

Equalities, Human Rights and Civil Justice Committee

26th Meeting, 2023 (Session 6), Tuesday 5 December 2023

UK subordinate legislation: consideration of consent notification

Note by the Clerk

Introduction

1. This paper supports the Committee's consideration of a 'type 1' consent notification sent by the Scottish Government relating to the following proposed UK statutory instrument (SI)—**the Civil Jurisdiction and Judgments (Saving Provision) Regulations 2023**

2. The process for the Scottish Parliament's consideration of consent notifications is set out in a [Protocol on scrutiny by the Scottish Parliament of consent by Scottish Ministers to UK secondary legislation in devolved areas arising from EU Exit](#). Further details of this process are set out in **Annexe A**.

The Civil Jurisdiction and Judgments (Saving Provision) Regulations 2023

3. On 9 November 2023, the Minister for Victims and Community Safety wrote to the Committee to notify the Scottish Government's proposal to consent to the UK SI. This correspondence is in **Annexe B**. The SI notification is available in **Annexe C** and the summary notification in **Annexe D**.

4. The Scottish Government has asked the UK Government to make the SI on or after 11 December so the Committee will have the full 28 days provided for in the protocol to consider the notification. Consequently, the Committee is asked to respond by **8 December 2023**.

5. The proposed SI will continue savings which the UK Government, Scottish Government, and Northern Ireland Administration decided at EU Exit should be made for transitional cases, but which are at risk of repeal by the Retained EU Law

(Revocation and Reform) Act 2023 Act (“the REUL Act”) at the end of 2023 if further savings are not made through this SI.

6. The 2007 Lugano Convention is a Private International Law instrument containing rules governing jurisdiction in civil and commercial matters when a case has connections to more than one country, as well as rules providing for the recognition and enforcement of judgments in such matters. The Convention is a treaty amongst EU member states (EUMSs), Norway, Iceland, and Switzerland and was entered into by the EU on behalf of EUMSs while the UK was a Member State.

7. At EU Exit, the Convention was revoked for the UK because the UK’s membership was dependent on its status as an EUMS and because its operation relied on reciprocal application which would no longer occur. Given the need for reciprocity, alignment with EU provisions was not possible.

8. However, the Convention was saved for transitional cases i.e. to save the jurisdiction rules for cases commenced before the end of the transition period with the EU (subject to limited modifications), and to save the recognition and enforcement rules for judgments issued in cases commenced before that point. This decision was made in order to minimise potential disruption to litigants and to make outcomes as predictable as possible.

9. This savings provision for limited legacy cases relied in part on section 4 of the European Union (Withdrawal) Act 2018 (“the Withdrawal Act”), as well as on the Exit SI that was made (The Civil Jurisdiction and Judgments (EU Exit) (Amendment) Regulations 2019, regulations 92 and 93) (“the Exit Regulations”).

10. Since the original savings for transitional cases extended UK-wide, the UK Government propose to extend this SI UK-wide.

11. Members will wish to note that there is no statutory requirement on the UK Ministers to seek the consent of, or consult, Scottish Ministers before making this SI. This means that, from a legal point of view, the UK Government could still go ahead with this instrument, whether or not the Scottish Government consents. The UK Government has, however, stated that it does “not intend normally to use the powers under the [REUL Act] in devolved areas without the agreement of the relevant devolved administration. Where a UK Minister intends to exercise the powers in devolved areas we will seek agreement on an SI-by-SI basis”.

Next steps

12. If the Committee wishes to approve the proposal to consent to the SI, it may, in doing so, set out any observations or concerns in its letter to the Scottish Government that it thinks are relevant.

13. If the Committee is not content with the proposal, however, it may make one of the following recommendations—

- I. That the Scottish Government should not give its consent to the provision being made in a UK SI and that the Scottish Government should instead produce an alternative Scottish legislative solution;
- II. That the Scottish Government should not consent to the provision being made in a UK SI laid solely in the UK Parliament and should instead request that the provision be included in a UK SI laid in both Parliaments under the joint procedure; or
- III. That the provision should not be made at all (that is, that the Scottish Government should not consent to the provision being included in a UK SI, nor should the Scottish Government take forward an alternative Scottish legislative solution).

14. If the Committee recommends that the Scottish Government should not consent, it should write to the Scottish Government, setting out which of the options for non-consent (see above), reflects its view.

Clerks to the Committee
November 2023

Annexe A: Process for parliamentary scrutiny of consent notifications in relation to UK statutory instruments

15. The Protocol provides for the Scottish Parliament to scrutinise the Scottish Government's decisions to consent to certain subordinate legislation made by the UK Government: specifically, UK Government subordinate legislation on matters within devolved competence in areas formerly governed by EU law. It sets out a proportionate scrutiny approach and categorises SI notifications as 'type 1' or 'type 2'.

16. Type 2 applies where all aspects of the proposed instrument are clearly technical (e.g., they merely update references in legislation that are no longer appropriate following EU exit) or do not involve a policy decision. These are notified retrospectively, after the Scottish Government has given its consent.

17. All other proposals are type 1. In this case, the Scottish Parliament's agreement is sought *before* the Scottish Government gives consent to the UK Government making subordinate legislation in this way. Each type 1 notification must be considered by the relevant Committee.

18. The Committee's role in relation to type 1 notifications is to decide whether it agrees with the Scottish Government's proposal to consent to the UK Government making Regulations within devolved competence, in the manner that the UK Government has indicated to the Scottish Government.

19. If Members are content for consent to be given, the Committee will write to the Scottish Government accordingly. The Committee may also wish to note any issues in its response or request that it be kept up to date on any relevant developments.

20. If the Committee is not content with the proposal, however, it may recommend that the Scottish Government should not give its consent (more detail on the options available to the Committee in relation to this particular notification is given below). In that event, the Scottish Ministers have 14 days under the Protocol to respond to the Committee's recommendation. They could—

- Agree. If so, the Scottish Ministers would then withhold their consent.
- Not agree. If so, the Parliament will debate the issue.

21. If the Parliament agrees to the Committee's recommendation that the Scottish Ministers should not consent, the Protocol provides that the Scottish Ministers should "normally not consent" to the UKSI. However, the Protocol also provides that if the Scottish Ministers consider that the Committee's proposed alternative cannot be achieved, they may consent to the UK SI. If so, they must explain why they are doing so to the Scottish Parliament.

Annexe B

Letter from the Minister for Victims and Community Safety

9 November 2023

Dear Convener

RETAINED EU LAW (REVOCATION AND REFORM) (SCOTLAND) ACT 2023 THE CIVIL JURISDICTION AND JUDGMENTS (SAVING PROVISION) REGULATIONS 2023

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 a UK Act of Parliament for proposals relating to EU exit which are within the legislative competence of the Scottish Parliament

I attach a Type 1 notification which sets out the details of an SI which the UK Government proposes to make and the reasons why I am content that Scottish devolved matters are to be included in this SI.

We will, in accordance with the protocol, advise you when the final SI is made and advise you as to whether the final SI is in keeping with the terms of this notification.

We have asked the UK Government to make the SI on or after 11 December so the Committee will have the full 28 days provided for in the protocol to consider the notification. I look forward to hearing from you by 8 December.

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

SIOBHIAN BROWN

Annexe C

SI Notification

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

The Civil Jurisdiction and Judgments (Saving Provision) Regulations 2023

Is the notification Type 1 or Type 2

Type 1

Details of the provisions that Scottish Ministers are being asked to consent to.

The proposed SI will continue savings made at EU Exit to ensure that the 2007 Lugano Convention on jurisdiction and enforcement of judgments in civil and commercial matters (“the 2007 Lugano Convention”), a private international law agreement, can continue to apply to certain legacy cases.

Summary of the proposals

The proposed SI will continue savings which the UK Government, Scottish Government, and Northern Ireland Administration decided at EU Exit should be made for transitional cases, but which are at risk of repeal by the Retained EU Law (Revocation and Reform) Act 2023 Act (“the REUL Act”) at the end of 2023 if further savings are not made through this SI.

The 2007 Lugano Convention is a Private International Law instrument containing rules governing jurisdiction in civil and commercial matters when a case has connections to more than one country, as well as rules providing for the recognition and enforcement of judgments in such matters. The Convention is a treaty amongst EU member states (EUMSs), Norway, Iceland, and Switzerland and was entered into by the EU on behalf of EUMSs while the UK was a Member State.

At EU Exit, the Convention was revoked for the UK because the UK’s membership was dependent on its status as an EUMS and because its operation relied on reciprocal application which would no longer occur. Given the need for reciprocity, alignment with EU provisions was not possible.

However, the Convention was saved for transitional cases i.e. to save the jurisdiction rules for cases commenced before the end of the transition period with the EU (subject to limited modifications), and to save the recognition and enforcement rules for judgments issued in cases commenced before that point. This decision was made in order to minimise potential disruption to litigants and to make outcomes as predictable as possible.

This savings provision for limited legacy cases relied in part on section 4 of the European Union (Withdrawal) Act 2018 (“the Withdrawal Act”), as well as on the Exit SI that was made (The Civil Jurisdiction and Judgments (EU Exit) (Amendment) Regulations 2019, regulations 92 and 93) (‘the Exit Regulations’).

Since the original savings for transitional cases extended UK-wide, the UK Government propose to extend this SI UK-wide.

Does the SI relate to a common framework or other scheme?

No.

Summary of stakeholder engagement/consultation

There has been no engagement or consultation on this SI, which is preserving the status quo.

A note of other impact assessments, (if available)

No impact assessments have been prepared by the UK Government for this SI as it continues legacy savings and does not change how they operate.

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

Scottish Ministers propose to consent to this legislation to:

- ensure continuity in respect of relevant judgements issued before the end of the transition period; and
- save the recognition and enforcement rules for judgments issued in cases commenced before the end of the transition period.

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

Making date of 11 December 2023.

Under the powers being used by the UK Government, there is no Parliamentary procedure at Westminster.

The Scottish Government has asked the UK Government to make the SI on or after 11 December, to give the Committee the full 28 days to respond.

If the Scottish Parliament does not have 28 days to scrutinise Scottish Ministers' proposal to consent, why not?

N/A

Information about any time dependency associated with the proposal

Section 2 of the REUL Act will repeal section 4 of the Withdrawal Act at the end of the year. This repeal therefore creates a risk that the savings put in place for legacy 2007 Lugano Convention cases will fall away unless this SI is made.

Are there any broader governance issues in relation to this proposal, and how will these be regulated and monitored post-withdrawal?

There are no broader governance issues in relation to this proposal.

Any significant financial implications?

There are no significant financial implications.

**Justice Directorate
Scottish Government
November 2023**

Annexe D

Summary Notification

Title of Instrument
The Civil Jurisdiction and Judgments (Saving Provision) Regulations 2023
Proposed laying date at Westminster
Making date of 11 December 2023. Under the powers being used by the UK Government, there is no Parliamentary procedure at Westminster. The Scottish Government has asked the UK Government to make the SI on or after 11 December, to give the Committee the full 28 days to respond.
Date by which Committee has been asked to respond
8 December 2023
Power(s) under which SI is to be made
Section 22(4) of the Retained EU Law (Reform and Revocation) Act 2023.
Categorisation under SI Protocol
Type 1
Purpose
To continue savings made at EU Exit to ensure that the 2007 Lugano Convention on jurisdiction and enforcement of judgments in civil and commercial matters, a private international law agreement, can continue to apply to certain legacy cases.
Other information
SG Policy contact:
Stephanie Smith Simon Stockwell