November 2018

Dear Convener,

EU EXIT LEGISLATION – PROTOCOL WITH SCOTTISH PARLIAMENT

THE JURISDICTION AND JUDGMENTS (FAMILY) (AMENDMENT ETC.) (EU EXIT) REGULATIONS 2018

THE CIVIL JURISDICTION AND JUDGMENTS (AMENDMENT) (EU EXIT) REGULATIONS 2018

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 on 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 Law 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 notifications 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 the SIs.

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 SIs will make provision for a number of pieces of legislation relating to retaining EU law in the area of civil judicial co-operation. The SIs covers a range of reserved and devolved matters and it makes sense to make these largely technical fixes as part of a UK wide approach. The regulations will ensure a continuity of law and functioning statute book on exit from the EU.

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

I look forward to hearing from you.

HUMZA YOUSAF
NOTIFICATION TO THE SCOTTISH PARLIAMENT

Name of the SI(s) (if known) or a title describing the policy area

THE JURISDICTION AND JUDGMENTS (FAMILY) (AMENDMENT ETC.) (EU EXIT) REGULATIONS 2018

A brief explanation of law that the proposals amend

The civil judicial cooperation framework within the EU includes two Regulations in the area of family law:

Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark. (This is known as the "Maintenance Regulation").

The Maintenance Regulation provides rules on jurisdiction and for the recognition and enforcement of family maintenance decisions between EU Member States.


Brussels IIa provides rules (i) to determine which Member State’s courts have jurisdiction in proceedings with a connection to more than one Member State which relate to matrimonial matters (divorce) or parental responsibility matters (including child residence and contact); and (ii) on recognition and enforcement of judgments relating to these matters between Member States. It also provides rules on the return of children abducted to, or wrongfully retained in, other Member States. These rules supplement the international 1980 Hague Child Abduction Convention.

On Exit Day, these EU family law instruments (and related domestic legislation) will become ‘retained EU law’ in UK domestic law. However, in the absence of an agreement between the EU and the UK, the retained EU law will cease to operate reciprocally between the EU Member States and the UK. Accordingly, amendments are required to address the deficiencies arising.

Summary of the proposals and how these correct deficiencies

The Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2018 revoke the Maintenance Regulation as retained EU law, with a series of savings for cases which are 'live' on exit day. Related domestic legislation for the Maintenance Regulation is amended accordingly. The proposal is that where there is an alternative international Convention, this will be used instead.
In relation to Maintenance, the UK is a member of the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance by virtue of its EU membership but intends to join in its own right and steps have been taken to do so. The UK is also a party to, in its own right, a 1973 Hague Convention and a 1956 UN Convention which some EU countries are a party to. However, the Maintenance Regulation takes precedence over these other Conventions between Member States.

As the UK already operates these other Conventions, either in its own right or by virtue of EU membership, the implementing legislation is mostly in place. A number of minor amendments are however made to ensure that those Conventions now operate with respect to EU Member States where currently the EU Regulation takes precedence. Where there are no other international agreements which cover areas in the Maintenance Regulation, the intention is to revert to the pre-EU rules concerning jurisdiction to decide maintenance claims.

This Statutory Instrument (SI) revokes Brussels IIa for England and Wales and Northern Ireland only.

This SI does, however, make amendments for Scotland in legislation concerning international child abduction under Brussels IIa. Specifically, it repeals for Scotland the provisions within the Child Abduction and Custody Act 1985 that provide for Article 60 of Brussels IIa to take precedence over the 1980 Hague Convention on international child abduction (the Convention on the Civil Aspects of International Child Abduction which was signed at The Hague on 25th October 1980). This is known as the "child abduction override". The override allows a court in the country of a child’s habitual residence to make an order for return which will prevail over the refusal of a court in another EU Member State to order the return of the child under the 1980 Hague Convention. This revocation means that the 1980 Hague Convention remains in force in the UK but from exit day without the Brussels IIa override for EU Member States. The override is rarely used and unilateral retention is not considered appropriate. Non-return decisions will instead be subject to appeal but not override.

A Scottish Statutory Instrument will be brought forward for all other matters covered by Brussels IIa such as the rules for jurisdiction and recognition and enforcement of judgments in divorce and parental responsibility.

The UK SI contains saving and transitional provisions which provide for the approach to cases in which the application or the action has been commenced prior to exit day. It provides that cases which have commenced under the EU rules pre-Exit day should continue under those rules. Where new proceedings, either based upon jurisdiction, or applications for recognition and enforcement, are started after Exit, these will then rely on the law as amended by the SI. For maintenance, the transitional provisions are designed to work in unison with those in the International Recovery of Maintenance (Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007) (EU Exit) Regulations 2018. The Committee has previously considered the
notification for this SI and approved the Scottish Ministers’ consent to the instrument.

An explanation of why the change is considered necessary

Brussels IIA and the Maintenance Regulation are part of the civil judicial cooperation framework between EU Member States. Post EU-exit, as a third country, the United Kingdom cannot participate in the civil judicial cooperation framework, and consequently post EU-exit these reciprocal EU Regulations will cease to have effect in relation to the UK. The UK cannot legislate to restore the necessary reciprocity.

Scottish Government categorisation of significance of proposals

Category A, with the following characteristics:

- Minor and technical in detail;
- Ensuring continuity of law;
- Clear there is no significant policy decision for Ministers to make; 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 civil law and procedure which relates to devolved matters. In the absence of these EU frameworks, the legal rules need to be certain which this SI does for international maintenance and child abduction. The Scottish Government intends to bring forward an SSI for Brussels IIA (jurisdiction and the recognition and enforcement of judgments in divorce and matters of parental responsibility) and related domestic legislation.

Summary of stakeholder engagement/consultation

A formal consultation on this SI has not been carried out. This SI is designed to repeal EU legislation which provides for reciprocal effects between Member States. The changes proposed in this SI are necessary due to the fact that the required reciprocity will cease when the United Kingdom ceases to be a Member State of the EU.

The Scottish Government carried out a consultation on the impact of Brexit on family law earlier this year. Written responses were received from legal practitioners, academics and third sector groups. Responses were mainly in favour of retaining the EU regulations on a reciprocal basis through an agreement with the EU. However, in the absence of this being agreed with the EU the necessary reciprocity cannot be achieved and the amendments proposed in this SI are accordingly necessary.
A note of other impact assessments, (if available)

The UK Government has informed the Scottish Government that it has conducted its own assessment for this SI. This should be available when the SI is published by the UK Government.

Due to the timescales involved in bringing forward this legislation, the Scottish Government has not conducted its own assessment.

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

As the UK Government is bringing forward legislation to address these deficiencies, the Scottish Government considers for reasons of efficiency that consent should be given to Scotland’s inclusion in the statutory instrument to make these amendments. The Scottish Government has considered the areas in which the UK legislation is appropriate for Scotland’s interests and is proposing consenting to the repeal of the Maintenance Regulation and the repeal of the provisions on child abduction in Brussels IIa. The other deficiencies caused by EU exit in relation to Brussels IIa will be dealt with by an SSI.

Intended laying date (if known) of instruments likely to arise

These Regulations will be subject to the affirmative procedure. The intended laying date is 10 December 2018.

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

Drafting issues emerged late. As a consequence, this leaves less than the 28 days for consideration of the notification. If the Committee is able to consider the notification in a shorter timescale that would be appreciated.

Information about any time dependency associated with the proposal

No associated time dependency.

Are there any broader governance issues in relation to this proposal, and how will these be regulated and monitored post-withdrawal?

There are no broader governance issues in relation to this proposal.

Any significant financial implications?

None identified.
NOTIFICATION TO THE SCOTTISH PARLIAMENT

Name of the SI(s) (if known) or a title describing the policy area

THE CIVIL JURISDICTION AND JUDGMENTS (AMENDMENT) (EU EXIT) REGULATIONS 2018

A brief explanation of law that the proposals amend

The “Brussels regime” comprises a series of EU legislative instruments and treaties that deal with:

- the allocation of jurisdiction between courts of EU Member States and EFTA States in civil and commercial matters; and
- the recognition and enforcement of judgments emanating from those courts in such matters.

The principal instrument in this regime is Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (referred to as “Brussels IA”). Brussels IA governs the allocation of jurisdiction in civil and commercial matters between EU Member courts (except Denmark which has opted out of EU measures in Justice and Home Affairs) as well as recognition and enforcement of their judgments.

Brussels IA was preceded by, and is a recast of, Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters dated 22 December 2000 (referred to as “Brussels I”). Brussels I included orders for maintenance. Brussels IA does not cover maintenance matters within the EU which are now governed by the Maintenance Regulation (Council Regulation (EC) No. 4/2009 of 18 December 2008). A separate SI addressing the legislative regime in relation to maintenance is being prepared and will be notified to the Committee.

There are a number of international agreements relevant to the Brussels regime. The principal one is the Lugano Convention of 2007 (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 signed on behalf of the European Community on 30th October 2007). This applies the substance of the Brussels I rules on jurisdiction and recognition and enforcement to matters involving the EFTA States of Switzerland, Iceland and Norway as well as Denmark. Its subject matter scope (being similar to Brussels I) includes maintenance.

The principal EU legislative instruments and treaties are supplemented by a number of tertiary EU instruments relating to the Brussels regime such as Council Decision establishing the European Judicial Network in civil and commercial matters (2201/470/EC) and Decisions relating to the conclusion of the various Agreements comprising the regime.
Domestically, the Civil Jurisdiction and Judgments Act 1982 is the principal legislative vehicle for implementation of the Brussels regime. There are also references to the various EU instruments in other domestic legislation.

On Exit Day, these EU law instruments, the rights etc. deriving from the international agreements and the related implementing primary and secondary legislation will become ‘retained EU law’ in UK domestic law. However, in the absence of an agreement between the EU and the UK, the retained EU law will cease to operate reciprocally between the EU Member States and the UK. The UK alone is not able to legislate to restore that reciprocity and in addition the retained law will contain numerous EU exit related deficiencies meaning that it will cease to operate effectively.

Summary of the proposals and how these correct deficiencies
The policy proposal is to revert to the rules for jurisdiction, recognition and enforcement pre-existing the Brussels regime which is applicable for cases involving countries not part of that regime.

The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2018:

- Revokes Brussels IA (and the two EU Regulations that amend Brussels IA), Brussels I and the related tertiary EU instruments;

- Extinguishes the rights, powers, liabilities, obligations, restrictions, remedies and procedures that are derived from the international agreements related to the Brussels regime (the principal one being the Lugano Convention of 2007). These are retained in domestic law by section 4 of the 2018 Act and so any such retentions are removed by the SI for the avoidance of doubt;

- Amends domestic legislation to remove references to the Brussels regime and, where appropriate, replace these with references to domestic legislation so that legislation will work effectively post exit;

- Preserves aspects of the Brussels regime and the domestic implementing legislation for transitional purposes so they continue to apply to determine jurisdiction for proceedings instituted in the UK before exit day and in relation to the recognition or enforcement of a judgment given, court settlement concluded or authentic instrument registered in a EU or EFTA State before exit day;

- Preserves, in restated form, elements of the Brussels IA Regulation in two areas: (1) consumer and employment litigation; and (2) interpretative provision for determining whether a company or association is domiciled in the UK.

Broadly, the effect of the above will be to remove the Brussels regime rules from domestic law. In its place, jurisdiction and the recognition and enforcement of judgments will be determined by a combination of the common law; statutory
provisions on (1) cross-border civil and commercial claims involving UK domiciled consumers and employees and (2) domicile of companies; and the Hague 2005 Convention on Choice of Court Agreements to which the UK is acceding as an independent Contracting State post exit (which is being taken forward in a separate statutory instrument to which the Scottish Ministers have consented, with agreement of the Committee).

An explanation of why the change is considered necessary

Brussels IA, Brussels I and the associated conventions are part of the civil judicial co-operation framework between EU Member States. Post EU-exit, as a third country, the United Kingdom cannot participate in the civil judicial cooperation framework, and consequently post EU-exit these reciprocal EU Regulations will cease to have effect in relation to the UK. The UK cannot legislate to restore the necessary reciprocity.

Scottish Government categorisation of significance of proposals

Category A, with the following characteristics:

- Minor and technical in detail;
- Ensuring continuity of law;
- Clear there is no significant policy decision for Ministers to make; 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 civil law and procedure which relates to devolved matters. In the absence of these EU frameworks, the legal rules need to be certain which this SI does for the jurisdiction of the courts and recognition and enforcement of judgments in civil and commercial matters. In absence of these EU frameworks, the fall-back position will be returning to the pre-existing rules and the application of the 2005 Hague Convention on Choice of Court Agreements. The Scottish Ministers, with the agreement of the Scottish Parliament, have consented to a UK SI extending to Scotland to join this Convention as an independent member.

Summary of stakeholder engagement/consultation

A formal consultation on this statutory instrument has not been carried out. This statutory instrument is designed to repeal EU legislation which provides for reciprocal effects between Member States. The changes proposed in this SI are necessary due to the fact that the required reciprocity will cease when the United Kingdom ceases to be a Member State of the EU.

The Scottish Government considers that in the circumstances formal consultation is impractical given the timescales.
A note of other impact assessments, (if available)

The UK Government has informed the Scottish Government that it has conducted its own assessment for this SI. This should be available when the SI is published by the UK Government.

Due to the timescales involved in bringing forward this legislation, the Scottish Government has not conducted its own assessment.

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

As the UK Government is bringing forward legislation to address these deficiencies, the Scottish Government considers for reasons of efficiency that consent should be given to Scotland’s inclusion in the statutory instrument to make these technical amendments. In particular, the legislative framework is broadly the same throughout the UK jurisdictions.

Intended laying date (if known) of instruments likely to arise

These Regulations will be subject to the affirmative procedure. The intended laying date is 10 December 2018.

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

Drafting issues emerged late. As a consequence, this leaves less than the 28 days for consideration of the notification. If the Committee is able to consider the notification in a shorter timescale that would be appreciated.

Information about any time dependency associated with the proposal

No associated time dependency.

Any significant financial implications?

None identified.