

Title: The Cross-Border Mediation (EU Directive) (EU Exit) Regulations 2018	Impact Assessment (IA)
IA No: MoJ024/2018	
RPC Reference No:	
Lead department or agency: Ministry of Justice	
Other departments or agencies:	
Date: 01/03/2019	
	Stage: Final
	Source of intervention: EU Exit
	Type of measure: Secondary Legislation
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Summary: Intervention and Options **RPC Opinion: N/A**

Cost of Preferred (or more likely) Option					
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANDCB in 2014 prices)	One-In, Three-Out?	Business Impact Target	Status
n/a	n/a	n/a	n/a	Out of Scope	

What is the problem under consideration? Why is government intervention necessary?

The Mediation Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008, on certain aspects of mediation in civil and commercial matters provides a framework to promote access to, and the use of, mediation in some cross-border matters. In EU terms, "civil" includes both "civil" and "family". The Mediation Directive seeks to harmonise certain aspects of mediation in relation to EU cross-border disputes and encourage parties to settle disputes outside court during the mediation process and makes provision on limitation periods. The Directive applies to EU Member States, except Denmark (for the purposes of this IA where we refer to EU Member States that does not include Denmark).

The Mediation Directive was implemented in England and Wales by the Cross-Border Mediation (EU Directive) Regulations 2011. Those regulations also made provision in respect of matters concerning Scotland and Northern Ireland to the extent that those matters are reserved to the UK Government. Specific provision in respect of devolved matters was made in Northern Ireland by the Cross-Border Mediation Regulations (Northern Ireland) 2011 and in Scotland by the Cross-Border Mediation (Scotland) Regulations. These regulations, and changes to court rules, implemented two aspects of the Mediation Directive in the UK: confidentiality of mediations; and extension of limitation periods. Certain other requirements of the Mediation Directive were implemented by changes to court rules. Other aspects were already part of the law of the UK. Under the European Union (Withdrawal) Act 2018, the legislation implementing the Mediation Directive will become "retained EU law". Government intervention is necessary because the legislation implementing the Mediation Directive will contain EU exit related deficiencies which will undermine the effectiveness of the retained law and may create uncertainty for parties as to which set of rules apply to their mediation. Further, the reciprocity on which the Mediation Directive is based will cease. Mediations which currently only fall within the scope of the Mediation Directive because one of the parties to the dispute is domiciled or habitually resident in the UK, or by virtue of the judicial proceedings or arbitration taking place in the UK, will no longer be recognised for the purposes of the Mediation Directive. The UK Parliament cannot legislate to restore reciprocity and to ensure that EU Member States continue to apply the special rules set down in the Mediation Directive to mediations involving parties domiciled or habitually resident in the UK which would not otherwise fall within the scope of the Mediation Directive.

This instrument amends the law in England and Wales and Northern Ireland and Scotland. Provision applying to Scotland is only amended insofar as it relates to reserved matters. Separate instruments will amend court rules in England and Wales and Northern Ireland. Scotland will legislate separately to repeal relevant provisions which are within the legislative competence of the Scottish Parliament, including court rules.

What are the policy objectives and the intended effects?

To clarify UK law (save for matters within the legislative competence of the Scottish Government and court rules) applying to UK parties and parties domiciled or habitually resident in EU Member States and ensure, post-EU exit, that UK-EU Mediations are treated consistently with mediations between UK domiciled or habitually resident parties, or UK parties and parties domiciled or habitually resident in non-EU third countries.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option

- **Option 0.1: Static acquis** - The pre- EU exit implementation of the Mediation directive in UK legislation
- **Option 0.2: Do nothing** - Make no amendments to existing domestic legislation in this area to account for the effects of the UK leaving the EU.
- **Option 1** - Repeal the legislation implementing the Mediation Directive and make transitional arrangements for mediations which have already started.
- **Option 2** - Unilaterally apply the requirements set out in the Mediation Directive.

The Government's preferred option is option 1 as this best meets the policy objectives.

Will the policy be reviewed? It will not be reviewed. If applicable, set review date: n/a				
Does implementation go beyond minimum EU requirements?				
Are any of these organisations in scope?			Micro	Small
			Medium	Large
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded:	Non-traded:

I have read the 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.

Signed by the responsible Minister: Lucy Frazer Date: 01/03/2019

Summary: Analysis & Evidence

Policy Option 1

Description: Repeal the legislation implementing the Mediation Directive and make transitional arrangements for mediations which have already started.

FULL ECONOMIC ASSESSMENT

Price Base Year n/a	PV Base Year n/a	Time Period Years n/a	Net Benefit (Present Value (PV)) (£m)		
			Low: n/a	High: n/a	Best Estimate: n/a

COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	n/a	n/a	n/a	n/a
High	n/a		n/a	n/a
Best Estimate	n/a		n/a	n/a

Description and scale of key monetised costs by 'main affected groups'

n/a

Other key non-monetised costs by 'main affected groups'

Baseline: Option 0.1 Static acquis:

Participants in mediations which were previously in the scope of the Mediation Directive will no longer have the protection of statutory provisions which protect confidentiality and automatically extend limitation periods to allow EU cross-border mediations to be conducted. While we are unable to assess how many cases this might affect, claimants in England and Wales involved in such mediations who no longer have the protection of the extended limitation period would, if they needed to stay proceedings to allow time for mediation to take place and in addition to paying a fee to issue their claim, have to pay a general application fee (in cases where fees are applicable) :

- In civil proceedings that fee would be £100 for an application with the consent of the other party;
- In family proceedings that fee would be £50 for an application with the consent of the other party.

Baseline: Option 0.2 Do nothing:

Mediations where one party is domiciled or habitually resident in one EU Member State and at least one other party is domiciled or habitually resident in another EU Member State will no longer have the protection of statutory provisions which protect confidentiality and automatically extend limitation periods to allow EU cross-border mediations to be conducted.

BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	n/a	n/a	n/a	n/a
High	n/a		n/a	n/a
Best Estimate	n/a		n/a	n/a

Description and scale of key monetised benefits by 'main affected groups'

n/a

Other key non-monetised benefits by 'main affected groups'

Baseline: Option 0.1 Static acquis:

There may be some limited benefits for certain parties who are seeking to rely on evidence that was previously confidential under the Mediation Directive and for defendants who could gain an advantage from limitation periods no longer being extended.

Baseline: Option 0.2 Do nothing:

Repealing the legislation implementing the Mediation Directive would create greater legal clarity as the law applying to protect the confidentiality of, and to extend limitation periods relevant to, EU cross-border mediations in England and Wales and Northern Ireland would be clear and unambiguous. It would also avoid a unilateral arrangement where certain mediations where one party is domiciled or habitually resident in one EU Member State and at least one other party is domiciled or habitually resident in another EU Member State are subject to different (and arguably more favourable) rules on confidentiality or limitation.

Key assumptions/sensitivities/risks	Discount rate (%)
None	

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m
Costs: n/a	Benefits: n/a	Net: n/a	
			n/a

Summary: Analysis & Evidence

Policy Option 2

Description: Unilaterally apply the requirements set out in the Mediation Directive.

FULL ECONOMIC ASSESSMENT

Price Base Year n/a	PV Base Year n/a	Time Period Years n/a	Net Benefit (Present Value (PV)) (£m)		
			Low: n/a	High: n/a	Best Estimate: n/a

COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	n/a	n/a	n/a	n/a
High	n/a		n/a	n/a
Best Estimate	n/a		n/a	n/a

Description and scale of key monetised costs by 'main affected groups'

n/a

Other key non-monetised costs by 'main affected groups'

Baseline: Option 0.1 Static acquis:

Reciprocity would be lost. Mediations which currently only fall within the scope of the Mediation Directive because one of the parties to the dispute is domiciled or habitually resident in the UK, or by virtue of the judicial proceedings or arbitration taking place in the UK, will no longer be recognised for the purposes of the Mediation Directive and will not subject to the relevant rules in EU Member States.

Mediation Directive rules on confidentiality and extension of limitation periods would apply to EU cross-border mediations but not other mediations. Post EU exit, with no reciprocal rules applying in EU Member States to mediations involving UK domiciled parties, this distinction in treatment is difficult to justify.

Baseline: Option 0.2 Do nothing:

Greater disadvantage for those parties mediating in the UK who were never in scope of the Mediation Directive as a result of the fact that unilateral application would retain the benefits of confidentiality and extended limitation periods for a larger group of parties than the do nothing option without a clear policy rationale for the differential treatment given that the UK would no longer be a party to the EU. This will lead to increased unjustified unfairness within the system.

BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	n/a	n/a	n/a	n/a
High	n/a		n/a	n/a
Best Estimate	n/a		n/a	n/a

Description and scale of key monetised benefits by 'main affected groups'

n/a

Other key non-monetised benefits by 'main affected groups'

Baseline: Option 0.1 Static acquis:

None

Baseline: Option 0.2 Do nothing:

Mediations which will remain in scope under the unilateral option, which would not under the do nothing option (i.e. those which will remain in scope as either one party to the dispute is domiciled in the UK or the court or arbitration hearing the dispute is in the UK) would retain the provision regarding confidentiality and limitation periods.

Correcting the deficiencies in the legislation arising out of EU Exit would create legal clarity as the law applying to protect the confidentiality of, and to extend limitation periods relevant to, EU cross-border mediations in England and Wales and Northern Ireland would be clear and unambiguous.

Those parties who would not retain the confidentiality and limitation benefits under the do nothing option, but will under the unilateral application option (i.e., those who will remain in scope as either one party to the dispute is domiciled in the UK or the court or arbitration hearing the dispute is in the UK) will benefit from not having to pay the general application fees referred to above to stay proceedings in order to allow additional time for mediation to take place in cases where fees are applicable.

Key assumptions/sensitivities/risks	Discount rate (%)
None	

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:	Score for Business Impact Target (qualifying provisions only) £m		
Costs: n/a	Benefits: n/a	Net: n/a	n/a

Evidence Base (for summary sheets)

A. Background

1. The Mediation Directive 2008/52/EC of the European Parliament and the Council provides a framework to promote access to, and use of, mediation in cross-border civil and commercial matters.
2. The Mediation Directive seeks to harmonise certain aspects of mediation in relation to EU cross-border disputes and aims to encourage parties to settle disputes outside court. The Directive applies to cross-border civil and commercial disputes across EU Member States, except Denmark. A cross-border dispute is defined as one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:
 - (a) the parties agree to use mediation after the dispute has arisen;
 - (b) mediation is ordered by a court or the parties are invited to mediate by the court;
 - (c) an obligation to use mediation arises under national law; or
 - (d) The court makes an invitation is made to the parties to mediate.
3. Cross border disputes are also defined as one where judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date.
4. The Mediation Directive was implemented in England and Wales by the Cross-Border Mediation (EU Directive) Regulations 2011. Those regulations also made provision in respect of matters concerning Scotland and Northern Ireland to the extent that those matters are reserved to the UK Government. Specific provision in respect of devolved matters was made in Northern Ireland by the Cross-Border Mediation Regulations (Northern Ireland) 2011 and in Scotland by the Cross-Border Mediation (Scotland) Regulations. These regulations, and changes to court rules, implemented two aspects of the Mediation Directive in the United Kingdom: confidentiality of mediations; and extension of limitation periods. Certain other requirements of the Mediation Directive were implemented by changes to court rules. Other aspects were already part of the law of the United Kingdom.
5. Under the European Union (Withdrawal) Act 2018, the legislation implementing the Mediation Directive will become “retained EU law” upon the UK’s exit from the EU. However, once the UK exits the EU, the reciprocity on which the Mediation Directive is founded will be lost. The UK cannot legislate to restore this reciprocity.
6. Government intervention is necessary because the legislation implementing the Mediation Directive will contain EU exit related deficiencies. These deficiencies will undermine the effectiveness of the retained law and may create uncertainty for parties as to which set of rules apply to their mediation. Further, the reciprocity on which the Mediation Directive is based will cease. Mediations which currently only fall within the scope of the Mediation Directive because one of the parties to the dispute is domiciled or habitually resident in the UK, or by virtue of the judicial proceedings or arbitration taking place in the UK, will no longer be recognised for the purposes of the Mediation Directive. The UK Parliament cannot legislate to restore reciprocity and to ensure that EU Member States continue to apply the special rules set down in the Mediation Directive to mediations involving parties domiciled or habitually resident in the UK which would not otherwise fall within the scope of the Mediation Directive.
7. This instrument amends the law in England and Wales, Northern Ireland and Scotland. Provision applying to Scotland is only amended insofar as it relates to reserved matters. Separate instruments will amend court rules in England and Wales and Northern Ireland. Scotland will legislate separately to repeal relevant provisions which are within the legislative competence of the Scottish Parliament, including court rules.

B. Policy Rationale and Objectives

8. The conventional economic rationales for government intervention are based on efficiency and equity arguments. The government may consider intervening if there are failures in the way markets operate (e.g., monopolies overcharging consumers) or where there are failures with existing government interventions (e.g., waste generated by misdirected rules). The proposed new interventions should avoid creating a further set of disproportionate costs and distortions. The government may also intervene for equity (fairness) and re-distributional reasons (e.g., to reallocate goods and services to the more disadvantaged groups in society).
9. The rationale for intervention in this instance is efficiency: to ensure legal certainty about cross-border mediations. In addition, if the Government were not to intervene the effect would be that the regulations would continue to operate unilaterally in certain circumstances (though with certain deficiencies), which is not the Government's preferred policy outcome.
10. The associated policy objectives are, after the UK leaves the EU, to maintain an environment that sustains the UK's strong international reputation as a centre of legal excellence.

C. Affected Stakeholder Groups, Organisations and Sectors

11. The groups most likely to be affected by the options in this IA are as follows:
 - Businesses and individuals in England and Wales and Northern Ireland involved in EU cross-border mediations
 - The providers of legal services
 - UK courts

D. Description of Options Considered

12. In order to meet the policy objectives, the following options are assessed in this IA:
 - **Option 0.1: Static acquis** - The pre- EU exit implementation of the Mediation directive in UK legislation
 - **Option 0.2: Do nothing** - Make no amendments to existing domestic legislation in this area to account for the effects of the UK leaving the EU.
 - **Option 1 - Repeal** the legislation implementing the Mediation Directive and make transitional arrangements for mediations which have already started.
 - **Option 2 - Unilaterally apply** the requirements set out in the Mediation Directive.
13. Each of these options applies to the legislation implementing the Mediation Directive except for those elements that are covered by court rules or within the legislative competence of the Scottish Government.
14. The Government's preferred option is option 1 as this best meets the policy objectives.

Option 0.1 Baseline: Static acquis

15. This option reflects how, pre-EU exit, the Mediation Directive, and related instruments, function in the UK.

Option 0.2 Baseline: Do nothing

16. This option would result in the Cross-Border Mediation (EU Directive) Regulations 2011, the Cross-Border Mediation Regulations (Northern Ireland) 2011 and the domestic extension of time provisions being retained without the deficiencies in them arising from EU exit being corrected.
17. Under this option the Mediation Directive's confidentiality and extension of time provisions as implemented in England and Wales and Northern Ireland would cease to operate effectively in certain circumstances, because the UK will no longer be an EU Member State. Post EU exit, a court would not interpret the requirements of the Mediation Directive as applying to a mediation involving a party who is domiciled or habitually resident in the EU where (i) one of the parties to the dispute is domiciled or habitually resident in the UK, or (ii) the judicial proceedings or arbitration are in the UK unless the dispute otherwise satisfied the requirements because it involved one party domiciled or habitually resident in one EU Member State and at least one other party domiciled or habitually resident in another EU Member State.
18. This could, in turn, lead to confusion as to which confidentiality and extension of time rules apply.

Option 1: Repeal the legislation implementing the Mediation Directive

19. This option would result in the Cross-Border Mediation (EU Directive) Regulations 2011 and the Cross-Border Mediation Regulations (Northern Ireland) 2011 and the domestic extension of time provisions in England and Wales and Northern Ireland being removed from the statute book.
20. This will mean that in England and Wales and Northern Ireland EU cross-border mediations will be subject to the same rules as domestic mediations and non-EU cross-border mediations in respect of confidentiality of mediations and extension of limitation periods.

Option 2: Unilaterally apply the requirements set out in the Mediation Directive

21. This option would result in the Cross-Border Mediation (EU Directive) Regulations 2011 and the Cross-Border Mediation Regulations (Northern Ireland) 2011 and the domestic extension of time provisions in England and Wales, Northern Ireland and, for matters reserved to the UK government, Scotland continuing to apply to EU cross-border mediations post EU exit.

E. Cost and Benefit Analysis

22. This IA follows the procedures and criteria set out in the IA Guidance and is consistent with the HM Treasury Green Book.
23. Where possible, this IA identifies both monetised and non-monetised impacts on individuals, groups and businesses in the United Kingdom with the aim of understanding what the overall impact on society might be from the proposals under consideration. IAs place a strong focus on the monetisation of costs and benefits. There are often, however, important impacts that cannot sensibly be monetised. These might be impacts on certain groups of society or some data privacy impacts, positive or negative. Impacts in this IA are therefore interpreted broadly, to include both monetisable and non-monetisable costs and benefits, with due weight given to those that are non-monetisable.
24. However, in this case, there is no measure of legal certainty or way to quantify the impact of legal certainty on economic interaction so all costs and benefits are non-monetisable in nature.
25. This cost benefit analysis section will first compare the two options against the Option 0.1/Static Acquis baseline, before comparing the two options against Option 0.2/Do nothing.

Cost and benefit analysis, Option 0.1 Static acquis:

Option 1: Repeal the legislation implementing the Mediation Directive

Costs of Option 1

26. While we are unable to assess how many cases this might affect, due to a lack of available data, claimants in England and Wales involved in such mediations who no longer have the protection of the extended limitation period may, if they needed to stay proceedings to allow time for mediation to take place, would, in addition to paying a fee to issue their claim have to pay a general application fee (where applicable):

- In civil proceedings that fee would be £100 for an application with the consent of the other party;
- In family proceedings that fee would be £50 for an application with the consent of the other party.

27. Participants in mediations which were previously in the scope of the Mediation Directive will no longer have the protection of statutory provisions which protect confidentiality and automatically extend limitation periods to allow EU cross-border mediations to be conducted.

Benefits of Option 1

28. There may be some limited benefits for certain parties who are seeking to rely on evidence that was previously confidential under the Mediation Directive and for defendants who could gain an advantage from limitation periods no longer being extended.

Option 2: Unilaterally apply the requirements set out in the Mediation Directive

Costs of Option 2

29. Reciprocity would be lost. Mediations which currently only fall within the scope of the Mediation Directive because one of the parties to the dispute is domiciled or habitually resident in the UK, or by virtue of the judicial proceedings or arbitration taking place in the UK, will no longer be recognised for the purposes of the Mediation Directive and will not be subject to the relevant rules *in EU Member States*.

30. Mediation Directive rules on confidentiality and extension of limitation periods would apply to EU cross-border mediations but not other mediations. Post EU exit, with no reciprocal rules applying in EU Member States to mediations involving UK domiciled parties, this distinction in treatment is difficult to justify.

Benefits of Option 2

31. None

Cost and benefit analysis, Option 0.2 Do nothing:

Option 1: Repeal the legislation implementing the Mediation Directive

Costs of Option 1

UK businesses, the providers of legal services, UK courts, individuals that use cross-border mediation services & mediators

32. While we are unable to assess how many cases this affects, claimants in England and Wales involved in such mediations who no longer have the protection of the extended limitation period would, if they needed to stay proceedings to allow time for mediation to take place, may, in addition to paying a fee to issue their claim have to pay a general application fee (where applicable):

- In civil proceedings that fee would be £100 for an application with the consent of the other party;

- In family proceedings that fee would be £50 for an application with the consent of the other party.
33. Mediations where one party is domiciled or habitually resident in one EU Member State and at least one other party is domiciled or habitually resident in another EU Member State will no longer have the protection of statutory provisions which protect confidentiality and automatically extend limitation periods to allow EU cross-border mediations to be conducted.

Benefits of Option 1

UK businesses, the providers of legal services, UK courts, individuals that use cross-border mediation services & mediators

34. Repealing the legislation implementing the Mediation Directive would create greater legal clarity as the law applying to protect the confidentiality of, and to extend limitation periods relevant to, EU cross-border mediations in England and Wales and Northern Ireland would be clear and unambiguous. It would also avoid a unilateral arrangement where certain mediations where one party is domiciled or habitually resident in one EU Member State and at least one other party is domiciled or habitually resident in another EU Member State are subject to different (and arguably more favourable) rules on confidentiality or limitation.

Option 2: Unilaterally apply the requirements set out in the Mediation Directive

Costs of Option 2

UK businesses, individuals that use cross-border mediation services, the providers of legal services, UK courts

35. Greater disadvantage for those parties mediating in the UK who were never in scope of the mediation directive as a result of the fact that unilateral application would retain the benefits of confidentiality and extended limitation periods for a larger group of parties than the do nothing option without a clear policy rationale for the differential treatment given that the UK would no longer be a party to the EU. This will lead to increased unjustified unfairness within the system.

Benefits of Option 2

UK businesses, the providers of legal services, UK courts, individuals that use cross-border mediation services & mediators

36. Those parties who would not retain the confidentiality and limitation benefits under the do nothing option, but will under the unilateral application option (i.e. those who will remain in scope as either one party to the dispute is domiciled in the UK or the court or arbitration hearing the dispute is in the UK) will benefit from not having to pay the general application fees referred to above to stay proceedings in order to allow additional time for mediation to take place (in cases where fees are applicable).
37. Mediations which will remain in scope under the unilateral option, which would not under the do nothing option (i.e. those which will remain in scope as either one party to the dispute is domiciled in the UK or the court or arbitration hearing the dispute is in the UK) would retain the provision regarding confidentiality and limitation period. Correcting the deficiencies in the legislation arising out of EU Exit would create legal clarity as the law applying to protect the confidentiality of, and to extend limitation periods relevant to, EU cross-border mediations in England and Wales and Northern Ireland would be clear and unambiguous.

F. Wider Impacts

38. This instrument amends the Equality Act 2010 to omit section 140A and makes consequential amendments to other provisions to reflect this omission. Section 140A implements Article 8 of the

Mediation Directive. It extends the time limit for bringing claims under sections 118(1), 123(1) and 129(3) in a court or tribunal to enable a mediation within the scope of the Mediation Directive to be completed. Section 140A does not apply to any other type of mediation and was enacted to give effect to Article 8 of the Mediation Directive. The Mediation Directive will cease to apply to the UK post exit meaning the reciprocity between the UK and EU Member States that underpins the Mediation Directive will be lost. Post-exit, there is no justification for applying the preferential rules of Article 8 to EU cross-border mediations.

39. Due regard has been had to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.

G. Enforcement and Implementation

40. Following the UK's exit from the EU, the amendments made by the new instrument will apply in the UK jurisdictions. This SI does not cover court rules or matters within the competence of the Scottish Parliament.

H. Monitoring and Evaluation

41. As this instrument is made under the EU (Withdrawal) Act 2018, no review is required.

I. Business Impact Target

42. This measure is out of scope of the Business Impact Target.