EXPLANATORY MEMORANDUM TO

THE JURISDICTION AND JUDGMENTS (FAMILY) (AMENDMENT ETC.) (EU EXIT) REGULATIONS 2019

2019 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Act.

2. Purpose of the instrument

2.1 This instrument, the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019, is made under the European Union (Withdrawal) Act 2018 (the Withdrawal Act) to ensure a functioning domestic statute book in the event the UK exits the EU without an agreement in relation to civil judicial cooperation in family law. The relevant EU family law instruments deal with jurisdiction and recognition in matrimonial matters of divorce, legal separation or annulment (divorce etc), parental responsibility (including residence and contact and international child abduction) and family maintenance matters reciprocally between EU Member States and that reciprocity will no longer apply between EU Member States and the UK after exit. This instrument addresses changes required to retained EU law to avoid inappropriate unilateral UK application of these rules following exit, as well as making provision for cases which started before exit day.

Explanations

What did any relevant EU law do before exit day?

2.2 Council Regulation No. 2201/2003 (Brussels IIa) provides rules:

- to decide which EU Member State's court has the power to act (jurisdiction) in proceedings for matrimonial matters of divorce etc or parental responsibility matters
- on recognition and enforcement of judgments relating to these matters between EU Member States
- on the return of children wrongfully removed to, or wrongfully retained in, other Member States (abduction), which supplement the international 1980 Hague Child Abduction Convention (1980 Hague Convention)
- on cooperation between central authorities (administrative bodies sending and receiving applications and requests between countries) in matters of parental responsibility to assist individuals and courts to deal with applications and requests between parties in different EU Member States covered by Brussels IIa
- on the provision of legal aid in such matters.

2.3 Council Regulation No. 4/2009 (the Maintenance Regulation) provides rules:

- to decide which court has the power to act (jurisdiction) in proceedings for family maintenance obligations

- on recognition and enforcement of family maintenance decisions relating to these matters between EU Member States
- on cooperation between central authorities to assist individuals and courts to deal with applications and requests between parties in different EU Member States on matters covered by the Maintenance Regulation
- on the provision of legal aid in such matters.

Why is it being changed?

2.4 On exit day, Brussels IIa and the Maintenance Regulation (and related primary and secondary legislation) will become "retained EU law" under the Withdrawal Act. However, in the absence of an agreement between the EU and the UK on the continued operation of Brussels IIa and the Maintenance Regulation rules post-exit, the two EU Regulations will cease to operate reciprocally and therefore effectively between the EU Member States and the UK. The UK cannot legislate to restore this reciprocity. Alternative arrangements for the matters covered by Brussels IIa and the Maintenance Regulation (rules of jurisdiction, recognition and enforcement and central authority cooperation) are therefore required post EU Exit.

What will it now do?

2.5 This instrument revokes Brussels IIa for England and Wales and Northern Ireland and revokes the Maintenance Regulation for the UK, except in relation to proceedings or applications which have already started before exit day (see 7.1). After exit day, the rules of Hague Conventions will replace many of the Brussels IIa and Maintenance Regulation rules on recognition and enforcement and central authority cooperation for matters involving EU Member States (see 7.3). In other areas, this instrument ensures there are workable post exit rules on jurisdiction for divorce etc (see 7.2,7.4 and 7.7) and for maintenance matters (see 7.3 and 7.8).

3. Matters of special interest to Parliament

Matters of special interest to the [Joint Committee on Statutory Instruments

3.1 None

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this instrument varies between provisions.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the UK.

4.2 The territorial application of this instrument is the UK except that the revocation of Brussels IIa and certain amendments to the Family Law Act 1986 do not apply to Scotland.

5. European Convention on Human Rights

5.1 The Parliamentary Under-Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019 are compatible with the Convention rights."

6. Legislative Context

6.1 Brussels IIa and the Maintenance Regulation, as directly effective EU legislation will, under section 3(1) of the Withdrawal Act, form part of domestic law on and after exit day. The domestic legislation that implements Brussels IIa and the Maintenance Regulation, as EU-derived domestic legislation, will continue to have effect in domestic law on and after exit day under section 2(1) of the Withdrawal Act. Both direct EU legislation and EU-derived domestic legislation are "retained EU law" within the meaning of the Act.

6.2 Section 8(1) of the Withdrawal Act empowers a Minister of the Crown to make regulations to prevent, remedy or mitigate any failure of retained EU law to operate effectively, arising from EU exit. Section 8(2) provides that deficiencies which may be remedied include where the Minister considers that the retained EU law makes provision for, or in connection with, reciprocal arrangements between the UK or any part of it or a public authority in the UK and a Member State, or a public authority in a Member State, which no longer exist or are no longer appropriate. Regulations made under section 8(1) may make any provision that could be made by an Act of Parliament, including repeal of relevant retained EU law.

7. Policy background

What is being done and why?

7.1 This instrument:

- revokes Brussels IIa as retained under the Withdrawal Act for England and Wales and Northern Ireland. It also revokes the domestic legislation that implemented Brussels IIa in England and Wales and Northern Ireland (and part revokes this legislation for Scotland in relation to the child abduction override);
- revokes the Maintenance Regulation as retained under the Withdrawal Act for the UK. It also revokes the domestic legislation that implemented the Maintenance Regulation (except where the legislation is required to implement the 2007 Hague Convention on Child Support and Other Forms of Family Maintenance (the 2007 Hague Maintenance Convention));
- revokes Council Regulation (EC) No 664/2009 on making third country agreements for matrimonial, parental responsibility and maintenance obligations matters as retained under the Withdrawal Act for the UK;
- revokes Council Regulation (EC) No 2116/2004 amending Brussels IIa which concerns arrangements with the Holy See in relation to jurisdiction and recognition and enforcement of judgments in matrimonial and parental responsibility matters;
- makes amendments to domestic primary and secondary legislation in the light of the revocation of Brussels IIa and the Maintenance Regulation;
- makes saving and transitional provision for proceedings before a court seised (an application has been validly made to the court), and for applications for recognition and enforcement made before exit day;

7.2 The revocation of Brussels IIa and the Maintenance Regulation and the amendments to domestic legislation will ensure that references to EU legislation which no longer applies to the UK are removed from domestic legislation in England and Wales and Northern Ireland (and to the limited extent described above) Scotland and are replaced with appropriate provisions. (The Scottish Government will take forward its own legislation on other aspects of Brussels IIa as necessary.) This in turn will ensure:

- there are effective rules on jurisdiction in divorce etc proceedings, recognition and enforcement of divorce etc orders and jurisdiction, recognition and enforcement and central authority cooperation for parental responsibility and maintenance matters involving EU Member States. The UK will operate a number of Hague Conventions which provide reciprocal rules on recognition and enforcement and central authority cooperation on many of the matters regulated under Brussels IIa and the Maintenance Regulation;
- there are effective and workable rules governing jurisdiction for opposite sex divorce etc proceedings and parental responsibility cases in England and Wales and Northern Ireland, and in the case of child abduction, for the UK;
- there are effective and workable rules governing jurisdiction for maintenance in the UK;
- there are clear rules for cases, applications and requests begun under Brussels IIa and the Maintenance Regulation but not concluded at the time of exit.

7.3 The UK is a Contracting State to a number of important Hague Conventions on family law, including the 1970 Hague Convention on the Recognition of Divorces and Legal Separations (1970 Hague Convention), the 1973 Hague Maintenance Convention (1973 Hague Convention), the 1980 Hague Convention and the 1996 Hague Protection of Children Convention (1996 Hague Convention). The UK is also bound by the 2007 Hague Maintenance Convention by virtue of its EU membership. The UK intends to continue to participate in this Convention after exit (the formal steps began by laying Command Paper 9707). The UK already operates these Conventions with other non-EU Contracting States and, after exit day, will operate them with EU Contracting States. This instrument amends domestic law to ensure this is possible (in relation to maintenance, relevant changes are also made by the International Recovery of Maintenance (Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007 (EU Exit) Regulations 2018 (S.I. 2018/1125)). In addition, as well as the 2007 Hague Convention, this instrument amends domestic law so that the 1973 Hague Convention and the 1956 New York (UN) Convention on Recovery of Maintenance will again operate between the UK and those EU Member States party to them where appropriate.

7.4 For the recognition of divorces, the provisions of the 1970 Hague Convention are implemented by the Family Law Act 1986, which also provides additional provision for recognition as permitted in the Convention. This instrument amends the Family Law Act 1986 to apply to the recognition of divorce etc orders obtained in EU Member States after exit day.

7.5 In the areas where there are Hague Conventions, they provide an alternative to the EU legislation and, as they are already operated with non-EU Contracting States, the courts and legal practitioners who work in cross-border family law are familiar with them. For example, the 1980 Hague Convention currently applies to international

child abduction matters involving all EU Member States and more than 90 Contracting States across the world.

7.6 For those areas not covered by Hague Convention rules, in particular divorce etc and maintenance jurisdiction, this instrument takes the following approach.

7.7 For divorce etc jurisdiction, this instrument revokes (for England and Wales and Northern Ireland) Brussels IIa and replicates the rules for establishing divorce jurisdiction set out in Article 3 of Brussels IIa, with the appropriate drafting changes necessary to account for the UK no longer being an EU Member State (including omitting the Brussels IIa joint application jurisdiction rule, which is not applicable because joint application for divorce by both parties is not available in England and Wales and Northern Ireland). It extends the additional jurisdiction rule of sole domicile available for non-EU cases to all cases (currently sole domicile is only available where no EU court would have jurisdiction under Brussels IIa). It also replaces the mandatory stay provisions that currently apply to cases involving the courts of EU Member States (which mean that the court where proceedings started second must suspend proceedings in favour of the court where proceedings started first) with the discretionary stay provisions that currently apply in other cases (which mean that a court where the case has started can choose whether or not to seek to transfer the case).

7.8 As to maintenance, this instrument revokes the Maintenance Regulation and amends relevant domestic legislation, including for intra-UK proceedings, broadly to adopt the position before the Maintenance Regulation (applying from June 2011) and before other EU rules. For the other EU instruments before the Maintenance Regulation relating to family maintenance, amendments to that retained EU law are made in the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019.

7.9 This instrument has saving and transitional provisions to ensure that where cases, applications and requests for assistance have begun, or maintenance is due to be paid, before exit day they will continue under the EU rules after exit day, including unilaterally where necessary.

7.10 This instrument applies to private international law which is a transferred matter for Northern Ireland under section 4(1) of the Northern Ireland Act 1998. The UK Government remains committed to restoring devolution in Northern Ireland. This is particularly important in the context of EU Exit where we want devolved Ministers to take the necessary actions to prepare Northern Ireland for exit. We have been considering how to ensure a functioning statute book across the UK including in Northern Ireland for exit day absent a Northern Ireland Executive. With exit day less than four months away, and in the continued absence of a Northern Ireland Executive, the window to prepare Northern Ireland's statute book for exit is narrowing. UK Government Ministers have therefore decided that in the interests of legal certainty in Northern Ireland, the UK Government will take through the necessary secondary legislation at Westminster for Northern Ireland, in close consultation with the Northern Ireland departments. This is one such instrument.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument is being made using the powers in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom

from the European Union. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

9.1 There are no current plans to consolidate the legislation amended by this instrument.

10. Consultation outcome

10.1 There has been no formal consultation on this instrument.

10.2 The Government's no deal legislative options have been discussed with key family law stakeholders and leading family law practitioners from October 2016 to December 2018 prior to finalising the policy position set out in this instrument. The Government considered that for this technical area of law it was appropriate to discuss with specialist stakeholders and practitioners. There was general agreement to the Government's proposal that, where possible, the UK should fall back on to Hague Convention rules and with the proposal to repeal the Brussels IIa and Maintenance Regulation jurisdiction rules, in particular, the lis pendens mandatory stay rule. Stakeholders recognised that the rules on divorce and maintenance would not work unilaterally.

10.3 The devolved administrations have been consulted about this instrument.

11. Guidance

11.1 The Government has no plans to issue guidance on this instrument.

12. Impact

12.1 We have assessed the impact of this instrument and will publish a full Impact Assessment shortly. However, a description of the expected impacts on business, charities, voluntary bodies and the public sector is set out below.

12.2 In the event of a no deal EU Exit, the impact on business, charities or voluntary bodies (being those that advise, represent and support individuals and families engaged in cross-border family law matters) of this instrument will, on balance, be positive. The amendments provide a basis for continued reciprocal cooperation with most EU Member States through the UK's participation with those Member States in 1996 Hague, 1980 Hague and 1970 Hague as implemented through the Family Law Act 1986. Where no Hague Convention rules are available (divorce etc jurisdiction, maintenance jurisdiction and parental responsibility legal aid) this instrument provides workable alternative rules that will promote certainty and ensure equality of treatment between cross-border family law cases in EU Member States and other cross-border cases. However, the change to Hague Convention rules and the new domestic rules on divorce etc jurisdiction, maintenance jurisdiction and parental responsibility legal aid will require relevant businesses, charities and voluntary bodies to familiarise themselves and adjust their administrative arrangements to deal with the new rules. In some cases (especially divorce etc jurisdiction) the new rules could lead to greater disputation and complexity.

12.3 In the event of a no deal EU Exit, the impact on the public sector is expected to be an increase in case volume and complexity of cases before the family court due to the changes in divorce and maintenance jurisdiction rules. However, this instrument will

have positive impacts on the family court as it ensures there will be workable rules governing cross-border family law disputes.

12.4 The government objective in the event of 'no deal' is to minimise disruption. Therefore, the impact has additionally been measured against the current arrangements with the EU. Whilst the Hague Conventions and other measures contained within this SI are not as comprehensive as the existing EU arrangements, the adoption of these Conventions and other measures will ensure that there is an established and consistent framework for operating after March 2019. This is expected to minimise any disruption upon exit from the EU.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 As this instrument is made under the EU (Withdrawal) Act 2018, no review clause is required.

15. Contact

15.1 Miss G Bailey at the Ministry of Justice Telephone: +44 (0)20 3334 3200 or email: gay.bailey@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Kristen Tiley, Deputy Director for Europe Division, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Lucy Frazer QC MP at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

1.1 The Parliamentary Under Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019 does no more than is appropriate".

1.2 This is the case because, consistent with the *vires* in section 8 of the Act, this instrument does no more than ensure that, post exit, there will be effective rules in relation to jurisdiction, recognition and enforcement, central authority cooperation and legal aid in matrimonial, parental responsibility and maintenance matters to replace both the Brussels IIa rules in England and Wales and Northern Ireland and, to the extent specified, Scotland and the Maintenance Regulation rules in the UK, that will cease to apply reciprocally between the UK and the EU upon UK EU exit.

2. Good reasons

2.1 The Parliamentary Under Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action".

2.2 These are: as noted in paragraph 2.4, upon EU exit, Brussels IIa and the Maintenance Regulation will cease to apply to the UK meaning the reciprocity on which the Brussels IIa and Maintenance Regulation rules on jurisdiction, recognition and enforcement, central authority cooperation and legal aid are based will be lost. As noted in section 7, this instrument ensures that new rules (a combination of Hague Conventions and new domestic rules dealing with these matters) will be in place ensuring a functioning statute book upon exit.

3. Equalities

3.1 The Parliamentary Under Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement:

"The draft instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts."

3.2 The Parliamentary Under Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the draft instrument, I, Lucy Frazer QC MP, Parliamentary Under Secretary of State for Justice, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.

This Act does not extend to Northern Ireland, but as the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019 extend to Northern Ireland, I have given equivalent due regard to the need to eliminate discrimination, harassment and victimisation in relation to Northern Ireland".

4. Explanations

4.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.