

BUSINESS AND REGULATORY IMPACT ASSESSMENT (BRIA)

Title of Proposal

The Civil and Family Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020

1. Purpose and intended effect

- **Background**

The Civil and Family Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 adjust aspects of civil law to reflect the end of the transitional period for leaving the EU at the end of 2020. This is a composite SSI covering civil justice matters relating to legal aid, legal services and the legal profession, cross-border mediation and civil status documents.

- **Objective**

To address deficiencies of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the UK from the EU. In summary, it addresses reciprocal arrangements which no longer exist and EU references which are no longer appropriate. It makes transitional provision in respect of matters and procedures begun but not completed before the end of the implementation period. It makes provision in respect of ongoing judicial cooperation in civil and commercial matters relating to certain EU measures to reflect the withdrawal agreement.

Rationale for Government intervention

The UK left the EU with the withdrawal agreement on 31 January 2020. The transitional period ends on 31 December 2020. This instrument is therefore required to reflect the end of the transitional period.

2. Consultation

The Scottish Government has consulted with the UK Secretary of State under paragraph 4 of schedule 2 of the EU (Withdrawal) Act 2018 where Regulations remove wholly or partly reciprocal arrangements.

The Scottish Government has consulted with the Scottish Legal Aid Board, The Law Society of Scotland, The Faculty of Advocates and National Records of Scotland on provisions relative to their interests.

More generally, in July 2018, the Scottish Government consulted with family and civil law stakeholders to gather views on potential changes to family law in the context of EU exit. We have published the responses to the letter.¹

3. Options

Option 1: Do nothing

The Scottish Government does not consider this to be a viable option given the transitional period will end on 31 December 2020 and adjustments are required for civil justice matters to reflect the end of the transitional period.

Option 2: Make the Regulations

This would address deficiencies of retained EU law in order that it can operate effectively, address reciprocal arrangements which no longer exist, adjust EU references which are no longer appropriate. This includes necessary technical amendments which we do not anticipate would have an impact such as amending “exit day” to “IP completion day”. It would also amend SSIs that made provision in relation to the UK’s exit from the EU to ensure they align with the relevant parts of the withdrawal agreement.

Notably, in terms of a possible impact, the instrument would revoke regulations on the fees which National Records of Scotland (NRS) can charge for issuing a multi-lingual translation aid under the EU Regulation 2016/1191 on simplification of the requirements for presenting certain public documents in the EU.

It also makes a technical amendment to The Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 (SSI 2019/104) to reflect the terms of the withdrawal agreement on transitional provision.

Sectors and groups affected

We consider that the following groups or sectors are affected:

- National Records of Scotland (who issue multi-lingual translation aids under the EU Regulation on the presentation of civil status documents)
- Users of Legal Aid Services in EU cross-border cases
- Scottish Courts and Tribunals Service
- Legal representatives
- Citizens seeking to resolve cross-border disputes and seeking to present civil status documents in EU Member States

Benefits and costs

¹ <https://www2.gov.scot/Topics/Justice/law/17867/brexit/responses-to-brexit-questionnaire>

Benefits

In Scotland, National Records of Scotland (NRS) is responsible for issuing multi-lingual standard forms under the EU Regulation 2016/1191 on simplifying the requirements for presenting certain public documents. The Immigration, Nationality and Asylum (EU Exit) Regulations 2019/745 will revoke the EU Regulation for the UK. It will therefore cease to be competent for NRS to issue multi-lingual standard forms under the Regulation and cease to be a requirement under the Regulation for Scottish public authorities to accept multi-lingual standard forms used in conjunction with civil status documents.

Removing the requirement on NRS to issue multi-lingual translation aids under the EU Regulation may save NRS around £30,000 a year. This saving is based on one NRS staff member (including staff costs) who could be redeployed to other duties. However, this is a consequence of the UK SI 2019/745 which will revoke the EU Regulation for the whole of the UK. This instrument would revoke Regulations on the fees which NRS can charge for issuing a multi-lingual translation aid.

Costs

The converse of the savings to NRS is that revoking the EU Regulation will likely generate a cost for a citizen who needs to present a civil status document such as birth, death or marriage registration in an EU Member State. They will no longer be able to obtain a multi-lingual translation aid after the end of the transitional period and will need to pay for such documents to be certified. Our estimation is that this could cost between £50 - £60 for a certified translation of the documents a multi-lingual translation aid would have previously covered, this would be around 5x the current cost (£10). The Foreign, Commonwealth and Development Office (FCDO) run a legalisation service.²

This SSI also makes a technical amendment to The Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 (SSI 2019/104) to reflect the withdrawal agreement on transitional provision. SSI 2019/104 relates to family law and removes reciprocal arrangements on the recognition of judgements between Scotland and other EU Member States.

Cross-border family cases could involve, for example, a dispute over child custody and maintenance between two countries where it needs to be determined which country's court should hear the case, and whether orders granted in one country can be recognised and enforced in the other.

There is a number of families with parents of different EU nationalities. A report by Together (the Scottish Alliance for Children's Rights) found that approximately 10%

² The costs of using the FCDO legalisation service are outlined at <https://www.gov.uk/get-document-legalised>

(5,604) of children born in Scotland in 2016 had at least one parent born in another EU country.³ When such families break down this could result in a cross-border dispute over, for example, in which country a child should reside.

As noted, the possible impact for individuals involved in cross-border family cases would be as a consequence of SSI 2019/104.

More generally, however, the Scottish Government has not been able to quantify the costs to family law cases arising from EU exit.

- Information on the number of civil cases in the courts is available at the publication Civil Justice Statistics in Scotland 2018-19.⁴
- Our understanding is that most family law cases are domestic in that they only relate to Scotland. Cross-border family law cases could involve disputes within the UK, within the EU or international.
- Overall, the costs arising are likely to be low in aggregate as most family law cases are domestic (as defined above) but there could be additional costs for individuals involved in cross-border cases.

Competition Assessment

There is no impact on competition.

Consumer Assessment

The Scottish Government considers that EU exit is not beneficial for Scotland. However, the Scottish Government needs to implement relevant measures to address issues arising from the UK's exit from the EU. Those most impacted by this SSI include:

- National Records of Scotland
- Users of Legal Aid Services in cross EU border cases.
- Scottish Courts and Tribunals Service
- Legal representatives
- Citizens seeking to resolve cross-border disputes and seeking to present civil status documents in EU Member States.

Test run of business forms

There are no new forms for business proposed.

5. Digital Impact Test

There is no digital impact.

³ https://www.togetherscotland.org.uk/pdfs/Brexit_Cross_Border_Report_Oct17.pdf

⁴ <https://www.gov.scot/publications/civil-justice-statistics-scotland-2018-19/>

6. Legal Aid Impact Test

The Scottish Government has considered the impact on the legal aid fund. From a legal aid perspective the differences in costs and speed of the Scottish Legal Aid Board processing an application should not necessarily be more expensive or slower under the Hague Conventions rather than Brussels IIa. Clearly, if the court process should take longer, this might impact on the amount of legal aid required per case.

7. Enforcement, sanctions and monitoring

Enforcement and sanctions

The Regulations relate to civil justice matters and there is no impact for enforcement or sanctions.

Monitoring

The Scottish Government will continue to monitor the impact of EU exit generally, including the impact on the civil justice matters relevant to this SSI.

8. Implementation and delivery plan

The SSI is due to come into force before the end of the transitional period on 31 December 2020.

Post-implementation review

As indicated, the Scottish Government will continue to monitor the impact of EU exit generally, including the impact on civil justice matters relevant to this SSI.

9. Summary and recommendation

This SSI is required to reflect the end of the EU transitional period.

Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Scottish Government Contact point: Family Law Unit (family.law@gov.scot)

Signed: Ash Denham
Minister for Community Safety

Date: 28th October 2020