

Cross-EU border family law from 1 January 2021: guidance for legal professionals

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Summary

Updated guidance for legal professionals on cross-EU border family law (including divorce and child maintenance) from 1 January 2021.

The UK has left the EU, and the transition period after Brexit comes to an end on 31 December 2020.

This page tells you what you'll need to do from 1 January 2021. It will be updated if anything changes.

Detail

This guidance is provided for the information of legal practitioners involved in family law in Scotland and the EU. It is not legal advice. It is not a complete statement of the law.

Practitioners should be aware that they may need to consider leading judgments from the UK courts and judgments from the Court of Justice of the European Union (CJEU) where relevant.

Members of the public involved in cross-border family law cases should read the [guidance](#) for the public.

Statutory instruments

The [Jurisdiction and Judgments \(Family\) \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) will be amended by a [further instrument](#) before 31 December 2020 to ensure its provisions are consistent with Title VI of the [Withdrawal Agreement](#). Similarly, [The Jurisdiction and Judgments \(Family, Civil Partnership and Marriage \(Same Sex Couples\)\) \(EU Exit\) \(Scotland\) \(Amendment etc.\) Regulations 2019](#) will be [amended](#) to ensure its provisions are consistent with Title VI of the Withdrawal Agreement.

The EU Commission has also published [guidance](#) on civil justice, including family law, as a consequence of the UK's departure from the EU.

1. Divorce

1.1 Current law

Jurisdiction

The jurisdiction rules set out in Article 3 of Council Regulation 2201/2003, known as Brussels Ia, have been applied to all cases of mixed sex divorce, legal separation and declarators of nullity of marriage in Scotland whether or not the case has a cross border element.

The jurisdiction rules can mean that parties to a marriage may have standing to seise the court in a number of different member states. Parallel proceedings are avoided by the lis pendens rule in Article 19, requiring the court second seised to sist the proceedings before it.

For [dissolution, legal separation or nullity of a civil partnership](#) and [divorce, legal separation or nullity of a same sex marriage](#) the Scottish Ministers have made Scottish Statutory Instruments which broadly replicate the jurisdiction rules in Brussels Ia.

For further information, refer to the [Brussels Ia Regulation](#). The Brussels Ia Regulation does not apply to Denmark (see recital 32 of the preamble).

Recognition of orders

Judgments on divorce made in a member state are generally recognised in other member states without any special procedure, under Article 21. This is subject to the exceptions contained in Article 22.

A party seeking or contesting recognition of orders for divorce etc. made in Scotland is required to produce the documents detailed in Article 37 and in particular the Article 39 certificate at Annex I to Brussels Ia.

An interested party (in Scotland or in an EU Member State) can apply for a court order that a judgment on divorce etc. should not be recognised.

1.2 From the end of the transition period

Cases in Scotland

Cases ongoing in Scotland at the end of the transition period

The treatment of cases commenced before the end of the transition period (11pm on 31 December 2020) is governed by Title VI of the [Withdrawal Agreement](#). The Brussels Ia provisions will continue to apply to such cases, and to the recognition and enforcement of judgments delivered in them. This includes judgments delivered, whether before or after the end of the transition period, by a court in an EU member state in proceedings commenced before the end of the transition period, but which have not been enforced in an EU Member State or the United Kingdom respectively before the end of the transition period. The Withdrawal Agreement does not apply to the treatment of cases that commence after the end of the transition period.

Jurisdiction

Divorce proceedings ongoing in Scotland at the end of the transition period will continue under the current law and rules of Brussels Ia.

Recognition of orders

Courts in Scotland will continue to recognise divorces granted in EU member states in the same way under Brussels Ia if the recognition proceedings started, or the divorce was granted, before the end of the transition period.

New cases in Scotland after the end of the transition period

Jurisdiction

Brussels Ia will no longer apply to cases in Scotland. As retained EU law, it is revoked and [provision](#) made so that jurisdiction in divorce (whether of a mixed sex or same sex marriage) and in dissolution of civil partnership is based on whether either party is domiciled in Scotland when the action is begun or was habitually resident in Scotland for a year ending on that date.

For both same sex divorce and the dissolution of civil partnership, a “jurisdiction of last resort” is retained if the couple entered into their relationship in Scotland; no court has or is recognised as having jurisdiction; and it appears to the Scottish court to be in the interests of justice to assume jurisdiction.

For further information, please refer to [The Jurisdiction and Judgments \(Family, Civil Partnership and Marriage \(Same Sex Couples\)\) \(EU Exit\) \(Scotland\) \(Amendment etc.\) Regulations 2019](#) [SSI 2019/104] and the [accompanying Policy Note](#).

Recognition of orders

After the end of the transition period, Scotland will recognise divorces granted in EU member states in which proceedings started after the end of the transition period in the same way as currently for orders from non-EU countries. The rules on recognition are to be found in Part II of the Family Law Act 1986 which implemented the 1970 Hague Convention on the recognition of divorce and legal separations.

(The 12 EU member states that are currently party to the 1970 Hague Convention on Divorce Recognition are Cyprus, Czech Republic, Denmark, Estonia, Finland, Italy, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Sweden).

Cases in an EU member state

The treatment of cases commenced before the end of the transition period in EU member states is governed by Title VI of the Withdrawal Agreement. The Withdrawal Agreement does not apply to the treatment of cases that commence after the end of the transition period.

New cases in an EU member state after the end of the transition period

The EU Commission has published [guidance](#) on civil justice, including family law, as a consequence of the UK's departure from the EU

Recognition of orders

The recognition in an EU member state of a decree of divorce granted in Scotland in proceedings which were started after the end of the transition period will be governed by each member state's national rules of private international law, unless they are party to the 1970 Hague Convention on Divorce Recognition, in which case the rules of that Convention apply, for divorce and separation only. Parties should seek local legal advice.

For further information, parties should refer to the full [1970 Convention](#).

The approach to the recognition of the divorce of same sex couples and of the dissolution of a civil partnership varies significantly between member states. Parties should seek local legal advice.

2. Maintenance

The treatment of cases commenced before the end of the transition period (11pm on 31 December 2020) is governed by Title VI of the Withdrawal Agreement. The Maintenance Regulation will continue to apply to such cases, and to the recognition and enforcement of judgments delivered in them. This includes judgments delivered, whether before or after the end of the transition period, by a court in an EU member state in proceedings commenced before the end of the transition period, but which have not been enforced in an EU member state or the United Kingdom respectively before the end of the transition period. The Withdrawal Agreement does not apply to the treatment of cases that commence after the end of the transition period.

2.1 Current law

Jurisdiction

The court in Scotland currently applies the rules in [Chapter II of the EU Maintenance Regulation 4/2009](#) to decide if it has jurisdiction to hear a maintenance case.

Recognition and enforcement of decisions

A maintenance decision made in Scotland that is to be recognised and enforced in another EU member state must be recognised and must have a declaration of enforceability (registration for enforcement) before it can be enforced there. It should be accompanied by the documents required under Article 28, subject to the exceptions in Article 29.

A maintenance decision made in another EU member state (except Denmark) that is to be recognised and enforced in Scotland does not need to be registered for enforcement. It should be accompanied by the documents required under Article 20.

For further information, refer to the [Sheriff Court Child Care and Maintenance Rules](#).

2.2 From the end of the transition period

Cases in Scotland

Cases ongoing in Scotland after the end of the transition period

The treatment of cases commenced before the end of the transition period is governed by Title VI of the EU Withdrawal Agreement.

New cases starting in Scotland after the end of the transition period

Jurisdiction

The EU Maintenance Regulation 4/2009 will be revoked at the end of the transition period. For cases starting after this point, the court in Scotland will decide if it has jurisdiction using the relevant non-EU rules (unless parties have before the end of the transition period made a choice of law agreement in accordance with the EU rules). These rules are different depending on the type of maintenance case before the court.

Recognition and enforcement of maintenance decisions

After the end of the transition period, the UK will use the rules of the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance with other States Party, which include all EU member states except Denmark. [The 1973 Hague Maintenance Enforcement Convention](#) will continue to operate between the UK and Denmark.

For further information, refer to the full [2007 Hague Convention](#).

Cases in an EU member state

Cases ongoing in an EU member state at the end of the transition period

The treatment of cases commenced before the end of the transition period in EU member states is governed by Title VI of the Withdrawal Agreement. The Withdrawal Agreement does not apply to the treatment of cases that commence after the end of the transition period.

New cases starting in an EU member state after the end of the transition period

Jurisdiction

The guidance from the European Commission states that where proceedings involve a UK domiciled defendant, unless an EU instrument sets out the rules of jurisdiction with regard to third countries, international jurisdiction will be governed by the national rules of the EU member state in which the court is seised. To find out the law the member state's court will apply in a case involving a UK party or parties after the end of the transition period, individuals should seek local legal advice if possible.

Recognition of decisions

The guidance from the European Commission states that in some instances international conventions will apply provided that both the EU member state and the United Kingdom are party to the convention. All EU member states except Denmark are party to the 2007 Hague Maintenance Convention so this will enable the recognition of UK maintenance decisions in EU member states after the end of the transition period.

Choice of court agreements within a Maintenance case after the end of the transition period

In Scotland

The court in Scotland will continue to recognise choice of court agreements in maintenance cases agreed before the end of the transition period in writing between all parties which satisfy the relevant conditions, even if the case is issued after the end of the transition period.

In EU member states

There is no guarantee that the courts of EU member states will recognise a choice of court agreement in favour of a court in Scotland after the end of the transition period.

Further information

Scope of the 2007 Hague Maintenance Convention

The Scottish Government intends to operate the 2007 Hague Convention as soon as possible after the end of the transition period both for new cases and for payments from before exit for the benefit of a person under 21, with EU member states except Denmark. The UK has ratified the 2007 Hague Convention with the same declarations and reservations as before and the same scope as that applied by the EU, including spousal maintenance. The UK will in future consider wider application.

For further information, refer to the [2007 Hague Convention](#).

Terminology differences between the 2007 Hague Maintenance Convention and the EU Maintenance Regulation

The EU Maintenance Regulation 4/2009 provides for the UK (and Ireland) to read “nationality” as “domicile”. The 2007 Hague Convention refers only to nationality.

The 2007 Hague Convention provides for the recognition and enforcement of maintenance decisions where the court which made the decision had jurisdiction for divorce, except if that was based on the nationality of only one spouse. Therefore, where the court’s jurisdiction for the divorce relies on sole domicile, not nationality, it should be possible for any maintenance decision to be recognised and enforced under the 2007 Hague Convention.

Central Authority for Scotland

The Central Authority for Scotland can be contacted on:

Email: maintenanceenforcement@gov.scot

Telephone: 0131 244 0460

Address: Room GW-15
St Andrew's House
Regent Road
Edinburgh
EH1 3DG

3. International parental child abduction

3.1 Current law

The main provisions of the [1980 Hague Convention on the Civil Aspects of International Child Abduction](#) are incorporated into the law of the UK jurisdictions by the Child Abduction and Custody Act 1985. All EU member states are party to the 1980 Hague Convention and use it with the UK. This provides a summary procedure for children wrongfully removed or retained away from their country of habitual residence to be returned there, so that long-term decisions about the future of the child can be made (abduction includes both wrongful removal and wrongful retention).

Members of the public whose child has been abducted out of Scotland should contact the Central Authority for Scotland for information on what action to take. If the member of the public believes their child is at risk of abduction in future from any

part of the UK, they should contact the charity reunite International Child Abduction Centre for advice and information.

If they believe the child is being wrongfully removed from the UK and is on their way out of the country they should go at once to their nearest police station and ask for warning list action. They should also contact reunite International Child Abduction Centre.

For further information refer to:

- [Child Abduction and Custody Act 1985](#)
- [Chapter 70 of the Court of Session Rules](#)
- [Reunite International](#) on 0116 2556234.

Contact details for the Central Authority for Scotland

Email: childabduction@gov.scot

Telephone: 0131 244 0460

Address: Room GW-15
St Andrew's House
Regent Road
Edinburgh
EH1 3DG

3.2 From the end of the transition period

The UK and EU member states will continue to use the 1980 Hague Convention in international child abduction cases between them.

4. Children cases (parental responsibility)

Note: In EU terms parental responsibility includes residence and contact.

4.1 Current law

Jurisdiction

Article 8 of Brussels Ia provides that jurisdiction in children cases generally rests with the court of the country of the child's habitual residence. Habitual residence is a question of fact which requires consideration of a number of factors. There are also other grounds of jurisdiction which may sometimes be relied upon. For example, under Article 12, the court with jurisdiction where there are divorce etc proceedings also has jurisdiction for proceedings about a child when at least one spouse has parental responsibility for that child and the relevant people agree the court should have jurisdiction.

For further information, refer to the [Brussels Ia Regulation](#).

Recognition of orders

The general rule is that judgments on parental responsibility issued in a member state are recognised in other member states without any special procedure, under Article 21. This is subject to the exceptions contained in Article 23.

An order made in Scotland is recognised and enforced in EU member states when accompanied by the relevant certificate: Annex II to Brussels Ia for parental responsibility, Annex III for rights of access, Annex IV for return of the child. An order made in an EU member state is recognised and enforced in Scotland when accompanied by the relevant certificate as above.

4.2 From the end of the transition period

If the case is in Scotland

Cases ongoing in Scotland at the end of the transition period

The treatment of cases commenced before the end of the transition period is governed by Title VI of the Withdrawal Agreement. The Withdrawal Agreement does not apply to the treatment of cases that commence after the end of the transition period.

New cases in Scotland after the end of the transition period

Jurisdiction

Brussels Ia will no longer apply in Scotland after the end of the transition period. As retained EU law it is revoked by the Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019.

The court will instead make its decision on whether it has jurisdiction to hear private law cross border children cases in accordance with the rules of the [1996 Hague Protection of Children Convention](#).

Recognition of orders

In future, parental responsibility judgments from EU member states will be recognised under the 1996 Hague Convention. The Convention was implemented by the [Parental Responsibility and Measures for the Protection of Children \(International Obligations\) \(Scotland\) Regulations 2010 \(SSI 2010/213\)](#).

If the case is in an EU member state

Cases ongoing in an EU member state at the end of the transition period

The treatment of cases commenced before the end of the transition period in EU Member States is governed by Title VI of the Withdrawal Agreement.

Transfer of cases after the end of the transition period

The provisions of Brussels Ia could prevent a court in an EU member state using the 1996 Hague Convention to transfer jurisdiction in children cases to the UK after the end of the transition period. The legal position on transfer of cases is not clear. Parties may wish to consider seeking local legal advice in the relevant EU member state if possible.

New cases in an EU member state after the end of the transition period

Jurisdiction

All EU member states are party to the 1996 Hague Protection of Children Convention so it is expected that the court of an EU member state in a case with a UK connection will apply the rules of the 1996 Hague Convention to decide whether it has jurisdiction in children cases.

For further information, refer to the [1996 Hague Convention](#).

Recognition of orders

The guidance from the European Commission states that in some instances international conventions will apply provided that both the EU member state and the United Kingdom are party to the convention.

5. Placement of children

5.1 Current law

Jurisdiction

Under Brussels IIa, the court hearing public law care proceedings will normally be the court of the country of the child's habitual residence.

Current procedure

If the local authority wishes to propose to the court or the Children's Hearing that the child be placed with a family member in another member state, local authorities are required under the rules in the Brussels IIa Regulation to seek and obtain prior consent from the competent authority in the EU country where they wish to place the child, in cases where that authority is involved in domestic placements.

For further information, refer to: the full [Brussels IIa Regulation](#).

5.2 After the end of the transition period

Cases ongoing in the UK at the end of the transition period

The treatment of cases commenced before the end of the transition period is governed by Title VI of the Withdrawal Agreement. The Withdrawal agreement does not apply to the treatment of cases that commence after the end of the transition period.

Cases that commence after the end of the transition period

After the end of the transition period, local authorities and social welfare authorities in EU member states will use the rules in the 1996 Hague Protection of Children Convention on placements; under these rules they will need to seek and obtain consent to the placement in every case. Under the 1996 Hague Convention, the court hearing public law care proceedings will normally be the court of the country of the child's habitual residence.

6. Civil status documents

[EU Regulation 2016/1191](#) simplified the requirements for presenting certain public documents in the European Union. It removed requirements across the EU for the legalisation of certain civil status documents and introduced multi-lingual translation aids for some documents. The EU Regulation will be revoked for the UK as a whole at the end of the transitional period by [The Immigration, Nationality and Asylum \(EU Exit\) Regulations 2019](#)

The guidance issued by the European Commission says that Regulation 2016/1191 will no longer apply to a public document issued by the United Kingdom authorities presented to the authorities of an EU Member State after the end of the transition period, regardless of its date of issue and period of validity.

Therefore, persons presenting civil status documents from Scotland in EU member states may need to get the documents legalised and translated, and should be encouraged to check requirements in the relevant jurisdiction in advance. National Records of Scotland will cease to issue multi-lingual translation aids under the EU Regulation.

Multi-lingual translation aids issued by EU Member States will continue to be accepted in Scotland as part of a notice of intention to marry or notice of intention to

enter a civil partnership, provided that the multi-lingual translation aid gives the civil registrar the information they require to process the notice.

In any other case, if an organisation is presented with a civil status document and multi-lingual translation aid from an EU Member State, notwithstanding EU Exit the organisation may wish to consider if these documents jointly provide it with the information they require.

7. Domestic abuse

[EU Regulation 606/2013](#) makes some provision on mutual recognition of civil protection measures across the EU. Under the Regulation, for a civil protection order to be recognised in another Member State, the originating Member State has to issue a certificate.

This EU Regulation seems little used in Scotland. The Scottish Government intends to legislate in 2021 in relation to this EU Regulation to reflect the UK's departure from the EU. In the meantime, any certificate issued by the Scottish courts under this EU Regulation may not be recognised in EU Member States, given the UK's departure from the EU.

**Scottish Government
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