Dear Margaret

THE CHOICE OF COURT AGREEMENTS (HAGUE CONVENTION 2005 ETC) (AMENDMENT ETC.) (UNITED KINGDOM) (EU EXIT) REGULATIONS 2018

THE INTERNATIONAL RECOVERY OF MAINTENANCE (HAGUE CONVENTION 2007 ETC.) (AMENDMENT) (UNITED KINGDOM) (EU EXIT) REGULATIONS 2018

EU EXIT LEGISLATION – PROTOCOL WITH SCOTTISH PARLIAMENT

I am writing in relation to the protocol on obtaining the approval of the Scottish Parliament to the exercise of powers by UK Ministers under the European Union (Withdrawal) Act 2018 in relation to proposals within the legislative competence of the Scottish Parliament.

As you know, the Cabinet Secretary for Government Business and Constitutional Relations wrote to the Conveners of the Finance & Constitution and Delegated Powers and Legislative Reform Committees on 11 September setting out the Scottish Government’s views on EU withdrawal. That letter also said that we must respond to the UK Government’s preparations for a No-Deal scenario as best we can, despite the inevitable widespread damage and disruption that would cause. It is our unwelcome responsibility to ensure that devolved law continues to function on and after EU withdrawal.

I attach a notification which sets out the details of two Statutory Instruments (SIs) which the UK Government propose to make and the reasons why I am content that Scottish devolved matters are to be included in these SIs.

Both of these SIs are being brought forward by the UK Government as preparation for the scenario of the UK leaving the EU without a deal being reached.
The UK currently participates in these international Conventions by virtue of EU membership. This will cease on exit from the EU. The UK is seeking to join both Conventions in its own right and to do so in timescales which, in the event of no deal being reached with the EU, would minimise the gap during which the UK is not a member of the Conventions to two days.

Within the EU, the Brussels Ia Regulation and the Maintenance Regulation take priority over these Conventions. Due to lack of reciprocity, which forms the basis for EU civil judicial co-operation instruments, in the event of a no deal retaining these Regulations would mean Scotland applying their rules on an unilateral basis. Therefore it has been sensibly proposed that these pieces of EU legislation should no longer apply on exit date. In addition to non-EU countries, the Conventions would also apply between the UK and EU countries, on their entry into force.

In the event of no deal, without the Conventions, there will no longer be effective international arrangements between Scotland and other countries for enforcement or registration of family maintenance agreements/orders or choice of court agreements in civil and commercial matters. This would impact directly on both Scottish citizens and Scottish businesses. There would be an impact on families living in Scotland due to the difficulties that would arise with enforcement and recognition of child maintenance orders/agreements. This could create economic hardship for children living in Scotland. Scottish businesses could face costly and time consuming legal action in the absence of international rules for determining jurisdiction and recognising judgments. For these reasons, I consider that, to protect Scottish families and businesses, it is both pragmatic and prudent for Scotland to be included in this UK legislation.

I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee.

I look forward to hearing from you within 28 days from the date of this letter.

HUMZA YOUSAF
NOTIFICATION TO THE SCOTTISH PARLIAMENT (13 SEPTEMBER 2018)

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<th>The name of the instrument in question (if known) or a title describing the policy area:</th>
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<td>The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018; and</td>
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<th>Brief explanation of law that the proposals amend:</th>
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<td>The UK currently participates in the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance and the Hague Convention of 30 June 2005 on Choice of Court Agreements by virtue of EU membership. This will cease on exit from the EU. The EU is the contracting party for all member states. The UK is seeking to join the Conventions as an independent contracting party.</td>
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<td>The 2007 Hague Convention provides rules on the international recovery of child support and other forms of family maintenance. It also provides rules for the recognition and enforcement of maintenance decisions across borders.</td>
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<td>The 2005 Hague Convention provides rules in relation to international commercial choice of court agreements relating to both jurisdiction (choice of court) and enforcement and recognition of judgements.</td>
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<td>These Regulations are the domestic implementing legislation needed to operate the Conventions once the UK leaves the EU and becomes an independent contracting party. The domestic implementation of the UK’s obligations under the Conventions as an EU Member State is currently achieved by virtue of section 2(1) of and by Regulations made under the powers of section 2(2) of the European Communities Act 1972.</td>
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<th>Summary of the proposals and how these correct deficiencies:</th>
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<td>The UK Government intends to bring forward the above Regulations under section 8 of the European Union (Withdrawal) Act 2018. The purpose of both sets of Regulations is to address failure of retained EU law to operate effectively and deficiencies in domestic legislation arising from the withdrawal of the UK from the EU. The UK currently participates in these Conventions by virtue of its membership of the EU. The rules under the Conventions apply between the UK (as a member of the EU) and non-EU contracting parties. Between EU member states the internal EU Frameworks govern in priority to the rules in the Conventions. The Regulations are required to address the deficiencies in these arrangements when the UK ceases to be a member of the EU. They make provision for the way the rules in the Conventions will apply to arrangements with...</td>
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all contracting states, including in a “no deal” scenario, the remaining EU member States. Specifically, the Regulations will ensure that the existing rights, obligations and powers arising under both Hague Conventions, which immediately before exit day were available under section 2(1) of the European Communities Act 1972, can continue to be recognised and available in domestic law after the UK leaves the EU. Provision is also made to cover cases which transition the change in the arrangements.

Due to the ratification process for the Hague Conventions the UK is aiming to join in its own right on 1 April 2019. There will be a two day gap between 29 March – when the UK will cease to be a party to the Convention by virtue of EU membership – and 1 April when the Conventions will again enter into force in the UK. These Regulations will enter into force on exit day and make legal provisions for transitional cases involving rights under the Conventions before exit day, during the aforementioned gap and after the Conventions enter into force again.

The regulations for the 2007 Convention make provision in relation to the preserved rights that are derived from the Convention by virtue of section 2(1) of the European Communities Act 1972 and provide for the modification and amendment of relevant existing primary and secondary legislation required in consequence. In doing so, the regulations set out the legal position and approach that is to be taken for:

- Payments falling due under maintenance obligations towards a person under 21 years of age before the 2007 Hague Convention again enters into force for the United Kingdom;
- Maintenance obligation and requests before exit day;
- Maintenance obligations and requests before the 2007 Hague Convention again enters into force; and
- Maintenance obligations and requests after the 2007 Hague Convention again enters into force.

The regulations for the 2005 Convention make provision in relation to the preserved rights that are derived from the Convention by virtue of section 2(2) of the European Communities Act 1972 and provide for the modification and amendment of relevant existing primary and secondary legislation required in consequence. In doing so, the regulations set out the legal position and approach that is to be taken for:

- Choice of court agreements concluded before exit day;
- Choice of court agreements concluded before the 2005 Hague Convention again enters into force for the United Kingdom; and
- Choice of court agreements concluded after the 2005 Hague Convention again enters into force for the United Kingdom.

An explanation of why the change is considered necessary:

The EU concluded the Conventions and is the Contracting Party for member States. The UK will join the Conventions in its own right. Therefore domestic legislation is required for the Conventions to be implemented in the UK. The end of
the UK’s participation in both Conventions would result in the loss of international arrangements with non-EU countries which also participate in the Conventions. Between EU member States, the 2007 Convention is superseded by the Maintenance Regulation and the 2005 Convention is superseded by the Brussels IA Regulation. In a ‘no deal’ scenario EU member States will not be required to apply these EU Regulations on a reciprocal basis with the UK, therefore both Regulations should be revoked. The Conventions will then provide the arrangements for the UK and EU member states.

Without the Conventions (and the EU legislation), there will no longer be effective international arrangements between Scotland and other countries for enforcement or registration of family maintenance agreements/orders or choice of court agreements in civil and commercial matters. This would impact directly on both Scottish citizens and Scottish businesses. There would be an impact on families living in Scotland due to the difficulties that would arise with enforcement and recognition of child maintenance orders/agreements. Scottish businesses could face costly and time consuming legal action in the absence of international rules for determining jurisdiction and recognising judgments.

The change is considered necessary to ensure Scotland has international arrangements in place with other countries including EU member states, which are reciprocal in these areas.

Continued participation in the 2007 Hague Convention will enable individuals and families, who rely on the rules in this Convention to recognise and enforce family maintenance decisions, to continue to do so after we leave the EU.

Continued participation in the 2005 Hague Convention will provide legal certainty to the individuals and businesses who rely on the rules in this Convention to resolve cross-border disputes after we leave the EU.

**Scottish Government categorisation of significance of proposals:**

Category A, with the following characteristics:

Technical in detail;
Ensuring continuity of law; and
Proposals necessary for continuity where there may be a minor policy change, but limited policy choice and an “obvious” policy answer.

**Impact on devolved areas:**

The Scottish Government has responsibility for implementing international obligations which relate to devolved matters.

The Conventions make provision in the devolved areas of international private law as it operates in family law and the law of obligations. International private law provides rules governing the interaction of different legal systems. Amendments have been drafted to retain current policy.
**Summary of stakeholder engagement/consultation:**

The Scottish Government has consulted stakeholders on the impact of EU exit in the areas of family law and civil law. A time lag between the EU provisions ceasing to apply and the Hague Conventions entering into force was considered to be problematic by respondents. Consultation responses have also largely been in favour of continuing to apply both the Maintenance Regulation and the Brussels IA Regulation on a reciprocal basis with EU member States, indicating that reciprocal international arrangements for maintenance and commercial agreements are valued by Scottish stakeholders.

**A note of other impact assessments (if available):**

The UK Government has prepared impact assessments for these SIs.

**Summary of reasons for Scottish Ministers’ proposing to consent to UK Ministers legislation:**

The Conventions could be implemented in Scotland by Scottish Statutory Instruments. As the UK Government is bringing forward implementing legislation, the Scottish Government considers for reasons of efficiency that consent should be given to Scotland’s inclusion in the statutory instruments. The current legislative regime is broadly the same across the UK and the policy position is the same across the UK. These are further reasons for the proposal to consent.

**Intended laying date (if known) of SI/SIs:**

These Regulations will be sent to the UK Parliament sifting committees on 13 September 2018. The formal laying date will be in October. The sifting period ends 10 October. SIs lay for 40 calendar days in Parliament from 11 October to 19 November approximately.

**If the Scottish Parliament will not have 28 days to scrutinise Scottish Minister’s proposal to consent, why not?**

These Regulations will be laid before the UK Parliament sifting committees on 13 September. Due to the differing recess periods of the two parliaments, the formal laying date will likely be once the Scottish Parliament enters recess in October. This shortens the scrutiny period to 23 days. The UK Parliament laying date for these SIs is to ensure the instruments of ratification for the two Conventions are deposited timeously for entry into force by 1 April 2019. This minimises the gap between the Conventions being in force to two days, which is as short a gap as possible.

**Information about any time dependency associated with the proposal:**

Time dependency is set out above – for these SIs the timeline is determined by the ratification process for the Hague Conventions which is driven by minimising the gap during which the Conventions are not in force.
**Any significant financial implications:**

Not for implementing the legislation. There would be financial implications for families and businesses in Scotland if the UK does not re-join the Conventions as set out above.