EXPLANATORY MEMORANDUM TO

THE MUTUAL RECOGNITION OF PROTECTION MEASURES IN CIVIL MATTERS (AMENDMENT) (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.

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

2. Purpose of the instrument

2.1 The Mutual Recognition of Protection Measures in Civil Matters (Amendment) (EU Exit) Regulations 2019 are being made using powers in the European Union (Withdrawal) Act 2018 ("EU (Withdrawal) Act") in order to address failures in retained EU law to operate effectively and other deficiencies arising from the withdrawal of the United Kingdom from the European Union.

2.2 The Mutual Recognition of Protection Measures in Civil Matters (Amendment) (EU Exit) Regulations 2019 amend Regulation (EU) 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters (the "CPM Regulation") as retained under the EU (Withdrawal) Act and associated domestic legislation to ensure that, post EU Exit, protection measures made in EU Member States will continue to be recognised and may be enforced in England & Wales and Northern Ireland.

Explanations

What did any relevant EU law do before exit day?

2.3 The CPM Regulation provides for the mutual recognition of protection measures (protection measures are explained in more detail in paragraph 7.2) across the EU (other than Denmark, which does not apply the measure). The effect of the CPM Regulation is that a protection measure ordered in one Member State ("the Member State of origin") must be recognised without any special procedure being required and enforceable without the requirement for a declaration of enforceability in another Member State ("the Member State addressed"). It is treated as if the protection measure had been ordered in the Member State addressed.

Why is it being changed?

2.4 The CPM Regulation operates on a reciprocal basis. Subject to certain requirements, including the issue of a certificate, which are specified in the CPM Regulation, a protection measure ordered in one EU Member State must be recognised in all other EU Member States without the need for any special procedure and is enforceable without a declaration of enforceability being required. As the CPM Regulation is drafted so as to apply only to EU Member States, amendments are needed to the CPM Regulation as retained to ensure that protection measures and certificates issued in EU Member States post Exit will continue to be recognised without any special procedure

being required and enforceable without the requirement for a declaration of enforceability in England & Wales and Northern Ireland. In the event that the United Kingdom leaves the European Union without an agreement on the future operation of the CPM Regulation, it cannot be assumed that the EU will recognise and enforce protection measures and certificates issued under the CPM Regulation in the United Kingdom. Therefore, the Articles that make provision for the issue of certificates in England & Wales and Northern Ireland for the purposes of recognition and enforcement of protection measures in EU Member States will be repealed as retained EU law. This is explained further in paragraph 7.12.

What will it now do?

2.5 Under the CPM Regulation as retained by the operation of the EU(Withdrawal) Act and amended by this instrument, civil protection measures and certificates issued by issuing authorities in EU Member States post EU Exit will continue to be recognised and may be enforceable in England & Wales and Northern Ireland. However, civil courts in England & Wales and Northern Ireland will, post EU Exit, be unable to issue the certificates which must, under the CPM Regulation, be presented with the protection measure for recognition and enforcement in EU Member States.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument was laid for sifting by the Sifting Committee on 29th October 2018. The Secondary Legislation Scrutiny Committee recommended on 13th November 2018 this instrument use the affirmative procedure due to concerns that the regulations would appear to create an uneven playing field where there may be a burden on UK courts and policing to enforce EU orders but no reciprocal benefit to UK citizens seeking compensation in EU Member States.

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.

3.3 The territorial application of this instrument is England & Wales and Northern Ireland, except regulations 2 and 3, which have the same application as the legislation they amend.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England & Wales and Northern Ireland, except regulations 2 and 3, which have the same extent as the legislation they amend. This instrument does not extend to Scotland as the Scottish Government is legislating independently on these matters.

4.2 The territorial application varies between provisions. The territorial application of this instrument is England & Wales and Northern Ireland, except regulations 2 and 3, which have the same application as the legislation they amend.

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 Mutual Recognition of Protection Measures in Civil Matters (Amendment) (EU Exit) Regulations 2019 are compatible with the Convention rights".

6. Legislative Context

6.1 The CPM Regulation was adopted under Article 81 of the Treaty of the Functioning of the European Union. It is directly applicable EU legislation.

6.2 The CPM Regulation will form part of domestic law on and after EU Exit day under section 3 of the European Union (Withdrawal) Act 2018 (EU (Withdrawal) Act).

6.3 The CPM Regulation was supplemented and facilitated by domestic legislation including, in particular, the Civil Jurisdiction and Judgments (Protection Measures). Regulations 2014. This domestic legislation continues to have effect in domestic law after EU Exit day under section 2 of the EU (Withdrawal) Act.

6.4 In addition, the CPM Regulation was supplemented by court rules, however these rules will be addressed by separate instruments.

7. Policy background

What is being done and why?

7.1 This is an EU Exit SI made under the powers conferred by section 8 of the European Union (Withdrawal) Act 2018. This instrument corrects deficiencies arising as a result of the UK no longer being a member state of the European Union. In conjunction with separate instruments addressing court rules, it will ensure that, post EU Exit, civil protection measures issued in EU Member States will continue to be recognised and be may enforceable in England & Wales and Northern Ireland.

7.2 A "protection measure" is a decision ordered by an issuing authority of an EU Member State in accordance with its national law, which imposes restriction on an individual with a view to protecting another person, when the latter person's physical or psychological integrity may be at risk. A protection measure imposes one or more of the following obligations on the person causing the risk:

- a prohibition or regulation on entering the place where the protected person resides, works, or regularly visits or stays;
- a prohibition or regulation of contact, in any form, with the protected person, including by telephone, electronic or ordinary mail, fax or any other means;
- a prohibition or regulation on approaching the protected person closer than a prescribed distance.

7.3 Such measures are found most commonly in the law of England and Wales in non-molestation orders under Part 4 of the Family Law Act 1996 or injunctions under section 3 of the Protection from Harassment Act 1997. In the law of Northern Ireland, they are most commonly found in non-molestation orders under Article 20 of the Family Homes and Domestic Violence (Northern Ireland) Order 1998 or injunctions under Article 5 of the Protection from Harassment (Northern Ireland) Order 1997.

7.4 The CPM Regulation provides for the mutual recognition of protection measures in civil matters across the EU (except for Denmark, which does not participate in the European Union Area of Freedom, Security and Justice, in accordance with Protocol 22 on the Position of Denmark in the Treaty on the Functioning of the European

Union). The effect of this is that a protection measure granted in one Member State ("the Member State of origin") must be recognised without any special procedure being required and enforceable without the requirement for a declaration of enforceability in another Member State ("the Member State addressed") (Article 4(1) CPM Regulation). It is treated as if the protection measure had been ordered in the Member State addressed.

7.5 A person benefitting from a protection measure ("a protected person") who wishes to invoke their protection measure in another Member State, is required to produce (Article 4(2) CPM Regulation):

- A copy of the protection measure;
- A certificate issued by the Member State of origin; and
- Where necessary, a translation or transliteration.

7.6 The procedure for enforcement of the protection measure is governed by the law of the Member State addressed (i.e. the Member State where enforcement takes place) (Article 4(5) CPM Regulation).

7.7 The requirements of the certificate issued by the Member State of origin are set out in Articles 5 to 9 of the CPM Regulation. Note that Article 8 CPM Regulation provides that the certificate must be brought to the attention of the person causing the risk. The form of the certificate is established by means of implementing acts adopted by the Commission, assisted by a committee (Articles 19 and 20 CPM Regulation).

7.8 The factual elements of a protection measure may be adjusted by the Member State addressed, in order to give effect to the protection measure in the Member State addressed (Article 11 CPM Regulation). The adjustment must be brought to the attention of the person causing the risk (Article 11(3) CPM Regulation). The Member State addressed may not review the substance of the protection measure (Article 12 CPM Regulation).

7.9 There are only limited grounds on which a court in the Member State addressed can refuse to enforce a protection measure issued in another Member State. Article 13 CPM Regulation provides that the Member State addressed may refuse to recognise or enforce a protection measure, upon application by the person causing the risk, to the extent such recognition is:

- Manifestly contrary to public policy in the Member State addressed; or
- Irreconcilable with a judgment given or recognised in the Member State addressed.

7.10 To ensure, post EU Exit, protection measures and certificates issued in EU Member States will be recognised without any special procedure being required and enforceable without the requirement for a declaration of enforceability in England & Wales and Northern Ireland, this instrument amends the CPM Regulation as retained EU law and associated domestic legislation to take account of the UK no longer being an EU Member State. Separate instruments will address the court rules which supplement the CPM Regulation. Protection measures and certificates issued in a 'participating Member State' (an EU Member State other than Denmark) will continue to be recognised without any special procedure being required and shall be enforceable without a declaration of enforceability being required.

7.11 Civil courts in England & Wales and Northern Ireland will retain the power to adjust an EU protection measure to ensure that it may be enforced in England & Wales and Northern Ireland. The courts of England & Wales and Northern Ireland will retain the ability to refuse to recognise and, where relevant, enforce an EU protection measure where to do so would be manifestly contrary to public policy, or would be irreconcilable with a judgment given, in England & Wales or Northern Ireland (as the case may be). Where a protection measure is suspended or withdrawn by the originating EU Member State, the court in England & Wales or Northern Ireland (as the case may be) must suspend or withdraw the effects of recognition and enforcement upon submission by the protected person or person causing the risk.

7.12 In the event that the United Kingdom leaves the European Union without an agreement on the future operation of the CPM Regulation, the CPM Regulation (as it has effect in EU law) will cease to apply to UK issued protection measures and certificates. Therefore, courts in other EU Member States would no longer be obliged to recognise and enforce them. This instrument therefore repeals Articles 5 to 10 of the retained CPM Regulation, being those articles relevant to the issue of a certificate by civil courts in England & Wales and Northern Ireland. To allow UK civil courts to issue certificates post EU-exit would, potentially, mislead protected persons as to the recognition and enforceability of their UK issued protection measures in EU Member States post exit potentially placing them at risk.

7.13 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 six 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 interest 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 power in section 8 of the EU (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. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 Annex A 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 statutory instrument has not been carried out.

10.2 The proposal that, post EU Exit, protection measures and certificates issued in EU Member States continue to be recognised and enforceable in the UK was discussed with key family law stakeholders and with leading family law practitioners prior to our finalising of the policy position.

11. Guidance

11.1 The Government does not intend providing guidance on this statutory 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 Protection measures and certificates are issued to individuals (the protected person) and impose restrictions on other individuals (the person creating the risk). The impact of this instrument is negligible. HMCTS do not publish data on the recognition and enforcement of protection measures under the CPM Regulations in family proceedings. While there may be data within case files that might provide such details, which would assist assessing the impacts of this legislation, to extract this would be hugely resource intensive and would likely provide results of only limited reliability. It would be an impracticable and a disproportionate use of resources to attempt to manually collate this information using court files. Through the Family Courts Operational Forum, we approached court staff on the use of the CPM Regulation. Staff stated that they had no experience or recollection of dealing with applications under the CPM Regulation. We therefore believe that the policy given effect through this instrument will have no significant impact on the family court. Additionally, given that it would not be possible to legislate to ensure that protection measures issued in the courts of England and Wales would be recognised by EU Member States, the decision to stop the issuing of certificates for their recognition will not have a direct, negative impact on court users.

Consultation with key family law stakeholders (see paragraph 10.2) suggests minimal reliance upon the CPM Regulation. Protection measures and certificates issued in EU Member States will continue to be recognised and be enforceable in England & Wales and Northern Ireland.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is Parliamentary Committees.

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

15. Contact

15.1 Paul Norris at the Ministry of Justice Telephone: 07547 972245 or email: paul.norris2@justice.gov.uk can be contacted with any queries regarding the instrument.

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

15.3 The Parliamentary Under Secretary of State, 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
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 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12	State why it is appropriate to create such a sub-delegated power.

		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.	
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 Mutual Recognition of Protection Measures in Civil Matters (Amendment) (EU Exit) Regulations 2019 do no more than is appropriate".

1.2 This is the case because they do no more than prevent, remedy or mitigate deficiencies in retained EU law arising from the withdrawal of the UK from the EU which will prevent recognition and enforcement of protection measures and certificates under the CPM Regulation in England & Wales and Northern Ireland, post Exit. The instrument also repeals the provisions of the retained CPM Regulation that provide for the issue of certificates by civil courts in England & Wales and Northern Ireland, which, in a no deal EU Exit, will no longer be recognised by EU Members States under the CPM Regulation.

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 draft instrument, and I have concluded they are a reasonable course of action".

2.2 These are that amendments in the instrument will ensure that protection measures and certificates issued in EU Member States post the UK's exit from the EU will be recognised without any special procedure being required and enforceable without the requirement for a declaration of enforceability in the England & Wales and Northern Ireland for the benefit of protected persons. Post the UK's exit from the EU, the CPM Regulation will cease to recognise UK issued protection measures and certificates. This instrument therefore repeals Articles 5 to 10 of the retained CPM Regulation, being those articles relevant to the issue of a certificate by civil courts in England & Wales and Northern Ireland. To allow civil courts in England & Wales and Northern Ireland to issue certificates post EU-exit would, potentially, mislead protected persons as to the recognition and enforceability of their protection measures in EU Member States post exit. Further details about these reasons are set out in paragraphs 7.10 and 7.11 of this explanatory memorandum.

3. Equalities

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

"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, 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.