Title of instrument:

The Law applicable to Contractual Obligations and Non-Contractual Obligations (Amendment) (EU Exit) Regulations 2018. (“the proposed Regulations”)

Brief explanation of the law that the proposals amend

The proposed Regulations address deficiencies in retained EU law relating to private international law applicable to contractual and non-contractual obligations so that the rules which determine the applicable law continue to operate effectively after the UK’s exit from the European Union.

Regulation (EC) No. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) and Regulation (EC) No. 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II) set out the rules, applicable by EU Member States (except Denmark), for determining, where there is conflict, which law applies to respectively: contractual obligations; and non-contractual obligations.

Rome I provides for uniform choice of law rules throughout the EU (except Denmark) in the field of contractual obligations where the case has a cross-border dimension, for example a case where parties to a contract live in different countries and the contract is to be performed in a third country. The rules mean that where a case falls within the Regulation’s scope of application, the same national law will generally be applied in all Member States.

Rome II provides for choice of law rules which apply principally in the context of delict, for example claims for personal injury and damage to property. It also applies to certain other types of claims e.g. relating to unjust enrichment. A number of types of cases are excluded from the scope of Rome II. These include non-contractual obligations arising from family law, matrimonial property regimes and company law.

These uniform rules identify the law to be applied in determining cases that have a cross-border dimension e.g. where the parties live in different member states and the alleged delict has taken place in a third member state. The objective of the rules is to increase legal certainty within the European Union by ensuring that the same national law applies to cross-border cases across the EU.

Rome I and Rome II provide for uniformity across the European Union on which law applies where there is a cross-border dimension.

The operation of Rome I and II are supported by provisions in the domestic law listed below.
• The Law applicable to Non-Contractual Obligations (Scotland) Regulations 2008/404
• The Law applicable to Contractual Obligations (Scotland) Regulations 2009/410
• Contracts (Applicable Law) Act 1990
• Prescription and Limitation (Scotland) Act 1973

In addition, the Rome Convention 1980 contains rules on the law applicable to contractual obligations which applied to all existing European Union Member States up until the point that the Rome I Regulation was adopted in 2008. The Rome Convention therefore remains relevant and continues to apply to contracts entered into between 1991 (when it came into force) and 16 December 2009. The Rome Convention 1980 was implemented in UK law via the Contracts (Applicable Law) Act 1990 which came into force on 1 April 1991. This Convention and its related Protocols will terminate for the UK as a result of EU exit.

On the UK’s exit from the EU, Rome I and II and the domestic legislation which gave effect to them will be retained under the EU (Withdrawal) Act 2018.

It is anticipated that the UK Government will lay the proposed Regulations in January 2019.

Summary of the proposals and how these correct deficiencies

Currently Rome I and Rome II establish uniform rules on the law applicable to contractual and non-contractual obligations which apply across the EU (with the exception of Denmark). The rules apply to situations where there is a foreign element and identify factors which connect the situation to the legal system of a particular country and determine which country’s law applies. In the main this set of rules are capable of continuing to be applied in the UK after exit day, as they do not depend on membership of the EU. Rather, they have universal application as the law which is determined to be applicable does not need to be that of an EU Member State. The policy behind the proposals is to retain the status quo as far as possible with amendments limited to those required to make that work effectively in the context of the UK not being an EU Member State.

The proposed Regulations are to be made using the powers in section 8 of the EU (Withdrawal) Act 2018 to address deficiencies in retained EU law arising from the withdrawal of the UK from the EU. Rome I and II will become part of domestic law on the UK’s exit from the EU in terms of section 3 of the EU (Withdrawal) Act 2018.

The proposals are to retain the Rome I and II Regulations as part of domestic law and make some amendments to ensure that the Rome I and II Regulations will operate effectively as domestic laws once the United Kingdom ceases to be an European Union Member State. The proposed Regulations amend the retained EU law to
correct provisions which are being retained but no longer work correctly in the context of the UK ceasing to be an EU member State and to omit those provisions which relate to those aspects of the EU Regulations which are no longer relevant after the UK has left the EU.

The main issue which the Regulations would remedy is the need to adapt references in Rome I and Rome II to “Member State” to operate effectively when the United Kingdom has left the EU. There are also a number of references in Rome I to EU Directives which are out of date and the proposal is to update these to restate retained EU law in a clearer and more accessible way. It is also proposed to remove redundant provision relating to notification to and a reporting function of the EU Commission.

The proposed Regulations will make some minor changes, consequential on the changes to Rome I and II, to relevant provisions in domestic legislation (as detailed above) associated with the EU measures.

The proposed Regulations will also make provision to ensure that despite termination of the 1980 Rome Convention for the UK, the substantive rules of that Convention can continue to be applied by UK courts to contracts entered into between 1 April 1991 (when the Convention came into force in the UK) and 16 December 2009 (after which the Rome I Regulation rules apply). Amendments are proposed to the Contracts (Applicable Law) Act 1990 (which incorporated the 1980 Rome Convention into domestic law) to preserve the existing substantive rules in the Convention. The amendments will omit provisions which are no longer relevant and amend the provisions being retained so they can continue to operate effectively in the context of the UK ceasing to be a member of the EU. This change, although formally prospective, will have an element of retrospective effect as these amendments to primary legislation will affect contracts which parties have already entered into (between 1 April 1991 and 16 December 2009 when the Rome I Rules took over). The effect is minimal given the approach to maintain the substantive rules of the Rome Convention and limit changes to those required to make the provisions operable.

By way of a consequential amendment, the proposed Regulations will also revoke Regulation EC No 662/2009 of the European Parliament and of the Council. That Regulation established a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations.

An explanation of why the change is considered necessary

When the United Kingdom withdraws from the European Union in order to avoid creating uncertainty and the prolonging of disputes, Rome I and Rome II and the domestic legislation which gave effect to those EU Regulations will be retained under the European (Withdrawal) Act 2018. In order for the rules on applicable law to continue to work effectively they will however need correcting to address some deficiencies. The UK’s exit from the EU will terminate the UK’s status as a contracting party to the 1980 Rome Convention. This means that the Convention’s rules will no longer apply to the UK as a matter of international law. Amendments need to be made to the Contracts (Applicable Law) Act 1990 to preserve the substantive rules which will continue to apply. The change is necessary to deliver that policy intention and ensure
that the law operates effectively in the context of the UK not being an EU member state.

**SG Categorisation of significance of proposals:**

Category ‘A’ This category is considered appropriate because the current unilateral and universal application of Rome I and Rome II by European Union States means that they will continue to be applied in the same way once the United Kingdom is no longer a member of the European Union.

The amendments are minor and technical in nature intended to ensure the continued smooth running of domestic law in this area and there has been no significant policy decision for Scottish Ministers to make.

**Impact on Devolved Area:**

The law of contract and obligations and private international law are devolved policy areas.

The Regulations will not change the current policy position and there is no change in relation to the powers which are currently devolved.

There are no impacts specific to Scotland.

**Summary of stakeholder engagement/consultation:**

The Scottish Government has not undertaken any formal consultation on the draft SI. The Scottish Government did carry out some focussed consultation on family and civil law in July 2018. The questionnaire issued did not seek specific views on Rome I and II but did ask if there were any points about the impact on civil law of Brexit which respondents wished to make. No respondents mentioned Rome I or II. The instrument has not been the subject of UK consultation although a draft was published by deposit in the House of Commons library on 8 March 2017. No comments opposing or criticising the decision to retain Rome I and Rome II (and to the extent necessary, the Rome Convention rules) have been received.

**Any other impact assessments:**

We have discussed with the UK Government and have concluded that no significant impact on business, charities, the voluntary sectors or on the public sector is foreseen. As any impact would be negligible, there is not a requirement to undertake an impact assessment. The amendments to retained EU law and domestic legislation in this instrument correct EU exit related deficiencies so that Rome I and II and the Rome Convention Rules will apply effectively after exit. There is no change to policy or the underlying applicable rules.
Summary of reasons for Scottish Ministers proposing to consent to UK Ministers’ legislation

Policy and the amendments proposed in relation to Rome I and II and the Rome Convention 1980 are the same across the UK and it makes sense in terms of efficiency for this to be done at UK level. While the amendments to devolved domestic legislation are specific to Scotland, these are just consequential on the policy to Rome I and II after exit which is consistent across the UK.

Both Rome I and Rome II interact with some reserved areas. For example: Article 6 of Rome I relates to consumer protection; Article 7 of Rome I deals with insurance provisions; and Article 8 of Rome II relates to unitary Community Intellectual Property rights. Whilst these areas are reserved, private international law is devolved. Extending the Regulations to Scotland avoids any potential devolution issues.

Intended Laying date if known of UK instrument arising from the notification

Likely to be January 2019.

Does the Scottish Parliament have 28 days to scrutinise?

No. Drafting issues emerged late. As a consequence, this leaves less than the 28 days for consideration of the notification. If the Committee is able to consider the notification in a shorter timescale that would be appreciated.

Information about any time dependency associated with the proposal:

It is preferable that the Regulations are in force on the day we exit the European Union, in the event of a no deal scenario, to ensure that legislation is operable and that there is a system in place to enable continued certainty in disputes which have a cross-border dimension.

Any significant financial implication:

Uncertainty in the law as it relates to contractual and non-contractual obligations has the potential to prolong disputes which is likely to have a financial impact on the parties involved in the disputes. Any actual financial impact would be dependent on the individual circumstances of the case in question, it is not possible to provide an estimate of the financial impact. The Regulations will however reduce uncertainty in the law.