a view to ensuring that lessons are learned to prevent recurrence. The 2005 Act extends to the whole of the UK, and governs the establishment of inquiries by Scottish Ministers, as well as UK Ministers. Section 28 of the 2005 Act limits the terms of reference of an inquiry established by the Scottish Ministers to “Scottish matters”, i.e. a devolved matter which relates to Scotland.

2. Before exit day a person can rely on an EU obligation or an enforceable EU obligation under the sections listed below within the Inquiries Act 2005. There are four relevant sections:

3. Section 19, which gives a Minister or an inquiry chair powers to restrict public access to an inquiry’s proceedings. Restrictions can only be imposed in specified circumstances including where a restriction is required by an enforceable EU obligation. Other reasons to restrict attendance include that the Minister or chairman considers it to be conducive to the inquiry fulfilling its terms of reference or it is necessary in the public interest.
   - Section 22, provides that a person cannot be required to produce evidence to an inquiry if it would be incompatible with an EU obligation. Other reasons include that the evidence or document could not be required in civil court proceedings or it is in the public interest not to produce it.
   - Section 25, where the Minister or chair whose duty it is to arrange for the publication of reports of the inquiry may withhold material in the report from publication where this is required by an enforceable EU obligation. Other reasons include that it would not be in the public interest to publish the material.

4. An EU obligation is simply an obligation under EU law. An “enforceable EU obligation” is a particular class of EU obligation enforceable in terms of section 2(1) of the European Communities Act 1972.

5. Section 8 of the EU (Withdrawal) Act 2018 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 or any other deficiency in retained EU law, arising from the withdrawal of the UK from the EU.

*Summary of the proposals and how these correct deficiencies:*

6. The proposed regulations amend references to “EU obligation” and “enforceable EU obligation” in the above noted sections of the Inquiries Act 2005, to ensure reference is now made to “retained EU obligation” and to “retained enforceable EU obligation” following the United Kingdom’s withdrawal from the European Union.

7. The proposed regulations also amend section 43 (interpretation) of the Inquiries Act 2005 to provide a definition of ‘retained enforceable EU obligation’ for the purposes of the 2005 Act. The term “retained EU obligation” is already defined in the Interpretation Act 1978 as a result of amendments made by the EU (Withdrawal) Act 2018.

*An explanation of why the change is considered necessary:*

8. The references to EU obligations and enforceable EU obligations need to be amended to ensure retained EU law continues to apply to these Acts once the UK leaves the EU. If the references to EU obligations and enforceable EU obligations are not amended then the relevant provisions will no longer operate correctly because those terms will no longer have a clear meaning. The terms need to be amended to refer to the new terminology relating to retained EU law to be introduced by the EU (Withdrawal) Act 2018. The proposal is not that these regulations amend any underlying policy in relation to the conduct of inquiries, but rather that existing policy continues to be effectively delivered in statute.

*Scottish Government categorisation of significance of proposals:*

9. Category A, with the following characteristics:
   - Minor and technical in detail;
   - Ensuring continuity of law;
   - Clear there is no significant policy decision for Ministers to make;
   - Proposals necessary for continuity where there may be a minor policy change, but limited policy choice and an “obvious” policy answer;

*Impact on devolved areas:*

10. The Scottish Government has responsibility for inquiries policy which relate to devolved matters.
11. The impact of these proposals is merely technical and of negligible practical impact. The nature of this impact is not specific to Scotland and will be the same across the UK.

Summary of stakeholder engagement/consultation:

12. A formal consultation on these proposals has not been carried out. The proposal is make technical changes to legislation to reflect the UK withdrawal from the EU.

13. The Scottish Government considers that in the circumstances formal consultation is disproportionate and impractical given the timescales.

14. UKG has discussed the proposed changes with operational stakeholders in inquiries and they were unaware of any examples of an EU obligation or enforceable EU obligation being used in the circumstances set out in 2005 Act. In practice it is considered that other reasons within the sections are used as appropriate to restrict access, evidence or publication. These provisions remain unchanged.

A note of other impact assessments (if available):

15. The UK Government has conducted its own assessment for its proposed SI and does not judge there to be any significant, impact upon business, charities, voluntary bodies or the public sector.

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

16. As the UK Government is bringing forward legislation to address these deficiencies, the Scottish Ministers considers for reasons of efficiency that consent should be given to Scotland’s inclusion in the statutory instruments to make these minor and technical amendments. The current legislative regime is broadly the same across the UK and the policy position is the same across the UK.

Intended laying date (if known) of the UK Instrument arising from the notification

17. These Regulations will be sent to the UK Parliament sifting committee on 29 October 2018 but will not be laid in the UK Parliament until the Scottish Parliament has had up to 28 days to consider the notification.

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

N/A

Information about any time dependency associated with the proposal:
18. None identified.

   *Any significant financial implications:*

19. None identified.