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Proposal for an Agreement between the EU and the UK on Future Judicial Cooperation

Part I Introduction

1. In December 2017, the Bar sent letters to Michel Barnier for the EU27 and to the then UK Lord Chancellor, setting out its idea for a separate track for justice matters in the UK withdrawal negotiations, leading if necessary, to a stand-alone treaty, capable of surviving even a hard Brexit. This present paper takes that idea one step further by presenting a draft proposal for such an agreement.
2. We are prompted to make this proposal by our concern about the consequences of UK withdrawal from the EU for individual citizens and small businesses, both UK and EU, including in the context of the future recognition and enforcement of their legal rights in cross-border contexts.
3. A number of examples will illustrate the scope and seriousness of the concerns that may arise:
 - Is it the intention that a British father, estranged from his Spanish wife who has returned to Spain taking their children, be unable to obtain enforcement of an English court judgment requiring that he be given access to those children during school holidays? Or if the nationalities and habitual residence were reversed? Or that the non-breadwinner among them not be able to enforce a maintenance order against the other?
 - Will a UK citizen injured elsewhere within the EU lose the right to sue the insurer of the tortfeasor in his own home country, or having successfully done so, will they still be able to enforce the judgment, perhaps for future periodical payments, against the foreign insurer? Or again, if the nationalities and habitual residence were reversed?
 - Will a Belgian consumer whose online order from the UK arrives damaged lose his ready remedy or the ability to enforce it?
 - Will a German SME that supplies parts to a UK manufacturer no longer be able to enforce its German court judgment in England and Wales for non-payment of invoices (or vice versa)?

4. UK and EU citizens and businesses benefit from having at their disposal a range of mechanisms to facilitate cross-border judicial and administrative cooperation. Many of the EU instruments that are now in place have their origins in intergovernmental cooperation, but existing international alternatives would not provide the protection needed, particularly to those that do not have large legal teams at their disposal.
5. Nor do the Citizens Rights' provisions of the draft Withdrawal Agreement provide adequate protection, focussed as they are on rights based on residence. We are looking at the rights going forward of all EU and UK citizens and businesses engaged in cross-border activity between those territories.
6. The Bar of England and Wales considers that providing solutions in the context of Brexit for the types of scenarios described above should rise above political and negotiation rhetoric. We are increasingly concerned that the justice elements could get lost in the negotiations, particularly as they do not fit neatly into economic or thematic cooperation pillars, as foreseen in existing European Council guidelines or European Parliament resolutions. They are horizontal issues, that go to the heart of what it means to have a justice system in which citizens and businesses place their confidence. They concern access to justice at its purest.
7. On the criminal justice side, instruments such as the European Arrest Warrant and European Investigation Order provide for the judicial recognition and enforcement of national judgments and orders in other Member States. The growing volume of such cases illustrates the mutual benefit of such cooperation. The Bar understands, of course, that on the criminal side, the need to continue or replicate the institutional arrangements that underpin the use of such instruments (such as the Schengen Information System, Europol and Eurojust), concerns about data protection as well as the future protection and enforcement of fundamental rights present particular challenges. We are aware of the ongoing efforts by the EU and the UK to find a mutually agreeable solution in this regard, and for the time being therefore, our proposal is focussed on civil justice cooperation.
8. We would however, support any efforts that ensure continuing close cooperation on both the civil and criminal justice sides, whether that best be achieved through having separate pillars of the Withdrawal Agreement and / or Framework for the Future Relationship, or as the case may be, one or more stand-alone international agreements, that could also take effect if the UK were to leave without a formal Withdrawal Agreement and Framework for the Future Relationship in place on time or at all.
9. Accordingly, the attached proposal for an agreement covers Judicial Cooperation in Civil and Commercial Matters only at this point.

Part II **DRAFT AGREEMENT ON FUTURE JUDICIAL COOPERATION IN CIVIL AND COMMERCIAL MATTERS following the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community**

Explanatory text:

(i) The Draft Withdrawal Agreement (in its version dated 19 March 2018) contains, in Title VI of Part III (Articles 62 to 65), a proposal for continued judicial co-operation in civil and commercial matters following withdrawal of the UK from the EU. It is designed to cover arrangements during the transition period (though oddly it states, in Art 168, second paragraph, that it is to take effect at the end of the transition period). Those provisions provide for the continuation during the transition period of the rules and arrangements which apply at present. Articles 62, 64 and 65 are agreed in principle (they are in green in the coloured version of the draft agreement). Article 63 is not agreed and does not yet feature on a list of topics for discussion in the on-going negotiations. The stated position of the Government (August 2017 Position Paper, paragraph 19) is effectively that it wishes to continue the current arrangements. In its “Framework for the UK - EU partnership - Civil judicial cooperation” (June 2018), the Government states (p.17), *“A UK - EU agreement on civil judicial cooperation. We are seeking a new bilateral agreement with the EU to cover a package of measures, underpinned by robust governance arrangements. A UK - EU agreement should recognise that the UK will be a third country but also recognise the close and continuing ties between our citizens and our businesses. The EU has already signalled it is willing to consider a new form of relationship in respect of family law. The UK wants to see this extended across the sphere of civil judicial cooperation.”*

(ii) What follows is a draft Agreement between the UK and the EU the objective of which is to continue those same arrangements beyond the end of the transition period. It proceeds on the assumption that the Withdrawal Agreement is adopted in its current form so far as relevant (except Art 168, as noted above). It is framed as a free-standing intergovernmental instrument, resembling the present Agreement between Denmark and the EU on mutual recognition etc. of judgments in civil and commercial matters. However, it could readily be adopted as a Part of, or Protocol to, the eventual agreement between the UK and EU on their future relationship, or indeed (if agreed in time) as a Protocol to the Withdrawal Agreement. Alternatively, in the event that the UK and the EU fail to reach an agreement in time or at all on the Withdrawal Agreement and Framework for the Future Relationship, and/or the 29 March 2019 passes without all formalities having been completed, such that the UK leaves the EU without agreements in place,

this draft Agreement should then be amended to take effect as a standalone agreement having the effect of continuing those same arrangements beyond the date of the UK's exit from the EU.

(iii) The draft Agreement is arranged as follows:

- Article 1 provides for the Protocol to take effect upon the end of the transition period and contains no end point.
- Articles 3 to 6 are based on Articles 62 to 65 of the Withdrawal Agreement, but without the time limitations in the latter.
- Article 7 deals with the interpretation of the Protocol and applies the draft Articles 153 to 155 of the Withdrawal Agreement, which deal with interpretation of the latter.
- Article 8 deals with the interpretation of the Civil Justice Instruments themselves. It is based on Protocol II to the 2007 Lugano Convention and requires courts – both in the UK and in the EU - to “pay due account to the principles laid down by any relevant decision” of the CJEU or other Member States courts. It also replicates the procedural opportunity for the UK to file submissions with the CJEU on Article 267 references from courts of other Member States. (NB – There is no equivalent provision in the draft Withdrawal Agreement for the transitional period – which is an important omission if this is to be adopted for the future relationship. The matter could be resolved by an amendment of Articles 153 and 154 to refer to the instruments mentioned in Articles 62 to 67).
- Article 9 aims to deal with the amendment or replacement of civil justice instruments so that the UK has an opt-in to new versions of the relevant instruments.

The footnotes at the end are identical to those which appear in the draft Withdrawal Agreement, with the numbering directly replicated. For ease of reference there is a short identifying description of each civil justice instrument where it appears in the text.

DRAFT AGREEMENT

Whereas the European Union and the United Kingdom wish to retain for the legal protection of persons therein established the system of Judicial Cooperation established by the European Union, notwithstanding the withdrawal of the United Kingdom from the European Union,

THE EUROPEAN UNION AND THE UNITED KINGDOM

[...]

HAVE AGREED AS FOLLOWS:

Part I – Common Provisions

Article 1

The provisions of this Agreement shall take effect upon the end of the transition period specified in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

Article 2

The provisions of Parts II and III of this Agreement shall apply subject to the provisions of Part III of this Agreement.

Part II – Continued Application of Instruments relating to Judicial Cooperation in Civil and Commercial Matters

Article 3

Applicable law in contractual and non-contractual matters

In the United Kingdom, the following acts shall continue to apply as follows:

- (a) Regulation (EC) No 593/2008 of the European Parliament and of the Council (Rome I)⁶² ;
- (b) Regulation (EC) No 864/2007 of the European Parliament and of the Council (Rome II)⁶³.

Article 4

Jurisdiction, recognition and enforcement of judicial decisions, and related cooperation between central authorities

1. In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, the following acts or provisions shall continue to apply:
 - (a) the provisions regarding jurisdiction of Regulation (EU) No 1215/2012 of the European Parliament and of the Council (Brussels I – Recast)⁶⁴;
 - (b) the provisions regarding jurisdiction of Regulation (EU) 2017/1001 (EU Trademark Codification)⁶⁵, of Regulation (EC) No 6/2002 (Community Designs)⁶⁶, of Regulation (EC) No 2100/94 (Community Plant Variety Rights)⁶⁷, of Regulation (EU) 2016/679 (the General Data Protection Regulation) ⁶⁸ and of Directive 96/71/EC of the European Parliament and of the Council (Posted Workers in Services)⁶⁹;
 - (c) the provisions of Council Regulation (EC) No 2201/2003 (Jurisdiction etc. in matrimonial and parental responsibility matters)⁷⁰ regarding jurisdiction;
 - (d) the provisions of Council Regulation (EC) No 4/2009 (jurisdiction etc. in relation to maintenance obligations)⁷¹ regarding jurisdiction.

2. In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, the following provisions shall continue to apply in respect of the assessment of the legal force of agreements of jurisdiction or choice of court agreements:
 - (a) Article 25 of Regulation (EU) No 1215/2012 (Brussels I – Recast);
 - (b) Article 4 of Regulation (EC) No 4/2009 (jurisdiction etc. in relation to maintenance obligations).

3. In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, the following acts or provisions shall continue to apply in respect of the recognition and/or enforcement of judgments, decisions, authentic instruments, court settlements and agreements:

- (a) Regulation (EU) No 1215/2012 (Brussels I – Recast);
 - (b) the provisions of Regulation (EC) No 2201/2003 (Brussels II A) regarding recognition and enforcement ;
 - (c) the provisions of Regulation (EC) No 4/2009 (Maintenance Regulation) regarding recognition and enforcement;
 - (d) Regulation (EC) No 805/2004 of the European Parliament and of the Council (European Enforcement Order Regulation) ⁷².
4. In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, the following provisions shall continue to apply as follows:
- (a) Chapter IV of Regulation (EC) No 2201/2003 (Brussels IIA) shall continue to apply to requests and applications received by the central authority or other competent authority of the requested State whether before or after the end of the transition period;
 - (b) Chapter VII of Regulation (EC) No 4/2009 (Maintenance Regulation) shall continue to apply to applications for recognition or enforcement as referred to in point (c) of paragraph 3 of this Article and requests received by the central authority of the requested Member State whether before or after the end of the transition period;
 - (c) Regulation (EU) 2015/848 (Insolvency Regulation)⁷³ shall continue to apply to insolvency proceedings irrespective of whether the main proceedings were opened before the end of the transition period;
 - (d) Regulation (EC) No 1896/2006 (European Order for Payment Procedure)⁷⁴ ;
 - (e) Regulation (EC) No 861/2007 (European Small Claims Procedure) ⁷⁵ ;
 - (f) Regulation (EU) No 606/2013 (mutual recognition of protection measures in civil proceedings) ⁷⁶.

Article 5

Ongoing judicial cooperation procedures

In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, the following acts shall continue to apply:

- (a) Regulation (EC) No 1393/2007 (Service Regulation)⁷⁷
- (b) Council Regulation (EC) No 1206/2001 (Taking of Evidence Regulation)⁷⁸
- (c) Council Decision 2001/470/EC (European Judicial Network in civil and commercial matters)⁷⁹.

Article 6

Other applicable provisions

1. In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, the following acts shall continue to apply:
 - (a) Council Directive 2003/8/EC (minimum common rules on legal aid)⁸⁰;
 - (b) Directive 2008/52/EC of the European Parliament and of the Council (mediation in civil and commercial matters)⁸¹;
 - (c) Council Directive 2004/80/EC (compensation to victims of crime)⁸².
2. Point (a) of paragraph 1, point (a) of paragraph 2 and point (a) of paragraph 3 of Article 4 of this Protocol shall also apply in respect of the provisions of Regulation (EU) No 1215/2012 (Brussels I – Recast) as applicable by virtue of the agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁸³.
3. Point (a) of Article 5 of this Protocol shall also apply with regard to the provisions of Regulation (EC) No 1393/2007 (Service Regulation) as applicable by virtue of the agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil and commercial matters⁸⁴.

Part III – Interpretation.

Article 7

Interpretation of this Protocol

Articles 153 to 155 of the Withdrawal Agreement shall apply in respect of this Agreement as it applies to the Withdrawal Agreement and its respective Parts.

Article 8

Interpretation of the Instruments referred to in Part II

1. Any court applying and interpreting any of the Instruments referred to in Part II of this Protocol shall pay due account to the principles laid down by any relevant decision concerning the provision(s) concerned or any similar provision(s) of

- Regulation (EU) 1215/2012 (Brussels I - Recast),
- Council Regulation (EC) No 44/2001 (Brussels I),
- Council Regulation (EC) 1347/2000 (Brussels II),
- the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed at Brussels on 27 September 1968, and of the Protocol on interpretation of that Convention by the Court of Justice of the European Communities, signed at Luxembourg on 3 June 1971, as amended by the Conventions of Accession to the said Convention and the said Protocol by the States acceding to the European Communities,
- the Agreements between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and on the service of judicial and extrajudicial documents in civil and commercial matters.
- the Revised Lugano Convention of 15 October 2007, or
- the Lugano Convention of 16 September 1988,

rendered by the courts of the Member States of the European Union, of the United Kingdom or of the States bound by the 2007 Lugano Convention and by the Court of Justice of the European Communities.

2. For the courts of Member States of the European Union, the obligation laid down in paragraph 1 shall apply without prejudice to their obligations in relation to the Court of Justice of the European Union resulting from the Treaty on the Functioning of the European Union the European Community or from the Agreements between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and on the service of judicial and extrajudicial documents in civil and commercial matters.

3. Article 267 of the Treaty on the Functioning of the European Union shall apply to the courts of the United Kingdom in respect of an issue concerning

(a) the interpretation of this Agreement, or

(b) the validity and interpretation of any of the instruments referred to in Part II of this Agreement,

provided that:

- a party to the case in which the issue in question arises is a citizen of a Member State of the European Union; and
- that party applies to the court for the issue to be referred to the Court of Justice for a preliminary ruling.

In the event of the Court of Justice making a preliminary ruling pursuant to a request by a court of the United Kingdom, that ruling shall have the same authority in the law of the United Kingdom as it would have in the law of a Member State.

4. The United Kingdom is entitled to submit statements of case or written observations, in accordance with Article 23 of the Protocol on the Statute of the Court of Justice of the European Union, where a court or tribunal of a Member State of the European Union refers to the Court of Justice for a preliminary ruling a question on the interpretation of any of the instruments referred to in Part II of this Agreement.

Part IV – Final Provisions

Article 9 – Revision of Instruments

1. If the European Union amends or replaces any of the instruments referred to in Part II of this Agreement, the European Commission shall, not less than two months before it comes into effect, notify the United Kingdom of such amendment or replacement. Within two months of the date of such notification, the United Kingdom shall notify the European Commission whether it wishes such amended or replacement instrument to be applied in the United Kingdom and in the Member States in situations involving the United Kingdom. If the United Kingdom indicates that it does so wish, this Agreement shall, subject to such transitional arrangements as may apply to that instrument and the instrument which it amends or replaces, apply to the amended or replacement instrument as it applies to the instrument which it amends or replaces.

Footnotes

- 62 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6).
- 63 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 1 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 199, 31.7.2007, p. 40).
- 64 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 (OJ L 351, 20.12.2012, p. 1).
- 65 Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification) (OJ L 154, 16.6.2017, p.1)
- 66 Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ L 3, 5.1.2002, p. 1).
- 67 Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ L 227, 1.9.1994, p. 1).
- 68 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).
- 69 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ L 18, 21.1.1997, p. 1).
- 70 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ L 338, 23.12.2003, p. 1).
- 71 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 (OJ L 7, 10.1.2009, p. 1).
- 72 Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ L 143, 30.4.2004, p. 15).
- 73 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ L 141, 5.6.2015, p. 19).
- 74 Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ L 399, 30.12.2006, p. 1).

- 75 Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ L 199, 31.7.2007, p. 1).
- 76 Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters (OJ L 181, 29.6.2013, p. 4).
- 77 Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 (OJ L 324, 10.12.2007, p.79).
- 78 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 (OJ L 174, 27.6.2001, p. 1).
- 79 Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters (OJ L 174, 27.6.2001, p. 25).
- 80 Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (OJ L 26, 31.1.2003, p.41).
- 81 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ L 136, 24.5.2008, p. 3).
- 82 Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims (OJ L 261, 6.8.2004, p. 15).
- 83 OJ L 299, 16.11.2005, p. 62.
- 84 OJ L 300 17.11.2005, p. 55.