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The Great EU Repeal Bill White Paper and family law

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Overview

David Hodson examines the UK government consultation paper on proposed legislation on Brexit in respect of EU law. He finds that unlike many other areas of law, family law does not need, nor want, EU law to be simply put into national law as the government proposes. In only a couple of places at most will there then be a gap in the law which needs to be filled, and this can be undertaken by domestic legislation. Most EU family law only works on an entirely reciprocal basis

Government proposals in respect of EU law after Brexit

On Wednesday, 29 March 2017, the UK government gave notice to the EU of the intention to leave the EU. On Thursday, 30 March 2017 the government published its White Paper: "*Legislating for the U.K.'s withdrawal from the EU*". This sets out how the government intends to deal with the huge number of EU laws which now pervade every element of UK life. The stated aim is to produce certainty for business, public sector and everyone in the country.

The government states that it intends to convert the "*acquis*", namely the existing body of European legislation, into UK law at the moment it repeals the European Communities Act, i.e. at the point of leaving the EU. It is said by the Prime Minister, Theresa May MP, in the foreword to the White Paper that this will provide maximum certainty and clarity. The same rules and laws will apply on the day after exit as on the day before. It would then be for the democratically elected UK representatives to decide on any changes to that law after full scrutiny and proper debate. This is as she announced in October 2016 at the Conservative party conference.

Undoubtedly this policy will be important, perhaps essential, for areas of law where there are legally imposed standards, regulations, rights of workers and consumers and similar provisions which are stand-alone entitlements irrespective of any reciprocity with the rest of the EU.

However with a couple of exceptions, EU family law operates only in the cross-border context. EU family law does not provide stand-alone, self-contained laws which can viably continue unless part of some reciprocal arrangement with the EU. The purpose of this note, compiled by us as specialist family lawyers dealing daily with EU family law at a very detailed level and with considerable day-to-day experience on how it works, is to examine how this government policy will actually operate. The conclusion is that a simple adoption of the acquis will be unsuccessful in family law. None of this is to detract from the overall government policy. It is simply not applicable or appropriate in family law

This note does not contain detailed citations, authorities or extended statute names which can be supplied if needed

Although the note is personally written, with the author alone responsible, the views reflect the lawyers in our practice which specialises in international family law

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Perceived options in respect of EU law after Brexit

In discussion since the EU referendum between practitioners, academics and others involved in international family law, three options and routes have prevailed.

One option, described here as the first option without any intention of giving it a priority or preference, is that all EU family law is adopted into national law, as the government proposes, but crucially and fundamentally the UK enters into some arrangement with the EU to maintain complete reciprocity between us and the EU and its member states in respect of these laws.

The second option is as the government proposes in their White Paper namely all EU family law is adopted into national law. But this would be without any reciprocity because such reciprocity was either not wanted, was politically unacceptable to the UK, impossible to negotiate or politically unacceptable to the EU

The third option is to have no EU law within national law and to fill the gap in the couple of areas where EU law has not just been cross-border but has created substantive English law. There would be reliance on Hague laws for cross-border family work. The distinctive couple of areas are perfectly able to be agreed and put into substantive primary legislation before the UK leaves the EU

Operation of these options

Our worry and concern is that the first option is unlikely to happen, even if it was the preferred option. Some of us support the first option. I and others support the third option. None of us support the second. We believe this is the general feeling across many in the family law profession who have been considering this issue.

Parliamentary Justice Committees also do not support the second option. On Wednesday, 22 March 2017, the House of Commons Justice committee produced its report on the implications of Brexit for the justice system. Two days earlier, a similar committee of the House of Lords produced a Report on the same topic with far narrower evidence taking

In respect of family law, chapter 3 of the House of Commons Report, the recommendation is that the *government should seek to maintain the closest possible cooperation with the EU on family justice matters, and in particular to retain a system for mutual recognition and enforcement of judgements*. The Report says that Brussels II and the Maintenance Regulation *are improvements over their default alternatives.* But *they are not without fault: races to issue resulting from Brussels II's divorce provisions are particularly undesirable. Nevertheless, mutual recognition and enforcement of judgements in family cases is of demonstrable value in resolving cross-border instances of child abduction and non-payment maintenance.*

I have analysed and commented upon that report here. Some of the evidence on which they relied in a preference for EU legislation over the Hague Convention equivalents, as quoted in their Report, was not reliable. Even so they themselves stopped a long way short of saying that we should have all EU family law in national law. They were highly critical of some elements of EU law in practice. Their recommendation was reciprocal recognition and enforcement, which we entirely support. Adoption of the acquis will not do this. So the UK would have unsatisfactory EU laws within national laws without the reciprocity which is required for cross-border families.

For this reason, the proposals in the government White Paper for conversion of EU family law into national law will not work, for the law itself and for the families involved both here and abroad.

We doubt the first option will be achievable. In our perception in dealing with the EU, which goes back to my active consultation with the EU in the late 1990s before the introduction of the Brussels Regulation in March 2001, they have been unhappy that the UK has had a distinctive opt out in respect of family law. This opt out has been frequently exercised so that we have fewer EU family laws than the rest of the EU, with special provisions just for us in e.g. enforcement of maintenance orders where there is a two track process, one for us and Denmark and one for the rest of the EU. After discussions including with leading academics in continental Europe, we anticipate that the EU will only give reciprocity if we give up our opt out and moreover accept all EU family laws and not just those into which we have opted. This will be politically unacceptable in our judgement. More important for us as lawyers, it will be laws which are thoroughly against UK common-law traditions and practices including e.g. applicable law, choice of law.

With EU family laws intended to provide for cross-border families, they have minimal benefit and viability if only within the national law of one country. They only work in conjunction with the same law applying in the other member states. Laws on mutual recognition and enforcement require reciprocity. Judicial co-working based on legal requirements demand judges in different countries working from the same law together. The UK having the EU family law in its national law will not provide the necessary mutual recognition and enforcement which the Justice Committee recommended.

Accordingly, we urge the government to look distinctively at family law. It is a very important element of our social life. In family law, converting the acquis into national law will not answer the stated aims in the White Paper of creating certainty for either national families or our very many international families, both those who are here and UK families abroad.

Instead there is a twofold answer. In respect of the couple of areas where EU law has changed UK national substantive law, there should be short, new primary legislation. Agreeing it should not be contentious, both generally and certainly compared to the many difficulties if the acquis, EU law, were simply made into UK law. In all other areas, there are good alternatives in the global international family laws of the Hague Conference on Private International Law, of which the UK is a prominent supporter and signatory and to which the EU is also a signatory. When the UK leaves the EU, we will still have a mutual reciprocal relationship with the EU through these Hague Conventions. This is the far better and more reliable approach, moreover with a highly respected global organisation bringing forward international laws for all countries

Moreover this is crucial for the stated aim of the UK government, the English Law Society and others that the UK law should have a prominent global role. We have written previously about this in our submissions here. We look forward to being able once again to enter into bilateral and multilateral treaties with other, non-EU, countries to advance international family laws. By concentrating on global laws including with our traditional common law partners but also with other countries around the world with which we share many international families, we will take again our important place on the world stage and help many other countries around the world by promoting global family laws

To analyse how it will work in practice, we set out distinctive elements and the interaction with EU laws

Divorce jurisdiction

We start immediately with one primary area where EU law has directly changed English substantive law. Jurisdiction, connectedness, to issue a UK divorce petition is now based on Art 3 of the Brussels Regulation. It could be converted into national law but this makes no sense. Some parts are irrelevant to us e.g. joint petitions which we do not have. It presumes a mutual forum criteria which, as below, will be impossible without reciprocity. In any event it has been strongly condemned by practitioners, judges and the House of Commons Justice

committee. Without the forum criteria, it makes no sense to have the historic English basis of jurisdiction of sole domicile only available if no other EU member state has jurisdiction. Moreover England has interpreted some elements of the jurisdiction grounds very differently to most other EU member states, as our firm investigated and analysed and put to the Court of Appeal in the case of Tan v Choy [2014] EWCA Civ 251. Without reference to the CJEU, we will perpetuate differences in its interpretation. So we will move inexorably away from how the rest of the EU understands divorce jurisdiction. Converting the Brussels Regulation into national law will be of no benefit and only cause further confusions, internally and internationally, delays and increased judicial time with more litigation.

Moreover this EU divorce jurisdiction was predicated on a common divorce jurisdiction across the entire EU, which was commendable whilst we were part of a common family law justice system in the EU. It is not needed at all now. It has been said by some that English practitioners have got used to the jurisdiction grounds. This is completely contrary to our experience. The vast number of divorces are based only on joint habitual residence which would remain, so no change would occur. Many lawyers make significant errors in completing the jurisdiction box on the standard divorce petition because they are confused by the reference to EU law.

But we must have a new divorce jurisdiction law. Aware of this, I instigated a discussion amongst specialist practitioners on what should be the new divorce jurisdiction law for our country. Fairly quickly a consensus was reached. A paper was published across the family law professions in late February 2017 and can be found here. It has had support from across the profession. We urge the government to introduce it as the substantive divorce jurisdiction law once we leave the EU. We are very happy to discuss this in more detail with government

Forum criteria on divorce

Where two or more countries could deal with proceedings, a decision has to be taken as to which country will do so. The EU introduced in March 2001 a forum test which was at best experimental and is not used by any other group of countries around the world. It is simply who is first to commence proceedings, technically lis pendens. This created the race to court. In my opinion and some of my colleagues, it has been an appalling law creating much unfairness. In contrast to government promotion of mediation, it is a direct discouragement to mediation and settling cases before commencement of proceedings. It is a direct discouragement to reconciliation and attempting to save savable marriages, also contrary to government policy. It accelerates the breakdown of a marriage. It favours the wealthy spouse able to engage in forum shopping and therefore issue the proceedings in the most financially advantageous country. As a practice we have been involved in countless cases of racing to court. We have won many of them for the advantage of our clients because we are specialist and geared up to make sure we can act very quickly. But these have not been cases necessarily where the proceedings have been in the country with the closest connection to the family. It has simply been racing.

(It's right to record that in our firm some nevertheless see the advantages of the certainty and cost savings that lis pendens creates, even with these disadvantages.)

The House of Commons Justice Committee Report rightly refers to this controversy with Brussels II. It referred to many witnesses, oral and written, criticising *the frequent race to issue*. It referred to the FLBA saying *that the more legally astute spouse, often the financially stronger spouse, can arrange to win the race in the favoured jurisdiction*. Many practising lawyers and judges have condemned this law as very unfavourable on the financially weaker spouse, and being very arbitrary and unfair. Resolution said that it *prevents opportunities for families to mediate and reconcile*. The report states that the FLBA *agreed absolutely* with my firm's claim in our written submissions that Brussels II *discourages mediation and can accelerate the breakdown of savable marriages*. The Report did not mince its words in its criticisms of this forum criteria adopted by the EU and the very adverse consequences of Brussels II.

So we have argued strongly over many years for it to be removed. Indeed, lately, the EU acknowledged its disadvantages and invited discussion of a hierarchy of jurisdiction. But then when the proposed amendments to the Brussels Regulation were published in June 2016, there was no change.

With the rest of the world, our country adopts a forum criteria of which country has the closest connection with the family. We are presently in a cleft position of having one forum test with the EU which involves racing to court and another forum test with the rest of the world of closest connection where tactical manoeuvring of racing to issue is deprecated. Closest connection is in English statute law with significant case law

Putting EU divorce law put into national law will not produce any answer to forum criteria. Unless there is reciprocity, the forum criteria will not apply between the UK and the EU, even if there was any support for the continuance of racing to court. There is no point in converting this forum law into national law. There is no gap to be filled as the closest connection forum test is already there and presently used with non-EU cases. The UK should have one forum criteria law for all proceedings involving any other country around the world, namely the traditional common law approach of which country has the closest connection. This meets a fairness and understanding of ordinary people and is well developed in case law. It is the same law as many other countries with which we have international family connections. So the EU divorce forum criteria should not be put into national law and is not needed for our national law

Mutual recognition of divorces

Adopting the Brussels Regulation into national law will not lead to mutual recognition of divorces granted by courts around the EU without also having reciprocity. In fact it is not needed in our opinion for the recognition in our country of EU divorces. We have an incredibly liberal policy on recognition of foreign divorces. We expect any divorce regularly granted by an EU member state court to be recognised here.

But we understand the concerns expressed by the Justice Committee for the need for intra-EU mutual recognition. We assert this can be accomplished by the Hague Convention of 1970 in respect of recognition of foreign divorces and legal separations. At the moment at least 12 EU member states are signatories as is the UK. We know no good reason why the EU itself could not become a signatory to this Convention. Then immediately all divorces around the EU and the UK, along with divorces in a number of other countries around the world would be mutually recognised. We have written separately about this here. This approach has the support of a number of lawyers and academics, and of course the Hague Conference on Private International Law. It puts the UK into a global law alongside the EU, and not an EU-only law.

Jurisdiction for maintenance, needs-based, orders

This is the second area where EU law has changed UK substantive law. Unlike divorce jurisdiction which has been in force since March 2001, this is only since June 2011. It is the EU Maintenance Regulation. Moreover it is on any basis a very complicated EU law and which has rarely affected a family lawyer dealing with a national case. It has been controversial and disliked. It has introduced concepts into English law with which we are deeply unhappy e.g. binding agreements on choice of law for which there has been no independent legal advice or disclosure and therefore contrary to English case law from the Supreme Court in Radmacher.

The House of Commons Justice Committee dealt with this. The EU Maintenance Regulation was described as *similarly contentious* as with the Brussels Regulation. The intention, they said, was to *produce clear and consistent rules on where the parties can start proceedings* with *detailed rules to assist enforcement and recovery of maintenance across borders*. However they recorded a conflict with Brussels II which could result in an English court not having jurisdiction over maintenance claims in respect of a divorce case it was hearing. The Report referred to the EU law as enforcing *inappropriate prenuptial agreements* i.e. where there has not been independent legal advice or disclosure.

However the Report said the Regulation had no natural replacement, based on the evidence of some witnesses. It described the 2007 Hague Maintenance Convention as a *powered down version with orders only enforceable in certain circumstances*. The FLBA claimed *most people did not know the 2007 Convention existed* and it was *little used*. The Report consequently said this would support the UK *remaining a party to the Maintenance Regulation if possible, at least in the short to medium term*. Unfortunately they were not, in our opinion, given the full facts. In respect of it being little used, they were not told at the oral session that in January 2017 all 52 states in the USA joined the equivalent Hague Maintenance Convention. We understand that other countries will be joining in the next year. By end March 2019, there will be a good number of leading countries around the world who will be signatories. It will not be little used! The Justice Committee was not told that there has been a lot of work creating a uniform digital case management system with which governments can work for quicker transmission of maintenance orders (with no EU equivalent under the EU Maintenance Regulation). We believe that if this information had been given, the Justice Committee would not have made these unfair critical remarks about the equivalent Hague Convention and instead would have acknowledged that it is an adequate substitute.

In respect of jurisdiction for maintenance based orders, there is a further fundamental difficulty in that the EU law does not allow jurisdiction based on sole domicile. We have seen in our practice how this has had a major disadvantage for many UK domiciliaries; nationals and former residents who have been living abroad but in a country with which they do not want to deal with the family courts and then find themselves unable to bring needs-based claims in this country. This has produced much unfairness and injustice as well as confusion and frustration amongst the legal profession, with arguably judicial creativity being used by the High Court to overcome its perceived unfairnesses. We would not want this in national law after leaving the EU.

EU Jurisdiction based on choice of law agreements without independent legal advice are equally unsatisfactory and at odds with other English family law. We do not want this in English law and it is at odds with the whole direction of English law on marital agreements.

The grounds for maintenance jurisdiction do not add to our pre-June 2011 existing jurisdiction as ancillary to divorce or other statutory entitlements. There is no need to import this EU law for UK law. There are real problems if we were to do so.

Forum criteria for maintenance

This is again based on lis pendens, the race to court. It has meant that fast applications have been made to the court for financial claims ancillary to a divorce whereas the English tradition is to try to negotiate and settle before commencing proceedings. There has had to be a distinctive exemption from attending MIAMs, mediation information meetings, before proceedings to enable this fast issuing. Without reciprocity, importing this law would be meaningless. In any event this is not needed in national law.

Mutual recognition of maintenance, needs-based, orders

The House of Commons Justice Committee recommended *a system for mutual recognition and enforcement of judgements*. This is available through the 2007 Hague Maintenance Convention. The EU is a signatory for all member states. The UK will become a signatory on leaving the EU. The 2007 Hague Convention is a simpler process than the EU Maintenance Regulation, not requiring a two track procedure dependent upon whether a country operates applicable law as does the EU law. The Hague's innovative digital management system will more assist with the international transmission and enforcement of such orders than the EU Maintenance Regulation. Importing the EU Maintenance Regulation into national law will have no mutual recognition benefit if there is no reciprocity. But reciprocity on this EU legislation has carried some major difficulties, as set out above under jurisdiction, which are not the case if reliance is placed on the equivalent Hague Convention. The two laws were drafted at the same time and have a similar basis. The UK should be encouraging global laws for the many families from around the world. It is a good alternative.

Financial provision after a foreign divorce

This is an exceptional statutory power which allows the English courts to make financial provision if there has been inadequate provision ancillary to a divorce abroad. Only a few other countries have this power. It is exercised sparingly but creates much justice and fairness when required. It is in Part III Matrimonial and Family Proceedings Act 1984. It was amended with the introduction of the EU Maintenance Regulation, to bring its jurisdiction into line with EU law and allow us to make freestanding maintenance orders on the basis of that EU law. However the statutory amendment in June 2011 was commonly agreed to be a disaster of drafting. It was clearly rushed. It is dense, complicated, not necessarily clearly expressing what was intended and has caused real confusions.

There is no reason for this EU law of maintenance jurisdiction to remain part of this Part III English law once we leave the EU. The 1984 legislation was working very well before June 2011. There were no categories of claimants who lacked jurisdictional qualifications. It should not be kept in English law.

Pension sharing orders after a foreign pension sharing order

This is a fairly narrow issue but curiously one where we have creatively used EU law as grounds for jurisdiction to allow sharing of UK pensions after the parties have a foreign order or agreement to share a UK pension. UK pension companies, like pension companies around the world, will only implement a pension share if an order has been made locally. They will not recognise foreign court orders or agreements. Often there is jurisdiction under the 1984 legislation as above. But sometimes the parties have no ongoing connection with this country apart from the UK pension. I have innovated a way to enable many couples to do so using one of the more obscure elements of jurisdiction in the EU Maintenance Regulation, namely forum of necessity. The background is set out in my article here. Obviously this opportunity will be lost if the Maintenance Regulation is not in national law.

In fact I and a few others have been lobbying government for about 15 years for a minor statutory extension of jurisdiction to the 1984 legislation to allow local pension sharing. The Ministry of Justice told me many years ago they were supportive but then couldn't find a piece of legislation appropriate in which to include it. The Law Commission has recently investigated and reported on Enforcement of Financial Orders and made a specific recommendation, para 9.66, that statute law should be amended to give a new ground of jurisdiction namely that one of the parties has an interest in a pension arrangement situated in England and Wales and thereby allow pension sharing powers. We urge the government to introduce statutory reform as recommended by the Law Commission which would therefore obviate the need for this minor piece of EU law to be brought into national law.

Financial provision for children

This is found in Schedule 1 Children Act 1989. Before June 2011 there had been some controversy as to what was the basis of jurisdiction. Case law then resolved the issue only for it to be quickly changed when the EU Maintenance Regulation was introduced. See comments above regarding jurisdiction under this law. The picture has in fact been even further confused by CJEU case law in 2015 which says that needs-based claims for children should only be in the country of the habitual residence of the child and not e.g. in the country where divorce claims or spousal financial claims are being dealt with. In fact this is very similar to our own pre-June 2011 case law. The White Paper refers to existing CJEU at the time of leaving the EU as being maintained. We anticipate we will do so in this distinctive context. There is therefore no need for the EU Maintenance Regulation provisions in respect of jurisdiction of financial provision for children to be incorporated into English law. We can rely on existing EU and previous High Court case law i.e. presence of child or of paying party

Matrimonial property orders

We include for completeness. An EU law is coming into force soon to deal with matrimonial property orders, as a compliment to maintenance. But even before the referendum, the UK had decided not to opt in. It was acknowledged this would mean an incomplete legal situation i.e. we were part of the EU maintenance regime but not part of the EU marital property regime. It will therefore not be incorporated into English law However it highlights again the unsatisfactory element of attempts to introduce EU family laws into national law

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Child abduction

The UK is one of the most vigourous countries in supporting the return of children after child abduction. It has the world by example and encouraged the development of international laws. It has been instrumental in creating a network of judges around the world specialising in this work. The UK has some of the best and most effective Central Authorities in the world. We should be proud of our work and our reputation.

The worldwide law is originally the 1980 Hague Convention. Subsequently the Brussels Regulation added further requirements for cross-border EU cases. This imposed for example a six week time period to which the UK has worked hard to comply but, sadly, some EU countries have seemingly ignored in practice. The UK has adopted the same fast timetable for both EU and Hague cases. The only distinctive element of the Brussels Regulation is the so-called trumping provision. However this is rarely used, with England and Italy the only countries to have ever used it more than once a year, and is not of major substance.

Putting the Brussels Regulation in respect of child abduction matters into national law without reciprocity is meaningless. The entire point of international child abduction laws is reciprocity. The 1980 Hague Convention on Child Abduction works very well. Again we feel the House of Commons Justice Committee was not given sufficient evidence about the benefits of the 1980 Hague Convention.

Their Report deals with the complex relationship between EU law and Hague Conventions in respect of child abduction. The Report refers to evidence from Resolution that the EU law provides greater speed than the Hague Convention. Instead, my firm's considerable experience in child abduction work (as one of the country's leading child abduction law firms including acting for the English Central Authority) is that the English High Court invariably deals with child abduction cases under EU law or Hague Convention law with the same timetable and same vigour. The FLBA gave evidence that the existence of EU law had discouraged updates to the Hague Conventions. We are not aware that this is so. To the contrary, much work has been undertaken by English practitioners to encourage countries around the world to become signatories of the 1980 Hague Convention such as Japan and Russia. In autumn 2016 Pakistan became a signatory after encouragements from English judges, practitioners and others. Moreover, evidence was also given, as stated in the Report, that the EU has the benefit of Central Authorities and the European Judicial Network. Again this is misleading as, across the world, governments have set up Central Authorities to work with child abduction cases, and not just within Europe. Moreover whilst there is undoubtedly the EJN, there is a very active network of Hague Convention judges, significantly promoted and encouraged by LJ Mathew Thorpe when our international liaison judge. So we are not convinced, on the evidence to which the Report refers, that there is a significant difference in child abduction work undertaken in England between EU law and Hague law and practice. Indeed, the new form of Brussels II intended to be introduced by the EU in the next couple of years includes a new timetable to take account of the slower EU member states whereas the UK is one of the fastest across Europe.

In conclusion, and after careful reflection over these past months, we have come to the conclusion that we do not need the Brussels Regulation in respect of child abduction. We are content to rely on the 1980 Hague Convention which already applies with the UK and the EU. Specifically there is no point in the introduction of the Brussels Regulation into national law if there is no reciprocity

Mutual recognition of children orders including custody, contact and return

This is found within Europe in the Brussels Regulation. As elsewhere in this note, there is no point importing into national law if it is not reciprocated. But there is no need to have the Brussels Regulation because the UK and the EU are already within the 1996 Hague Convention, which provides for exactly this need namely mutual recognition of children orders made around the world. There are 48 signatory countries, inclusive of the EU countries, including many countries outside of the EU with which we share international families. This legislation will answer the need identified by the Justice Committee for mutual recognition.

Child relocation

This arises when one parent wants to take a child from one country to live permanently in another country and requires the consent of the other parent or, in its absence, an order of the court. It is inevitably a growth area with the movement of international families. There is no EU law directly relevant. We use our existing 1989 legislation with case law. Recognition of orders after relocation can best be dealt with under the 1996 Hague law rather than relying on the Brussels Regulation.

Child adoption and surrogacy

Again there is no relevant EU law. Indeed, in respect of adoption, there are Hague Convention laws to which the UK is a signatory and through which many international child adoptions are undertaken successfully

FGM and forced marriages

These are two areas in which the UK is leading the world with extraterritorial effect. Neither involve EU laws

Domestic violence

We admit we will be disappointed at losing the EU Civil Protection Regulation which recognises and enforces domestic violence protection orders made in a EU member state. It has only been introduced recently but has been used in some English cases, although ancillary to other substantive orders e.g. children cases. However importing it into national law without reciprocity would be pointless. We urge the government to become a signatory to the Istanbul Convention which has extraterritorial effect and recognition provisions. In any event

we understand the Hague Conference on Private International Law is actively advancing a global law on recognition of domestic protection orders and which we hope our government will support. It is also worth recording that the EU law has been of more particular importance in continental Europe because perpetrators were able to escape from domestic violence orders by crossing a nearby local land border. Without diminishing its importance, it has been less required in the UK without land borders apart from Ireland. But crucially for this paper we do not need the law to add to our existing domestic violence law, found in Part IV Family Law Act 1996

Public law children proceedings

We include for completeness although we do not undertake public law cases. We have heard very clearly the concerns of local authorities about the need for transitional provisions on leaving the EU. Again, it seems to us that this can only operate with reciprocity. Importing into national law alone will therefore not suffice

Conclusion

We have tried systematically and methodically to go through the primary areas of family law to consider in each instance where EU law applies, how it applies and specifically whether it operates only within national law so that it would suffice for the acquis to be within national law. It is only within a couple of distinctive areas of jurisdiction that national law would need to be amended if there was no EU law. In one, divorce, we have shown that importing EU law would be very unsatisfactory and we have set out alternatives. In the other, maintenance, there would be no loss whatsoever if the EU law was not within national law. These are not the sort of areas to which our Prime Minister was referring in respect of the need for certainty and clarity on leaving the EU.

All of the remaining laws can only operate with reciprocity. We consider a new EU treaty is highly unlikely from the EU on the terms in which we presently operate, even if it was needed and on balance I do not consider it is. Doing so in any event would be fraught with difficulties as we would no longer be subject to the CJEU.

Moreover and even more important, the UK has good, adequate and satisfactory international reciprocity alternatives in laws from the Hague Conference. Criticisms by the House of Commons Justice Committee were unfair and unfounded. We believe there is a general and increasing consensus within those in the family law profession working in international matters that these Hague Conventions are the alternative. Moreover they put the UK within global laws, not just EU laws, and enable the UK to have good influence on the global legal stage.

So we ask the government to accept that family law is not an area where EU law has made substantive changes to national, non-cross-border law. Adopting the acquis would be of little benefit and instead would create real problems. Instead it is an area where EU laws depend on reciprocity which in the future can be satisfactorily found between us and the EU, as well as with many other countries around the world, in Hague Convention

laws. We say to the government that the proposal in the White Paper to convert EU family laws into national laws will not work and is not needed.

We hope this note is of assistance to government. We would be pleased to discuss further as needed

David Hodson is grateful to his many colleagues at iFLG for their help in this paper

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