

<b>TITLE:</b> IMPACT ASSESSMENT FOR THE JURISDICTION AND JUDGMENTS (FAMILY) (AMENDMENT ETC.) (EU EXIT) REGULATIONS 2018, AND THE CIVIL PARTNERSHIP AND MARRIAGE (SAME SEX COUPLES) (JURISDICTION AND JUDGMENTS) (AMENDMENT ETC.) (EU EXIT) REGULATIONS 2018  <b>IA No:</b> MoJ021/2018 <b>RPC Reference No:</b> N/A  <b>Lead department or agency:</b> Ministry of Justice <b>Other departments or agencies:</b> N/A	<b>Impact Assessment (IA)</b>			
	<b>Date:</b> 24/01/2019			
	<b>Stage:</b> Final			
	<b>Source of intervention:</b> EU Exit			
	<b>Type of measure:</b> Secondary Legislation			
<b>Contact for enquiries:</b> <a href="mailto:andrew.thompson@justice.gov.uk">andrew.thompson@justice.gov.uk</a>				
<b>Summary: Intervention and Options</b>				<b>RPC Opinion:</b> N/A

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANDCB in 2014 prices)	One-In, Three-Out?	Business Impact Target Status
n/a	n/a	n/a	n/a	Out of Scope

**What is the problem under consideration? Why is government intervention necessary?**

In the event of 'no deal', there would be no agreed EU framework for ongoing civil judicial cooperation between the UK and EU countries. On Exit Day, the EU family law instruments (Brussels IIA and the Maintenance Regulation) and related primary and secondary legislation, as retained EU law, will become UK domestic law under the European Union (Withdrawal) Act 2018. However, the EU rules governing family law operate on the basis of reciprocity between EU Member States. The UK cannot legislate for reciprocity in family judicial co-operation and alternative arrangements for the matters covered by these Regulations (jurisdiction, recognition and enforcement and central authority cooperation in marital, parental and maintenance matters) would be required post EU Exit.

Government intervention is necessary to provide a clear and workable set of alternative rules for a no deal scenario, to minimise impacts on courts, judiciary, and users of the family justice system.

**What are the policy objectives and the intended effects?**

The policy objectives are, in the case of 'no deal', to address inappropriate rules applying in these areas in light of the loss of reciprocity with the EU under these instruments, to minimise disruption to those affected on exit (29 March 2019).

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

**Option 0.1: Static Acquis** - the current/pre-EU exit application of Brussels IIA in England and Wales and Northern Ireland legislation, and the Maintenance Regulation in UK legislation.

**Option 0.2: Do Nothing** - England and Wales and Northern Ireland, and in relation to the Maintenance Regulation and child abduction override Scotland, would continue to apply rules unilaterally after exit under no deal but without correcting EU exit-related deficiencies.

**Option 1:** Apply Hague Conventions for those areas of Brussels IIA and the Maintenance Regulation where they provide an equivalent, supplemented by the Family Law Act 1986 in the case of the 1970 Hague Convention on the Recognition of Divorces. In areas where there are no relevant provisions we intend to:

For divorce jurisdiction: Repeal the Brussels IIA rules and broadly replicate the applicable grounds of divorce jurisdiction set out in Article 3 of Brussels IIA, plus extend the additional ground of sole domicile and discretionary stay provisions to all cases.

For maintenance jurisdiction: Repeal Maintenance Regulation rules and broadly adopt the position prior to the introduction of the Maintenance Regulation and other EU rules.

For child abduction override: Repeal the Brussels IIA rules and revert to the 1980 Hague rules

Legal aid: Repeal EU rules and revert to existing domestic rules that apply to other cross-border (non-EU/1996 Hague) parental responsibility matters.

**Will the policy be reviewed?** It will not be reviewed. **If applicable, set review date:** n/a

Does implementation go beyond minimum EU requirements?	n/a			
Are any of these organisations in scope?	<b>Micro</b>	<b>Small</b>	<b>Medium</b>	<b>Large</b>
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)	<b>Traded:</b>		<b>Non-traded:</b>	

**I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.**

Signed by the responsible Minister : David Gauke Date: 24/01/2019

## Summary: Analysis & Evidence

## Policy Option 1 v Option 0.2

**Description:** Repeal Brussels IIa and Maintenance Regulation, apply Hague Conventions where applicable and broadly replicate the grounds of divorce jurisdiction set out in Article 3 of Brussels IIA, plus extend the ground of sole domicile and discretionary stay provisions to all cases. Broadly adopt the position prior to the introduction of the Maintenance Regulation and other EU rules. Replicate changes made to jurisdiction and recognition rules for same sex couples.

### FULL ECONOMIC ASSESSMENT

Price Base Year n/a	PV Base Year n/a	Time Period Years n/a	Net Benefit (Present Value (PV)) (£m)		
			Low: n/a	High: n/a	Best Estimate: n/a

COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
	Low	n/a		
High	n/a		n/a	n/a
Best Estimate	n/a		n/a	n/a

**Description and scale of key monetised costs by 'main affected groups'**  
None

**Other key non-monetised costs by 'main affected groups'**  
In the areas of divorce jurisdiction and recognition and maintenance jurisdiction, recognition and enforcement, the government expects a slight increase in the volumes of cases to HMCTS and some possible increase in complexity for courts and service users. With regards to parental responsibility matters and the divorce of same sex married couples and dissolution of civil partnerships, the government anticipates minimal impacts.

BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
	Low	n/a		
High	n/a		n/a	n/a
Best Estimate	n/a		n/a	n/a

**Description and scale of key monetised benefits by 'main affected groups'**  
None

**Other key non-monetised benefits by 'main affected groups'**  
There are likely to be some benefits from the move to a single system for EU and non-EU nations in relation to rules of jurisdiction and divorce recognition. The framework proposed is also a considerable improvement on Option 0a as it provides legal certainty and mirrors the current systems as much as is possible within the scope of existing arrangements. Option 1 is expected to achieve the primary objective of "minimising disruption".

<b>Key assumptions/sensitivities/risks</b>	<b>Discount rate (%)</b>
As with the comparison to Option 0a, the main risks are: - The divorce rate - Underlying public law and private law children case volumes - Complexity impacts mainly being borne administratively	

### BUSINESS ASSESSMENT (Option 1)

<b>Direct impact on business (Equivalent Annual) £m:</b>			<b>Score for Business Impact Target (qualifying provisions only) £m:</b>
<b>Costs:</b>	<b>Benefits:</b>	<b>Net:</b>	

## Evidence Base (for summary sheets)

### A. Background

1. Currently, the UK applies EU rules in certain areas of civil and family law to determine jurisdiction, applicable law, recognition and enforcement, and cross-border legal procedural matters.
2. In family law cooperation, the key EU Regulations are Council Regulation 2201/2003, known as Brussels IIa, which covers:
  - Jurisdiction for legal separation or marriage annulment (**divorce** etc) proceedings, and the recognition of divorce etc orders from other Member States and vice versa;
  - Jurisdiction for most **children matters** (known as parental responsibility matters, which in EU-terms includes residence and contact), recognition and enforcement of such decisions, and cooperation between central authorities across borders in many children matters, in particular cross-border placement of children;
  - Some limited aspects of proceedings related to **parental child abduction** within the EU;

And the Maintenance Regulation 4/2009, which covers:

- Jurisdiction for proceedings on **maintenance** obligations towards spouses, children and other family members; administrative central authority cooperation across borders on maintenance matters; legal aid entitlement in certain circumstances; and recognition and enforcement of maintenance decisions from other Member States and vice versa;

#### Problem under consideration

3. In the event of 'no deal', there would be no agreed EU framework for ongoing civil judicial cooperation between the UK and EU countries.
4. Maintaining judicial co-operation in family law with EU member states through existing EU legislation would be uncertain in the event of a 'no deal' scenario. On Exit Day, the EU family law instruments and related primary and secondary legislation, as retained EU law, will become UK domestic law under the European Union (Withdrawal) Act 2018. However, the EU rules governing family law operate on the basis of reciprocity between EU Member States. The UK could continue to apply the rules unilaterally after exit, however, the UK's status as a non-EU Member State would mean that, in the EU, the two EU Regulations would no longer apply to the UK.
5. With the exception of remaining in or joining existing international agreements, such as Hague Conventions, the UK cannot legislate for reciprocity in family judicial co-operation. Alternative arrangements for the matters covered by Brussels IIa and the Maintenance Regulation are therefore required post EU Exit.

## **B. Rationale and policy objectives for intervention**

6. The conventional economic rationales for government intervention are based on efficiency and equity arguments. The government may consider intervening if there are failures in the way markets operate (e.g., monopolies overcharging consumers) or where there are failures with existing government interventions (e.g., waste generated by misdirected rules). The proposed new interventions should avoid creating a further set of disproportionate costs and distortions. The government may also intervene for equity (fairness) and re-distributional reasons (e.g., to reallocate goods and services to the more disadvantaged groups in society).
7. The rationale for intervention for the options assessed in this Impact Assessment (IA) is to ensure, where possible, a viable basis for continued cooperation with EU member states in family law in a 'no deal' scenario or where continued cooperation is not possible, a workable set of alternative rules, thereby minimising impacts on users of the family justice system, the courts and the judiciary.

### Policy Objective

8. The associated policy objectives are to minimise disruption to stakeholders on exit (29 March 2019) in the form of increased delay and uncertainty likely to provoke judicial challenge and its associated costs and delays.

## **C. Affected Stakeholder Groups, Organisations and Sectors**

9. The groups most affected by the options assessed in this IA are as follows:
  - Individuals and public authorities affected by family law disputes covered by the existing EU regulations (including divorce, parental responsibility and maintenance) including users of the family courts
  - Her Majesty's Courts and Tribunals Service (HMCTS) and the family judiciary
  - Legal Profession
10. These provisions apply to England and Wales and Northern Ireland and, in the cases of maintenance and the child abduction override, Scotland.

## D. Options under Consideration

11. In order to meet the policy objectives, the following options are assessed in this IA:

- **Option 0.1:** Static Acquis – the pre-EU exit application of Brussels IIa and the Maintenance Regulation in UK legislation.
- **Option 0.2:** Do Nothing - UK would continue to apply rules unilaterally after exit under no deal but without correcting EU exit-related deficiencies. This baseline is predicated upon having no deal with the EU. Any direct costs from no deal are therefore not outlined in this IA.
- **Option 1:** Containing the following sub-options:  
For those areas of Brussels IIa and the Maintenance Regulation where there are equivalent Hague Conventions, and where a provision of EU law would conflict with a Convention rule, the only lawful option in a no deal scenario is for the retained EU law rules to be repealed and for the UK to switch to the equivalent Hague Convention rules for cases involving EU Member States. This is because a failure to ensure that our domestic law complied with the relevant Hague Convention rules would place us in breach of our obligations at international law.

The action for each area under consideration is listed below:

- i. For divorce jurisdiction: Repeal the Brussels IIa rules and broadly replicate the applicable grounds of divorce jurisdiction set out in Article 3 of Brussels IIA, plus extend the additional ground of sole domicile and discretionary stay provisions to all cases.
- ii. For divorce recognition, the provisions of the 1970 Hague Convention on the Recognition of Divorces are implemented by the Family Law Act 1986, which provides more generous provision as to recognition which is specifically allowed in the Convention.
- iii. For maintenance jurisdiction: repeal the Maintenance Regulation rules and broadly adopt the position prior to the introduction of the Maintenance Regulation and other EU rules.
- iv. For maintenance recognition and enforcement: re-join the 2007 Hague Convention
- v. For children matters (parental responsibility): use the 1996 Hague Convention
- vi. For legal aid: Repeal EU rules and revert to existing domestic rules that apply to other (non-EU) parental responsibility matters.
- vii. For child abduction override: Repeal the EU rules and revert to the 1980 Hague Convention rules only, removing the override.
- viii. For civil partnership dissolution and same sex divorce: Replicate the jurisdiction and recognition rules for divorce, annulment and legal separation that apply to opposite-sex couples, removing reference to EU membership in domestic legislation to ensure that these powers can be used.

12. The Government's preferred option is option 1, and its attendant sub-options, as this best meets the policy objectives.

### Option 0.1: Static Acquis

13. This option is the status quo – this reflects how currently, pre-EU exit, Brussels IIa and the Maintenance Regulation, function in the UK.

### Option 0.2: Do Nothing – UK would continue to apply rules unilaterally after exit

14. This baseline is predicated upon having no deal with the EU. Any direct costs from no deal are therefore not outlined in this IA. Under this option the UK would continue to apply rules unilaterally after exit, which would lead to uncertainty. The UK's status as a non-EU Member State would mean that EU countries would not consider the UK to be covered by these rules and therefore UK citizens and families would not benefit from reciprocity as they do currently.

15. Doing nothing is not a viable option, as failure to correct EU exit-related deficiencies would mean that the UK would not comply with its international obligations under the Hague Conventions in relation to EU Member States and the statute book would be unclear. UK residents and citizens abroad would suffer from the inappropriate unilateral application of rules which currently operate on the basis of reciprocity.

**Option 1: Repeal Brussels IIa and Maintenance Regulation, apply the relevant Hague Conventions where applicable; for divorce jurisdiction, broadly replicate the applicable grounds of divorce jurisdiction set out in Article 3 of Brussels IIA, plus extend the additional ground of sole domicile and discretionary stay provisions to all cases; for maintenance jurisdiction, broadly adopt the position prior to the introduction of the Maintenance Regulation and other EU rules; and replicate changes made to jurisdiction and recognition rules for opposite sex couples to the jurisdiction and recognition rules for same sex couples concerning divorce and dissolution.**

16. Ministers agreed the following policy decisions for a no-deal scenario in August 2018:

- i. in relation to divorce etc jurisdiction, repeal the Brussels IIa EU rules and broadly replicate the applicable grounds of divorce jurisdiction set out in Article 3 of Brussels IIA, plus extending the additional ground of sole domicile to all cases. Rather than the lis pendens rules (whereby if parallel proceedings are issued in another EU country, the second-seized court has a mandatory obligation to stay the proceedings) the courts will have discretion as to whether to stay proceedings;
- ii. in relation to the recognition of foreign divorces, switch to the 1970 Hague Convention, as implemented in domestic law by the Family Law Act 1986;
- iii. repeal Maintenance Regulation rules and broadly adopt the position prior to the introduction of the Maintenance Regulation and other EU rules (in some cases this involves using the current domestic law rules for non-maintenance financial matters);
- iv. repeal the Maintenance Regulation recognition and enforcement and central authority rules and switch to 2007 Hague Convention rules in relation to recognition and enforcement and central authority cooperation. In relation to jurisdiction, (direct rules of which are not included in the 2007 Hague Convention), broadly adopt the position prior to the introduction of the Maintenance Regulation and other EU rules
- v. in proceedings relating to parental responsibility repeal the relevant provisions of Brussels IIa and switch to the 1996 Hague Convention,
- vi. repeal the Brussels IIa provisions in relation to legal aid for recognition and enforcement and parental responsibility cases;
- vii. repeal the relevant provisions of Brussels IIa and switch to the 1980 Hague Convention insofar as it makes similar provision, repealing the 'child abduction override' and related provisions which are found in Brussels IIa have no equivalent in the Hague Conventions so will no longer be available;
- viii. apply the same jurisdiction and recognition rules to same sex divorces and civil partnership dissolutions as we are intending to apply to opposite sex divorce;

17. These changes will be implemented through the following SIs:

- The Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2018;
- The International Recovery of Maintenance (Hague Convention 2007 etc.) (Amendment) (EU Exit) Regulations 2018;
- The Civil Partnership and Marriage (Same Sex Couples) (Jurisdiction and Judgments) (Amendment etc.) (EU Exit) Regulations 2018;
- The Family Procedure Rules 2010 (Amendment) (EU Exit) Regulations 2018.

## **E. Cost and Benefit Analysis**

18. This IA follows the procedures and criteria set out in the IA Guidance and is consistent with the HM Treasury Green Book.

19. Where possible, this IA identifies both monetised and non-monetised impacts on individuals, groups and businesses in England and Wales with the aim of understanding what the overall impact on society might be from the options under consideration. These impacts are compared to those of the 'do nothing' option. As the 'baseline' option is compared to itself, the costs and benefits are necessarily zero, as is its Net Present Value (NPV).

20. IAs place a strong focus on the monetisation of costs and benefits. There are often, however, important impacts that cannot sensibly be monetised. These might be impacts on certain groups of society or some data privacy impacts, positive or negative. Impacts in this IA are therefore interpreted broadly, to include both monetisable and non-monetisable costs and benefits, with due weight given to those that are non-monetisable.

21. The primary rationale for intervention in these instances is to promote legal certainty and provide as smooth transition as possible in the case of no deal. However, in this case, it is not possible to robustly quantify the benefits of legal certainty or its wider impacts, and all the costs and benefits in this IA are non-monetisable in nature.

### **Approach**

22. Paragraphs 24-31 set out the overall impacts across all components of Option 1 as compared to each of the baselines (0.1 & 0.2).

23. As these overall impacts (see paragraph 22) hold true for all policy areas, only those costs and benefits that are specific to each EU instrument will be considered separately against the dual baseline in the breakdown for each policy area. These are covered in paragraphs 32-89.

### **Cost and benefit analysis, compared to Option 0.1**

24. Whilst Option 0.1 is not actually possible in the scenario of 'no-deal', a comparison to the current arrangements gives a clearer picture of what impacts are likely to occur in this eventuality. The inclusion of this comparison seeks to lay out the extent to which the stated objective of "minimising disruption" is expected to be met and what risks remain.

#### *Overall costs*

25. The UK seeks to minimise disruption by utilising Hague Conventions, in which the UK already participates, that cover the affected areas. This will minimise the transition impact as the UK already uses these Conventions with non-EU Contracting Parties. Whilst these Conventions do not fully mitigate the impact of losing the internal EU arrangements, they provide a consistent framework around which co-operation with EU Member States can be maintained following the UK's exit, with minimal additional administrative complexity.

26. In the areas where there are no equivalent Hague Conventions, Option 1 is expected to increase costs compared to the static *acquis* position, primarily through possible increases in case volume and length of proceedings where forum is disputed, due to changes to jurisdiction and associated rules for divorce and maintenance (paragraphs 33-34 & 56).

#### *Overall benefits*

27. Whilst there may be some increase in the complexity of cases. There may be some benefits from having a single process for EU and non-EU nations (non-EU nations who are signed up to the relevant Hague Conventions).

*Net Impact*

28. The government objective in the event of 'no deal' is to minimise disruption. Whilst the Hague Conventions are not as comprehensive as the existing EU arrangements, the adoption of these conventions will ensure that there is an established and consistent framework for operating after March 2019.

**Cost and benefit analysis, compared to Option 0.2***Overall costs*

29. Option 1 is expected to increase costs, primarily through possible increases in case volume and length of proceedings where forum is disputed due to changes to jurisdiction and associated rules for divorce and maintenance (paragraphs 33-34 & 56). In other areas, where possible, our proposal is to use existing Hague Conventions in which the UK already participates, and which we intend to continue participating in, minimising disruption to affected persons. Moreover, any costs associated with this option are set against a baseline of greater disruption that would result from the overlap of redundant retained EU legislation with Hague Conventions in a no-deal exit.

*Overall benefits*

30. Compared to the baseline of a no-deal scenario in which no action is taken to address issues with the retained EU law no longer operating on a reciprocal basis, this option primarily offers benefits to the groups listed in paragraph 10. The principal benefit of Option 1 is that it: (a) provides a basis for continued judicial co-operation in family law in areas subject to Hague Convention rules, which will promote legal certainty and efficiency and thereby reduce the cost of resolving cross-border family law disputes; (b) provides workable and equitable rules on divorce jurisdiction, maintenance jurisdiction and legal aid in recognition and enforcement and parental responsibility cases; this will promote legal certainty and ensure equality of treatment between EU cross-border and other cross-border cases.

*Net Impact*

31. The Government believes that, for the reason that it provides a viable basis for continued reciprocal judicial co-operation with EU Member States in the specified areas covered by Hague Conventions and promotes legal certainty, Option 1 would have a net benefit to society.

**i. Divorce Jurisdiction**

32. In a no-deal scenario, for jurisdiction for divorce in England and Wales and Northern Ireland Brussels IIA would be repealed. Instead the applicable jurisdiction grounds set out in Article 3 of Brussels IIA would be replicated in domestic law, with the addition of sole domicile as an alternative jurisdictional ground being available for all cases. The government would repeal the lis pendens rule and switch to a forum non conveniens approach, meaning that if parallel proceedings were issued in another country, courts in England and Wales and Northern Ireland would have a discretion to stay the proceedings (as opposed to a mandatory obligation to stay the proceedings if they were the second-seized court under EU rules).

**As compared to Option 0.1***Costs*

33. The addition of sole domicile as an alternate ground would, however, potentially make more parties eligible to file for divorce in England and Wales and Northern Ireland courts. In England and Wales, when the court has jurisdiction for divorce proceedings, it also has jurisdiction to make certain financial orders. As the courts in England Wales are perceived to make financial orders more favourable to the financially weaker party (paragraph 56) this could lead to an increase in the number of divorce and associated financial cases before the courts. However, this might, in part be counterbalanced by the fact that a discretionary stay might mean the court could refuse jurisdiction in some cases where the mandatory stay would previously have secured it. Nonetheless, the extensions of the discretion to stay cases, and the additional ground of domicile, mean that additional court time and hearings would be needed in cases where jurisdiction is contested.
34. Although it is not possible to assess the size of this impact, we anticipate that, due to the complexity of certain international family cases, it may fall particularly on the family court and district judges, circuit judges and those of high court level. Given the current severe capacity constraints in the family justice system, any impact on the family courts is challenging, and puts performance levels at risk. Any financial impact on the system would depend on these capacity constraints. The likely



immediate impact of an increase in volumes would be worsening performance through slower case progression.

### *Benefits*

#### Court Users

35. Jurisdictional rules would be the same for court users, whether the potential competing jurisdiction in divorce cases is an EU Member State or another third country.
36. An increase in case volumes would lead to a corresponding increase in fee income.

#### Legal Profession

37. Family lawyers might benefit, in part, from any increase in the volume of work from an increase the number and length of divorce cases in England and Wales and Northern Ireland courts.

#### UK citizens living in Europe

38. Impact Assessments usually focus on the impacts to UK residents, however here we consider the impacts to UK citizens who are not resident in the UK.
39. The broader jurisdiction grounds would mean that citizens habitually resident in the EU, but who are domiciled in England and Wales or Northern Ireland may be able to divorce in England and Wales or Northern Ireland under the new rules. There is a perception that the courts of England and Wales in particular are more generous towards financially weaker parties than the courts of other Member States. The opportunity to choose jurisdiction is a benefit for these citizens and there may be a financial advantage to the financially weaker party in applying for divorce in England and Wales.

### **Net Impact**

40. The net impact of the change will be to move to a more complex system that will place greater demands upon the justice system and is likely to add complexity to users of the system. However, this offers greater fairness to court users than unilateral application of the lis pendens rules, as well as an approach that is consistent with that applied to non-EU Member States.

### **As compared to Option 0.2**

#### *Costs*

41. The rules replacing Brussels IIa are likely to lead to increased demand for court services. Whilst the exact increase is uncertain, the existing pressures on the family courts means that any increase is likely to negatively impact performance. The impact of adding sole domicile as a jurisdiction ground is discussed in paragraph 33.

#### *Benefits*

#### Court Users

42. Jurisdictional rules would be the same for court users, whether the potential competing jurisdiction in divorce cases is an EU Member State or another third country.

#### HMCTS and the family judiciary

43. Despite the loss of the mandatory stay, there would be limited case complexity impacts for courts relative to the baseline, as reciprocity would have been lost anyway, but the failure to address exit-related deficiencies would lead to greater complexity.
44. The benefits of this approach are outlined in paragraphs 35-40. It should be noted that the complexity from which lawyers benefit (paragraph 37), will be a disbenefit to court users who have to attempt to navigate a longer or more complex system.

### **Net impact**

45. The Government believes that, on the basis that it provides a continued basis for deciding divorce jurisdiction that is consistent for all court users, these changes would have a net benefit to society.

### **ii. Divorce recognition**

46. In relation to the recognition of foreign divorces, Ministers have decided the UK would switch to the 1970 Hague Convention, as implemented through the Family Law Act 1986. These rules apply to

divorces from all countries and not just those countries which are party to the 1970 Hague Convention.

### **As compared to Option 0.1**

#### *Costs*

47. Only 12 Member States<sup>1</sup> are signatories to the 1970 Hague rules which the UK will be adopting, so individuals could potentially face proceedings in another jurisdiction when seeking recognition of their divorce in a Member State which is not a party to the Convention. Recognition procedures would vary by Member State, and whilst this change may impose additional costs on UK residents, it is not possible to estimate their likelihood or size.

#### *Benefits*

48. The Family Law Act 1986 allows wide and generous provision to decide when overseas divorces will be recognised in the UK. This means that all individuals will have the current provisions offered by the law in England and Wales and Northern Ireland, as to when their overseas divorce will be recognised.

49. The preferred option is intended to mitigate the impacts of the loss of the existing framework. In the absence of a completely new framework, it retains the maximum benefits for UK citizens.

#### **Net Impact**

50. The net impact relative to Brussels IIa is that divorces will no longer be automatically recognised in all EU Member States and UK citizens may need to incur additional costs should they require the divorce to be recognised in an EU Member State.

### **As compared to Option 0.2**

#### *Costs*

51. We anticipate no significant costs to any of the stakeholders compared to the baseline, as this position merely extends current rules used for third countries, and in neither scenario, can we guarantee recognition of UK divorces in all EU Member States.

#### *Benefits*

#### Users of the family courts

52. All users would have the current protections offered by the relevant law as to when their divorce would be recognised, which are more favourable than the baseline. This approach would ensure consistency across third countries after EU exit.

#### HMCTS and the family judiciary

53. As the court decides on the recognition of foreign overseas divorces under the Family Law Act 1986, the changes would not have a direct impact on England and Wales courts.

#### **Net Impact**

54. The government believes that, by providing a basis for continued recognition of foreign overseas divorces, this option offers a net benefit to society.

### **iii. Maintenance jurisdiction**

55. The UK intends to continue to participate in the 2007 Hague Convention on International Recovery of Child Support and Other Forms of Family Maintenance, which sets out rules for the recognition and enforcement of maintenance decisions and for co-operation between central authorities.<sup>2</sup> The UK is also already a party to the earlier 1973 Hague Convention and 1956 New York Convention in its own right which also concern maintenance and which the UK intends to use when the 2007 Hague Convention is not applicable. The 2007 Hague Convention (and other international Conventions) do not include direct rules of jurisdiction and Ministers have decided that the UK will broadly adopt the position prior to the introduction of the Maintenance Regulation and other EU rules.

### **As compared to Option 0.1**

<sup>1</sup> Cyprus, Czech Republic, Denmark, Estonia, Finland, Italy, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Sweden

<sup>2</sup> See IA MOJ016/2018 IA for the International Recovery of Maintenance (Hague Convention 2007 etc.) (AMENDMENT) (UNITED KINGDOM) (EU EXIT) REGULATIONS 2018

*Costs*HMCTS and the family judiciary

56. These changes have the potential to lead to an increase in the volume of maintenance applications in the UK, if the perceived view that UK courts make orders more favourable to the financially weaker party, holds. This could lead to increases in administrative workload and potentially court workload for HMCTS and the judiciary. As noted for divorce jurisdiction, any impact on the family courts is important, given the current severe capacity constraints in the family justice system and the already pressured performance levels. The financial impact on the system would depend on these capacity constraints. The likely impact would be an increasing number of outstanding cases and a slightly worsening performance in that proceedings would take longer on average to conclude.

*Benefits*Court Users

57. Replacing the mandatory stay with a discretionary stay would ensure that, in jurisdictional disputes, consideration would be given to which is the most appropriate court to hear users' cases, rather than imposing a mandatory stay to proceedings where an EU court is seized first.

HMCTS and Family Judiciary

58. By changing jurisdictional rules, courts would be able to decide maintenance alongside divorce cases where jurisdiction is founded on sole domicile, providing a clearer view of the case to both judges and court users.

Legal Profession

59. As with divorce jurisdiction, family lawyers might benefit, in part, from any increase in the volume of work from an increased volume and complexity of maintenance cases in UK courts.

**Net Impact**

60. The main impact of the changes relative to static acquis will be an increase in court volumes, though with the possibility of some cases being heard in a more appropriate jurisdiction.

**As compared to Option 0.2***Costs*

61. As outlined in paragraph 57, there is a greater risk of parallel proceedings as a result of the change from *lis pendens* to *forum non conveniens*. The increase in family court workload relative to 0.1 is likely to be smaller than the increase relative to 0.2 as in both Options 0.1 and 1 there is reciprocal recognition of court decisions.

*Benefits*

62. The benefits are primarily as described in paragraphs 57-59. Relative to option 0.1, this option retains that there may be instances where cases are most appropriately heard in the UK, where previously they would have been heard abroad and vice versa.

**Net Impact**

63. The government believes that, as it offers a consistent basis for maintenance jurisdiction, this option offers a net benefit to society.

**iv. Maintenance Recognition and Enforcement**

64. The 2007 Hague Convention, to which all EU Member States except Denmark are parties, sets out broadly similar rules to the Maintenance Regulation for recognition and enforcement. The UK is aiming to re-join Hague 2007 in its own right on 1 April 2019 (see The International Recovery of Maintenance (Hague Convention 2007 etc.) (Amendment) (United Kingdom) (EU Exit) Regulations 2018).

**As compared to Option 0.1****Net Impact**

65. The Hague 2007 convention effectively replicates the existing arrangements in the areas of Maintenance Recognition and Enforcement. The only impact of this will be that Denmark is not a party to this convention and so will become equivalent to other non-Hague 2007, non-EU countries.

**As compared to Option 0.2***Costs*

66. We do not anticipate that the use of 2007 Hague for Maintenance Recognition and Enforcement with EU Member States would have any distinct costs for stakeholders.

*Benefits*

67. We anticipate benefits to stakeholders through the establishment of a continued basis for judicial co-operation in this area, in line with the general benefits set out in paragraph 30, as this ensures that domestic law properly implements the 2007 Hague Convention meaning that there is clarity for those who seek to rely on it in domestic law.

**Net Impact**

68. The government believes that, as it extends an existing international agreement, with established processes similar to those currently used with EU Member States, to replace the Maintenance Regulation, this option offers a net benefit to society. The impact of re-joining the 2007 Hague Convention is assessed in full in the impact assessment for The International Recovery of Maintenance (Hague Convention 2007 etc.) (Amendment) (United Kingdom) (EU Exit) Regulations 2018.

**v. Children Matters (parental responsibility)**

69. In a no deal scenario, the UK would revoke Brussels IIa and 'switch' to the broadly equivalent parental responsibility jurisdiction, recognition and enforcement and central authority (administrative) cooperation rules in the 1996 Hague Convention, which already covers parental responsibility proceedings involving the UK and non-EU states which are party to Hague 1996. All EU Member States are parties to 1996 Hague, on which Brussels IIa was modelled.

**As compared to Option 0.1***Costs*

70. Article 9 of Brussels IIa provides that where a child moves lawfully to another state, the previous state retains jurisdiction for three months. However, under the 1996 Hague Convention, the courts of the new country immediately acquire jurisdiction. The loss of the three-month retention period could have an operational impact as the courts of England and Wales and Northern Ireland will acquire jurisdiction for an incoming child under 1996 Hague where they would not have done under BIIa, or lose it for an outgoing child where they would not have done previously. This may also lead to an increased number of disputes about whether a child's habitual residence has changed.

71. Although the 1996 Hague Convention makes similar provisions to Brussels IIa, it has not been widely relied upon in scenarios involving EU Member States to date, due to the availability of Brussels IIa. Initial cases may therefore take longer to conclude, and involve higher costs for the family court and court users.

**Net Impact**

72. Based on the information available, the government expects a limited impact in this area relative to the static acquis, as the 1996 Hague Convention is already in use for parental responsibility proceedings involving the UK and non-EU states which are party to Hague 1996, and the existing provisions of Brussels IIa are based on it. There is potential for some applications to take longer under Hague 1996 than under BIIa but this is unlikely to have a significant impact.

**As compared to Option 0.2***Costs*

73. We anticipate no significant costs to any of the stakeholders from the use of 1996 Hague rules compared to the baseline.

*Benefits*

74. We anticipate benefits to stakeholders through the establishment of a continued basis for judicial co-operation in this area in line with the general benefits set out in paragraph 30.

**Net Impact**

75. The government believes that, as it uses a proven international convention to ensure continued co-operation on parental responsibility and children matters, these changes offer a net benefit to society.

**vi. Legal Aid**

76. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) provides that recognition and enforcement of a judgment in England and Wales in accordance with Articles 21 (recognition of judgments), 28 (enforcement of parental responsibility judgments), 41 (recognition and declarations of enforceability of access rights judgments), 42 (recognition and declarations of enforceability relating to the return of abducted or wrongfully retained children) and 48 (practical arrangements for rights of access) of Brussels IIa are in scope of legal aid. This is because Article 50 of Brussels IIa provides that *“an applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in the procedures provided for in Articles 21, 28, 41, 42 and 48 to benefit from the most favourable legal aid or the most extensive exemption from costs and expenses provided for by the law of the Member State of enforcement”*.
77. In a no deal scenario, these provisions of Brussels IIa, as retained in UK law are to be revoked. As stated in paragraphs 46 and 69 a switch will be made to the Family Law Act 1986 for divorce recognition, and to the 1996 Hague Convention for parental responsibility. However, unlike Brussels IIa there are no legal aid requirements under these conventions. Therefore, legal aid will no longer be available for such applications in England and Wales following the ‘switch’, except where the application otherwise falls within the scope of legal aid.

**As compared to Option 0.1***Costs*

78. Repealing the legal aid provisions of Brussels IIa will decrease the liability of the legal aid fund but it is not possible to estimate the size of the impact, although we expect it to be small. Records show that there is a low volume of cross-border applications under the provisions of Brussels IIa, with fewer than ten a year submitted. Legal Aid Agency (LAA) management information does not record whether these applications were subsequently granted, and therefore if they resulted in a cost to the legal aid fund.

**Net Impact**

79. Although this option offers a more consistent application of legal aid rules in cross-border cases, the government expects it to have an impact on a small number of court users who currently benefit from legal aid under its provisions.

**As compared to Option 0.2****Net Impact**

80. Repealing the legal aid rules in Brussels IIa will ensure legal certainty and greater clarity regarding legal aid entitlement, as there should be no uncertainty over who is entitled to legal aid provision.

**vii. Child Abduction Override**

81. Article 11 of Brussels IIa contains an override mechanism which enables an order on custody which entails the return of a child, made by a court with jurisdiction under Brussels IIa, to prevail over any non-return order by a court under Article 13 of the 1980 Hague Convention on International Child Abduction. In a no deal scenario, the UK would revert to the 1980 Hague Convention on Child Abduction and repeal the supplementary provisions of Brussels IIa, meaning there would be no such override. Instead, left behind parents would have to appeal the non-return order in the state that made the order. This approach already applies between the UK and non-EU states.

**As compared to Option 0.1***Costs*

82. For those few left behind parents who might rely on the child abduction override provisions, there would be the additional cost of having to appeal the non-return order in another state. However, the child abduction override is not part of Brussels IIa’s legal aid requirements and Member States are not currently required to provide legal aid for child abduction override proceedings. The need to appeal would therefore potentially produce increased costs.

**Net Impact**

83. Based on the information available, we have concluded that there will not be a significant impact on the family court. The research suggests that the child abduction override has not been frequently

used, with orders rarely enforced.<sup>3</sup> Nonetheless, the loss of the override may increase costs for some left behind parents having to appeal non-return orders in another state. It may also be necessary to revise the International Child Abduction and Contact Unit guidance to assist parents who do not have legal representation in these types of cases so they are aware of the processes and expectations in the course of the proceedings.

### **As compared to Option 0.2**

#### *Costs*

84. We anticipate no significant costs to any of the stakeholders compared to the baseline, as these changes merely repeal additional, seldom-used, provisions to the international agreement that underpins the Brussels IIa regulations.

#### *Benefits*

85. We anticipate benefits to stakeholders through the establishment of a continued basis for judicial co-operation in this area, in line with the general benefits set out in paragraph 30.

#### **Net Impact**

86. The government believes that as it ensures the consistent application of the 1980 Hague Convention on Child Abduction, rather than the unilateral recognition and enforcement of child abduction orders, without the expectation of reciprocity, this change offers a net benefit to society relative to the baseline.

### **viii. Civil Partnership Dissolution and Same Sex Divorce**

87. To ensure equality under the law, the Government has made a policy decision when legislating for civil partnership dissolution and same sex couples' divorces to as closely as possible replicate the jurisdiction and recognition rules for divorce, annulment and legal separation that apply to opposite-sex couples. The existing powers to do this in section 219 of the Civil Partnerships Act 2004 and paragraph 5 of Schedule A1 of the Domicile and Matrimonial Proceedings Act 1973 presuppose the UK's membership of the EU. They need to be amended to ensure that, post-EU exit, this power can be used if needed. Changes are also being made to the existing regulations made under these sections and paragraphs so that the same position will apply to same sex married couples (England and Wales only) and civil partners (England and Wales and Northern Ireland) as for opposite sex couples in the Brussels IIa SI and reflect the UK's exit from the EU.

### **As compared to Option 0.1**

#### **Net Impact**

88. The impacts of this are as above. This maintains the equal rights for opposite sex and same sex couples and so offers a net benefit to society.

### **As compared to Option 0.2**

#### *Costs*

89. As these changes merely replicate those for opposite sex marriage, we anticipate no costs in addition to those laid out in paragraphs 33-34 and the general costs set out in paragraph 29.

#### *Benefits*

90. We anticipate benefits to stakeholders through the mirroring of provisions for opposite sex marriage, in line with the benefits set out paragraphs 35-40.

#### **Net Impact**

91. The government believes that, as it ensures equal treatment in matters of divorce, annulment and legal separation for opposite sex and same sex couples, this change offers a net benefit to society.

<sup>3</sup> Beaumont P, Walker L, Holliday J (2016a) 'Conflicts of EU Courts on Child Abduction: The reality of Article 11(6)-(8) proceedings across the EU' 12 Journal of Private International Law 211.

## F. Risks and assumptions

92. The assessment of options in this IA are based on a number of assumptions. In the table below, we set out some of the key assumptions we have made and the potential impact if that assumption is not accurate.

Assumption or risk	Impact of assumption not holding
We have assumed no changes to the divorce rate.	If there were any increase in rates would have an impact on the costs and benefits of both the policy and the baseline, in particular to administrative workload, but also to court workload and would impact on the timeliness in the family courts.
We have assumed that volumes of public and private law cases for children would not change as a result of this policy.	Any additional increase would have an impact on the costs and benefits of the policy (as well as the baseline).
We have assumed that any complexity effects from switching to Hague Conventions will be borne administratively, rather than impacting on court sitting days	Increased complexity would then impact on court sitting days, and given capacity constraints, affect case timeliness in the family courts.

## G. Wider Impacts

### Equalities

93. The equality impacts of adopting Option 1 for these areas of family law have been considered. Option 1 aims to provide a basis for continued reciprocal judicial co-operation in family law through the UK's participation in Hague Conventions and to ensure there are effective jurisdiction rules for divorce proceedings in England and Wales and Northern Ireland and maintenance proceedings in the United Kingdom.
94. The intention is, as far as possible, to provide for equality of treatment for court users and a degree of certainty for courts and the legal profession in the event of a no deal exit from the EU. Option 1 ensures equality of treatment between EU and non-EU cross-border family law matters (see paragraph 30).
95. Individuals most affected are those involved in family law disputes covered by the existing EU regulations (including divorce, parental responsibility and maintenance) including users of the family courts.
96. Consideration of protected characteristics where impacts could vary:
- Sex: There is a perception amongst some stakeholders that the courts of England and Wales are more generous towards financially weaker parties in divorce and ancillary maintenance matters, than the courts of other Member States. Broadening the jurisdiction of the courts of England and Wales may benefit financially weaker parties who may be more likely to be women as there may be a financial advantage to the financially weaker party in petitioning the courts of England and Wales.
  - Sexual orientation: The changes outlined in Option 1 to same-sex marriage and civil partnership legislation will ensure that the treatment of same-sex couples in matters of divorce, annulment and legal separation or civil partnership dissolution, and maintenance is equal to that for opposite sex couples.
97. The range of impacts are difficult to quantify or predict at this stage, however on the basis of the available evidence considered in this impact assessment, it is likely that the overall impact of Option 1 will result in a greater net benefit to society than Option 0.
98. The proposed instrument does not amend, repeal or revoke any part of the Equality Acts 2006 or 2010 or subordinate legislation made under those Acts.
99. Due regard has been taken on the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010. The Equality Act 2010 does

not extend to Northern Ireland, but as this SI extends to Northern Ireland an equivalent regard has been taken on the need to eliminate discrimination, harassment and victimisation in relation to Northern Ireland.

#### Family Impact Test

100. As set out above, Option 1 will ensure that, in the event of no deal, UK domestic law is clear and complies with the Hague Conventions that provide alternative rules on jurisdiction, recognition and enforcement and administrative cooperation to pre-exit EU rules and that there are workable rules on jurisdiction for divorce and maintenance proceedings in the UK. In doing so it aims to minimise disruption to families.

#### **H. Implementation and Monitoring**

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