

POLICY NOTE

THE CIVIL AND FAMILY JUSTICE (EU EXIT) (SCOTLAND) (AMENDMENT ETC.) REGULATIONS 2020

SSI 2020/XXX

The above instrument was made in exercise of the powers conferred by paragraph 1(1) and (3) and 11G(1) of Schedule 2 and paragraph 21(b) of Schedule 7 of the European Union (Withdrawal) Act 2018 (“the 2018 Act”) and sections 12 and 14 of, and paragraph 12 of Schedule 4 to, the European Union (Withdrawal Agreement) Act 2020 (“the 2020 Act”). The instrument is subject to the affirmative procedure.

Purpose of the instrument.

The purpose of the Civil and Family Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 (“the 2020 Regulations”) is to address deficiencies of retained EU Law to operate effectively and other deficiencies arising from the withdrawal of the United Kingdom from the European Union and to make changes in relation to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the Atomic Energy Community (“the withdrawal agreement”), the EEA EFTA separation agreement and the Swiss citizens’ rights agreement.

Policy Objectives

The 2020 Regulations are a composite instrument that will adjust aspects of civil law in order to address deficiencies of retained EU Law to operate effectively and other deficiencies arising from the withdrawal of the United Kingdom from the European Union. It addresses reciprocal arrangements which no longer exist and EU references which are no longer appropriate. It makes transitional provision in respect of matters and procedures begun but not completed before the end of the implementation period and reflects Title VI of Part 3 of the withdrawal agreement.¹

Title VI of Part 3 of the withdrawal agreement makes provision in respect of ongoing judicial cooperation in civil and commercial matters relating to certain EU measures. Generally, it preserves the application of particular EU measures in respect of any matters or procedures begun but not completed before the end of the implementation period. These Regulations therefore make necessary transitional provisions for such matters and procedures.

The areas covered by the Regulations are varied including provisions on mediation, civil status documents, legal services, legal aid and transitional matters. In particular:

- Part 2 makes provision to revoke Scottish legislation which implemented EU Directive 2008/52/EC² on cross-border mediation in civil and commercial matters and reflects the withdrawal agreement.

¹ Title 6 of Part 3 of the withdrawal agreement

<https://www.legislation.gov.uk/eu/withdrawal-agreement/part/three/title/vi/adopted>

² <https://www.legislation.gov.uk/eudr/2008/52/contents>

- Part 3 makes provision to revoke Scottish legislation which implemented EU Directive 2003/8/EC³ of the European Council on improving access to justice in cross-border disputes by establishing minimum common rules relating to legal aid and makes transitional provision.
- Part 4 revokes the Multilingual Standard Forms (Fees) Regulations 2018⁴ on fees which can be charged by National Records of Scotland (NRS) for multi-lingual translation aids issued under EU Regulation 2016/1191⁵ on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union.
- Part 5 makes a number of changes to the Services of Lawyers and Lawyer’s Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 (“the 2019 Regulations”)⁶ which end the preferential practising rights of EU and EFTA lawyers in Scotland and provides for a range of rights for Swiss nationals or others who are professionally recognised in Switzerland and who have Swiss legal qualifications to practice in Scotland under certain conditions and reflects the withdrawal agreement. In addition, references to “exit day” are updated to “IP completion day”. That instrument is to come into force on IP [Implementation Period] completion day and, as such, the amending provisions of this instrument require to come into force immediately before IP completion day to ensure the law is clear following IP completion day.
- Part 6 amends the Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 (“the 2019 Family Regulations”)⁷ on family law to reflect the terms of the withdrawal agreement on transitional provisions. That instrument is to come into force on IP completion day and as such, the amending provisions of this instrument require to come into force immediately before IP completion day to ensure the law is clear following IP completion day.

Explanation of the law being amended by the regulations

Part 2 of the 2020 Regulations make amendments to a number of Acts and revoke the Cross-Border Mediation (Scotland) Regulations 2011 (“the 2011 Regulations”).

The 2011 Regulations partially implemented in respect of devolved matters, EU Cross-Border Mediation Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (“the Mediation Directive”). The aim of this Directive is to encourage the use of mediation in cross-EU border cases.

The UK Government has made provision implementing the Mediation Directive including for Scotland in respect of reserved matters in separate regulations.⁸

The reciprocity on which the Mediation Directive is based, and on which the 2011 Regulations were implemented, will cease. Unilateral application of the Mediation Directive in the UK after EU Exit would mean different rules would apply to certain mediations

³ <https://www.legislation.gov.uk/eudr/2003/8>

⁴ <https://www.legislation.gov.uk/ssi/2018/373/made>

⁵ <https://www.legislation.gov.uk/eur/2016/1191>

⁶ <https://www.legislation.gov.uk/ssi/2019/127/contents/made>

⁷ <https://www.legislation.gov.uk/ssi/2019/104/contents/made>

⁸ <https://www.legislation.gov.uk/uksi/2011/1133/made>

involving parties domiciled in EU member states compared with parties domiciled in the UK. The 2020 Regulations apply to devolved matters covered by the 2011 Regulations, and in doing so reverse the changes made by the 2011 Regulations to implement the Mediation Directive.

The 2011 Regulations will continue to apply to mediations begun but not completed before the end of the implementation period.

Part 3 of the 2020 Regulations makes amendments to the Legal Aid (Scotland) Act 1986 and related statutory instruments to remove references to Council Directive 2003/8/EC, which make provision for civil legal aid for cross-border disputes, and to remove an exception relating to EU Member States in respect of the Convention on the International Recovery of Child Support and other forms of Family Maintenance (“the Hague Convention 2007”). It also provides transitional and saving provisions. The provisions are saved until 15 days after IP completion day to provide a period of time for an application to be received after EU exit in relation to proceedings begun but not completed before the end of the implementation period.

Part 4 revokes the Multilingual Standard Forms (Fees) (Scotland) Regulations 2018.⁹ These Regulations lay down the fee to be paid to NRS for issuing a multi-lingual translation aid under EU Regulation 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union.

EU Regulation 2016/1191 makes provision on the mutual recognition across the EU of civil status documents (e.g. birth and marriage certificates) and establishes multi-lingual translation aids for certain civil status documents.

In Scotland, NRS is responsible for issuing these translation aids. This obligation will end when a UK SI, the Immigration, Nationality and Asylum (EU Exit) Regulations 2019¹⁰ comes into force at the end of the transitional period as this will revoke EU Regulation 2016/1191 for the UK as a whole.¹¹ Accordingly, it will no longer be necessary for there to be legislation in place which specifies the fee to be charged by NRS for issuing these translation aids.

There is existing provision in the Marriage (Scotland) Act 1977 and the Civil Partnership Act 2004¹² on registrars accepting multi-lingual translation aids issued by EU Member States when handling notices of intention to marry or enter a civil partnership. This provision will remain in place given the benefits to both registrars and individuals of the continued ability to use these multi-lingual translation aids as part of marriage or civil partnership notices.

⁹ <https://www.legislation.gov.uk/ssi/2018/373/made>

¹⁰ <https://www.legislation.gov.uk/uksi/2019/745/made>

¹¹ <https://www.legislation.gov.uk/uksi/2019/745/schedule/1/made> The last entry in part 1 of schedule 1 of this SI revokes EU Regulation 2016/1191 for the UK.

¹² SSI 2018/374 amended section 3 of the Marriage (Scotland) Act 1977 and section 88 of the Civil Partnership Act 2004 so that registrars can accept multi-lingual translation aids issued under the EU Regulation in conjunction with any of the documents required to be submitted to a registrar as part of a notice of intention to marry or notice of intention to enter into a civil partnership. The SSI also made minor consequential amendments to both Acts. Registrars are able to seek further details if the multi-lingual translation aid does not contain sufficient information.

Part 5 makes amendments to legislation in the field of legal services and amends the 2019 Regulations in light of article 28 of the withdrawal agreement and sections 12 and 14 of the 2020 Act to change references from “exit day” to “IP completion day”. It also makes consequential amendments and transitional provision.

Part 6 relates to family law. Regulation 16 amends the 2019 Family Regulations. It replaces regulation 6 of those Regulations with provisions that make clear that nothing in those Regulations affects the application of the relevant paragraphs of Article 67 of the withdrawal agreement. This ensures that court actions started before the end of the implementation period can continue to be dealt with on the basis of the relevant EU provision.

Reasons for and effect of the proposed change or changes on retained EU law

The 2020 Regulations relate to various pieces of legislation designed to implement EU legislation. Some of the changes reflect the fact that reciprocity with EU Member States is no longer in place once the implementation period comes to an end.

This instrument also makes a number of changes to amend references from “exit day” to “IP completion day” to reflect the end of the transitional period.

It also makes transitional provision in respect of matters and procedures begun but not completed before the end of the implementation period to reflect the withdrawal agreement

Both the 2019 Regulations and the 2019 Family Regulations are not yet in force. They are to come into force on IP completion day (31 December 2020 at 23.00). Therefore, the 2020 Regulations require to come into force before IP completion day so the amended versions of the 2019 Regulations and the 2019 Family Regulations can come into force on IP completion day.

The amendments are mainly of a technical nature and do not introduce any policy changes.

Statements required by the European Union (Withdrawal) Act 2018 and Additional Information required by the Protocol between the Scottish Government and the Scottish Parliament

The Regulations are made in exercise of powers in the 2018 Act both to deal with deficiencies in retained EU law (paragraphs 1(1) and (3) of Part 1 of schedule 2) and to implement Part 3 of the withdrawal agreement (paragraph 11G(1) of Part 1B of schedule 2). The Regulations also exercise the powers in paragraph 21(b) of schedule 7 in relation to transitional etc. provision.

In addition, the Regulations are made in exercise of sections 12 and 14 of, and paragraph 12 of Schedule 4 to the 2020 Act to implement the professional qualifications provisions of the withdrawal agreement, the EEA EFTA separation agreement and the Swiss citizens’ rights agreement.

Regulations 2, 3, 4, 5, 6, 8, 9, 10, 11, 13 and 14 are made in exercise of the deficiencies powers.

Regulations 7, 12 and 16 are made in exercise of the power to implement Part 3 of the withdrawal agreement.

Regulation 15 is made in exercise of the deficiencies power (as expanded by paragraph 21(b) of schedule 7 of the 2018 Act) and the power to implement the professional qualifications provisions of the withdrawal agreement, the EEA EFTA separation agreement and the Swiss citizens' rights agreement (as expanded by paragraph 12 of Schedule 4 to the 2020 Act).

The Statements set out below relate to the exercise of the deficiencies powers.

The Additional Information set out below relates to the deficiencies powers and the powers to implement Part 3 of the withdrawal agreement as well as the powers to implement the professional qualifications provisions of the withdrawal agreement, the EEA EFTA separation agreement and the Swiss citizens' rights agreement

Statements required by European Union (Withdrawal) Act 2018

The following statements are required under paragraph 29 of Schedule 7 of the 2018 Act as this instrument contains Regulations under Part 1 of the 2018 Act.¹³

Statement that in their opinion Scottish Ministers consider that the regulations do no more than is appropriate

The Minister for Community Safety has made the following statement “In my view the Civil and Family Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 do no more than is appropriate. This is because the Regulations address necessary changes arising from leaving the EU”.

Statement as to why the Scottish Ministers consider that there are good reasons for the regulations and that this is a reasonable course of action

The Minister for Community Safety has made the following statement “In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action. It is the case that deficiencies arising from the withdrawal of the UK from the EU need to be addressed and that “exit day” needs to be amended to “IP completion day”. The amendments made by it relate to a number of reciprocal measures which will cease to apply to the UK at the end of the implementation period. The technical amendments will remove redundant legislation and adjust legislation which is being retained so that it continues to operate effectively. The amendments will also make minor technical changes to domestic legislation to reflect EU exit and to ensure the law is clear following IP completion day.”

Statement as to whether the SSI amends, repeals or revokes any provision of equalities legislation, and, if it does, an explanation of that amendment, repeal or revocation

The Minister for Community Safety has made the following statement “In my view the Civil and Family Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 do not amend,

¹³ <https://www.legislation.gov.uk/ukpga/2018/16/schedule/7/paragraph/29/enacted>

repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.”

Statement that Scottish Ministers have, in preparing the regulations, 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

The Minister for Community Safety has made the following statement “In my view the Civil and Family Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 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.”

Additional information provided for EU Exit instruments in terms of the protocol agreed between the Scottish Government and the Scottish Parliament

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the guidance principles on the environment and animal welfare

This is not applicable.

Statement explaining the effect (if any) of the regulations on rights and duties relating to employment and health and safety and matters relating to consumer protection (so far as is within devolved competence)

This is not applicable.

An indication of how the regulations should be categorised in relation to the significance of the change proposed

The Regulations are categorised as low in relation to the significance of the change proposed. They are predominantly concerned with technical detail including amendments to primary legislation to ensure the law operates after IP completion day. There is no significant policy choice involved.

Statement setting out the Scottish Ministers’ reasons for their choice of procedure

This instrument is subject to the mandatory affirmative procedure under paragraph 1(6) of Schedule 7 of the 2018 Act as it contains a provision (regulation 14) which relates to a fee in respect of functions exercisable by a public authority.

Further information

Consultation

There is a requirement to consult the UK Secretary of State under paragraph 4 of schedule 2 of the 2018 Act where Regulations contain provisions which are due to come into force before IP completion day or where they remove wholly or partly reciprocal arrangements. The relevant UK Secretary of State has been consulted as required before the Regulations were made.

The Law Society of Scotland, the Faculty of Advocates and the Scottish Legal Aid Board were consulted on provisions relative to their interests.

National Records of Scotland have been consulted on the provision relative to their interests.

No other consultation was considered necessary as the amendments are technical in nature.

Impact Assessments

We have not prepared the following impact assessments:

- Data Protection Impact Assessment
- Strategic Environmental Impact Assessment
- Fairer Scotland Duty Assessment
- Island Communities Impact Assessment

The amendments do not alter the Scottish Government's current environmental policies and priorities and therefore do not have a significant impact on the environment. There is no anticipated impact on data, no significant impact on socio-economic disadvantage and no differential impact on island communities.

We have completed the following impact assessments:

- Child Rights and Wellbeing Impact Assessment (CRWIA)
- Equality Impact Assessment (EQIA)
- Business and Regulatory Impact Assessment (BRIA)

Financial Effects

A Business and Regulatory Impact Assessment has been completed. In broad terms, financial implications are low. There may be a modest saving (around £30,000 a year) to NRS as a result of not having to issue multi-lingual translation aids under the EU Regulation on civil status documents. Citizens travelling or living in EU Member States will likely find the cost of translating civil status documents to be higher than the cost of obtaining a multi-lingual translation aid.

Scottish Government
Justice Directorate

28 October 2020