EXPLANATORY MEMORANDUM TO

THE JURISDICTION, JUDGMENTS AND APPLICABLE LAW (AMENDMENT) (EU EXIT) REGULATIONS 2020

2020 No. [XXXX]

1. Introduction

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

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument is made under sections 8 and 8B of the European Union (Withdrawal) Act 2018 (the Withdrawal Act). It amends a number of statutory instruments made to remedy deficiencies in domestic legislation arising from the UK's withdrawal from the European Union (EU). The amendments address minor defects in those instruments, clarify the interaction of international conventions and domestic law after the end of the transition period and ensure two of those instruments are consistent with the provisions of the Withdrawal Agreement.

2.2 This Memorandum refers to "the end of the transition period" rather than to "exit day", since references to "exit day" in the instruments are or will be amended where necessary by this instrument or a separate instrument or instruments made under powers in relation to implementation of the Withdrawal Agreement.

Explanations

What did any relevant EU law do before the end of the transition period?

2.3 Regulation (EU) No 1215/2012[1] (Brussels Ia) provides rules on jurisdiction and the recognition and enforcement of judgments in cross-border civil and commercial matters.

2.4 Council Regulation (EC) No 2201/2003[2] (Brussels IIa) provides rules on jurisdiction and the recognition and enforcement of judgments in cross-border family matters, including divorce and parental responsibility matters (matters involving children).

2.5 Council Regulation (EC) No 4/2009[3] (the Maintenance Regulation) provides rules on jurisdiction and the recognition and enforcement of family maintenance (financial

[1] 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, repealing Regulation (EC) No 1347/2000

[2] 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

[3] 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.

support paid by a person to or for the benefit of their former partner or their children) involving parties located in two or more EU Member States.

2.6 Regulation (EC) No. 593/2008[4] (Rome I) establishes the rules applicable to EU Member States (except Denmark) that determine which country's laws apply to contractual obligations raising cross-border issues.[5]

2.7 Regulation (EC) No. 864/2007[6] (Rome II) establishes the rules applicable to EU Member States (except Denmark) that determine the law applicable to non-contractual obligations raising cross-border issues.

2.8 Directive 2008/52/EC[7] (the Mediation Directive) seeks to harmonise certain aspects of mediation in relation to EU cross-border disputes, with the aim of promoting its use in those EU cross-border disputes.

2.9 The Family Procedure Rules (FPR) make provision governing practice and procedure for family proceedings (in the Family Court and the Family Division of the High Court). This includes provision in relation to proceedings under or pursuant to a variety of EU instruments and international agreements between the EU and third countries (for example, for an application for the court to exercise powers conferred by such an instrument or agreement).

2.10 The Court of Protection Rules (COPR) make provision governing practice and procedure in the Court of Protection, including provision governing practice and procedure for proceedings under or pursuant to the EU Service Regulation[8] and the Taking of Evidence Regulation[9].

Why is it being changed?

2.11 The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (the Civil Regulations) revoke Brussels Ia. In its place, domestic private international law rules will apply to cross-border cases involving parties from EU Member States. However, to ensure employees are not disadvantaged by the UK's withdrawal from the EU, the Civil Regulations transpose a special "protective" jurisdiction rule for employment cases from Brussels Ia into UK domestic law.

2.12 An error has been identified in the way the Civil Regulations transpose that special rule. The Government's policy intention is to replicate, as closely as possible, the Brussels Ia employment jurisdiction rule, modified only as necessary to make it work in the UK. In one aspect, the Brussels Ia jurisdiction rule has been inadvertently broadened to encompass employees without a habitual place of work in *any one part of the UK*, but who may have a habitual place of work in a country outside the UK, rather than employees without a habitual place of work in *any one country*.

[4] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations

[5] Rome I replaced the rules in the 1980 Rome Convention on the law applicable to contractual obligations, with effect from 17 December 2009, although the 1980 Rome Convention continues to apply to certain contracts entered into before Rome I entered into force.

[6] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations

[7] 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

[8] Council Regulation (EC) No. 1393/2007

[9] Council Regulation (EC) No. 1206/2001

2.13 The Jurisdiction and Judgments (Family) (Amendment Etc.) (EU Exit) Regulations 2019 (the Family Regulations) revoke Brussels IIa and the Maintenance Regulation. In their place the UK will fall back (principally) onto the 1996 Hague Convention[10] (for cross-border parental responsibility matters involving parties from EU member states) and the 2007 Hague Convention[11] (for the cross-border recognition and enforcement of maintenance involving parties from EU member states). Where there are no Hague Convention rules to fall back on, the Family Regulations make provision for the rules which will apply. In the case of maintenance jurisdiction, these are primarily the rules as they existed prior to the relevant EU rules taking effect (the pre-EU rules).

2.14 The Family Regulations contain saving and transitional provisions that determine how cases that start under Brussels IIa and the Maintenance Regulation before, but are ongoing as at, the end of the transition period are to be treated. These provisions were made in contemplation of the UK's exit from the EU without an agreement on withdrawal. As such they are inconsistent with the provisions of Article 67 of the Withdrawal Agreement, insofar as those provisions apply to matters commenced before the end of the transition period under Brussels IIa and the Maintenance Regulation.

2.15 Additionally, two minor errors have been identified in the amendments the Family Regulations make to domestic legislation to re-instate the pre-EU jurisdiction rules in Scotland. The first of these is the inclusion of a reference to actions for adherence and aliment, which have been abolished. The second has the unintended effect that, post the end of the transition period, an applicant seeking aliment (on a standalone basis – i.e. where that is not connected to divorce or other proceedings) will be unable to bring the proceedings in Scotland and will have to pursue the paying party in the courts of the location (domicile) of the paying party. This was not the intention and therefore does not meet the Government's policy intention. The Government also recognises that some of the provisions of the Family Regulations are potentially open to argument about their precise effect, family law stakeholders having expressed uncertainty as to the effect of the saving and transitional provisions in relation to choice of court agreements and intra-UK maintenance disputes and as to the relationship between domestic jurisdiction rules in parental responsibility matters and maintenance matters and relevant Hague Convention rules after the end of the transition period.

2.16 The Cross-Border Mediation (EU Directive) (EU Exit) Regulations 2019 (the Mediation Regulations) revoke and repeal (as the case may be) the domestic legislation which gave effect to the EU Mediation Directive (other than court rules and matters within the legislative competence of the Scottish Parliament). They also make provision of a saving and transitional nature for EU cross-border mediations that commence before the end of the transition period.

[10] Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. All EU Member States are Contracting States to this Convention.

[11] Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance. All EU Member States are Contracting States to this Convention by virtue of their EU Membership.

2.17 One of the domestic instruments amended by the Mediation Regulations, the Fair Employment and Treatment (Northern Ireland) Order (the NI Order), has, subsequent to the making of the Mediation Regulations, been further amended by the Employment Act (Northern Ireland[12]) with effect from 27 January 2020. The Mediation Regulations need to be amended to take account of the 27 January 2020 amendment to the NI Order to ensure the meaning of the relevant provision in the NI Order[13] is clear once it is amended by the Mediation Regulations.

2.18 The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (the Rome Regulations) amend the retained[14] versions of the Rome I and Rome II Regulations (and, for contracts entered into between 1 April 1991 and 16 December 2009, the rules of the Rome Convention) so that the rules of Rome I, Rome II and the Rome Convention will apply as domestic law from the end of the transition period.

2.19 The Rome Regulations were made in contemplation of the UK's exit from the EU without an agreement on withdrawal. As such they are inconsistent with the provisions of Article 66 of the Withdrawal Agreement, insofar as those provisions apply in respect of contracts concluded before the end of the transition period and events giving rise to damage, where such events occurred before the end of the transition period.

2.20 The Family Procedure Rules 2010 (FPR) and Court of Protection Rules 2017 (COPR) (Amendment) (EU Exit) Regulations 2019 (the Rules Regulations) make amendments to the FPR and the COPR that are consequential upon the Withdrawal Act and upon statutory instruments made under powers conferred by that Act which form part of the implementation of the Government's strategy for ensuring an orderly statute book at the end of the transition period.

2.21 There is a minor technical error in the saving and transitional provisions for the FPR (which miss out a link in the FPR, for maintenance cases arising under the 2007 Lugano Convention, to the transitional provisions made in the Civil Regulations for such cases). In addition, a cross-referencing error in the amendments to the COPR have been noted as has the failure to omit an erroneous reference to EU Member States from a definition of 'Service Convention country' in the COPR.

What will it now do?

2.22 The Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020:

- amend the Civil Regulations to ensure the Brussels Ia employment jurisdiction rules are correctly transposed into domestic law, modified only as necessary to make them work in the UK context
- amend the Family Regulations to address the error in the amendments that re-instate the pre-Maintenance Regulation jurisdiction rules in Scotland for ailment to ensure these rules are properly re-instated, so that applicants can bring proceedings in Scotland against paying parties located (domiciled) in other countries

[12] 2016, c.15, s6(1).
[13] Article 46
[14] Rome I, Rome II (and for contracts entered into between 1 April 1991 and 16 December 2009, the rules of the Rome Convention), are retained pursuant to section 3 of the European Union (Withdrawal) Act 2018.

- amend the Family Regulations to remove the obsolete reference to "actions for adherence and aliment" from the Scottish maintenance jurisdiction rules
- amend the Family Regulations to clarify that they do not affect the application of Article 67 of the Withdrawal Agreement (so that for cases to which those provisions of the Withdrawal Agreement apply, the changes made by the Family Regulations do not have effect in respect of such cases); and also to clarify the transitional position for intra-UK maintenance matters commenced under the intra-UK rules prior to the end of the transition period and choice of court agreements made under the EU or intra-UK rules before the end of the transition period
- amend the Family Regulations to make clear that, after the end of the transition period, the relevant Hague Convention rules take precedence over the domestic jurisdiction rules in cases that properly fall under the relevant Hague Conventions
- amend the Mediation Regulations to take account of the January 2020 amendment to the NI Order made by the Employment Act (Northern Ireland) 2016
- amend the Rome Regulations so that Article 66 of the Withdrawal Agreement will apply to determine applicable law in respect of contracts entered into, and events giving rise to damage which occur, before the end of the transition period, in the case of conflicts between the laws of the UK and other countries
- amend the Rules Regulations to restore the link between the saving and transitional provisions in the FPR and those of the Civil Regulations in respect of Lugano Convention family maintenance cases;
- amend the Rules Regulations to correct the cross-referencing error and omit the erroneous reference to EU Member States from the relevant definition of 'Service Convention country' in the COPR.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument (in an earlier form, without the amendments to the Rome Regulations) was laid for sifting by the Sifting Committees on 2 July. In its Seventh Report of Session 2019–21 the European Statutory Instruments Committee (ESIC) has recommended the Fixing SI be progressed via the draft affirmative procedure. The Government has accepted the ESIC's recommendation.

3.2 The amendments to the Civil Regulations and most of the amendments to the Family Regulations were included in an earlier instrument (the Civil Jurisdiction and Judgments (Civil and Family) (Amendment) (EU Exit) Regulations 2019) that was made, on account of urgency, subject to the "made affirmative" procedure. That instrument was considered by the Delegated Legislation Committee of the House of Commons on 28 October 2019, and the motion to consider the instrument was carried unopposed after a short debate; but it was, due to the 2019 General Election, not debated in the House of Lords, and accordingly ceased to have effect.

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)

3.3 The territorial application of this instrument includes Scotland and Northern Ireland.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the whole of the UK.

4.2 The territorial application of this instrument varies between provisions. This instrument amends or revokes retained EU law with varying territorial application, including provision applying to Northern Ireland and Scotland. In each case, this instrument amends or revokes that provision in respect of its full territorial application.

5. European Convention on Human Rights

5.1 The Parliamentary Under Secretary of State in the Ministry of Justice, Alex Chalk MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020 are compatible with the Convention rights."

6. Legislative Context

6.1 The Civil Regulations, the Family Regulations, the Mediation Regulations, the Rome Regulations and the Rules Regulations are made under section 8 of the Withdrawal Act to remedy deficiencies in domestic legislation and rules of court arising from the UK's exit from the EU. The Civil Regulations were made on 4 March 2019, the Family Regulations on 6 March 2019, the Rome Regulations on 29 March 2019 and the Mediation Regulations on 1 March 2019, all by affirmative procedure. The Rules Regulations were made on 7 March 2019 by negative procedure. The Civil Regulations, Family Regulations, Mediation Regulations and Rules Regulations will come into effect at the end of the transition period.

6.2 The Withdrawal Agreement makes provision for the terms of the UK's exit from the EU including, at Part 3, Title VI, the treatment of transitional cases in civil and family law. The provisions of Part 3, Title VI of the Withdrawal Agreement are, by virtue of section 7A of the 2018 Act, directly applicable in the UK.

6.3 Section 8B of the 2018 Act includes a power to make regulations to supplement the effects of s7A, including to restate anything that forms part of domestic law by virtue of section 7A and Part 3 of the Withdrawal Agreement, including in order to make the law clearer or more accessible.

7. Policy background

What is being done and why?

Amendments to the Mediation Regulations

7.1 The Mediation Regulations amend the NI Order to omit Article 46A, which implements Article 8 of the Mediation Directive to extend limitation periods for the bringing of claims alleging unlawful discrimination or harassment to allow for an EU

cross-border mediation to occur[15]. A consequential amendment is made to Article 46 to omit a reference to Article 46A.

7.2 Subsequent to the Mediation Regulations being made, Article 46 has been amended by the Employment Act (Northern Ireland) 2016[16] to insert a reference to new Article 46B. This amendment came into effect on 27 January 2020 and, as such, the amendment to Article 46 in the Mediation Regulations does not take account of it. To ensure the effect of Article 46 post the end of the transition period is clear, the Mediation Regulations need to be amended to take account of the amendment to Article 46 made by the Employment Act (Northern Ireland) 2016. This instrument makes the appropriate amendment to the Mediation Regulations.

Amendments to the Civil Regulations

7.3 The issue with the Civil Regulations is that an error was made in relation to one of the three grounds of special employment jurisdiction sought to be transposed from Brussels Ia into UK domestic law. Article 21 of Brussels 1a provides that an employer may be sued:

- in the courts of the EU member state in which the employer is domiciled, or
- in the courts for the EU member state where or from where the employee habitually carries out their work, or the courts of the last place from which they did so, or
- where the employee does not or did not habitually carry out their work in any one country, in the courts of the EU member state where the business which engaged the employee is or was situated.

The error identified relates to the third ground above.

7.4 The third ground of the Brussels Ia rule applies only where an employee does not or did not habitually work *in any one country*. As transposed into UK law by the Civil Regulations, the rule provides that an employee who does not habitually work *in any one part of the UK* can sue in the courts of the part of the UK where the business which engaged them is situated. This means that the rule could be used even though the employee does have a habitual place of work in another country. This unintentional broadening of the category of employees to which these special jurisdictional rules apply does not meet the Government's policy intention which was to replicate, as closely as possible, the Brussels 1a employment jurisdiction rule, modified only as necessary to make it work in the UK.

7.5 This instrument addresses this error by amending the Civil Regulations to ensure that, as transposed into domestic law, the third ground of the special employment jurisdiction rule will properly reflect the Brussels Ia rule, by acting as a limited fall back where the employee has no habitual place of work anywhere in the world.

Amendments to the Family Regulations

7.6 The first issue with the Family Regulations relates to the Scottish maintenance jurisdiction rules that will apply after the end of the transition period. Schedule 8 to the Civil Jurisdiction and Judgments Act 1982 (the CJJA) makes provision for jurisdiction rules for Scotland. Prior to the commencement of the Maintenance

[15] Article 46A will continue to apply in respect of EU cross-border mediations commenced before the end of the transition period.
[16] 2016, c.15.

Regulation, paragraph 2(e) of Schedule 8 made provision for cross-border cases involving standalone aliment claims only (i.e. where that is not connected to divorce or other proceedings), involving countries other than EU member states and allowed a person who is domiciled or habitually resident in Scotland to sue a party who is domiciled or habitually resident in another country for standalone aliment in the Scottish courts. Paragraph 2(e) was revoked when the Maintenance Regulation came into effect in the UK.

7.7 To properly restore the Scottish pre-Maintenance Regulation jurisdiction rules in line with the Government's policy, the Family Regulations should have reinstated paragraph 2(e) of Schedule 8. However, they do not do so. This was an oversight. The result if not corrected would be that after the end of the transition period, an applicant seeking standalone aliment from a person domiciled or habitually resident in another country would not be able to bring proceedings in the Scottish Courts and would have to pursue their claim in the courts of the other person's domicile or residence. While the number of cases affected is not likely to be many, the impact on the parties involved in those cases could be significant.

7.8 Additionally, the Family Regulations re-instate a reference to "actions for adherence and aliment" into the Scottish maintenance jurisdiction rules. This was done in error. Actions for adherence were abolished in Scotland in 1984.

7.9 This instrument addresses these errors by amending the Family Regulations to ensure that paragraph 2(e) of Schedule 8 of the CJJA is re-instated to its pre-Maintenance Regulation form and to remove the reference to actions for adherence and aliment.

7.10 The second issue with the Family Regulations relates to the saving and transitional provisions in regulation 8. These provisions provide for matters commenced under the Maintenance Regulation and Brussels IIa rules prior to the end of the transition period to continue to be governed by these EU rules post the end of the transition period. This includes the Maintenance Regulation's rules about choice of court agreements which will continue to apply after the end of the transition period to proceedings that are before a court designated in a choice of court agreement.

7.11 When the EU Maintenance Regulation came into effect in the UK, new maintenance jurisdiction rules for intra-UK matters (that is maintenance disputes where the parties live in different parts of the UK), based on the Maintenance Regulation's jurisdiction rules, were introduced.

7.12 Title VI of Part 3 of the Withdrawal Agreement contains directly applicable saving and transitional (separation) provisions in relation to ongoing judicial co-operation in civil and commercial matters. Article 67 makes provision for matters commenced before the end of the transition period under Brussels IIa and the Maintenance Regulation.

7.13 The saving and transitional provisions of the Family Exit SI were made in contemplation of the UK's exit from the EU without an agreement on withdrawal. As such they are inconsistent with the provisions of Article 67 of the Withdrawal Agreement, insofar as those provisions apply to matters commenced before the end of the transition period under Brussels IIa and the Maintenance Regulation.

7.14 Additionally, the saving and transitional provisions of the Family Regulations do not expressly apply to matters commenced under the intra-UK maintenance jurisdiction rules. Family law stakeholders have advised that this creates uncertainty as to the application of the saving and transitional provisions of the Family Regulations to

intra-UK maintenance cases commenced under the intra-UK rules prior to the end of the transition period, in particular, about cases where a matter is before a court in one part of the UK as at the end of the transition period pursuant to an intra-UK choice of court agreement in maintenance. Family law stakeholders have also suggested there is uncertainty as to whether the saving and transitional provisions apply to proceedings before a court pursuant to a Choice of Court Agreement made under the EU or intra-UK rules after the end of the transition period.

7.15 This instrument amends the Family Regulations to revoke the saving and transitional provisions (regulation 8) and replace them with new provisions that are consistent with Article 67 of the Withdrawal Agreement, but which also retain transitional and saving provisions relating to matters not covered by Article 67, namely choice of court agreements for maintenance and intra-UK maintenance proceedings. The new provisions:

- expressly provide that nothing in the Family Regulations affects the application of the paragraphs of Article 67 of the Withdrawal Agreement that apply to Brussels IIa and the Maintenance Regulation (and accordingly, that legislation amended or revoked by the Family Regulations continues to have effect for the purposes of those paragraphs as if the amendments and revocations had not been made);
- are otherwise limited in their application to making (or more accurately retaining and clarifying, since this provision already forms part of the Family Regulations) saving and transitional provision with respect to proceedings commenced before the end of the transition period under Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 (intra-UK maintenance matters) and to proceedings commenced after the end of transition period pursuant to choice of court agreements made under the Maintenance Regulation (or the Brussels 1 Regulation[17] or 1968 Brussels Convention[18]) or Schedule 6 before the end of the transition period, neither of which come within the scope of Article 67 of the Withdrawal Agreement.

7.16 In addition to addressing the issues discussed above, family law stakeholders have asked the Government to make clear that, after the end of the transition period, the relevant Hague Convention rules (the jurisdiction rules of the 1996 Hague Convention, and Article 18 of the 2007 Hague Convention, which limits a court's jurisdiction to vary a maintenance decision that has been made by a court in another country where the creditor remains habitually resident in that other country) take precedence over the domestic jurisdiction rules in cases that properly fall under the two Hague Conventions. Family law stakeholders have advised that failing to make this clear in the relevant provisions creates uncertainty as to which rules take precedence which would, in the absence of clarification, be likely to require the matter to be tested before a court, with unnecessary cost for the parties. The Government agrees.

7.17 This instrument amends the Family Regulations to provide for amendment of relevant existing legislation to clarify the that the 1996 Hague Convention jurisdiction rules

[17] Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters

[18] The Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (as amended by various Accession Conventions)

and Article 18 of 2007 Hague Convention take precedence over relevant domestic jurisdiction rules.

Amendments to the Rome Regulations

7.18 Rome I and Rome II set out the rules, applicable by EU Member States (except Denmark), for determining, where there is conflict, which country's law applies to, respectively, contractual obligations[19] and non-contractual obligation[20]. The rules identify the law to be applied in determining cases which have a cross-border dimension. The objective of the EU rules is to increase legal certainty within the European Union by ensuring that the same national law applies to cross-border cases across the EU. The operation of Rome I[21] and Rome II[22] (which are directly effective EU Regulations) was given further effect by provisions in UK domestic law. Rome I[23] and Rome II[24] have been extended to intra-UK matters (for example, a contractual dispute between a claimant/pursuer in England and a defendant/defender in Scotland where there is no other connection outside those two jurisdictions to bring any other country's laws into play).

7.19 Rome I and Rome II (and the rules of the Rome Convention) are retained as domestic law from the end of the transition period by virtue of section 3 of the 2018 Act. The Rome Regulations provide that the retained versions of Rome I and Rome II (and for contracts entered into between 1 April 1991 and 16 December 2009, the rules of the Rome Convention), *as amended by that instrument*, apply to determine applicable law in respect of contractual and non-contractual obligations. No distinction is drawn between matters involving the UK and EU member states or intra-UK matters. No distinction is drawn between contracts concluded before or after the end of the transition period, nor between events giving rise to damage that occur before or after the end of the transition period. This policy approach reflects that the Rome Regulations were made in contemplation of the UK's exit from the EU *without a withdrawal agreement*.

7.20 Since the Rome Regulations were made in 2019, Part III of the Withdrawal Agreement has now been agreed, which provides separation provisions in relation to ongoing matters at the end of the transition period. Title VI of Part 3 contains directly applicable provisions in relation to ongoing judicial co-operation in civil and commercial matters. Article 66 relates to applicable law in contractual and non-contractual matters arising before the end of the transition period. Article 66 provides that the EU version of Rome I shall apply in respect of contracts concluded before the end of the transition period and that the EU version of Rome II shall apply in respect of events giving rise to damage, where such events occurred before the end of the transition period.

7.21 The effect of Article 66 of the Withdrawal Agreement is that, from the end of the transition period, there will, be two versions of Rome I and Rome II which may be applicable: the actual EU Regulations as required to be applied by Article 66 of the Withdrawal Agreement, and the retained versions as incorporated by section 3 of the Withdrawal Act and amended by the Rome Regulations.

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[19] Rome I.
[20] Rome II.
[21] See SI 2009/3064 and SSI 2009/410.
[22] SI 2008/2986 and SSI 2008/404.
[23] See regulation 5 of SI 2009/3064 and regulation 4 of SSI 2009/410.
[24] See regulation 4 of SI 2008/2986 and regulation 4 of SSI 2008/404.

7.22 This instrument amends the Rome Regulations to ensure it reflects the requirement of Article 66 that the actual EU versions of Rome I and Rome II, and not the retained versions of Rome I and Rome II (as amended by the Rome Regulations) apply in respect of contracts entered into, and events giving rise to damage which occur, before the end of the transition period, in the case of conflicts between the laws of the UK and other countries.

Amendments to the Rules Regulations

7.23 The first issue with the Rules Regulations relates to the saving and transitional provision for the amendments to Part 34 of the FPR (Reciprocal Enforcement of Maintenance Orders), regulation 27. Regulation 27 provides that the rules in Part 34 continue to apply to proceedings under Part 34 as if the Rules Regulations had not been made where "the relevant saving provision" applies. "Relevant saving provision" is defined to mean the saving and transitional provisions from the Family Regulations. This definition should also refer to the saving and transitional provisions of the Civil Regulations, which are relevant to Lugano Convention maintenance cases, but this was inadvertently omitted.

7.24 This instrument accordingly amends the Rules Regulations to add the relevant saving and transitional provision of the Civil Regulations to the definition of "relevant saving provision".

7.25 In addition, the Rules Regulations contain a cross-referencing error in the provisions that amend the COPR which mistakenly refer to omitted provisions while a reference to EU member states that should have been omitted from the definition of 'Service Convention country' was missed. This instrument amends the Rules Regulations to correct the cross-referencing error so that the correct provision is referred to and omit the reference to EU Member States from the relevant definition of 'Service Convention country.'

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 sections 8 and 8B of the Withdrawal Act. 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 and to ensure the domestic statute book is consistent with the provisions of the Withdrawal Agreement. 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 A formal consultation on this instrument has not been carried out.

10.2 No formal consultation was undertaken on the provision in this instrument that amends the Civil Regulations because it corrects an error in that instrument. In so doing this instrument ensures the special protective jurisdiction rule for employment matters is accurately transposed from Brussels Ia and will operate as described in the

explanatory memorandum for the Civil Regulations. The error was drawn to the Ministry's attention by an external legal expert.

10.3 No formal consultation was undertaken on the provision in this instrument that amend the Family Regulations due to their technical nature. Other than insofar as they ensure the Family Regulations are consistent with the Withdrawal Agreement, they do not change the Government's policy approach as set out in the explanatory memorandum for the Family Regulations. However, Ministry of Justice officials met with representatives of Resolution, the Family Law Bar Association and the International Association of Family Lawyers to discuss the technical error and concerns that family lawyers had about the Family Regulations. A draft of this instrument was provided to those organisations who were invited to comment on it. Those comments were taken into consideration before the instrument was finalised.

10.4 No formal consultation was carried out on the provisions of this instrument that amend the Mediation Regulations or Rules Regulation as these amendments correct minor deficiencies to ensure those instruments operate as described in the explanatory memorandum for the Mediation Regulations and the explanatory memorandum for the Rules Regulations.

10.5 No formal consultation was carried out on the provisions of this instrument that amend the Rome Regulations as these amendments ensure the saving and transitional provisions are consistent with Article 66 of the Withdrawal Agreement which is directly applicable as domestic law by virtue of section 7A of the Withdrawal Act.

11. Guidance

11.1 There are no plans to publish guidance with this instrument.

12. Impact

12.1 These amendments correct minor technical errors, and clarify ambiguities, in the Civil Regulations, Family Regulations, Mediation Regulations and Rules Regulations and ensure the Family Regulations and Rome Regulations are consistent with directly applicable provisions of the Withdrawal Agreement. It has not been possible to conduct an economic assessment as these instruments do not come into effect until the end of the transition period, and the amendments in this instrument are not expected to generate any net cost burden on parties involved in relevant legal matters, businesses, charities or the voluntary or public sectors.

12.2 An Impact Assessment has not been prepared for this instrument because there are no impacts on business, charities, voluntary or public sectors.

13. Regulating small business

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

13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is for this instrument to:

- amend the Civil Regulations, the Family Regulations, the Mediation Regulations and the Rules Regulations to address minor defects in those instruments and to clarify the operation of international conventions and domestic law after the end of the transition period;

- amend the Family Regulations and Rome Regulations to ensure those instruments are consistent with the provisions of the Withdrawal Agreement, which will clarify the law that applies to transitional matters (matters that arise under the relevant EU law before the end of the transition period).

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 Andrew Thompson at the Ministry of Justice Telephone: 07971 828014 or email: andrew.thompson@justice.gov.uk can be contacted with any queries regarding the instrument.

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

15.3 Alex Chalk MP, Parliamentary Under Secretary of State in 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 in the Ministry of Justice, Alex Chalk MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020 does no more than is appropriate".

1.2 This is the case because the instrument does no more than is necessary to ensure that: the special jurisdiction rule for employment cases from Brussels Ia is properly transposed into domestic law by the Civil Regulations; the pre-EU maintenance jurisdiction rules for Scotland are properly reinstated by the Family Regulations; the application of the saving and transitional provisions of the Family Regulations to intra-UK maintenance cases that commence before the end of the transition period and to choice of court agreements made before the end of the transition period is clear; ambiguity over the relationship between the jurisdiction rules of the 1996 Hague Convention and Article 18 of the 2007 Hague Convention and relevant domestic jurisdiction provisions is removed; Article 46 of the Fair Employment and Treatment (Northern Ireland) Order as amended by the Mediation Regulations takes account of an amendment to Article 46 made by another instrument after the Mediation Regulations were made; the saving and transitional provision for the amendments to Part 34 of the FPR in the Rules Regulations correctly links to the saving and transitional provision of the Civil Regulations; a cross-referencing error in the COPR amendments in the Rules Regulations corrected; an erroneous reference to EU Member States in a definition of 'Service Convention country' in the COPR Regulations is removed; the Family Regulations and Rome Regulations are consistent with the provisions of the Withdrawal Agreement.

2. Good reasons

2.1 The Parliamentary Under-Secretary of State in the Ministry of Justice, Alex Chalk 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: there is an error in the way the Civil Regulations transpose the Brussels Ia special employment jurisdiction rule into domestic law. The provisions in this instrument amend the Civil Regulations to correct that error and bring the rule into line with the intended policy and effect as described in the Explanatory Memorandum to the Civil Regulations; there are technical errors in the way the Family Regulations reinstate pre-EU maintenance jurisdiction rules in Scotland. The provisions in this instrument amend the Family Regulations to correct those technical errors; there is a lack of clarity as to whether the saving and transitional provisions in the Family Regulation apply to intra-UK maintenance cases commenced before the end of the transition period and whether they apply to choice of court agreements made after the

end of the transition period. The provisions in this instrument amend the Family Regulations to make clear that the saving and transitional provisions do apply to intra-UK maintenance cases commenced before the end of the transition period but only apply to choice of court agreements made before the end of the transition period; the amendments made to domestic primary and secondary legislation in the Family Regulations have created ambiguity over the relationship between the jurisdiction provisions of the 1996 Hague Convention and Article 18 of the 2007 Hague Convention and relevant domestic provisions post the end of the transition period. The provisions in this instrument amend the Family Regulations to remove that ambiguity and clarify the law that will apply post the end of the transition period; amendments in the Mediation Regulations do not take account of a 2020 amendment to the Fair Employment and Treatment (Northern Ireland) Order made after the Mediation Regulations were made. The provisions in this instrument update the Mediation Regulations to take account of that amendment to the Fair Employment and Treatment (Northern Ireland) Order; there is an error in the FPR provisions of the Rules Regulations that will prevent those provisions from operating correctly by reference to the saving and transitional provisions of both the Family and Civil Regulations. The provisions of this instrument correct that error so that the Rules Regulations will operate by reference to the saving and transitional provisions of both the Family and Civil Regulations; there is an incorrect cross-reference in the COPR provisions of the Rules Regulations and an erroneous reference to EU Member States in a definition of 'Service Convention country' in the COPR Regulations that should have been omitted. The provisions of this instrument correct that cross-referencing error and also omit the erroneous reference to EU Member States from the definition of 'Service Convention'. The Family Regulations and Rome Regulations are inconsistent with the Withdrawal Agreement. The provisions of this instrument amend the Family Regulations and Rome Regulations to ensure they are consistent with the relevant provisions of the Withdrawal Agreement.

3. Equalities

3.1 The Parliamentary Under-Secretary of State in the Ministry of Justice, Alex Chalk MP, has made the following statement:

"The 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 in the Ministry of Justice, Alex Chalk MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the instrument, I, Alex Chalk MP, Parliamentary Under-Secretary of State in the Ministry of 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."

4. Explanations

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