

EXPLANATORY MEMORANDUM TO

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

2018 No. 1125

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 This Statutory Instrument (SI) has been made under the European Union (Withdrawal) Act 2018 to ensure that the UK statute book is ready, on Exit, to comply with The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (the 2007 Hague Convention).
- 2.2 The UK and EU have agreed that during the implementation period, the UK is to be treated as a Member State for the purposes of international agreements, including the 2007 Hague Convention. This Statutory Instrument therefore would only apply in the unlikely event that the Withdrawal Agreement with the EU is not concluded.
- 2.3 The UK currently participates in the 2007 Hague Convention by virtue of EU membership, the EU itself having concluded the Convention in 2014 and thus being a Contracting Party. UK participation will therefore cease on Exit.
- 2.4 As explained in the Government's *'Providing a cross-border civil judicial cooperation framework – A future partnership paper'* (August 2017), the UK remains committed to continuing to participate in the 2007 Hague Convention after the UK leaves the EU.¹
- 2.5 This SI is required as part of the UK's overall preparations to achieve full independent contracting party status to the 2007 Hague Convention after we leave the EU and to ensure an effectively functioning statute book. It will underpin the UK's future ability to meet its international treaty obligations by ensuring the smooth continuation of existing domestic implementing legislation relating to this Convention, on and after exit day.
- 2.6 This SI will ensure that the rules of the 2007 Hague Convention on the recognition and enforcement of cross-border maintenance decisions (including for child maintenance) can work effectively between the UK and all the existing contracting parties to this Convention including the EU, USA, Brazil, Turkey and Ukraine

¹ See *'Providing a cross-border civil judicial cooperation framework – a future partnership paper'* (August, 2017), p. 6 (www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperationframework-a-future-partnership-paper).

amongst others. It will also ensure that the UK can operate the 2007 Hague Convention with any future contracting parties to this Convention.

Explanations

What did any relevant EU law do before exit day?

- 2.8 The 2007 Hague Convention is a multilateral treaty aimed at providing rules for the international recovery of child support and other forms of family maintenance, and for administrative cooperation between Contracting Parties. It provides rules for recognition and enforcement of maintenance decisions across borders.
- 2.9 At present, the 2007 Hague Convention is largely inapplicable between EU Member States. The EU's internal civil judicial cooperation (CJC) framework – namely the Maintenance Regulation which provides rules for determining which court has jurisdiction for, and the recognition and enforcement of, maintenance decisions – takes priority in relation to maintenance between Member States. This ensures that the rules of the 2007 Hague Convention do not conflict with the EU's internal CJC framework in this area.
- 2.10 Therefore, the 2007 Hague Convention currently only takes priority in maintenance matters between the UK and non-EU member state contracting parties – including USA, Brazil, Turkey and Ukraine, amongst others.

Why is it being changed?

- 2.11 Currently the UK's relationship with EU Member States in relation to maintenance is governed by the Maintenance Regulation. However, once the UK leaves the EU and in the absence of a future agreement in this area, that Regulation will no longer be operable on a reciprocal basis with the remaining Member States.
- 2.12 The UK intends to become an independent contracting party to the 2007 Hague Convention and to apply the Convention's rules in relation to the recognition and enforcement of maintenance with all the contracting parties, including, in a 'No Deal' scenario, the EU Member States. This SI contains implementing legislation to ensure that the necessary domestic legislation to do so is in place.

What will it now do?

- 2.13 This implementing legislation will ensure that the 2007 Hague Convention rules will govern the recognition and enforcement of maintenance decisions with the EU Member States in addition to the other existing (and future) contracting parties to the Convention after we leave the EU.
- 2.14 This domestic implementing legislation is necessary in order to implement fully our international treaty obligations under the 2007 Hague Convention as an independent contracting party to this Convention.
- 2.15 Under the terms of the 2007 Hague Convention, it will cease to apply to the UK immediately on the UK leaving the EU, and until the Convention again comes into force in the UK on the 1st day of the month following the expiration of three months after depositing our instrument of ratification (confirmation that the UK has met its domestic legislative and treaty ratification agreements) with the Hague Depository.
- 2.16 This instrument will in particular provide legal certainty regarding how 'transitional' cases to which the 2007 Hague Convention currently applies, and cases arising during

any period between disapplication of the 2007 Hague Convention to the UK by virtue of EU Exit and the Convention coming into force for the UK again following ratification, will be dealt with immediately on Exit – namely that:

- prior to the 2007 Hague Convention entering into force again for the UK, the UK will enforce payments falling due under maintenance obligations towards a person under 21 years of age as if the UK continued to be a State bound by the Convention, except where such an obligation was subject to EU rules before exit day (as a result of the disapplication of 2007 Hague Convention rules between Member States);
- in relation to matters governed by the Convention other than the enforcement of payments towards persons under the age of 21 years, the UK will treat maintenance obligations, applications, requests for specific measures and direct requests arising after the Convention originally came into force for the UK but before exit day as if the UK continued to be bound by the Convention. This will benefit non-EU Contracting Parties. EU Member States will not benefit from this rule on account of the disconnection of the Convention rules in EU cases in favour of the Maintenance Regulation during that period; and
- from 11pm on 29 March 2019 onwards until the Convention again comes into force for the UK, the UK will treat maintenance obligations, applications, requests for specific measures and direct requests received from all Hague 2007 Contracting Parties as if the UK continued to be bound by the Convention. By contrast with the bullet above, this approach will apply to EU Member States as well as other Contracting Parties.

2.17 The operation of the 2007 Hague Convention between the UK and the EU Member States has been almost entirely disconnected as explained at paragraph 2.9 above. Therefore, the transitional arrangements described in paragraph 2.16 operate differently for matters involving EU Member States where the relevant period of time predates exit day. They will be addressed in a related statutory instrument which will deal with the treatment of Maintenance Regulation cases. On and after exit day, because this disconnection will no longer apply once the UK leaves the EU, the approach to maintenance cases involving EU Member States will be aligned to that for other Contracting Parties.

2.18 This SI will provide legal certainty to the individuals and families who rely on the rules in this Convention to obtain maintenance in international cases after we leave the EU.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The EU Exit Sifting Committees have reviewed this Instrument and confirmed they agree with the Government's assessment that it should be subject to the negative resolution procedure. This Instrument was presented to the EU Exit Sifting Committees on 13th September 2018, and the process was completed on 16th October 2018.

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 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent and application of this Instrument is the United Kingdom.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 The UK has participated in the 2007 Hague Convention by virtue of its conclusion by the EU since 1 August 2014. This will cease on exit. Domestic implementation of this international treaty obligation was achieved by virtue of section 2(1), and Regulations drafted under section 2(2) of the European Communities Act (ECA) 1972.
- 6.2 Between EU Member States, the relevant internal EU CJC framework – namely the Maintenance Regulation – is prioritised so that these rules govern the operation of rules on the recognition and enforcement of maintenance decisions between Member States. This situation is specifically permitted under the terms of the 2007 Hague Convention. It also ensures there is no conflict between the internal EU rules in this area and the 2007 Hague Convention rules. The 2007 Hague Convention rules currently apply between EU Member States and the other Contracting Parties to this Convention including, USA, Brazil, Turkey and Ukraine, amongst others.
- 6.3 As indicated above, on leaving the EU, the UK will need to achieve independent contracting party status to this Convention. This Statutory Instrument will ensure that the UK is able to meet its international treaty obligations domestically and to operate this Convention with all the current and future contracting parties to it.

7. Policy background

What is being done and why?

- 7.1 This Statutory Instrument ensures that the UK's existing domestic implementation of the 2007 Hague Convention continues, on and after exit day, to support operation of that Convention once it comes back into force for the UK, and makes provision to ensure consistent and clear treatment of cases which would have benefitted from the 2007 Hague Convention rules in the UK had the Convention not been disapplied to the UK upon Exit, by requiring UK courts to treat such cases according to the 2007 Hague Convention rules.
- 7.2 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.

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 ('the Act') in order to address failures of retained EU law to operate effectively and 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 The Government has publicly committed to continuing to participate in the 2007 Hague Convention after we leave the EU in '*Providing a cross-border civil judicial cooperation framework – A future partnership paper*' (August, 2017). Furthermore, in its responses to the reports of the Lords EU Justice sub-Committee 17th Report of Session 2016-2017 '*Brexit: Justice for Families, Individuals and Businesses?*' and the Justice Select Committee Ninth Report of Session 2016–17, '*Implications of Brexit for the Justice System*' both published in December 2017, the Government made clear its intention to continue to participate in those Hague Conventions which we currently apply by virtue of the UK's membership of the EU.

10.2 Finally, there is widespread support among family law stakeholders, such as Resolution and the Family Law Bar Association, for the UK to continue to participate in this Convention.

11. Guidance

11.1 The Ministry of Justice has no plans to issue guidance in relation to this Statutory Instrument.

12. Impact

12.1 The 2007 Hague Convention has important implications for the individuals and families who rely on the rules in this Convention and those of the Maintenance Regulation to obtain recognition and enforcement of family maintenance decisions, to continue to secure maintenance after we leave the EU. There is no direct impact on business, charities, or voluntary bodies.

12.2 If the UK no longer participated in the 2007 Hague Convention after we left the EU, it would make the recovery of maintenance obligations from debtors in Contracting Parties much more difficult and expensive.

12.3 There is an impact on the public sector because in the absence of continued participation in the 2007 Hague Convention, it is likely that, in many cases, the financial burden of non-recovery of maintenance would fall on the Government and UK taxpayer.

12.4 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses in relation to the recognition and enforcement of maintenance decisions under the 2007 Hague Convention. The Convention provides benefits to businesses in the family law area in streamlining the recognition and enforcement of maintenance decisions in a State which is a contracting party to the Convention.

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 Ed Tynan at the Ministry of Justice Email: Edward.Tynan@Justice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Kristen Tiley at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Parliamentary Under-Secretary of State for Justice, Lucy Frazer, 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. Sifting statement(s)

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

“In my view 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 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure). This is the case because the instrument does not contain provision falling within subparagraph 1(2) of schedule 7 to the Act and the purpose of the instrument is to ensure that the UK is ready to continue applying the rules of the 2007 Hague Convention after exit day and in particular to deal with transitional cases pending its accession to the Convention in its own right, as explained in sections 2 and 7 of the Explanatory Memorandum.”

2. Appropriateness statement

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

“In my view the provisions of 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 do no more than what is appropriate to address deficiencies in retained EU law arising from the UK leaving the EU. The Act provides that the directly applicable provisions of the 2007 Hague Convention, and the EU Maintenance Regulation, and their related implementing legislation will become retained EU law immediately on exit day. Deficiencies arise because this retained EU law concerns reciprocal arrangements which operate under the 2007 Hague Convention and EU Maintenance Regulation, and that reciprocity will no longer exist from exit day. In the case of the 2007 Hague Convention, such reciprocal arrangements will operate again once the UK ratifies the Convention in its own right, but there will be a short gap after exit day before the Convention comes into force for the UK. The Regulations mitigate these deficiencies in three respects. Firstly, by providing for the continued application of the retained EU law, including directly applicable provisions of the 2007 Hague Convention, relating to that Convention in relation to certain transitional cases as if the UK were still a state bound by the Convention, pending the coming into force of that Convention for the UK as a contracting party in its own right. In the case of maintenance matters arising between 1st August 2014 and exit day, this application also operates as if the UK were still an EU Member State, in order to reflect the disapplication of the Convention rules to cases involving the EU during that period, in favour of the Maintenance Regulation. (Note that revocations of retained EU law relating to the EU Maintenance Regulation and relevant transition provision for such cases will be dealt with in a separate set of Regulations). This approach to transitional cases is

appropriate because it will provide legal certainty to families and individuals in relation to existing maintenance matters arising whilst the UK was bound by the Convention by virtue of its EU membership, and those which arise during the short gap between exit day and the UK's ratification of the 2007 Convention in its own right. Secondly, the Regulations describe the effect of the directly applicable provisions of the 2007 Hague Convention, retained by virtue of section 4 of the European Union (Withdrawal) Act 2018, at the point at which the Convention enters into force for the UK once more, thus ensuring necessary implementation of the Convention in domestic law. Lastly, the Regulations revoke the Council Decisions concerning signature and conclusion of the 2007 Hague Convention by the EU, which will be redundant upon Exit."

3. Good reasons

- 3.1. The Parliamentary Under-Secretary of State for Justice, Lucy Frazer, 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. These reasons are detailed in paragraph 7 of the explanatory memorandum."

4. Equalities

- 4.1. The Parliamentary Under-Secretary of State for Justice, Lucy Frazer, has made the following statement:

"This instrument does not amend, repeal or revoke any part of the Equality Acts 2006 or 2010 or subordinate legislation made under those Acts."

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

"In relation to the instrument, I, Lucy Frazer, 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. This Act does not extend to Northern Ireland, but as 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 extend to Northern Ireland, I have given equivalent due regard to the need to eliminate discrimination, harassment and victimisation in relation to Northern Ireland."

5. Explanations

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