

EXPLANATORY MEMORANDUM TO
THE CROSS-BORDER MEDIATION (EU DIRECTIVE) (EU EXIT) REGULATIONS
2019

2019 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Act.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The Cross-Border Mediation (EU Directive) (EU Exit) Regulations 2019 (the Mediation EU Exit Regulations) are made under the European Union (Withdrawal) Act 2018 (EU (Withdrawal) Act). Their purpose is to revoke and repeal (as the case may be), subject to transitional provision, domestic legislation which gave effect to 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) subject to paragraph 7.7 (court rules) and 7.8 (matters within the legislative competence of the Scottish Parliament) below.

Explanations

What did any relevant EU law do before exit day?

- 2.2 The Mediation Directive seeks to harmonise certain aspects of mediation in relation to EU cross-border disputes, with the aim of promoting its use in those EU cross-border disputes. An EU cross-border dispute can be a dispute between people who are domiciled or habitually resident in two or more different Member States (for example, contract, debt, contact with children) or it can be a dispute where the judicial proceedings or arbitration following mediation between the parties are started in a Member State other than one where the parties are domiciled or habitually resident. For the purposes of the Mediation Directive, Denmark is not included in the term “Member State”.
- 2.3 All EU Member States (other than Denmark) are obliged to ensure the requirements of the Mediation Directive (see paragraph 6.2) are met through domestic legislation. The Mediation Directive only applies, in EU cross-border disputes, to civil and commercial matters (but does not include disputes relating to rights and obligations which are not at that parties’ disposal under the relevant applicable law). For the purposes of this Explanatory Memorandum, a mediation which falls within the scope of the Mediation Directive shall be referred to as an EU-cross border mediation.
- 2.4 The Mediation Directive was implemented in England and Wales by the Cross-Border Mediation (EU Directive) Regulations 2011. Those regulations also made provision in respect of matters concerning Scotland and Northern Ireland to the extent that those matters are reserved to the UK Government. Specific provision in respect of devolved matters was made in Northern Ireland by the Cross-Border Mediation Regulations

(Northern Ireland) 2011 and in Scotland by the Cross-Border Mediation (Scotland) Regulations 2011.

Why is it being changed?

- 2.5 When the UK exits the EU, the domestic legislation implementing the Mediation Directive will be retained as UK law under the provisions of the EU (Withdrawal) Act. However, the law as retained may create uncertainty for parties as to which set of rules apply to their mediation. Further, the reciprocity on which the Mediation Directive is based will cease. Mediations which currently only fall within the scope of the Mediation Directive because one of the parties to the dispute is domiciled or habitually resident in the UK, or by virtue of the judicial proceedings or arbitration taking place in the UK, will no longer be recognised for the purposes of the Mediation Directive. The UK Parliament cannot legislate to restore reciprocity and to ensure that EU Member States continue to apply the special rules set down in the Mediation Directive to mediations involving parties domiciled or habitually resident in the UK which would not otherwise fall within the scope of the Mediation Directive. Unilateral application of the requirements of the Mediation Directive in the UK post EU Exit would mean different rules would apply to certain mediations involving parties domiciled or habitually resident in EU Member States compared with parties domiciled or habitually resident in the UK or in other non-EU countries. In addition, the Government believes that the distinction and preferential treatment of parties involved in EU cross-border mediations will no longer be justified when the UK ceases to be an EU Member State.

What will it now do?

- 2.6 The Mediation EU Exit Regulations revoke the Cross-Border Mediation (EU Directive) Regulations 2011 and the Cross-Border Mediation (Northern Ireland) Regulations 2011. The Mediation EU Exit Regulations also make certain amendments necessary to reflect the UK's exit from the EU to primary and secondary legislation. The Mediation EU Exit Regulations do not, however, make provision in respect to court rules (as to which see paragraph 7.7) or matters within the legislative competence of the Scottish Parliament (see paragraph 7.8). The Mediation EU Exit Regulations make saving and transitional provision to ensure that the relevant domestic legislation will continue to apply to EU cross-border mediations that started before EU Exit. It will make clear that the UK rules applying to cross-border mediations will be the same, whatever the country of domicile or habitual residence of the non-UK party.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument was laid for sifting by the Sifting Committee on 16th November 2018. The European Statutory Instruments Committee recommended this instrument be upgraded to affirmative as the instrument contains a large volume of amendments to both primary and secondary legislation. The Committee also assumed the instrument could possibly diminish rights by disengaging from EU obligations which further makes the affirmative resolution appropriate.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 The territorial application of the Mediation EU Exit Regulations varies between provisions. It corrects deficiencies in retained EU law which applies variously in relation to the whole of the United Kingdom, England and Wales, Scotland and to Northern Ireland.

4. Extent and Territorial Application

- 4.1 The Mediation EU Exit Regulations extend to the United Kingdom.
- 4.2 They revoke the Cross-Border Mediation (EU Directive) Regulations 2011, Part 1 of which extends to the whole of the United Kingdom, whilst Part 2 extends to England and Wales only. The remainder of the provision made by those Regulations amends various provisions in primary and secondary legislation to their full extent, where the subject matter of that legislation is not within the legislative competence of a Devolved Administration. This instrument repeals or revokes that provision to its full extent.
- 4.3 The Mediation EU Exit Regulations also revoke the Cross-Border Mediation Regulations (Northern Ireland) 2011 which extend to Northern Ireland only. Those Regulations make amendments to provision in primary and secondary legislation which extends to Northern Ireland only. This instrument repeals or revokes that provision to its full extent.
- 4.4 The territorial application of the Mediation EU Exit Regulations is the same as the extent.

5. European Convention on Human Rights

- 5.1 The Parliamentary Under-Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement regarding Human Rights:
- “In my view the provisions of The Cross-Border Mediation (EU Directive) (EU Exit) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The Mediation Directive forms part of a group of EU measures, adopted under the articles of the Treaty establishing the European Community, which deals with civil judicial co-operation. The Mediation Directive applies to disputes either where the parties are habitually resident or domiciled in two different Member States or where judicial proceedings or arbitration takes place in a different Member State from that in which the parties are habitually resident or domiciled. The Mediation Directive only applies to civil and commercial disputes (but does not include disputes relating to rights and obligations which are not at that parties’ disposal under the relevant applicable law).
- 6.2 The Mediation Directive seeks to harmonise certain aspects of mediation in relation to EU cross-border disputes, with the aim of promoting its use in those EU cross-border disputes. All participating EU Member States are obliged to ensure the requirements of the Mediation Directive on: ensuring the quality of mediation (Article 4); recourse to mediation (Article 5); enforceability of agreements resulting from mediation (Article 6); confidentiality of mediation (Article 7); extension of limitation periods (Article 8); and information for the general public (Article 9) are met through

domestic legislation. The Mediation Directive does not prevent EU Member States from applying the same rules to matters which do not fall within the scope of the Mediation Directive. The UK Government, however, chose only to implement the Mediation Directive in relation to EU cross-border disputes which fall within the scope of the Mediation Directive.

- 6.3 The arrangements for mediation in the UK at the time the Mediation Directive came into force were such that the laws of England and Wales and Northern Ireland complied with all but Articles 6, 7 and 8 of the Mediation Directive.
- 6.4 The Cross-Border Mediation (EU Directive) Regulations 2011 and the Cross-Border Mediation Regulations (Northern Ireland) 2011 partly implement Article 7 and fully implement Article 8 of the Mediation Directive in the United Kingdom, other than for matters which are within the legislative competence of the Scottish Parliament. In both England and Wales and Northern Ireland Article 6 and the rest of Article 7 of the Mediation Directive were implemented by rules of court.
- 6.5 The legislation implementing the Mediation Directive is “EU-derived domestic legislation” so continues to have effect in domestic law on and after exit day by virtue of section 2 of the EU (Withdrawal) Act.
- 6.6 Section 8 of the EU (Withdrawal) Act provides a Minister of the Crown with the power, exercisable by way of regulations contained in a statutory instrument, to make such provision as he or she considers appropriate to prevent, remedy or mitigate any failure of retained direct EU law to operate effectively, arising from the withdrawal of the UK from the EU (section 8(1)).

7. Policy background

What is being done and why?

- 7.1 The requirements of the Mediation Directive operate reciprocally as between participating EU Member States. Upon exiting the EU, the UK will cease to be an EU Member State. As a result, mediations which currently only fall within the scope of the Mediation Directive because one of the parties to the dispute is domiciled or habitually resident in the UK, or by virtue of the judicial proceedings or arbitration taking place in the UK, will no longer be recognised for the purposes of the Mediation Directive. The necessary reciprocity will be lost. The UK cannot legislate for reciprocity or require EU Member States to continue to apply the requirements of the Mediation Directive to mediations involving UK domiciled or habitually resident parties which are no longer within the scope of the Mediation Directive.
- 7.2 In the UK, the Mediation Directive and the legislation implementing the Mediation Directive apply only to EU cross-border mediations. Unilateral application of the requirements of the Mediation Directive in the UK post EU Exit via certain changes to the implementing legislation to fix deficiencies is possible. However, it would mean that, post EU Exit, certain UK domiciled or habitually resident parties involved in mediations with EU domiciled or habitually resident parties would be subject to different (and, arguably, more favourable) rules to those rules to which UK domiciled or habitually resident parties involved in mediations with other UK domiciled or habitually resident parties or parties domiciled or habitually resident in non-EU countries will be subject. The Government does not consider this appropriate once the UK ceases to be an EU Member State.

- 7.3 The Government's policy is, therefore, to repeal the domestic legislation that was implemented to give effect to Articles 7 and 8 other than court rules (see paragraph 7.7 below) and for matters within the legislative competence of the Scottish Parliament (see paragraph 7.8 below). This will ensure that, other than for transitional purposes (see paragraphs 7.4, 7.5 and 7.6), EU cross-border mediations will be subject to the same rules as domestic mediations and non-EU cross-border mediations with respect to the confidentiality of mediation and the extension of limitation periods in England and Wales, Northern Ireland and, where applicable, Scotland. These rules are determined under the common law, the Civil Procedure Rules (CPR), the Family Procedure Rules (FPR), Northern Ireland court rules and the relevant statutory provisions governing limitation.
- 7.4 To implement this policy, Regulation 2 of the Mediation EU Exit Regulations therefore repeals the Cross-Border Mediation (EU Directive) Regulations 2011, which partly implement Article 7 and fully implement Article 8 of the Mediation Directive to the extent not implemented by the Cross-Border Mediation Regulations (Northern Ireland) 2011, the Cross-Border Mediation (Scotland) Regulations 2011 or Court Rules. With respect to the Mediation Directive's application in England and Wales, the rest of Article 7 and all of Article 6 will be repealed by changes to the CPR and FPR in separate statutory instruments. Regulation 2 also contains transitional and savings provisions that provide for the continued application of the Cross-Border Mediation (EU Directive) Regulations 2011 on and after EU Exit Day in relation to an EU cross-border mediation that started before EU Exit Day, making necessary modifications to ensure EU Exit-related deficiencies are corrected (being modifications to reflect that, post Exit, the UK will no longer be an EU Member State) so that the retained provisions operate effectively post-EU Exit for transitional purposes.
- 7.5 Regulation 3 repeals the Cross-Border Mediation Regulations (Northern Ireland) 2011, which (subject to paragraph 7.4 above) partly implement Article 7 and fully implement Article 8 of the Mediation Directive in Northern Ireland. The rest of Article 7 and all of Article 6 will be repealed by changes to the relevant Northern Ireland procedure rules in separate statutory instruments. Regulation 3 also contains transitional and savings provisions that provide for the continued application of the Cross-Border Mediation Regulations (Northern Ireland) Regulations 2011 on and after EU Exit Day in relation to an EU cross-border mediation that commenced before EU Exit Day, making necessary modifications to ensure EU Exit-related deficiencies are corrected (being modifications to reflect that, post Exit, the UK will no longer be an EU Member State) so that the retained provisions operate effectively post-EU Exit for transitional purposes.
- 7.6 Regulation 4 and Schedule 1 amend primary and secondary legislation to omit provisions that implement Article 8 of the Mediation Directive. These provisions operate to extend limitation and prescription periods in the domestic law in certain circumstances for matters other than those within the legislative competence of the Scottish Parliament (see paragraph 7.8 below). This ensures that if a limitation or prescription period in domestic law expires during the mediation process, the parties are not subsequently prevented from seeking a remedy for that dispute through the courts or tribunals or through arbitration should the mediation fail. Regulation 5 ensures that the limitation provisions in the Cross-Border Mediation (EU Directive) Regulations 2011 and the Cross-Border Mediation Regulations (Northern Ireland) 2011 continue to apply on and after exit day to EU cross-border mediations

commenced before exit day, subject to the modifications in Schedule 2. Schedule 2 modifies the domestic primary and secondary legislation to ensure EU Exit-related deficiencies are corrected (being modifications to reflect that, post Exit, the UK will no longer be an EU Member State) ensuring the extension of time provisions operate effectively post-EU Exit for transitional purposes.

- 7.7 Separate Statutory Instruments will amend the CPR and FPR and the NI Rules.
- 7.8 Scotland will legislate separately to repeal relevant provisions which are within the legislative competence of the Scottish Parliament, including court rules.
- 7.9 This instrument applies to court procedure, land registration, equality, prescription, family law and limitation which are transferred matters for Northern Ireland under the Northern Ireland Act 1998. The UK Government remains committed to restoring devolution in Northern Ireland. This is particularly important in the context of EU Exit where we want devolved Ministers to take the necessary actions to prepare Northern Ireland for exit. UK Government Ministers have been considering how to ensure a functioning statute book across the UK including in Northern Ireland for exit day absent a Northern Ireland Executive. With exit day less than three months away, and in the continued absence of a Northern Ireland Executive, the window to prepare Northern Ireland's statute book for exit is narrowing. UK Government Ministers have therefore decided that in the interests of legal certainty in Northern Ireland, the UK Government will take through the necessary secondary legislation at Westminster for Northern Ireland, in close consultation with the Northern Ireland departments. This is one such instrument.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument is being made using the power in section 8 of the EU (Withdrawal) Act in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

- 9.1 The Ministry of Justice has no plans for consolidation of relevant enactments at present.

10. Consultation outcome

- 10.1 A formal consultation on these legislative amendments has not been carried out.
- 10.2 The Government's basic approach to repealing civil judicial cooperation measures that rely on reciprocity to operate effectively, such as those referred to in this instrument, has been discussed with members of the legal profession in the context of the overall approach to a no deal exit as outlined in the Civil Judicial Cooperation Technical Notice that was published on 13 September 2018 (<https://www.gov.uk/government/publications/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexiteal/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexiteal>).

10.3 Those stakeholders recognised the difficulty of continuing to apply measures that require reciprocity to operate effectively. The Government’s rationale for repealing the regulations in this instrument is set out in paragraph 2.5 of this memorandum.

11. Guidance

11.1 The Ministry of Justice has no plans to issue guidance in relation to this statutory instrument.

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 as no, or no significant, impact is expected.

13. Regulating small business

13.1 The legislation does apply to activities that are undertaken by small businesses in that small businesses involved in cross-border civil and commercial legal disputes with EU domiciled or habitually resident parties could elect to mediate. However, as noted in paragraph 12, the impact on small businesses of the loss of the Mediation Directive rules will be minimal.

13.2 To minimise any impact of the changes on small businesses (employing up to 50 people), the approach taken is to ensure, through savings and transitional provisions, that the Mediation EU Exit Regulations will continue to apply to an EU Cross-border mediation that commenced before EU Exit Day.

14. Monitoring & review

14.1 There are no plans to monitor or review this legislation as it repeals retained EU law, other than for transitional purposes.

14.2 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 346 579 or email: andrew.thompson@justice.gov.uk can be contacted with any queries regarding the instrument.

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

15.3 Lucy Frazer QC MP, Parliamentary Under-Secretary of State for Justice 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
Appropriateness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.

Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	Set out the ‘good reasons’ for creating a criminal offence, and the penalty attached.
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 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) Act 2018

1. Appropriateness statement

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

“In my view The Cross-Border Mediation (EU Directive) (EU Exit) Regulations 2019 does no more than is appropriate”.

- 1.2 This is the case because: by repealing the domestic legislation implementing the Mediation Directive (except for court rules and matters within the legislative competence of the Scottish Parliament) and making transitional and savings provision to ensure that the relevant domestic legislation will continue to apply to EU cross-border mediations that started before EU Exit, the Mediation SI does no more than is appropriate to remedy the deficiency in that retained EU law – such deficiency being that it makes provision for, or in connection with, arrangements between the UK and EU Member States which, post-exit, will no longer exist.

2. Good reasons

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

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

- 2.2 These are: The Cross-Border Mediation (EU Directive) (EU Exit) Regulations 2019 repeal retained EU law and associated domestic legislation that implement the Mediation Directive (except for court rules and matters within the legislative competence of the Scottish Parliament), as the reciprocity on which the Mediation Directive is based will cease. Applying requirements of the Mediation Directive unilaterally would result in preferential treatment for parties involved in EU cross-border mediations that the Government believes would no longer be justified when the UK ceases to be an EU Member State. Further details regarding the reasons are set out in paragraphs 7.2 to 7.6 of this Explanatory Memorandum.

3. Equalities

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

“The draft instrument does 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.

This instrument amends the Equality Act 2010 to omit section 140A and makes consequential amendments to other provisions to reflect this omission. Section 140A implements Article 8 of the Mediation Directive. It extends the time limit set out

under sections 118(1)(a), 118(2), 123(1)(a) and 129(3) for bringing claims in a court or tribunal to enable a mediation within the scope of the Mediation Directive to be completed. Section 140A does not apply to any other type of mediation and was enacted to give effect to Article 8 of the Mediation Directive. The Mediation Directive will cease to apply to the UK post exit meaning the reciprocity between the UK and EU Member States that underpins the Mediation Directive will be lost. Post-exit, there is no justification for applying the preferential rules of Article 8 to EU cross-border mediations.”

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

“In relation to the draft instrument, I, Lucy Frazer QC MP, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

4. Explanations

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