

EXPLANATORY MEMORANDUM TO
THE FAMILY PROCEDURE RULES 2010 AND COURT OF PROTECTION RULES
2017 (AMENDMENT) (EU EXIT) REGULATIONS 2019

2019 No. 517

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 This instrument is made using powers in the European Union Withdrawal Act 2018 (the Withdrawal Act). It makes amendments to the Family Procedure Rules 2010 (the FPR) and the Court of Protection Rules 2017 (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 in the event of Exit without a withdrawal agreement. The amendments remove provision in the FPR and COPR which relates to powers, processes and orders under EU instruments or international agreements which will no longer be applicable or available when those instruments or agreements are revoked by the Withdrawal Act or the statutory instruments made under it, or in some cases amend such provision where such instruments are retained in an amended form.
- 2.2 This instrument does not itself revoke or amend any direct EU legislation or other retained EU law other than the FPR and COPR themselves to the extent that they relate to retained EU law, and does not give effect to any substantive policy decision in relation to retained EU law. Rather, it simply ensures that the FPR and COPR are aligned with changes to retained EU law made by the instruments listed in paragraph 7.1 of this explanatory memorandum.

Explanations

What did any relevant EU law do before exit day?

- 2.3 The FPR make provision governing practice and procedure for family proceedings (in the Family Court and the Family Division of the High Court, provision in relation to the Court of Appeal being made by the Civil Procedure Rules 1998). This includes provision governing practice and procedure for proceedings under or pursuant to (for example, for an application for the court to exercise powers conferred by) a variety of EU instruments and international agreements between the EU and third countries:

- Council Regulation No. 2201/2003 (known as “Brussels IIa”)
- Council Regulation No. 4/2009 (the Maintenance Regulation)
- Directive 2008/52/EC (the Mediation Directive)
- Regulation (EU) 606/2013 (the Protection Measures Regulation)
- Council Regulation (EC) No. 1393/2007 (the Service Regulation)

- Council Regulation (EC) No. 1206/2001 (the Taking of Evidence Regulation)
- Regulation (EC) No 44/2001 (Brussels I) (in so far as maintenance orders and proceedings for maintenance come under that Regulation)
- the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark (the 2007 Lugano Convention), and its predecessor, the 1988 Lugano Convention (in so far as maintenance orders and proceedings for maintenance come under those Conventions)
- the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Brussels on 27 September 1968 (the 1968 Brussels Convention) (in so far as maintenance orders and proceedings for maintenance come under that Convention).

2.4 The FPR also make provision governing practice and procedure in proceedings under the Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005 (the 2005 Regulations) and the Marriage (Same Sex Couples) (Jurisdiction and Recognition of Judgments) Regulations 2014 (the 2014 Regulations), which make provision for jurisdiction in proceedings for dissolution of civil partnerships and divorce of same-sex married couples and recognition of judgments in such proceedings, mirroring the provision for these matters made by the Brussels IIa Regulation.

2.5 The 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 Service Regulation and the Taking of Evidence Regulation.

Why is it being changed?

2.6 Upon the UK's exit from the EU, provision in statutory instruments made under powers conferred by the Withdrawal Act will revoke, or retain with amendment, the EU instruments or international agreements referred to in paragraph 2.3 and repeal or amend associated domestic legislation. Provision governing practice and procedure for proceedings under such instruments or domestic legislation will (subject to transitional provision) be rendered superfluous where, as a result of revocation of the instrument, such proceedings will no longer be possible; and so rather than such superfluous provision being left in place, it is removed. Where, however, an EU instrument or associated domestic legislation is retained in an amended form, proceedings under it will still be possible, and that case the provision governing practice and procedure for such proceedings is not superfluous and is amended rather than removed.

2.7 The 2005 Regulations and the 2014 Regulations will also be amended, to remove special provision for the recognition of same sex divorce etc., and the dissolution etc of civil partnerships in the EU context. Post exit, existing domestic recognition provisions will apply to such matters.

What will it now do?

2.8 As amended by this instrument, the FPR and COPR no longer make provision governing the practice and procedure to be followed in proceedings under EU instruments which are revoked – by other SIs or by the Withdrawal Act. This is to

reflect the fact that proceedings under those revoked instruments will no longer be possible; nor will they make provision governing practice and procedure in proceedings under the 2005 Regulations and the 2014 Regulations (for which existing domestic legislation will instead make provision). They will of course continue to make provision governing practice and procedure in proceedings under existing international agreements (particularly Conventions agreed in the Hague Conference on Private International Law which cover the same areas). Where such an EU instrument (or associated domestic legislation) is being retained in an amended form, the Rules as amended will continue to make provision – amended as appropriate – governing practice and procedure to be followed in proceedings under the instrument or associated legislation as amended. There will also be transitional and saving provisions for proceedings which have commenced but not been concluded under those instruments, conventions and provisions before exit day, so they can be concluded under the same procedure as before Exit.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The EU Exit Sifting Committees have reviewed this instrument and confirmed that they agree with the Government’s assessment that it should be subject to the negative resolution procedure. This instrument was presented to the EU Exit Sifting Committees on 11th February 2019, and the process was completed on 26th February 2019.

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 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 The Family Procedure Rules 2010 SI 2010/2955 were made by the Family Procedure Rule Committee in exercise of the powers conferred by sections 75 and 76 of the Courts Act 2003 and other Acts which give that Committee power to make rules governing the procedure to be followed in proceedings in the Family Court and the Family Division of the High Court. They came into force on 6 April 2011 and have been updated by amendment Rules.
- 6.2 The Court of Protection Rules 2017 SI 2017/1035 were made by the President of the Family Division of the High Court (who is also the President of the Court of Protection) in exercise of powers conferred by section 51 of the Mental Capacity Act

2005, consolidating the previous Court of Protection Rules 2007 and numerous amendments to them). They came into force on 1 December 2017 and have not yet been updated by amendment Rules. The FPR and COPR, and amendments to them, are made in statutory instruments subject to negative resolution procedure.

- 6.3 The provisions of the FPR and COPR that make provision governing practice and procedure in proceedings under, or otherwise support the operation of, the EU instruments, Brussels and Lugano conventions and Regulations referred to in paragraphs 2.3 to 2.5 of this explanatory memorandum, are “retained EU law” within the meaning of section 2 of the Withdrawal Act.
- 6.4 Section 8(1) of the Withdrawal Act empowers a Minister of the Crown to make regulations to prevent, remedy or mitigate any failure of retained EU law to operate effectively, arising from EU exit. Section 8(2) provides that deficiencies which may be remedied include where the Minister considers that the retained EU law makes provision for, or in connection with, reciprocal arrangements between the UK or any part of it or a public authority in the UK and a Member State, or a public authority in a Member State, which no longer exist or are no longer appropriate. Regulations made under section 8(1) may make any provision that could be made by an Act of Parliament, including repeal of relevant retained EU law.

7. Policy background

What is being done and why?

- 7.1 The Government’s legislative strategy for managing a no deal EU exit in the area of family law (jurisdiction, recognition and enforcement of judgments and central authority cooperation in matrimonial matters, parental responsibility matters, maintenance matters, civil protection measures and associated matters including mediation of cross-border disputes and the cross-border service of documents and taking of evidence in family cases) is provided for in the following instruments made under powers conferred by section 8(1) of the Withdrawal Act:
- The Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019
 - The Civil Partnership and Marriage (Same Sex Couples) (Jurisdiction and Judgments) (Amendment Etc.) (EU Exit) Regulations 2019
 - The Cross-Border Mediation (EU Directive) (EU Exit) Regulations 2019
 - The Service of Documents and the Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provision) (EU Exit) Regulations 2019
 - The Mutual Recognition of Protection Measures in Civil Matters (Amendment) (EU Exit) Regulations 2019
 - The Civil Jurisdiction and Judgments (Amendment)(EU Exit) Regulations 2019
- 7.2 The effect of these instruments on relevant EU instruments, the Brussels and Lugano conventions and associated domestic legislation is (as indicated in paragraph 2.8 of this explanatory memorandum) to revoke, or retain with amendments, the EU instruments, international conventions and associated domestic legislation in question. Further detail about these instruments is provided in the explanatory memoranda published with them.

- 7.3 The amendments in this instrument are exclusively consequential upon the Withdrawal Act and the instruments listed in paragraph 7.1 of this explanatory memorandum. They remove from the FPR rules governing practice and procedure in proceedings under the EU instruments and international conventions referred to in paragraph 2.3 where those proceedings will no longer be possible due to revocation of the instruments, conventions or legislation, and retain such provision with amendments where such proceedings will still be possible because the instruments, conventions or legislation are retained with amendments. They also remove the special recognition provisions of the 2005 and 2014 Regulations (as explained in paragraph 2.4).
- 7.4 For example, since it will no longer be possible to submit a request for service of documents under the Service Regulation (since that Regulation is revoked by the Service of Documents and Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provisions) (EU Exit) Regulations 2018, the provision governing practice and procedure to be followed for such a request is removed (with transitional and saving provision for cases where proceedings were begun before exit day). Conversely, the recognition and enforcement provisions of the Protection Measures Regulation are being retained, with amendments, by the Mutual Recognition of Protection Measures in Civil Matters (Amendment) (EU Exit) Regulations 2019, and so the provision governing practice and procedure to be followed in such recognition and enforcement proceedings is retained, with corresponding amendments.
- 7.5 The amendments also ensure there are appropriate transitional and saving provisions for proceedings begun but not concluded under those instruments, conventions and provisions before exit day. The approach to transitional and saving provision is to follow the provision for these matters made in the statutory instruments listed in paragraph 7.1 (which can be summarised as allowing for proceedings started in a court in England and Wales before exit day to be concluded after exit day under the rules as they stood immediately before exit day), and in some cases to enable an “outgoing” request which will not be completed (for example a request for service of a document in an EU Member State under the Service Regulation) to be treated as a request which will be completed (for example a request for service of that document in that State under the Hague Convention on Service of Documents),
- 7.6 Similar provision is made for amendment of the COPR to remove provision governing practice and procedure in proceedings under the Service Regulation and the Taking of Evidence Regulation, and for provide transitional and saving provisions for documents where the relevant process was begun, but not completed, under the Regulation in question before exit day.

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 European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

- 9.1 The FPR provide a consolidated unified set of rules for all types of family proceedings. This instrument amends the FPR. There are currently no plans to undertake a consolidation exercise. The FPR as amended will be published at the following link: http://www.justice.gov.uk/courts/procedure-rules/family/rules_pd_menu
- 9.2 The COPR provide a consolidated unified set of rules for proceedings in the Court of Protection. This instrument amends the COPR. There are currently no plans to undertake a consolidation exercise (the 2017 Rules being themselves a consolidation). The COPR as amended will be published at the following link: <https://www.judiciary.uk/publications/court-of-protection-amendment-rules-2017-2/>

10. Consultation outcome

- 10.1 There has been no formal consultation on this instrument.
- 10.2 The amendments to the FPR in this instrument have been drafted in consultation with, and with the assistance of, the Family Procedure Rules Committee and an EU Exit working group under the aegis of that Committee including members of the Committee and representatives of practitioners and senior judiciary not on the Committee. Both the working group and the full Committee provided valuable technical input into the drafting of the instrument.
- 10.3 The amendments to the COPR in this instrument correspond to those made to the corresponding provisions of the FPR (on which the existing COPR provisions were modelled). The President of the Family Division and the Vice-President of the Court of Protection were consulted on the draft amendments to the COPR, but no changes of substance were required as a result.
- 10.4 The amendments to the FPR and COPR in this instrument are exclusively consequential upon the Withdrawal Act and the instruments listed in paragraph 7.1 of this explanatory memorandum which give effect to the Government's legislative strategy in the event of a no deal EU exit. The Government discussed its proposed legislative strategy on family law with key family law stakeholders including Resolution, the Family Law Bar Association and the International Association of Family Lawyers and other leading family law practitioners at various meetings between October 2016 and January 2019 prior to finalising the policy position set out in the instruments referred to in paragraph 7.1. The Government considered that for this technical area of law it was appropriate to discuss with specialist stakeholders and practitioners.

11. Guidance

- 11.1 The Government guidance on how cases family cases involving the EU would be in the event of a 'no-deal' Exit is available at <https://www.gov.uk/government/publications/family-law-disputes-involving-eu-after-brexite> . Further advise will be published although specific guidance on the amendments to the Rules is not currently planned.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because the amendments to the FPR and COPR have no or no significant impact on business, charities, voluntary bodies or the public sector of themselves. They are wholly consequential upon the instruments referred to in paragraph 7.1 of this explanatory memorandum and remove redundant rules and references that relate to the EU instruments, Brussels and Lugano conventions and Regulations referred to in paragraphs 2.3, 2.4, 2.5, 2.6 and 2.7 of this explanatory memorandum.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses, namely barristers and solicitors practising in the area of EU cross-border family law and in the Court of Protection.

13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is to ensure that there are appropriate transitional and saving provisions in the FPR and COPR for proceedings commenced but not concluded under the instruments, conventions and provisions referred to in paragraphs 2.3 to 2.5 of this explanatory memorandum before exit day.

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: 07761 346579 or email: andrew.thompson@justice.gov.uk can be contacted with any queries regarding the instrument.

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

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

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

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

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

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

Part 2

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

1. Sifting statement(s)

- 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 Family Procedure Rules 2010 and Court of Protection Rules 2017 (Amendment) (EU Exit) Regulations 2019 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure)”.

- 1.2 This is the case because: the instrument does not fall into the category of regulations identified in Schedule 7, Part 1, paragraph 1(2) of the Withdrawal Act as requiring approval in draft by resolution of both Houses of Parliament. Amendments to the FPR and COPR would normally be made by an instrument subject to the negative procedure, and the amendments to those Rules in this instrument are wholly consequential upon the provisions of the Withdrawal Act and of the instruments made under the Withdrawal Act referred to in paragraph 7.1 of this explanatory memorandum.

2. Appropriateness statement

- 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 the Family Procedure Rules 2010 and Court of Protection Rules 2017 (Amendment) (EU Exit) Regulations 2019 do no more than is appropriate”.

- 2.2 This is the case because: the instrument does no more than amend the FPR and COPR to remove redundant rules and references, or make amendments to mirror amendments made by other instruments, as described in paragraph 7.3 of this explanatory memorandum.

3. Good reasons

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

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

- 3.2 These are: they remove from the FPR and COPR provisions which are relevant to EU instruments, Brussels and Lugano conventions and domestic provisions that will no longer apply in domestic UK law post Exit and which will accordingly become superfluous on Exit. They also ensure there are appropriate transitional and saving provisions in the FPR and COPR for proceedings begun but not concluded under those instruments, conventions and provisions (as relevant) before exit day.

4. Equalities

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

“The Family Procedure Rules 2010 and Court of Protection Rules 2017 (Amendment) (EU Exit) Regulations 2019 do 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.

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