

EXPLANATORY MEMORANDUM TO
THE JURISDICTION AND JUDGMENTS (FAMILY) (AMENDMENT ETC.) (EU
EXIT) (NO.2) 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.

2. Purpose of the instrument

- 2.1 This instrument is made using powers in the European (Withdrawal) Act 2018 (the Withdrawal Act). It amends the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019 to ensure that, in England and Wales and Northern Ireland, the court's jurisdiction to determine a financial remedy application and the type of financial remedy the court can order under the Children Act 1989 and the Children (Northern Ireland) Order 1995 are not narrowed as a result of European Union (EU) exit.

Explanations

What did any relevant EU law do before exit day?

- 2.2 Schedule 1 to the Children Act 1989 (the Children Act) and Schedule 1 to the Children (Northern Ireland) Order 1995 (the Northern Ireland Order) provide, respectively, the court in England and Wales and in Northern Ireland with power to order a range of financial remedies that make provision for children and for persons over 18 in certain circumstances. Hereafter the term "children" includes those persons over 18 referred to. Currently the court's jurisdiction is decided in accordance with EU law (the EU Maintenance Regulation).

Why is it being changed?

- 2.3 The Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019 (the EU Exit Regulations) revoke the EU Maintenance Regulation (with transitional and savings provisions). Among numerous other amendments, the Regulations amend the Children Act and the Northern Ireland Order to remove references to the EU Maintenance Regulation and return the jurisdiction and powers of the court in England and Wales and Northern Ireland under these provisions in financial remedy cases involving children to the position prior to the application of the EU Maintenance Regulation.
- 2.4 In so doing, the jurisdiction of the court and the range of financial remedies the court may order under the Children Act and the Northern Ireland Order have been narrowed from the position under the EU Maintenance Regulation. In relation to remedies this means that the court, in some cases, would be limited to making an order for periodical payments for a child, and would be unable to make an order for a lump sum or a property settlement or transfer. This has been raised as a matter of concern by family lawyers and, while the existing approach is workable, the Government has decided to address the issue to ensure that jurisdiction grounds and remedies are not lost as a result of exit.

What will it now do?

- 2.5 As a result of this instrument, the court in England and Wales or Northern Ireland will, post-EU exit, have jurisdiction to make orders whenever a child or a parent or guardian is habitually resident or domiciled in England and Wales or Northern Ireland. It will also retain the power to make lump sum and property orders in addition to periodical payments. This will limit the impact of exit on the way in which the court may make financial orders for children.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

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

- 3.2 The territorial application of this instrument includes Northern Ireland.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the whole of the UK.
- 4.2 The territorial application of this instrument is England and Wales and Northern Ireland.

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 Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) (No. 2) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The application of the EU Maintenance Regulation was given effect in England and Wales and Northern Ireland by the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 (SI 2011/1484) (the 2011 Regulations). The 2011 Regulations made consequential amendments to Schedule 1 to the Children Act and Schedule 1 to the Northern Ireland Order to ensure the court in England and Wales and Northern Ireland respectively have jurisdiction to make financial remedy orders under that Act and that Order in line with the jurisdiction provisions of the EU Maintenance Regulation.
- 6.2 The EU Exit Regulations revoke the EU Maintenance Regulation and make consequential amendments to the Children Act and the Northern Ireland Order. These consequential amendments reinstate the relevant provisions in Schedule 1 to the Children Act and Schedule 1 to the Northern Ireland Order as these provisions were in their pre-Maintenance Regulation form (with some minor drafting changes to take account of family law reforms since they were first enacted).

7. Policy background

What is being done and why?

- 7.1 Schedule 1 to the Children Act and Schedule 1 to the Northern Ireland Order deal with financial provision for children, including maintenance (periodic payments), lump sums, property settlements and transfers (financial remedies). Paragraph 14 of Schedule 1 to the Children Act and paragraph 16 of Schedule 1 to the Northern Ireland Order tie the jurisdiction of the court to order the types of financial remedies available under the Act or Order to whether the court has jurisdiction under the EU Maintenance Regulation. The effect is that, where the court has jurisdiction under the EU Maintenance Regulation, it may make any of the orders for which Schedule 1 of the Act or of the Order provides.
- 7.2 Upon EU exit, the EU Exit Regulations will revoke the EU Maintenance Regulation and replace paragraphs 14 and 16 with provisions which revert to the position prior to the application of the EU Maintenance Regulation. This is consistent with the Government's policy as set out in its Technical Notice at: <https://www.gov.uk/government/publications/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brex-it-deal/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brex-it-deal>, published 13 September 2018 which is to revert to the pre-EU rules on maintenance jurisdiction.
- 7.3 Family law practitioners have raised concerns about the amendments to paragraphs 14 and 16. The concern is that the new provisions, when compared to the current position under the EU Maintenance Regulation, narrow both the jurisdiction of the court to hear an application for financial remedy orders in certain cases and the type of financial remedy the court can award in such cases.
- 7.4 The Government has considered these concerns and agrees they are valid. Although returning to the pre-Maintenance Regulation position was in line with the Government's general policy approach, in this case the Government considers it is necessary to depart from the general approach in order to preserve the extent of the jurisdiction and remedies (lump sum, property settlement and transfer orders) that are available under the Maintenance Regulation post EU exit.
- 7.5 This instrument amends the EU Exit Regulations by substituting revised versions of paragraphs 14 and 16 for those originally substituted by the EU Exit Regulations. The effect will be that, post EU exit, the court in England and Wales or Northern Ireland will be able to order all types of financial remedies available under the Children Act or the Northern Ireland Order in circumstances where either the parent, guardian or child is habitually resident or domicile at the date of the application in England and Wales or Northern Ireland, respectively, that it can under the current law. Sole domicile has been added as a ground of jurisdiction to reflect the approach that has been taken to jurisdiction for divorce and ensures that the court has jurisdiction to award child maintenance where the parents are unmarried in a similar way to when maintenance is being considered ancillary to divorce.
- 7.6 This instrument applies to private international law which is a transferred matter for Northern Ireland under section 4(1) of the Northern Ireland Act 1998. The UK Government remains committed to restoring devolution in Northern Ireland. This is particularly important in the context of EU Exit where we want devolved Ministers to take the necessary actions to prepare Northern Ireland for exit. We have been considering how to ensure a functioning statute book across the UK including in

Northern Ireland for exit day absent a Northern Ireland Executive. With exit day less than two 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 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 There are no current plans to consolidate the legislation amended by this instrument.

10. Consultation outcome

10.1 There has not been formal consultation on this instrument.

10.2 However, Ministry of Justice officials met with family lawyers over their concerns about the EU Exit Regulations. A draft of this instrument was provided to the statutory Family Procedure Rule Committee and its members, who include some of the family lawyers who raised concerns, were invited to comment on it. Those comments were taken into consideration before the instrument was finalised and laid.

11. Guidance

11.1 The Government guidance on how family cases involving the EU would be handled in the event of a 'no-deal' Exit is available at <https://www.gov.uk/government/publications/family-law-disputes-involving-eu-after-brexit> . Further advice will be published although specific guidance on this instrument, which address a technical drafting issue with the EU Exit Regulations, 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 an impact assessment was prepared and published for the EU Exit Regulations. This instrument amends the EU Exit Regulations to ensure that, post EU exit in England and Wales and Northern Ireland, the court's jurisdiction to determine a financial remedy application and the type of financial remedy the court can order under the Children Act and the Children Northern Ireland Order are not narrowed as a result of European Union (EU) exit and that married and unmarried parents will be treated equally in respect of applications for financial remedies under the Children Act and Northern

Ireland Order. This will prevent some applicants for financial remedies under the Children Act and Northern Ireland Order being disadvantaged as compared to the current position.

- 12.4 This SI will ensure that the impacts of the EU Exit Regulations will be as described in the impact assessment for those regulations. The SI specifically addresses the impact associated narrowing the courts' jurisdiction and remedies as raised by family law stakeholders.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses, being legal practitioners who advise and/or represent clients in financial remedy cases in respect of children.
- 13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken in this instrument is to amend the EU Exit SI to ensure that, in England and Wales and Northern Ireland, a court's jurisdiction to determine a financial remedy application, and the remedies the court can order, under the Children Act or the Northern Ireland Order are not narrowed as a result of EU exit.
- 13.3 The basis for the final decision on what action to take to assist small businesses were based on discussions between Ministry of Justice officials and family law stakeholders about the concerns stakeholders had with the EU Exit Regulations and the provisions addressing those concerns in this instrument.

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. 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 Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) (No. 2) Regulations 2019 does no more than is appropriate”.

1.2 This is the case because: the amendments to the EU Exit Regulations made by this instrument do no more than ensure that, in England and Wales and Northern Ireland, the court’s jurisdiction to determine a financial remedy application and the type of financial remedy the court can order under the Children Act and the Northern Ireland Order are not narrowed as a result of EU exit.

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: unless the EU Exit Regulations are amended as described in paragraph 7.5 of this explanatory memorandum, the court in England and Wales and Northern Ireland may, post-EU exit, be unable to make an order, or be unable to make an order for a lump sum or a property settlement or transfer, under the Children Act or the Northern Ireland Order, in all the types of cases it can presently, leaving some children without adequate financial provision.

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 not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.

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

“In relation to the draft instrument, I, Lucy Frazer QC MP, 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”.

4. Explanations

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