



Brexit and Family Law

October 2017

Family Law Bar Association (FLBA) is the specialist Bar Association for family barristers in England and Wales and has 1,750 members. The FLBA is consulted by both the Judiciary and Government Departments in all important initiatives affecting family law and family barristers.

International Academy of Family Lawyers (IAFL) is a worldwide association of family lawyers who are recognised by their peers as the most experienced and skilled family law specialists in their respective countries.

Resolution is an organisation of 6,500 family lawyers and other family justice professionals in England and Wales, who believe in a constructive, non-confrontational approach to family law matters. Resolution also campaigns for better laws and better support for families and children undergoing family change.

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Contents

1. Introduction

2. Executive summary

3. UK and EU family law instruments

i. The main EU instruments

ii. The Court of Justice of the EU ('CJEU')

4. Options for family law

i. **Retain full reciprocity** *i.e. maintain the current system (recommended)*

ii. **Domestication without full reciprocity** *i.e. turn the EU law into domestic law but lose the existing EU reciprocal arrangements (not recommended)*

iii. **Bespoke arrangement** *i.e. set up a new arrangement with the EU (a longer-term possibility, but not recommended)*

iv. **The 'no deal' scenario** *i.e. would other international instruments in place suffice*

5. Recommendations and conclusions

Annex 1 – full list of EU instruments affecting family law

Annex 2 - Acknowledgements

1. Introduction

This paper draws together the recommendations for family law post-Brexit of a group (the 'group') comprising of the lead specialist family law practitioner groups in England and Wales – the Family Law Bar Association, International Academy of Family Lawyers and Resolution. The recommendations are also supported by the Association of Lawyers for Children and other international family law experts. The paper responds to the Government's EU (Withdrawal) Bill 2017-19 and recent future partnership papers published by the Government.

These organisations are comprised of family lawyers who work every day with people going through the most challenging times in their lives as a result of families breaking up. Each has considered in detail the ramifications of the Government's proposed approach for families and individuals, and in particular the impact on those who are most vulnerable – children. Their work, and the remit of this paper, cover public and private law matters and includes the following situations:

- Divorce
- Financial provision after divorce for both spouses and children, in particular the payment and enforcement of maintenance
- Child arrangements between separated parents
- Child abduction
- Child protection cases.

This paper:

- considers the interplay between domestic and EU instruments relevant to family law in the UK and the role of the Court of Justice of the European Union ('CJEU');
- examines the options for what should happen to family law upon withdrawal from the EU and the considerations for each option;
- includes examples of how the proposals would affect families in real life in the hope that it makes this vital area of law more accessible to those who are not familiar with it; and
- considers what we would be left with in terms of other international legal instruments currently in place which some might argue will suffice in place of the EU law provisions.

Consideration is given in particular to the importance of transitional arrangements to ensure that families are not left in legal limbo as a result of Brexit.

The importance of a harmonised family law system across the EU comes sharply into focus when it is considered that there are approximately one million British citizens living in other EU member states and some three million EU citizens living in the UK. The scope for personal and family relationship issues arising is significant and so certainty and cooperation are key.

The group asks that all those debating the future of the relationship between the UK and the EU take extremely seriously the effect of the current proposal, which we consider would be very detrimental to family law in the UK and would negatively impact a significant number of families, resulting in unfairness and confusion. The group accepts that the instruments discussed here are not without their shortcomings or uncertainties but the group considers it pragmatic to consider the EU framework as a whole.

We hope the Government will consider carefully the recommendations made by the group both in relation to the short- and long-term.

As negotiations between the UK and the EU progress, this group is happy to advise and be consulted on issues around exiting the EU and minimising the impact on families and children and the family justice system.

Acknowledgements

This paper was prepared for and on behalf of the Family Law Bar Association, International Academy of Family Lawyers and Resolution by Eleri Jones of 1 Garden Court. We would also like to thank those who contributed to the paper and/or support its recommendations (please see Annex 2).

2. Executive summary

The EU instruments concerning family law have had a significant and valuable impact on the day-to-day life of British and other families both at home and across the EU. There are broadly three possibilities once the EU family law provisions cease to apply in the UK:

1. Replicate the EU instruments in our own domestic law and maintain the reciprocal arrangement between the UK and the other EU member states¹.

- This would effectively maintain the current system and we would retain all its benefits including harmonised rules across the EU for establishing jurisdiction to hear cases, to recognise and enforce each other's orders and to cooperate across borders.
- The UK would remain subject to the CJEU, but in family law the EU provisions are only concerned with uniform procedural rules and rules of private international law, not substance. This is not a disadvantage, rather an advantage to have a central arbiter of disputes about interpretation of the provisions we seek in any event to keep in place so that there is consistency across the EU.
- We would retain input into future amendments of the provisions (including any recast instruments).
- This is the **best** option long-term but, if there must be a new arrangement in the future, it is the **only** realistic option in any transitional period (whatever that may be).

2. Replicate the EU instruments in our own domestic law but without retaining full reciprocity with the other EU member states as at present.

- This would be the effect of the Government's EU (Withdrawal) Bill. It is extremely problematic: many of the EU family law provisions require reciprocity.
- It would effectively be a 'one way street': the UK would continue to apply EU family law and be obliged unilaterally to recognise and enforce decisions of other EU member states, but those other EU member states would not be obliged to recognise and enforce our decisions. There would also be significant risks of parallel proceedings in the UK and other EU member states and therefore irreconcilable judgments.
- This, in the view of the group, is the **worst** of all outcomes. It would leave our citizens in a position of significant vulnerability and confusion and lead to unfair outcomes.

3. Make our own bespoke arrangement with the EU, which sets out a new framework for family law cooperation between the UK and the EU.

- It would take a very long time to consider, negotiate and put into place alternative arrangements and that will not be achievable by 2019.
- The interim position must be **option 1** above (which is recommended long-term too).

¹ As the UK would be a non-member state, the EU instruments would need to be amended in order to implement this option

Whilst there are other existing international instruments that would fill some of the gaps if/when we lose the reciprocal EU family law provisions, they would not provide the same level of protection for our citizens and there are academic debates as to whether we can use them immediately or at all.

The group therefore recommends that the Government takes steps to achieve an outcome in line with **option 1** to ensure the provisions it wishes to retain (for now) have the intended effect. When considering how best to proceed in this field, it is also important for the Government to bear in mind:

- a. that the EU instruments which affect UK family law deal primarily with procedural rather than substantive law (in contrast to areas such as consumer or employment law) so this is a less an issue of sovereignty; and
- b. the alternative options to the CJEU set out in the government paper 'Enforcement and Dispute Resolution' would require the agreement of the other EU member states and the group anticipates that the EU is not likely to agree to such alternatives when there is already an overarching authority which works in the circumstances.

3. UK and EU family law instruments

Family law in the UK

It is important to understand that, unlike some other areas of law, for example, consumer or employment law, in family law the relevant EU instruments are a set of private international law rules, which in many ways are about procedure – they do not dictate what the substantive law is in each country. **The countries within the UK² have always set their own substantive family law and only apply their own laws in family cases.** For example, each UK jurisdiction has always applied its own legal principles to determine things like:

- The reasons you can divorce someone, for example, fault / no fault required and time limits.
- How much maintenance a parent should pay for a spouse or child and for how long, for example, spousal maintenance in England and Wales could be life-long whereas in most other EU member states, spousal maintenance for life is almost unheard of.
- The principles the court uses to decide the child arrangements after separation, for example, which parent a child should live with, or if one parent should be allowed to move to a different country with the child.
- The circumstances when a local authority should be able to take away a child from its parents' care or the appropriate placement for a looked after child.
- The basis for granting protection from domestic violence.

Those are all decided under our own individual legal principles in the UK – they always have been, and they always will be.

(i) The main EU instruments

There are many different EU instruments which impact family law in the UK – a full list of which is set out in Annex 1. For the purpose of this paper, we will concentrate on the two main EU Regulations which affect family law, namely:

1. Council Regulation No. 2201/2003, known to family lawyers in the UK as 'Brussels II Revised' or '**Brussels IIa**'. Brussels IIa came into force in its present form in March 2005.

This deals with jurisdiction for **divorce and** issues about **parental responsibility for children**. The parts of Brussels IIa concerning children encompass:

- Private law disputes (i.e. issues about child arrangements between parents and/or other family members)
- Public law disputes (i.e. where local authorities seek child protection measures)
- Child abduction cases.

² There are three distinct jurisdictions within the UK: England and Wales, Scotland and Northern Ireland, each with its own legal principles in the field of family law (albeit with some common aspects)

2. Council Regulation No. 4/2009, known as the **Maintenance Regulation**. It came into force in June 2011.

This deals with **maintenance obligations** between family members, including both:

- maintenance between adults in a family relationship, for example, husband/wife (importantly it does not prescribe what the relationship must be – that is down to national law); and
- child maintenance.

We would not wish to forget the benefits that the other EU instruments set out in Annex 1 bring to families, for example:

- The Regulation on mutual recognition of protection orders helps to enforce orders made to protect victims of domestic violence or harassment across borders.
- The European Enforcement Order provides a streamlined procedure for enforcing uncontested claims, for example, where there has been an out-of-court settlement, which is extremely useful.
- The European Judicial Network improves cooperation between judges and legal authorities at an official level and can help to eliminate obstacles in resolving cases.

At present, the EU Regulations have 'direct effect', i.e. we apply the provisions of those Regulations directly in our courts and those provisions do not need to be replicated in UK law to be effective. Instead, we require only 'implementing legislation' which creates procedures for our courts to deal with the logistics of implementing the EU Regulations within our legal system. This is why, if the Government wishes to continue to apply the EU provisions in the UK, it would have to 'copy' those EU provisions into the UK domestic law because it is not usually written in our domestic law at present.

The **fundamental principles** of EU provisions affecting family law are:

- To provide legal certainty, predictability, protect autonomy of the parties and establish mutual trust between member states.
- Certain factors are required to establish a connection for a court to hear a dispute (for example, the country(ies) in which family members live). In children matters, the child's best interests shape the rules about where cases should be heard. In maintenance cases, the aim is to protect the financially weaker party.
- Judgments should be able to be recognised and enforced swiftly and without undue formality and opportunity for challenge, particularly where protective measures need to be enforced.
- There is also a desire for cooperation between authorities in the EU member states.

The group notes that similar sentiments are echoed by the Government in its recent position paper³ as the **guiding principles for the UK** in designing its future partnership with the EU, which are to:

- Maximise certainty for individuals and businesses;
- Ensure that they can effectively enforce their rights in a timely way;
- Respect the autonomy of EU law and UK legal systems while taking control of our own laws; and
- Continue to respect our international obligations.

As mentioned above, in the family law arena, the EU instruments are about **procedure** – we already do, and therefore will continue to, control our own substantive family law.

There are three main procedural ways in which the EU instruments apply to family law cases between the UK and the other EU member states:

1. They establish whether there is a basis for a court in one country to hear a dispute (a question of '**jurisdiction**'), for example, whether there is a sufficient connecting factor for a dispute to be determined in a particular place. This also includes determining where a case should be decided if there are proceedings brought in two different countries at the same time about the same issue: it stops the risk of irreconcilable judgments (these are known as the '*lis pendens*' provisions).
2. They establish whether or not there should be **recognition and enforcement** of an order made in one country by the courts of another country, for example, for maintenance to be paid, or for contact between a parent and a child.
3. They enable **cooperation** between countries for the sharing of information and enforcing orders, for example, to locate people who are missing or the logistics of speedily returning an abducted child to his or her home country.

The importance of a harmonised family law system across the EU comes sharply into focus when it is considered that:

- There are approximately one million British citizens living in other EU member states and some three million EU citizens living in the UK⁴. There are currently approximately 16 million international families in the EU who could be affected by cross-border disputes⁵. The scope for personal and family relationship issues arising is significant and so certainty and cooperation are key.
- There are approximately 140,000 international divorces in the EU each year⁶.

³ HM Government, *Enforcement and dispute resolution: a future partnership paper* (August 2017), 3/11

⁴ Statistics quoted by HM Government in *Providing a cross-border civil judicial cooperation framework: a future partnership paper* (August 2017), 5/12 – figures taken from ONS Jan 17 and Aug 16 respectively

⁵ http://europa.eu/rapid/press-release_MEMO-16-2359_en.htm

⁶ *Ibid*

- There are approximately 1,800 cases of child abduction within the EU each year⁷.

Some examples are set out below of the ways in which the EU family law provisions have a material effect on individual lives:

Jurisdiction

1. A German husband and an English wife who had lived together in Germany as a married couple but have separated (the wife having returned to England for the last six months), are divorcing, and each thinks that they are better off divorcing in their home country because their local law suits them better:
 - a. The EU instruments provide for whether or not they can establish the required level of connection to that country to issue their divorce there, and
 - b. If they both issue divorce petitions in different countries at the same time, the EU instruments have a mechanism in place to ensure that there are not proceedings going on at the same time in both countries, i.e. whoever issues their divorce petition first has priority.

The importance of these provisions is clear when considering the number of international divorces in the EU each year (see above): there needs to be uniformity of approach and provisions which stop the possibility of conflicting decisions in different countries so that the two countries don't make different orders about the same people.

Enforcement

2. In the same example as above, if there were an English court order for the husband to pay the wife maintenance and the husband stops paying, this order can be enforced by the wife to ensure she is able to make ends meet and pay her bills, and therefore not be reliant on the State. The same would apply if there were children and the order was for child maintenance.
3. If a British father and French mother have a child in England, and the parents then separate and the mother has the court's permission to move back with the child to her home town in France, but she does not obey the contact order for the child to spend time with his father, the father can use the automatic enforcement EU law provisions to ensure the contact takes place.

The simplicity of the EU family law mechanism minimises 'red tape', reduces legal costs and expedites restoring contact between the father and his child.

4. The EU provisions relevant to family law significantly enhance the provisions of the 1980 Hague Convention on child abduction: there is a stricter timetable and so abducted children are returned more quickly and there is a back-up mechanism in the EU regulation that provides for the child's home country to make a final determination about what is best for the child. Given the significant emotional impact of child

⁷ *Ibid*

abduction on children both immediately and longer term, the speed of these proceedings is key. There will be further amendments to Brussels IIa as part of the current process of revision which will bring further benefits and enhancements to the EU family law provisions, for example:

- a. enhancing children's rights and the obligation on courts to give the children an opportunity to be heard;
 - b. removing the requirement for certificates of enforceability for decisions in cases about parental responsibility, thereby speeding up enforcement;
 - c. improving the efficiency of return proceedings following international child abduction (including stricter time limits and reducing the number of appeals), providing for mediation and use of expert judges in specific courts.
5. If an English woman obtains a domestic violence injunction in England against a man living in (or who moves to) another EU member state, this injunction is automatically enforceable in that member state.

Cooperation

6. If there are child protection concerns about a mother who lives in England, but decides to move to Ireland with her baby to avoid the authorities checking up on her, the public authorities in England and Ireland can share information and ensure that the child is safeguarded. Alternatively there might be a child who has been taken into foster care in England but has relatives in Poland who could care for her. The public authorities can liaise and cooperate to assess the Polish family for suitability, giving the child the greatest chance of being able to stay living with her family.

The provisions in EU family law for cooperation between public authorities in child protection cases are more broadly worded than they are in the 1996 Hague Convention on child protection, giving more flexibility to the public authorities to work together and can result in more effective and efficient assistance or assessment. Proper cooperation between authorities and timely resolution of such cases are key for children in this position who have often already suffered greatly due to substandard care.

(ii) The CJEU

As may be imagined, there is sometimes uncertainty as to what the words in the EU instruments mean or how some provisions should be interpreted. When such questions of **interpretation** arise, if the answer to the question would make a difference to the outcome of the case, then any court in any EU member state can refer that question to the Court of Justice of the European Union (the 'CJEU'). All of the other member states, if they are involved or interested, have an opportunity to contribute to the debate about such questions and the decisions are made by a panel of judges with selected representatives from the EU member states. The CJEU then gives a decision about how the provision(s) in question should be interpreted and the case goes back to be resolved in the country that sent the question. Each member state is required to apply the decisions of the CJEU about interpretation.

It is therefore important to remember that in the arena of family law, the CJEU is not ‘dictating’ what our substantive family law is – we have our own family law as explained above. Rather the CJEU is an overarching arbiter of disputes about what the EU family law provisions about procedure mean so that the EU member states can ensure they are all interpreting the terms in the same way. This is not something that any individual country is able to determine as it would not achieve consistency across the EU.

The Government’s stance so far has indicated a firm intention to end completely the involvement of the CJEU in the UK. However, it must be recognised that there is a distinction to be drawn, as explained above, between areas of law in which the CJEU deals with substantive law (as in consumer and employment law) and where it is dealing with procedural questions (as with family law).

The group considers that the political sensitivities attached to the question of the future role of the CJEU could be ameliorated given the difference in the reach and application of the CJEU in family law.

The group is aware of the various other models that may be considered by the Government for dispute resolution⁸ but the group feels that it would be most effective and sensible to leave in place the existing structure (i.e. the CJEU) for resolving disputes about interpretation of the very mutually beneficial EU family law provisions which the Government is proposing to write into UK law. The alternative options set out in the Government’s paper would require the agreement of the other EU member states and the group anticipates that the EU is not likely to agree to such alternatives when there is already an overarching authority which works in the circumstances. Merely having ‘regard’ to CJEU decisions would be insufficient - if the approaches diverge, it would undermine the consistency and certainty of the reciprocal arrangements we seek to retain.

To end the involvement of the CJEU means we would lose the ability to have a voice in that court, to contribute to arguments about the interpretation of the law and shape the future application of the rules/law that the Government is suggesting we will continue to apply.

Overall the group would concur with the conclusion in the report of the House of Commons⁹ that:

“a role for the CJEU in respect of essentially procedural legislation concerning jurisdiction, applicable law, and the recognition and enforcement of judgments, is a price worth paying to maintain the effective cross-border tools of justice discussed throughout our earlier recommendations.”

⁸ Canvassed in the HM government paper *Enforcement and dispute resolution: a future partnership paper* (August 2017)

⁹ House of Commons Justice Committee report, *Implications of Brexit for the justice system* (Ninth Report of Session 2016-17), 15 March 2017, paragraph 35

4. Options for family law

As part of the process of withdrawing from the EU, we need to consider what the options are once the EU family law provisions stop applying in the UK, whilst considering the impact on our citizens at home and abroad and promoting their best interests.

There are broadly three possibilities as to what could happen:

i. Retain full reciprocity:

We could replicate the EU instruments in our own domestic law and maintain the existing reciprocal arrangements between the UK and the other EU member states.

This would effectively mean that we retain the current system. We would keep the benefit of the reciprocal provisions for establishing jurisdiction to hear cases, for recognition and enforcement of orders and cooperation of authorities across borders in the manner of the examples given earlier in this paper.

The EU instruments are not perfect, but they are tried and tested. They provide legal certainty and efficiency in enforcement of orders across borders, which is invaluable to families going through difficult separations.

To achieve this option and maintain a reciprocal arrangement with the EU, we would have to continue to be bound by the decisions of the Court of Justice of the European Union ('CJEU'). As explained in section 3(ii) above, the role of the CJEU is to rule on disputes about *interpretation* of the wording in the EU law provisions and in family law matters, it does not have an effect on the substantive family law in the UK. Therefore we feel that this should not attract the same political sensitivities and is a worthwhile concession in order to secure the continued effect of the reciprocal arrangements between the UK and the EU member states. The effect of not retaining the reciprocity is examined in section 4(ii) below.

To remain part of a reciprocal system would likely allow the UK to continue to be part of future reform of EU family law, putting forward our own viewpoints and perhaps being able to opt-in to certain provisions (as we have always been able to do). We would anticipate that if we were to remain subject to the decisions of the CJEU, we would also have the opportunity not only to be part of any arguments made to that court, and therefore contribute to the development of the law about interpretation of the provisions we would be applying, but also importantly to continue to have a UK representative as part of the judging panel for those cases.

The group is firmly of the view that this option is the **best** way for the UK to continue to promote and protect the best interests of British people at home and those settled in other EU member states. We recommend this as the long-term solution. However, if the Government decides ultimately to formulate a new arrangement in its place, this option should be pursued as the interim arrangement whilst the UK negotiates long-term arrangements (see option 3, 'Bespoke arrangement').

ii. Domestication without full reciprocity:

We could replicate the EU instruments in our own domestic law but without retaining the existing reciprocal arrangements with the EU member states.

This seems to be the effect of the Government's current approach in the Bill and that this would apply whilst alternative arrangements are negotiated and put in place.

This is completely unsatisfactory as an interim (or long-term) arrangement. If we do not have a reciprocal arrangement with the EU, there is simply no point in retaining the majority of the EU instruments which work on a mutually applicable basis.

Whilst the group understands that the aim is for the status quo in the UK to continue, pending further provisions being enacted, the reality is that it would effectively be a 'one way street' - the UK would continue to apply the EU provisions which had been copied into domestic law and:

- we would have to recognise the priority of other courts if they were engaged (or 'seised') before us, but they would not have to recognise if we were engaged first, making the *lis pendens* provisions wholly redundant; and
- we would be obliged to recognise and enforce decisions of other EU member states, but those other EU member states would not be obliged to recognise and enforce our decisions in the same way within a mutually beneficial framework.

The following **examples** illustrate what this would mean to individuals in family law cases:

- In the German/English divorce example, if the German husband issued his divorce petition in Germany and the next day the English wife issued her petition in England, in England we would have to stop our proceedings because the German court was engaged first. However if it was the other way round, Germany would have no obligation to respect the fact that the English divorce came first and the wife would have no opportunity to proceed with her divorce here.
- If divorce proceedings had been started in the English court and it made an order that the husband should pay the wife maintenance in the interim, and the husband (living in Germany) refused to pay and had started his own German divorce proceedings, the German court would not be obliged to respect the English maintenance order and could refuse to enforce it.
- If a mother abducts a child from the UK to Spain and the Spanish court decides not to return the child to the UK (for example because the child says he does not wish to return), the left behind father in the UK would lose the benefit of the EU provision that gives the UK court the ability to overrule the Spanish decision and order that child's return. That UK return order would no longer be automatically enforceable in Spain. Instead, the father would have to litigate in Spain and, if successful, there would likely be far greater delay in restoring the previous status quo, which ultimately would have a very negative effect on the child.

There are other practical implications that will arise as a result of this option:

- There will be additional delay to families in having their disputes resolved because of the uncertainty in the approaches taken in the UK vs an EU member state.
- People involved in such disputes will likely incur far greater costs than they already do (or our legal aid system will be further burdened) as a result of the need for much more in-depth considerations of the uncertainties mentioned above.
- Cases will take longer to resolve in court, placing an even greater burden on our already over-stretched court service, which will be particularly notable in cases where there are litigants in person (as those cases usually take much longer to resolve).

There is the further consideration that we would have no part to play in any reform of the EU instruments and so we risk either keeping older, out-of-date EU law, or following blindly with no input as to the changes. Notably, at the moment Brussels IIa is being revised and the UK is currently participating in the negotiations considering the revised terms. It will be a while until the revised (or 'recast') version of Brussels IIa comes into force, it may not be before we leave the EU. If that is the case, the effect of the EU (Withdrawal) Bill will be to enshrine in UK law the current version of Brussels IIa, but soon afterwards the EU will operate the recast version. Will English courts then enforce orders from the EU countries made under the recast version, when we still operate the 'old' version? It is a further example of the prospective uncertainty of the implications of proposed approach by the Government.

We would also not be able to contribute to the determination in the CJEU of any disputes about interpretation of the very EU provisions which we would be applying in our law. There would be a significant risk of divergent approaches in the way our courts interpret the provisions compared with how the rest of the EU interprets them, leading to lack of certainty and unfair results.

This in the view of the group is the **worst** of all outcomes because we would retain the problematic parts of the EU framework and lose the best reciprocal aspects of the EU family law system. It would leave our citizens in a position of significant vulnerability and confusion and cost individuals and our domestic family law system a lot more in terms of time and money.

iii. Bespoke arrangement:

We could make our own bespoke arrangement with the EU which sets out a new framework for family law cooperation between the UK and the EU.

This third option would take a very long time to consider, negotiate and put into place as there would need to be careful deliberation about what our new laws should be and how we should transition to them. Significant work would be required to consider the possibilities legally and then to discuss and negotiate the arrangements politically. This represents a great challenge in terms of securing overall agreement and clearing legal hurdles.

It will not be possible to agree a bespoke arrangement by 2019 given the enormity of the task. We recognise the competing calls on the Government in considering the impact of Brexit, most particularly so for those areas of law where the EU provisions do provide the substantive law that we apply in the UK. That is not the case for family law – our substantive family law can remain the same with the EU provisions, incorporated in UK domestic legislation, being applied until a replacement is found. However, as is made clear above, the only way that there is any point in keeping those EU provisions in place, is to have full reciprocity with the other EU member states by way of **option 1** above.

iv. The ‘no deal’ scenario

The group has considered what might happen if ‘no deal’ were reached by the date the UK exits the EU and if the Government does not write the EU instruments into our domestic law.

There are other international instruments, considered below, which are already in place and deal with similar topics to those covered by the EU instruments, however they are on the whole not comparable or as desirable as alternatives, whether in the interim or long-term, to the more comprehensive EU instruments.

It must also be mentioned that it is not a straightforward matter to assume the instant applicability of each of the instruments below after the UK leaves the EU. There is academic and legal debate about issues of EU competence and questions of timing to avoid gaps in the regulations or conventions that apply, which means a risk of people falling into ‘legal limbo’. Such considerations are beyond the remit of this paper, but full details can be provided as required.

The following are the main alternative international instruments which might be considered and the most important shortcomings:

1. Maintenance obligations

- a. 2007 Hague Convention¹⁰: whilst this would go some way towards assisting with the recognition and enforcement of maintenance obligations, it does not contain any direct provisions for jurisdiction and falls short of what is covered by the EU Maintenance Regulation. The jurisdictional rules are important to regulate where people can bring maintenance claims and what happens if there are competing proceedings. The Convention also provides the ability for countries to opt out of various provisions, which is not permitted under the Regulation.
- b. 2007 Lugano Convention: the UK would be required to join the EFTA in order to join the 2007 Lugano Convention – if it did so, the Lugano Convention would go much further than the 2007 Hague Convention in terms of jurisdiction, but it is still not as comprehensive or up to date as the EU Maintenance Regulation. It would be considered a ‘step back’ in terms of effectiveness and efficiency.

¹⁰ The UK would have to ratify separately: currently the UK is a party via EU ratification

2. Children cases

- a. 1980 Hague Convention (child abduction): returning back to use this convention alone would significantly weaken the tools available to the court in relation to children abducted to other EU member states. There are provisions included in Brussels IIa which provide for speedier solutions and give the final say to the original home court of the child's habitual residence. The anticipated revisions to Brussels IIa will add yet further positive features that are absent in the 1980 Hague Convention alone and we would lose out if we do not have the ability to apply those revised features. As has already been mentioned, the ability to secure the return of an abducted child speedily is very important to that child's emotional wellbeing given the harmful impact of child abduction. It is also very valuable that under Brussels IIa, the country of origin has the final say as to what should happen to a child as set out in the example earlier.
- b. 1996 Hague Convention (child protection): this arguably provides the best in terms of alternative provision but it lacks, for example, the automatic enforcement of contact orders (which have been certified) that is available under Brussels IIa. This again affects the speed and efficiency of enforcement. Parents would be disadvantaged by this and ultimately the children would lose out in having contact with a parent as ordered by a court as being in their best interests.

3. **Divorce:** 1970 Hague Convention: this is much more restrictive than the provisions contained in Brussels IIa relating to divorce and very few EU member states are signed up to this. It too does not contain direct rules about jurisdiction and so we would end up back in the pre-EU situation of having *forum conveniens* arguments about which court is best placed to decide the divorce case. Whilst some family lawyers prefer that system, a decision made in the UK would not necessarily be respected by another country and those arguments are lengthy and expensive. In most cases this would involve two days of court time and at least a circuit judge. The parties would also incur tens of thousands of pounds of additional legal costs, with test cases¹¹ costing hundreds of thousands of pounds due to the likelihood of appeals. As it stands, the 1970 Convention cannot be considered a sufficient replacement, even for an interim period.

There are other considerations to be borne in mind regarding sole reliance on the Hague conventions mentioned above. Whilst remaining part of the Hague Conference on Private International Law – the body which formulates the Hague conventions – is undoubtedly important and beneficial for relations with non-EU member states that have signed up to those conventions, it is not an adequate alternative to the EU family law system. In particular:

¹¹ In one of the test cases over a decade ago following the introduction of Brussels II – Wermuth (No 2) [2003] EWCA Civ 50 - each party's costs exceeded £100,000

- There is no overarching court to assist with interpretation of key terms in the Hague conventions equivalent to the CJEU and therefore there can be divergent approaches.
- The process for development and reform of the Hague conventions is much slower and more restricted.
- It is possible to make ‘reservations’ (i.e. opt out of parts) to the Hague conventions.

In a recent position paper¹², the Government set out in an ‘Annex A’ its view as to what should happen if an agreement cannot be reached in time before ‘Brexit’. The Annex responds to the EU position paper on this topic¹³. The Government proposes, without prejudice to future negotiations, that existing EU rules about jurisdiction and recognition and enforcement will continue to apply to decisions given before ‘Brexit’ and to decisions given after ‘Brexit’ within proceedings instituted before ‘Brexit’. This is welcome news but remains subject to any agreement reached. The value of reaching such an agreement is set out above. If this ‘no deal’ scenario were to come to fruition, the difference between the situation before and after ‘departure day’ would be even more stark given that EU provisions would continue to apply to those decisions made before and during ‘Brexit’ whereas new decisions made thereafter would be subject to the ‘no deal’ problems discussed above.

Overall the current EU instruments relevant to family law provide superior protection for UK citizens at home and abroad and we should do all we can to maintain those provisions. Full reciprocity is required for them to function within the EU. The group suggests that it is not an answer to revert to alternative international instruments (where they exist) to ‘plug the gap’ until a longer-term solution is found. To do so would mean that UK citizens and families would lose the benefit of the additional efficiency of the EU instruments, whether it is in seeking the return of an abducted child, spending time with their child or securing the payment of maintenance in accordance with a court order. A ‘cliff edge’ would be particularly apparent in moving from one scenario to another, something the Government has said clearly that it wishes to avoid¹⁴.

¹² HM Government, *Providing a cross-border civil judicial cooperation framework – a future partnership paper* (August 2017)

¹³ Published on 13 July 2017

¹⁴ HM Government, *Enforcement and dispute resolution: a future partnership paper* (August 2017)

5. Recommendations and conclusions

The group is alive to the pressures on Government to consider the impact of Brexit across all areas of law. We anticipate that it is likely that family law will not be high on the agenda for political consideration.

If the Government intends through its EU (Withdrawal) Bill to try to preserve the status quo whilst considering the longer-term options, it must be aware of, and take seriously, the effect of writing the EU provisions into UK family law without an agreement with the EU that the provisions would continue to operate on a reciprocal basis. Without full reciprocity, the provisions which prevent parallel proceedings, provide for recognition and enforcement of orders and facilitate cross-border cooperation would be rendered useless and the outcome would be confusing for people, potentially leading to delays and unfair results. We would not know how the other EU member states would then treat UK court orders and so:

- It would be virtually impossible for lawyers to advise their clients about possible outcomes;
- The UK courts would not know how their orders would be received abroad which is likely to affect the outcome of the case, cause delay and have additional cost consequences for the UK court system and families; and
- Individuals would lose out by not being able to have UK decisions easily enforced in other EU member states. This would have a particularly adverse impact on UK families who have international connections.

The Government has stated in its recent position paper that¹⁵:

“The best way to ensure legal certainty for both UK and EU citizens and businesses as we leave the EU is to facilitate a **smooth transition** to a new relationship in civil judicial cooperation. Existing international conventions can provide for rules in some areas, but they would not generally provide the more sophisticated and effective interaction, based on mutual trust between legal systems, that currently benefits both EU and UK business, families and individual litigants. The optimum outcome for both sides will be an agreement reflecting our close existing relationship, where **litigating a cross-border case** involving UK and EU parties under civil law, wherever it might take place, **will be easier, cheaper and more efficient for all involved.**” (emphasis added)

The ultimate goals are to be applauded but as things stand there will most certainly not be a ‘smooth transition’ if the Government proceeds with ‘option 2’ set out above i.e. retaining the EU provisions but without ensuring full reciprocity. Litigating cross-border cases will be fraught with difficulty, uncertainty and complexity and will be expensive for all those concerned.

In the words of Professor Nigel Lowe¹⁶,

¹⁵ HM Government in *Providing a cross-border civil judicial cooperation framework: a future partnership paper* (August 2017), 6/18

¹⁶ Written evidence to the House of Commons Justice Committee from Professor Nigel Lowe, Emeritus Professor, Cardiff University and Consultant to Number Fourteen, Gray’s Inn Square, 2 November 2016

“It will not be good enough to adopt the strategy of enacting these [EU family law] instruments domestically since their efficacy depends on reciprocity and **orders that are not enforceable are not worth the paper they are written on.**” (emphasis added)

Accordingly the group recommends that the Government takes all possible steps to achieve an outcome as per ‘option 1’ above i.e. retaining the EU provisions and arranging for full reciprocity, provided we retain the UK’s ability to participate in any amendments to the existing instruments.

A further benefit of using option 1 in any transitional period is that we would be able to see how that system functions on a longer-term basis and whether a wholesale change (in the manner of option 3) would even be required. The courts will in any event have to continue to apply EU provisions to cases that started before Brexit and be bound by decisions of the CJEU for a long while after the date to leave has passed.

There would be an obvious benefit if the new system after the UK has left the EU is the same as it was before (in family law at least) – it would increase legal certainty as:

- There would be familiarity with the previously applied EU legal principles, so family lawyers would be better able to advise their clients about how best to resolve family disputes (ideally without court intervention).
- There would be no doubt about UK decisions being recognised and enforced abroad.
- Families would have the benefit of the more efficient provisions to secure contact or maintenance, or the return of their child if abducted.

The group will of course wish to engage fully and assist as and when necessary to advise as to the possibilities and implications of any new arrangement for cross-border family law between the UK and EU (‘option 3’ above), and will be happy to assist with contingency planning for a ‘no deal’ scenario.

However it remains this group’s clear view that option 1 would be the long-term preference.

Annex 1 – Full List of EU Instruments Affecting Family Law

- The Brussels IIa Regulation (2001/2003)¹⁷
Divorce, parental responsibility (private disputes about custody/access and protection measures taken by the state) and child abduction
- The Maintenance Regulation (4/2009)
Jurisdictional rules for maintenance claims and recognising and enforcing maintenance orders and binding maintenance agreements
- Regulation on mutual recognition of protection measures in civil matters (606/2013)
Measures to protect those at risk of domestic violence or harassment
- EU Service Regulation (2007/1393/EC)
Serving documents between EU member states
- Taking of Evidence Regulation (2001/1206)
Taking or collecting evidence between EU member states
- Legal Aid Directive (2002/8)
Provision of common minimum standards for granting legal aid in cross-border disputes
- Mediation Directive (2008/52)
To facilitate access to alternative dispute resolution and encouraging use of mediation
- European Judicial Network in Civil and Commercial Matter (2001/470/EC)
To improve cooperation at an official level between judicial and legal authorities
- European Enforcement Order (805/2004)
Provides a streamlined procedure for enforcing uncontested judgments e.g. out of court settlements.
- Recognition of public documents (2016/1191) – this will take effect from 16 February 2019
Simplifying requirements for presenting certain public documents in the EU e.g. birth, marriage or death certificates

¹⁷ Note there is currently a proposal for a recast of this regulation

Annex 2 – Acknowledgements

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