



Association of **Lawyers for Children**

Promoting justice for children and young people

**Joint Resolution and Association of Lawyers for Children note to public law children lawyers in England and Wales of practical recommendations in the circumstances of no deal on EU exit**

**26 February 2019**

### **Overview**

When this note was produced, the UK is scheduled to leave the EU at 23:00 on 29 March 2019. Our organisations have identified some key points for public law children practitioners to consider now and before 29 March, particularly for cases already underway. However this is only in the context of a 'no-deal' exit. If there is any EU deal, it is virtually certain that EU laws will continue throughout any transition (or similar period) and so this note would not apply.

Please see the [Resolution and Law Society note](#) published in January 2019 for issues to consider in respect of private law matters.

This note is not legal advice, opinion or guidance, nor represents policy. It cannot cover every situation or eventuality. Practitioners should consider the relevant international laws and national statutory instruments and where applicable take local legal advice on the likely position in relevant EU member state/s.

### **Introduction**

If the UK leaves the EU on 29 March 2019 and there is 'no-deal' (i.e. no Withdrawal Agreement), EU law will immediately cease to apply at 23:00 on 29 March. There will instead be reliance upon national law and international laws such as the Hague Conventions. The UK government is introducing a series of statutory instruments to apply in these circumstances including [The Jurisdiction and Judgements \(Family\) \(Amendments etc\) \(EU exit\) Regulations 2019](#) which contains important transitional arrangements.

### **Transfers of jurisdiction**

Currently, it is possible to transfer jurisdiction from one EU Member State to another under Article 15 of Brussels IIa (BIIa). In the event of a 'no-deal' exit, jurisdiction will largely be derived from the [1996 Hague Convention](#), which contains a similar mechanism to transfer jurisdiction between Contracting States under Articles 8 and 9.

Practitioners should consider the differences between the substantive and procedural requirements of BIIa and the 1996 Hague Convention.

Practitioners should be aware that there is a problem with the interplay between BIIa and the 1996 Hague Convention in relation to transfers of jurisdiction: BIIa takes priority over the 1996 Hague Convention in relation to children habitually resident in the territory of an EU Member State in matters governed by BIIa Article 61(b) and Article 62. Article 15 of BIIa only provides for transfers of jurisdiction between EU Member States rather than between EU Member States and 1996 Hague Convention Contracting States (Article 15(1)). This has been interpreted as precluding transfers of jurisdiction from other EU Member States to the UK in the event of a 'no-deal' exit.

This is a particular problem in cases where children are moved from the UK to other EU Member States to evade child protection interventions. At the moment, jurisdiction is often transferred back to the UK in these cases. This may not be possible following a 'no-deal' exit due to the conflict between BIIa and the 1996 Hague Convention.

This specific problem will, it appears, be resolved in Brussels IIa Recast which includes an amendment to Article 15 of BIIa permitting transfers of jurisdiction from EU Member States to Contracting States. If BIIa Recast is implemented in its current form before 29 March 2019, the above issue will not arise. However, if the other EU Member States are using BIIa in its current form, and the UK is using the 1996 Hague Convention, it may not be possible for jurisdiction to be transferred from an EU Member State to the UK until BIIa Recast enters into force.

The European Commission has published [guidance for Member States](#), dated 18 January 2019. We understand from paragraph 1.1 that for proceedings pending within a court of an EU Member State on the withdrawal date and which involve a defendant domiciled in the UK, BIIa will continue to apply.

Accordingly, if you have a case where a child has been moved from the UK to another EU Member State and you wish to apply for jurisdiction to be transferred to the UK under BIIa, it is important to act swiftly ahead of 29 March 2019 by liaising with the relevant authorities in the other EU Member State and/or by making an application to court under Article 15(2)(c) of BIIa.

### **Assessments in EU Member States**

The existing rules about the ability of professionals to work in other Member States on the basis of qualifications gained in their home states is likely to be affected. There is therefore an even greater need for social workers and other professionals who propose to undertake assessments in EU Member States to ensure that they will not be contravening law within that state. This is in addition to ascertaining in the first instance whether assessments can be procured through cross border co-operation with professionals in the relevant Member State, for example, in consultation with the Central Authority.

### **Placement of children abroad in institutional care or foster/kinship care and the recognition and enforcement of placement orders**

The 1996 Hague Convention contains similar provisions to BIIa for the placement of a child in institutional care or with a foster family/kinship placement in another Contracting State.

As with BIIa, it is important that there is effective cross border cooperation to ensure the placement of those children, which includes obtaining the necessary advance consent from

the relevant public authority in the other Contracting State. The requirements of the 1996 Hague Convention are more detailed than BIIa because when seeking the appropriate consents, a report on the child must be transmitted together with the reasons for the proposed placement.

Again, practitioners should consider the differences between the substantive and procedural requirements of BIIa and the 1996 Hague Convention.

Having first obtained the relevant consent, it is important to recognise and enforce the placement order in the other Contracting State prior to transferring the child to the new placement.

Under BIIa, most orders relating to parental responsibility (PR) require *exequatur* before they can be enforced in another Member State (BIIa Article 28). This means that there must be a declaration of enforceability (or as we call it in the UK, registration for enforcement).

In the event of a 'no-deal' exit you will not be able to apply for or obtain enforcement of orders relating to PR in an EU Member State under BIIa on or after 30 March 2019, even if:

- The order you want to enforce was made before 30 March 2019.
- The proceedings to enforce the order were started before 30 March 2019.
- There is a limited exception: if you obtained the *exequatur* in the relevant Member State before 30 March 2019, the order can be enforced under BIIa.

It is not clear whether orders which do not require *exequatur* will continue to be automatically recognised in other EU Member States under BIIa on or after 30 March 2019.

The 1996 Hague Convention provides an alternative mechanism for recognition and enforcement or judgments relating to PR across the EU.

Practitioners should note that whilst legal aid is available on a means tested basis for recognition and enforcement (and appeals against the same) under BIIa (LASPO 2012 Sch. 1, para. 17(1)(c)), legal aid is not available for the same type of cases involving applications for recognition and enforcement (or related appeals) under the 1996 Hague Convention (other than via an application under the Exceptional Case Funding scheme which has no guarantee of success). The government does not intend to make any changes to the scope of legal aid in this regard as it says this would just be a consequence of a 'no-deal' exit and EU Member States would not be treated differently to any other 1996 Contracting State. Practitioners may wish to consider whether they have clients with potential legal aid applications which should be made now.

If you want to try and achieve the enforcement of a judgment under BIIa before 30 March 2019, to avoid delay, you will need to ensure that there is an Annex II Certificate appended to the relevant order (BIIa Article 39). Courts may assist with this by ensuring that Annex II Certificates and sealed orders are issued expeditiously.

However, be aware of the time limits for appeal against declarations of enforceability (BIIa Article 33) and the fact that it may not be possible to complete enforcement proceedings before 30 March 2019 under BIIa.

## Co-Operation

In the event of a 'no-deal' exit you will not be able to use EU law on Civil Judicial Co-Operation on or after 30 March 2019. This applies to co-operation requests that are pending on 30 March 2019.

This is important for cases that engage:

- Brussels IIa (especially Articles 55 and 56);
- The EU Taking of Evidence Regulation;
- The EU Service Regulation;
- Judicial Liaison using the European Judicial Network.

Your pending co-operation request may be able to proceed under:

- The 1996 Hague Child Protection Convention;
- The 1965 Hague Service Convention (Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters);
- The 1970 Hague Taking of Evidence Convention (Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters);
- Judicial Liaison using the International Hague Network of Judges.

You should contact the relevant central authority dealing with your pending request to see if it can be dealt with before exit or, alternatively, whether a new request needs to be submitted if it will not be concluded before 30 March 2019. The ICACU may be able to clarify what will happen to pending co-operation requests under BIIa. The Office of International Family Justice may be able to clarify what will happen to pending requests for judicial liaison with EU Judges.

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