EXPLANATORY MEMORANDUM TO

THE EUROPEAN COMMUNITIES (DEFINITION OF TREATIES) (1996 HAGUE CONVENTION ON PROTECTION OF CHILDREN etc) ORDER 2009

2009 No.

1. This Explanatory Memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

This Explanatory Memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This draft Order specifies the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children signed in the Hague on 19 October 1996 ("the Convention") as one of the Community Treaties as defined in section 1(2) of the European Communities Act 1972 ("the 1972 Act"). Specification will enable the Government to make use of powers under s.2 (2) of the 1972 Act to give the Convention the force of law in the United Kingdom.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 This draft Order is necessary to enable the Government to implement the Convention in the United Kingdom, pursuant to an obligation imposed by Council Decision 2008/431/EC of 5 June 2008. That Decision authorises certain Member States to ratify the Convention on behalf of the European Community, and requires Member States which have not already done so to have taken all necessary preparatory steps for ratification, if possible before 5 June 2010.

4.2 The Council Decision followed on from the Commission proposal 10868/03, COM (2003) 348 for a Council Decision authorising Member States to ratify or accede to the Convention, which was the subject of the required scrutiny process. It cleared scrutiny in both Houses of Parliament in 2003. The UK signed the Convention on 1 April 2003.

4.3 Reference should also be made to the text of the Convention published as a Command Paper (Cm 7727) and, with its accompanying Explanatory

Memorandum, laid before Parliament on 16 October 2009 by the Secretary of State for Foreign and Commonwealth Affairs.

4.4 The Ministry of Justice intends to use the powers under s.2(2) of the 1972 Act to undertake implementation of the provisions of the Convention in England, Wales and Northern Ireland. Scottish Ministers have indicated that they propose to legislate for implementation in Scotland. All necessary implementing legislation must be enacted by June 2010. It is expected that instruments made using s.2(2) powers will be laid before Parliament in the first half of 2010.

5. Territorial Extent and Application

5.1 This instrument extends to the whole of the United Kingdom.

6. European Convention on Human Rights

6.1 The Secretary of State for Justice has made the following statement regarding Human Rights:

"In my view the provisions of the European Communities (Definition of Treaties) (Hague Convention on Protection of Children etc) Order 2009 are compatible with the Convention rights."

7. Policy background

7.1 The Convention supports the protection of children in matters where there is an international element. It provides rules to decide where a dispute regarding a child or the child's property will be determined ("jurisdiction"); whether, and in what circumstances, decisions made by a court or authority in one Contracting State will be recognised and enforced in another Contracting State ("recognition and enforcement") and which law will be applied to a dispute about the child or the child's property (where this relates to the protection of the child) ("applicable law"). It also provides for administrative co-operation between Contracting States to ensure the Convention works effectively and to assist with information and help for children where there is a cross-border aspect to the case. The Convention also deals with how the parental responsibility of a person in one Contracting State is to be treated in another. The primary basis of jurisdiction is the country of the child's habitual residence.

7.2 The Convention should reduce delay, uncertainty and cost in cross-border cases concerning children by avoiding the need to re-litigate cases, decided in one Contracting State, in another Contracting State. It applies to parental responsibility in international situations including its acquisition and extinction and how it may be exercised. It applies to custody and access orders concerning the child (known in domestic law as "residence" and "contact" orders); guardianship; fostering; and aspects of public authority

intervention such as placing a child in institutional or foster care. Adoption, naming of a child, parentage, maintenance and trusts in favour of a child are excluded from the scope of the Convention.

7.3 The Convention is closely connected with existing Community law in this area. Council Regulation (EC) 2201/2003 of 27 November 2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility (known as "Brussels IIa") regulates jurisdiction, recognition and enforcement, and some elements of administrative co-operation between Member States of the European Community and was drafted to fit with the provisions of the Convention (which preceded it).

7.4 If the Convention is ratified by the United Kingdom and other Member States, Brussels IIa will continue to regulate jurisdiction, recognition and enforcement within the European Community except Denmark. Additionally, the Convention will apply between the UK and Denmark, and between other Member States regarding matters not covered by Brussels IIa. The Convention will govern relationships between the United Kingdom and Contracting States other than those in the European Community.

7.5 Although the European Community has competence (power to conclude international agreements) for certain provisions of the Convention, the Convention itself can only be ratified or acceded to by States Parties. Therefore the European Community cannot ratify the Convention in its own right. Since the European Community has competence, the Government is seeking to specify the Convention as a Community Treaty under s.1(3) of the 1972 Act. Member States retain competence for some aspects of the Convention, for example the applicable law provisions.

7.6 It is not possible to undertake the necessary implementation of the Convention in United Kingdom law without legislation.

- ***Consolidation***

7.7 Not applicable: the Convention itself is free-standing, and the connected European instruments have direct effect and are not susceptible to consolidation at domestic level.

8. Consultation outcome

8.1 Public consultation was undertaken on whether the United Kingdom should sign and ratify the Convention in 2001. This included specialists in the legal profession and the judiciary. The response was favourable with the following main benefits being identified:

- It should ensure that, so far as possible, conflicts between the courts of different countries in relation to children are avoided;
- It should enable parents, children and others to have access to convenient and accessible courts;

- It should ensure that decisions relating to children made in one country will be respected in others, so that people do not have to incur the expense and trouble of taking fresh proceeding when they move to another country;
- It will complement and strengthen the operation of the 1980 Hague Child Abduction Convention between States which have ratified both Conventions.

The Government decided in May 2001 to sign and ratify the Convention.

8.2 Provided there is agreement to implementation of the Convention, there will be short technical consultations with key interests on the implementing Statutory Instrument and on the rules of court Statutory Instrument.

9. Guidance

9.1 Although the Order specifying the Convention as a Community Treaty will require no guidance, it is intended that guidance on the operation of the Convention and its relationship to other legal instruments in this subject area will be provided to relevant users.

10. Impact

10.1 An Impact Assessment has not been prepared for this instrument since the Order specifying the Convention as a Community Treaty will have no impact on business, charities or voluntary bodies.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 Not applicable.

13. Contact

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