



HM Government

# Providing a cross- border civil judicial cooperation framework

A FUTURE PARTNERSHIP PAPER

The United Kingdom wants to build a new, deep and special partnership with the European Union.

This paper is part of a series setting out key issues which form part of the Government's vision for that partnership, and which will explore how the UK and the EU, working together, can make this a reality.

Each paper will reflect the engagement the Government has sought from external parties with expertise in these policy areas, and will draw on the very extensive work undertaken across Government since last year's referendum.

Taken together, these papers are an essential step towards building a new partnership to promote our shared interests and values.

# Providing a cross-border civil judicial cooperation framework: a future partnership paper

## Executive Summary

1. As the United Kingdom leaves the European Union, the Government will seek a deep and special partnership with the EU. Within this partnership, cross-border commerce, trade and family relationships will continue. Building on years of cooperation across borders, it is vital for UK and EU consumers, citizens, families and businesses, that there are coherent common rules to govern interactions between legal systems.
2. To this end, the UK, as a non-member state outside the direct jurisdiction of the Court of Justice of the European Union (CJEU), will seek to agree new close and comprehensive arrangements for civil judicial cooperation with the EU.
3. We have a shared interest with the EU in ensuring these new arrangements are thorough and effective. In particular, citizens and businesses need to have continuing confidence as they interact across borders about which country's courts would deal with any dispute, which laws would apply, and know that judgments and orders obtained will be recognised and enforced in neighbouring countries, as is the case now.
4. Cooperation with the EU is one part of the UK's global outlook in this field. The new agreement with the EU would be integral to the UK's strategy to enhance civil judicial cooperation more widely. Beyond our relationship with the EU, the UK will remain committed to maintaining and deepening civil judicial cooperation internationally, both through continued adherence to existing multilateral treaties, conventions and standards, and through our engagement with the international bodies that develop new initiatives in this field.
5. The EU has presented its position on civil judicial cooperation in the context of separation. The UK is clear that it is in the interests of both the UK and the EU for cooperation in this field to continue as part of our future partnership. Nonetheless, in response, Annex A presents the UK's view of the principles that should govern the winding down of our existing relationship in the event that no agreement on a future relationship can be reached.

## Introduction

6. Civil judicial cooperation is the legal framework that governs the interaction between different legal systems in cross-border situations. In particular, this framework provides rules to determine which country's courts will hear a civil, commercial or family law case raising cross-border issues (jurisdiction); which country's law will apply (applicable law); and enables a judgment obtained in one country to be recognised and enforced in another (recognition and enforcement). Enforcement in this sense means that judgments falling within the scope of the agreement given by the national courts of one party to the framework must be enforced in the national courts of any and all other parties to the framework.
7. The UK believes that international intergovernmental cooperation and mutual recognition benefits all parties. The UK currently participates in the EU's civil judicial cooperation system provided by a range of EU instruments (see Box 1). This framework provides predictability and certainty for citizens and businesses from the EU and the UK about the laws that apply to their cross-border relationships, the courts that would be responsible, and their ability to rely on decisions from one country's courts in another State. It plays an important role in enabling businesses to trade with confidence across borders, providing legal certainty in cross-border transactions and avoiding delays and excessive costs where individual and family rights need to be protected in cross-border situations.
8. When the UK withdraws from the EU, we will leave the civil judicial cooperation system that exists between EU Member States. We will therefore need to negotiate and agree a new civil judicial cooperation framework, as an aspect of the deep and special partnership with the EU.

### Box 1 – Civil judicial cooperation: existing measures

Within the EU's system of civil judicial cooperation, the main instruments which have been agreed and in which the UK participates are set out below.

#### *Civil and commercial instruments*

- The Brussels I Recast Regulation – **Brussels Ia** – (1215/2012) covers jurisdiction and recognition and enforcement of judgments and applies between EU Member States.
- **Rome I Regulation** (593/2008) covers applicable law in contracts.
- **Rome II Regulation** (864/2007) covers applicable law in non-contractual obligations.
- **Insolvency Regulation** (1346/2000 and 2015/848) covers jurisdictional rules and applicable law and recognition of insolvency proceedings in cross-border insolvencies.
- The **small claims** (861/2007 revised by 2015/2421), **enforcement order** (805/2004) and **order for payment** (1896/2006) **Regulations** facilitate means for obtaining decisions on claims that can be enforced throughout the EU.

### ***Family instruments***

- The **Brussels Ila Regulation** (2201/2003) covers jurisdictional rules in matrimonial and parental responsibility matters and the recognition and enforcement of judgments.
- The **Maintenance Regulation** (4/2009) covers rules for determining which court has jurisdiction for, and the recognition and enforcement of, maintenance decisions.
- **Regulation on protection measures in civil matters** (606/2013) covers recognition and enforcement of protection measures, including for victims of domestic violence.

### ***EU instruments covering both civil and family matters***

- **EU Service Regulation** (2007/1393/EC) covers rules for serving documents in other EU countries.
- **Taking of Evidence Regulation** (2001/1206) covers cross-border processing of requests to take evidence.
- **Legal Aid Directive** (2002/8) covers rules for the grant of legal aid in cross-border disputes.
- **Mediation Directive** (2008/52) covers access to alternative dispute resolution and settlement of disputes through the use of mediation in cross-border disputes.
- **European Judicial Network in Civil and Commercial Matters** (2001/470/EC) facilitates cross-border cooperation for judges and practitioners and access to justice for those involved in disputes.

### **A future framework with the EU**

9. A close cooperative relationship between the legal systems of the UK and the EU is of mutual importance, and thousands of EU corporations have established a place of business in the UK. Companies across the EU choose to use English law to govern their affairs and it is the most popular contract law used for conducting international transactions. Research indicates that English law governs around 40 per cent of global commercial arbitrations.<sup>1</sup>
10. In developing a new framework for civil judicial cooperation, the UK and the EU Member States start from an unprecedented position of close integration, underpinned by a long history of cooperation in this field. Our discussions on civil judicial cooperation will therefore focus on a new relationship based on mutually beneficial rules and processes to facilitate and enable cross-border trade, commerce and family life.

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<sup>1</sup> Based on responses to the 2010 International Arbitration Survey: Choices in International Arbitration, Queen Mary, University of London, 2010.

11. We envisage that this new framework will be based on a commitment to:
  - build on the strong foundation of existing cooperation and belief in shared values such as the rule of law, respect for international law and democracy;
  - continue to collaborate at bilateral, regional and multilateral levels; and
  - develop our relationship over time as our societies, the laws that govern them and opportunities for further cooperation develop.
12. The world is more interconnected than ever and families increasingly come from or reside in more than one country – there are approximately one million British citizens living in other EU Member States<sup>2</sup> and some three million EU citizens living in the UK.<sup>3</sup> When things go wrong, families need to know that they will be able to resolve disputes in a clear, predictable way, without undue delay.
13. Consumers in the EU and the UK will continue to buy from each other’s retailers and manufactures and need a clear process for resolving any disputes that arise. Consumers should be confident that if they have a dispute they can bring a claim in their own country’s courts regardless of where the supplier is based, and that the resulting judgment will be enforceable.
14. Businesses and investors value certainty. The EU and the UK will continue to be key trading partners and to invest in each other’s economies. Confidence in cross-border commercial contracts and investment relationships is underpinned and enhanced by clear rules governing: which country’s courts hold responsibility for resolving disputes; the enforcement of the resulting judgment in other countries where a party has assets; and the approach to managing insolvency in cross-border situations.
15. In particular, contracting parties often agree which courts will have jurisdiction to hear their dispute, and which country’s law will apply. Common rules which ensure respect for such agreements support business confidence to trade, and minimise the potential for delaying tactics in the event of a dispute. EU and UK businesses, both big and small, should have confidence that when they trade with one another they can resolve disputes swiftly and with certainty.
16. Scotland and Northern Ireland have their own separate judicial systems. We have engaged with the Devolved Administrations in this area and will, of course, continue to work with them, and stakeholders in Scotland and Northern Ireland, to ensure a future civil judicial cooperation agreement benefits all parts of the UK.
17. The UK Government has consulted a range of bodies with interest and expertise in this area, such as the Law Society of England and Wales and the Bar Council. We have taken on board their thorough analyses on the value of comprehensive cooperation with the EU on civil justice.<sup>4</sup>

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<sup>2</sup> What information is there on British migrants living in Europe?, ONS, January 2017.

<sup>3</sup> Population of the United Kingdom by Country of Birth and Nationality 2015, ONS, August 2016.

<sup>4</sup> The EU and the Legal Sector, The Law Society of England and Wales, 2015; Brexit Paper 4: Civil Jurisdiction and the Enforcement of Judgments, The General Council of the Bar, 2017; Brexit Paper 6: Family Law, The General Council of the Bar, 2017.

18. The best way to ensure legal certainty for both UK and EU citizens and businesses as we leave the EU is to facilitate a smooth transition to a new relationship in civil judicial cooperation. Existing international conventions can provide for rules in some areas, but they would not generally provide the more sophisticated and effective interaction, based on mutual trust between legal systems, that currently benefits both EU and UK business, families and individual litigants. The optimum outcome for both sides will be an agreement reflecting our close existing relationship, where litigating a cross-border case involving UK and EU parties under civil law, wherever it might take place, will be easier, cheaper and more efficient for all involved.
19. The UK will therefore seek an agreement with the EU that allows for close and comprehensive cross-border civil judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework. As we legislate for our withdrawal from the EU, it is also our intention to incorporate into domestic law the Rome I and II instruments on choice of law and applicable law in contractual and non-contractual matters. This will provide a coherent legal framework for UK and EU businesses to trade and invest with confidence across borders and support the protection of individuals' and family rights in cross-border situations.
20. The UK's commitment to the rule of law has been built over centuries, and reaffirmed time and again by effective, independent courts. That commitment to the rule of law means that anyone seeking to vindicate their rights within the UK's legal systems know that they will be judged by clear rules applied in accordance with the law by the UK's expert, independent and internationally-respected judiciary. When the UK leaves the EU, the EU Treaties will cease to apply in the UK. Leaving the EU will therefore bring an end to the direct jurisdiction of the CJEU in the UK, because the CJEU derives its jurisdiction and authority from the EU Treaties. Ending the direct jurisdiction of the CJEU in the UK will not weaken the rights of individuals, nor call into question the UK's commitment to complying with its obligations under international agreements; where appropriate, the UK and the EU will need to ensure future civil judicial cooperation takes into account regional legal arrangements, including the fact that the CJEU will remain the ultimate arbiter of EU law within the EU.

#### **UK civil judicial cooperation internationally**

21. The UK is committed to increasing international civil judicial cooperation with third parties through our active participation in the Hague Conference on Private International Law and the United Nations Commission on International Trade Law (UNCITRAL – see Box 2). We will continue to be an active and supportive member of these bodies, as we are clear on the value of international and intergovernmental cooperation in this area.
22. It is our intention to continue to be a leading member in the Hague Conference and to participate in those Hague Conventions to which we are already a party and those which we currently participate in by virtue of our membership of the EU. Similarly, we will seek to continue to participate in the Lugano Convention that, by virtue of our membership of the EU, forms the basis for the UK's civil judicial cooperation with Norway, Iceland and Switzerland.

## **Box 2 – Civil judicial cooperation: international agreements**

### ***Hague Conventions***

The Hague Conference on Private International Law was formed to work for the progressive unification of the rules of private international law. It seeks to smooth over the conflict of domestic laws by creating sets of rules which can be applied in an international legal setting. The vehicles by which this is achieved are multilateral Conventions which promote the harmonisation of conflicting laws in a range of areas. 82 states and the EU are currently members of the Hague Conference, with a further 68 states participating in Conventions as non-member states of the Conference.

The UK participates in many Hague Conventions covering a range of civil, commercial and family matters, either as a party, or as a Member State of the EU where the EU is party to the instrument. Set out below are details of a number of conventions to which the UK is a party.

- **1965 Convention on Service Abroad of Judicial and Non-Judicial Documents** which provides for the channels of transmission to be used when a document is transmitted from one State Party to another.
- **1970 Convention on the Taking of Evidence Abroad** which establishes methods of cooperation for the taking of evidence abroad in civil or commercial matters.
- **1970 Convention on the Recognition of Divorces and Legal Separations** which provides rules for the recognition of divorces and legal separations.

### ***Hague Conventions relating to children***

- **1980 Convention on the Civil Aspects of International Child Abduction** which provides for international cooperation among States Parties to protect children from the harmful effects of wrongful removal abroad. It provides a legal mechanism for prompt return of the child to the country from which he or she was removed in the interest of the child, and so that considered decisions can be taken about where issues relating to custody should be determined. The Brussels IIa Regulation includes additional provisions to facilitate operation of the 1980 Convention between the EU Member States.
- **1993 Convention on Adoption (Co-operation)** which protects children and their families against the risks of illegal, irregular, premature or ill-prepared adoptions abroad.
- **1996 Convention on Parental Responsibility and Measures for the Protection of Children** which deals with recognition of orders concerning parental responsibility and decisions regarding contact, residence, and public care concerning children. It provides direct rules of jurisdiction and rules on applicable law. It also provides a system of administrative cooperation in children matters between contracting states.



### ***Participation of the UK in other key Hague Conventions by virtue of EU Contracting Party status***

The EU is the contracting party to the following Conventions and they bind the Member States by virtue of the EU's status. Between EU Member States, the internal EU instruments (for example Brussels Ia Regulation) are prioritised.

- **2007 Convention on Recovery of Maintenance** which provides rules for the international recovery of child support and other forms of family maintenance, and for administrative cooperation between contracting states. It provides rules for recognition and enforcement of maintenance decisions across borders. Compared to the EU Maintenance Regulation, it does not contain direct rules of jurisdiction, nor does it provide the additional benefits of the Regulation such as exchange of data between Member States as a means to ensuring maintenance is paid.
- **2005 Convention on Choice of Court Agreements** which aims to ensure the effectiveness of exclusive choice of court agreements between parties to international commercial transactions. It does this by providing rules on jurisdiction, including a requirement on non-chosen courts to cede jurisdiction to a chosen court, and enforcement of any resulting judgment. The 2005 Convention provides an important framework from a commercial perspective, but compared with the Brussels Ia Regulation for example, its civil and commercial coverage is limited.

### ***2007 Lugano Convention***

The Lugano Convention deals with jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. It applies between EU Member States and Switzerland, Norway and Iceland (European Free Trade Association (EFTA) Member States). Other, non-EU member countries can accede to the Convention under certain conditions.

The Convention is open to:

- future members of EFTA;
- Member States of the EU; and
- any other state, subject to the unanimous agreement of all the contracting parties.

The Convention is based on the Brussels I Regulation before it was recast, so does not reflect many of the improvements made in the recast regulation, operative since January 2015.

The 2007 Convention superseded the earlier 1988 Convention on the same subject matter.

### **1997 UNCITRAL Model Law on Cross-Border Insolvency**

The UNCITRAL Model Law is designed to assist contracting states to equip their insolvency laws with a modern legal framework to more effectively address cross-border insolvency proceedings concerning debtors experiencing severe financial distress or insolvency, which have assets or creditors in more than one state. It focuses on encouraging cooperation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency law or the enforcement of orders or judgments, and respects the differences among national procedural laws. It applies without reciprocity.

The UNCITRAL Model Law was enacted into UK domestic law by the Cross-Border Insolvency Regulations 2006.

### **Judicial cooperation in civil and commercial matters in the context of separation**

23. Citizens, consumers, families and businesses in both the UK and in EU Member States need to be able to plan ahead. As such, the UK and the EU would benefit from an interim period that allowed for a smooth and orderly move from our current relationship to our future partnership.
24. It is clear that the mutual interests of the UK and the EU are best served by continued close and comprehensive civil judicial cooperation. Nonetheless, in the event that we do not agree an arrangement for future civil judicial cooperation with the EU, it will be important to have reached a common view on the general principles that would govern how ongoing cooperation in this area could be wound down. The EU is keen to give some consideration to those issues at the start of negotiations and the position paper<sup>5</sup> published by the EU on 13 July 2017 envisages using this first phase of negotiations to consider how cooperation that is ongoing on the day the UK withdraws from the EU could be completed in an orderly manner. The UK's response is set out at Annex A. The UK's position is outlined without prejudice to negotiations on the future partnership.

### **Conclusion**

25. The UK is clear that international civil judicial cooperation is in the mutual interest of consumers, citizens, families and businesses in the EU and in the UK. With this in mind, we are seeking a close and comprehensive framework of civil judicial cooperation with the EU. That framework would be on a reciprocal basis, which would mirror closely the current EU system and would provide a clear legal basis to support cross-border activities, after the UK's withdrawal.

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<sup>5</sup> Position paper on Ongoing Police and Judicial Cooperation in Criminal matters, European Commission, 2017.

## Annex A: Judicial cooperation in civil and commercial matters in the context of separation

1. This annex outlines the UK's position without prejudice to negotiations on the future partnership between the UK and the EU.
2. It addresses withdrawing from the EU rules determining which country's courts will hear a civil, commercial or family law case raising cross-border issues (jurisdiction); which country's law will apply (applicable law); and enables a judgment obtained in one country to be recognised and enforced in another (recognition and enforcement), including on proceedings that are ongoing at the point of withdrawal from the EU.

### Context

3. The EU published its position paper on judicial cooperation in civil and commercial matters<sup>6</sup> on 13 July 2017.

### UK Position

4. Avoiding disruption and providing legal certainty is our guiding principle in negotiations on separation issues.
5. The UK believes that agreeing high-level principles that articulate clearly our approach to separation issues, should there be no future agreement in this area, will provide legal certainty and enable a smooth, orderly withdrawal.
6. The following principles should ensure orderly completion of ongoing cooperation, so that:
  - citizens, consumers, families and businesses involved in a dispute continue to have a clear, predictable, legal framework for the resolution of that dispute;
  - legal certainty is maximised to the benefit of citizens and business by ensuring that their properly negotiated arrangements are respected;
  - good administration and effective access to justice is ensured; and
  - operational disruption to judicial authorities is minimised.
7. In response to the principles stated in the EU position paper, the UK proposes the following general approach.
  - **Applicable law:** the existing EU rules governing the applicable law for contractual and non-contractual obligations should continue to apply to contracts concluded before the withdrawal date, and in respect of non-contractual liability, to events giving rise to damage which occur before withdrawal date. This will be necessary to avoid uncertainty or confusion as to which rules apply, which could cause disadvantage to families, businesses and individuals.

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<sup>6</sup> Position paper on Judicial Cooperation in Civil and Commercial matters, European Commission, 2017.

- **Jurisdiction:** the existing EU rules governing jurisdiction to determine disputes should continue to apply to all legal proceedings instituted before withdrawal date.
  - **Choice of court:** where a choice of court has been made prior to withdrawal date the existing EU rules should continue to apply to establishment of jurisdiction, and recognition and enforcement of any resulting judicial decision, where a dispute arises to which such a choice applies, whether before or after withdrawal date.
  - **Recognition and enforcement of judicial decisions:** the existing EU rules governing recognition and enforcement of judicial decisions should continue to apply to judicial decisions given before the withdrawal date, and to judicial decisions given after the withdrawal date in proceedings which were instituted before that date.
  - **Judicial cooperation procedures and requests for information:** judicial cooperation procedures and requests for information within the European Judicial Network in civil and commercial matters which are pending on the date of withdrawal should continue to be governed by the existing EU rules. The UK agrees that there is a need to identify the appropriate procedural stage that has to have been reached for the procedure to continue in accordance with those rules.
8. References to ‘judicial decision’ in this approach includes reference to authentic instruments formally drawn up or registered, and court settlements approved or concluded, as appropriate.

### **Material scope**

9. The UK largely concurs with the Commission’s position on material scope, which is reflected in Box 1 of the main paper. In addition, it will be necessary to discuss certain conventions in this area, including the 2005 EU–Denmark agreement.
10. The Compensation to Crime Victims Directive (Directive 2004/80/EC) has been included in the proposed material scope in the Commission’s position paper on judicial cooperation in civil and commercial. However, the UK believes it would sit better as a criminal measure.<sup>7</sup>

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<sup>7</sup> This Directive was originally adopted under Art 308 of the EC Treaty (the predecessor to Art 352 TFEU) and would not be within scope of Art 81 of the TFEU if adopted today. The UK regards this as a criminal measure as it deals with victims of violent crime. The EU categorises it as a criminal measure on both the EUR-Lex and Commission websites.

