

Final Business and Regulatory Impact Assessment

Title of Proposal

The Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019.

Purpose and intended effect

Background

Currently, EU Council Regulation 2201/2003 (known as “Brussels IIa”) makes provision on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility.

Objective

The objective of the Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc) Regulations 2019 is to make provision in relation to Brussels IIa if the UK leaves the EU without a negotiated settlement (i.e. without a deal).

Rationale for Government intervention

If the UK leaves the EU without a negotiated settlement, the necessary reciprocity for Brussels IIa to operate effectively will cease to exist.

Consultation

The Scottish Government has not carried out a specific consultation on this instrument, other than with the Secretary of State in accordance with paragraph 4(b) of schedule 2 of the European Union (Withdrawal) Act 2018. However, the Scottish Government has carried out a consultation on Brexit and family and civil law. This consultation and the responses can be found at <https://www2.gov.scot/Topics/Justice/law/17867/brexit>

Options

1. Do nothing

If this option was chosen, Brussels IIa would become part of EU retained law under the European Union (Withdrawal) Act 2018. The Scottish Government does not consider this to be a viable option in the event of no deal, given that the reciprocity across the EU needed for Brussels IIa to operate effectively will no longer be in place. As Brussels IIa is a regularly used measure, it is important to make appropriate provision to reflect the possibility of the UK leaving the EU without a deal.

2. Continue to recognise incoming orders under Brussels IIa

The Scottish Government did consider whether to make provision so that incoming orders under Brussels IIa would continue to be recognised. However, the general approach taken in these Regulations in relation to recognition and enforcement of overseas orders is to rely on international (Hague) Conventions. In the event of no deal, it seems preferable to rely on Conventions where there is mutual reciprocity, rather than use an EU Regulation where there would be no mutual reciprocity.

3. Make these regulations

Under this option, Brussels IIa would be revoked, in the event of no deal, and Scotland would rely on international (Hague) Conventions in relation to recognition and enforcement of overseas orders. The jurisdiction of the Scottish courts in relevant family cases would revert to the position before EU provision was in place and would be based on a Scottish Law Commission report:

<https://www.scotlawcom.gov.uk/files/6012/8014/6135/rep25.pdf>

Sectors and groups affected

Those affected are parties involved in cross-EU border family cases; their legal representatives and the courts.

Benefits

The Scottish Government believes that staying in the EU is the best option for the whole of the UK and Scotland. The Scottish Government's preferred option is another referendum which includes the choice to remain in the EU. Failing that, the Scottish Government supports a compromise option: continued membership of the European Single Market and Customs Union. However, if the UK leaves the EU without a deal, the Scottish Government needs to take appropriate action.

In this instance, the Scottish Government considers that if the UK leaves the EU without a deal, the best approach is to rely on international Conventions and for the jurisdiction of the Scottish courts to revert to the position before EU provision was in place. In relation to the jurisdiction of the Scottish courts in family cases, the Scottish Government does intend to carry out a longer-term review to see if any changes should be made on when the Scottish courts have jurisdiction.

Costs

The Scottish Government has not been able to quantify the costs arising from the changes made by this SSI. In broad terms, though:

- There are a large number of family cases in the courts. [Information on the number of civil cases in the courts is available at the publication Civil Justice Statistics in Scotland 2016-17: <https://www.gov.scot/publications/civil-justice-statistics-scotland-2016-17/pages/1/>]
- Most family cases are domestic only (i.e. just relate to Scotland) but anecdotally we hear that a growing number are cross-border. “Cross-border” could be within the UK or within the EU or internationally. Brussels IIa just relates to the EU (excluding Denmark, which does not take part in this EU Regulation).
- Some stakeholders have suggested that enforcing orders may be slower and more expensive under Hague Conventions than under EU provisions: the Scottish Government has not, though, been able to quantify that.
- Overall, costs arising from the changes made by this SSI are likely to be low (as most family cases are domestic) but there could be additional costs in individual cases.

A report by Together (the Scottish Alliance for Children’s Rights) found that approximately 10% (5,604) of babies born in Scotland in 2016 had at least one parent born in another EU country. This report can be found at: https://www.togetherscotland.org.uk/pdfs/Brexit_Cross_Border_Report_Oct17.pdf

Consumer Assessment

As indicated above, those affected are parties involved in cross-EU border family cases; their legal representatives and the courts. This SSI is not the Scottish Government’s preferred course of action but we need to make provision in the event of the UK leaving the EU without a deal.

Test run of business forms

No new forms are being created.

Digital Impact Test

There is no impact on technology and technological advances.

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 any more expensive or slower using 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.

Enforcement, sanctions and monitoring

This relates to civil matters and so there are no sanctions.

If the UK does leave the EU without a deal, the Scottish Government would intend to monitor the impact of Brexit generally, including the impact on the courts, on family law and on children and young people.

Implementation and delivery plan

The SSI is due to come into force on the day the UK leaves the EU.

If the UK does leave the EU without a deal, the Scottish Government will consider what guidance may be required for family law practitioners and for parties.

Post-implementation review

As indicated above, if the UK does leave the EU without a deal, the Scottish Government would intend to monitor the impact of Brexit generally, including the impact on the courts, on family law and on children and young people.

Summary and recommendation

Option 3 is recommended, if the UK leaves the EU without a deal. The Scottish Government considers that if the UK leaves the EU without a deal, the best approach is to rely on international Conventions and for the jurisdiction of the Scottish courts to revert to the position before EU provision was in place.

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