The Post-Brexit Legal Framework and its Implications for Children's Rights on the Island of Ireland

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GLOSSARY OF ABBREVIATIONS USED

CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CTA	Common Travel Area
ECHR	European Convention on Human Rights
EU	European Union
EUSS	EU Settlement Scheme
EU(W)A	European Union (Withdrawal) Act 2018
GFA	Good Friday Agreement
PINI	Protocol on Ireland / Northern Ireland
TCA	Trade and Cooperation Agreement
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UKIMA	United Kingdom Internal Market Act 2020
UN	United Nations
UNCRC	UN Convention on the Rights of the Child
WA	Withdrawal Agreement

INTRODUCTION

This report explains the legal framework governing the post-Brexit arrangements, and specifically its implications for children living on the island of Ireland. It reflects the legal and political situation as of 1st September 2022.

We know that, in any given situation involving children's rights or interests, the relevant legal provisions might be located across overlapping and intersecting regulatory fields and jurisdictions. A single case might simultaneously raise matters of, e.g. family, criminal and immigration or administrative law. The applicable rules or principles might derive from a combination of domestic law and policy, EU law and policy, the ECHR, and other sources of international law (such as the UNCRC). Brexit has undoubtedly made those overlaps and interactions more complex. UK membership of the EU has been replaced by new legal regimes affecting both the UK as a whole and Northern Ireland in particular – and not only internally, but also in their relations with the EU itself, as well as with the Republic of Ireland.

One of the key challenges posed by Brexit is therefore to understand the changes it has wrought upon the overall legal structures and frameworks governing any given situation involving children's rights or interests. Which rules are new? What fresh challenges do they create? Which previous opportunities have been lost? And which problems do we need to confront that did not exist before?

This report outlines the main changes in the overall post-Brexit legal framework that will inevitably affect children's rights and interests across the island of Ireland, illustrated by examples based on more concrete issues affecting the lives of children and young people (often those in socially and/or economically more vulnerable positions).

We will consider only those major regulatory changes which are a direct result of the UK's decision to leave the EU, i.e. the core package of internal legislation and international agreements that accompanied the very act of Brexit (on 31 January 2020) and the expiry of the UK's post-withdrawal transition period (on 31 December 2020). We will not specifically address other legislative changes that have occurred or other international agreements that have been adopted since the UK's withdrawal took full effect – whether affecting the EU, the Republic of Ireland, Northern Ireland, or the UK as a whole – even if such changes were inspired or facilitated by the desire of the current UK administration to diverge from EU standards, or proved necessary to address certain problems which arose after and indeed because of the UK's withdrawal from the EU. Instead, we will identify where those more detailed changes properly "fit" within the overall framework of the post-Brexit system now affecting the island of Ireland. This will hopefully assist readers in navigating the new landscape for themselves, when investigating more detailed issues that may arise in the course of their own activities and responsibilities.

Part 1 outlines the key legal changes and overall regimes brought in through Brexit, highlighting those elements that are of particular relevance to children. Part 2 presents a series of case studies to illustrate how the general frameworks and provisions presented in Part 1 might then apply and interact in more specific situations. Our overall goal is to provide a **working methodology** for analysing children's rights issues within

the post-Brexit legal landscape – a methodology that could be applied to a wide range of children's rights concerns and challenges as they arise in the future.

Obviously, the changes brought about by Brexit should be considered against the backdrop of other more long-standing legal arrangements affecting the UK and Ireland. Most notable are the following:

- The **Common Travel Area (CTA),** dating back to the establishment of the Irish Free State in 1922, provides a special travel zone between the Republic of Ireland and the UK, Isle of Man and Channel Islands.[1] Nationals of CTA countries can travel freely within the CTA without being subject to passport controls. The arrangements for non-CTA nationals are more complicated: whilst there are minimal immigration checks for journeys started within the CTA, non-CTA nationals must have the relevant immigration permission for the country they are seeking to enter. As we will explain, the CTA has remained intact following Brexit, though its interaction with other parts of the wider post-Brexit landscape gives rise to certain difficulties and disparities of treatment (particularly for non-Irish EU citizens in relation to the UK).

- The **Good Friday Agreement (GFA),** defined as both an international peace agreement and the basis for governmental reform, was signed on 10 April 1998 by various political parties in Northern Ireland and by the Irish and UK Governments. A key plank of the GFA is the right of all people born in Northern Ireland to choose either Irish or British citizenship or, indeed, to choose both. It also set in motion the devolution of power to Northern Ireland. The GFA was clearly concluded on the assumption that both Ireland and the UK were and would continue to be members of the European Union. That said, it never strictly required the UK to remain a Member State of the EU and so it was not, as such, incompatible with Brexit. Nonetheless, the GFA continues to apply following Brexit as a legally binding international treaty, while UK withdrawal from the EU has certainly created specific challenges for maintaining the proper functioning of the GFA – an issue we will return to below.

[1] See further, e.g. B Ryan, "The Common Travel Area between Britain and Ireland" (2013) 64 MLR 831; House of Commons Library Briefing Paper, *The Common Travel Area and the Special Status of Irish Nationals in UK Law* (No 7661 of 15 July 2016).

PART ONE: GENERAL OVERVIEW OF KEY BREXIT LEGAL CHANGES OF RELEVANCE TO CHILDREN AND YOUNG PEOPLE

We all take it for granted that legal relations, including children's rights issues, arising within the island of Ireland will be governed primarily by the domestic legal system of each of the two competent jurisdictions:

- situations falling within the Republic of Ireland will be governed by Irish law;

- those arising in Northern Ireland will be governed by Northern Irish law (including whatever legislation is adopted by the central UK authorities and made applicable to / within Northern Ireland).

Our focus is on identifying the additional sources of legal rights and obligations that will be relevant to each jurisdiction, as well as to their mutual interactions, as a direct result of the UK's withdrawal from the EU.

Life Before Brexit

Before Brexit, that question was relatively straightforward to answer, since both Ireland and the UK (including Northern Ireland) were bound by the common obligations of EU membership:

- Ireland and the UK had to observe certain mandatory or minimum regulatory standards, e.g. in fields like environmental, employment, consumer and data protection. Many of those standards are of direct importance to children – such as rules on the protection of young workers,[2] or binding standards for advertising directed towards children.[3]

- Ireland and the UK shared a detailed and sophisticated framework for addressing various cross-border problems and resolving many cross-border disputes, e.g. in fields such as trade in goods and services, the free movement rights of EU citizens, cross-border cooperation in civil, family and criminal matters etc. Again, many of those mechanisms are of direct importance to children – such as the migration, social and educational rights provided to the family members of EU citizens,[4] or the rules on cross-border child protection.[5]

- Ireland and the UK jointly participated in the system of EU external relations, e.g. through common adherence to various international agreements entered into by the Union. Sometimes those agreements are concluded exclusively by the Union on behalf of its Member States, e.g. as is often the case in the field of international trade. In other cases, such

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[2] E.g. Protection of Young People at Work Directive 94/33 [1994] OJ L216/12 (as amended).
[3] E.g. Audiovisual Media Services Directive 2010/13 [2010] OJ L95/1 (as amended).
[4] In particular, under the Citizens Rights Directive 2004/38 [2004] OJ L158/77.
[5] E.g. Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L338/1.

agreements are concluded jointly by both the Union and its Member States, e.g. in fields such as international labour or environmental standards. A good example of the latter kind of agreement is the UN Convention on the Rights of Persons with Disabilities, which contains specific provisions relating to disabled children.[6]

- In principle, if purely domestic law deviated from the binding obligations undertaken by Ireland or the UK as Member States of the EU, those Union law obligations were to take priority. If necessary, that means EU rules are enforced directly by the national courts, in preference to any conflicting rules of purely domestic law, through the principles of direct effect and primacy. The national courts are also obliged to ensure that the citizen's EU rights are effectively protected in practice, e.g. through the possibility of claiming damages against the Member State.[7]

Analysing any given legal situation therefore required a basic understanding of domestic Irish and/or Northern Irish law, read in the light of the common system of rights and obligations created for Ireland and the UK under EU law.

Of course, one might also look to any further provisions derived from the realm of public international law. This includes instruments of the Hague Conference relating to cross-border child protection and international adoption.[8] Ireland and the UK continued to enter into their own bilateral treaties and multilateral agreements, acting in their capacity as sovereign states, in areas falling outside the scope of EU law as such (albeit still subject to the obligations associated with EU membership). But given the "dualist" character of both the Irish and UK constitutional systems, whereby international agreements need to be implemented into domestic law before producing autonomous effects within the relevant jurisdiction, such public international law instruments tended to be of more secondary concern. An obvious "exception to prove the rule" is the ECHR – an international instrument that the UK incorporated into domestic law via the Human Rights Act 1998.

That said, EU law certainly helped enhance the domestic legal relevance of certain public international law instruments. In particular, EU law often treats major international agreements as valid sources of reference and interpretation specifically for the purposes of EU measures and any domestic implementing rules adopted by the Member States. For example: the CJEU decided that the UN Convention on the Rights of the Child should act as a valid source of inspiration for the interpretation of EU law and of the Member State's obligations under the EU Treaties.[9] In that regard, the incorporation of an explicit reference to the "best interests" principle under the EU's own Charter of Fundamental Rights (CFR) has also added an important dimension to the CJEU's interpretation of EU and Member State laws capable of touching upon

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[6] In particular Article 7.

[7] Cases C-6 and 9/90, *Francovich*, ECLI:EU:C:1991:428.

[8] The 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption; The 1996 Hague Convention on Parental Responsibility and Protection of Children.

[9] E.g. Case C-244/06, *Dynamic Median*, ECLI:EU:C:2008:85.

children's rights,[10] since it now provides a more explicit legal basis for the courts regularly to refer to the best interests principle for the purposes of developing EU law.[11]

Life After Brexit

After Brexit, the task of identifying the sources and frameworks that now govern both the content of, and the interaction between, the legal systems of Ireland and Northern Ireland has become considerably more complex. In broad terms:

- the common rights and obligations associated with EU membership remain applicable to Ireland, but are no longer binding upon the UK as such;

- similarly, the UK no longer participates in the common frameworks created by EU law to govern cross-border relations and resolve cross-border disputes, nor in the common system of EU external relations;

- instead, relations between the EU (including Ireland) and the UK (including Northern Ireland) will witness a renewed emphasis on the ordinary system of public international law. That means an enhanced reliance on bilateral treaties and multilateral agreements, which usually create more limited rights and obligations for their parties, and generally have a much weaker legal status and a more limited system of enforcement.

Henceforth, analysing any given legal situation therefore centres upon an understanding of domestic Irish and / or Northern Irish law, read in the light of any further rights and obligations – including:

- those created under EU law for Ireland;

- those entered into as a matter of Public International Law between the EU and the UK;

- those created under Public International Law between Ireland, acting in its capacity as a sovereign state, though still subject to its duties as a Member State, and the UK; and

- those otherwise contracted under Public International Law – including common adherence to various multilateral treaties or common membership of particular international organisations, e.g. as with the United Nations, the Council of Europe (including the European Convention on Human Rights), or the World Trade Organisation.

As we know, that overall post-Brexit landscape is likely to generate more specific challenges and problems as the substantive legal rules applicable within Ireland and Northern Ireland begin to diverge in various fields – from environmental law to consumer law, employment rights to data protection rules, as well as the various branches of public, civil and criminal law that influence children's rights and interests.

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[10] In particular, Article 24 CFR.

[11] E.g. Case C-483/20, *XXXX*, ECLI:EU:C:2022:103.

But of at least equal importance is the fact that a wide range of common frameworks, institutions and processes developed under EU law – particularly in the field of cross-border relations and dispute resolution – will, at best, be replaced with suboptimal alternatives under the less effective system of Public International Law. Most international agreements and organisations lack the EU's unique "ecosystem" of strong institutions with wide-ranging competences, together with independent and impartial oversight and enforcement, that enables the EU system to adopt and implement much more substantial and effective policies across its Member States than are normally found in ordinary international relations governed by ordinary international legal instruments (see for an illustration of this, Part 2 Case Study 4 on Cross-border Co-operation in Family Matters). At worst, it will be left to each jurisdiction – the EU, Ireland, the UK and Northern Ireland – to address such matters using their own essentially unilateral tools, and the latter may prove seriously limited or even manifestly deficient for the task at hand.

Against that broad background, we will now highlight the main sources and overall frameworks that will determine, influence and/or complement the domestic legal systems of Ireland and of Northern Ireland in the post-Brexit era. We present those sources and frameworks in the following order.

Section A addresses the **EU-UK withdrawal package.** This consists primarily of:

- the **Withdrawal Agreement** that was ratified in January 2020 and contains detailed provisions, e.g. on the future protection of acquired citizens' rights, as well as the Protocol on Ireland and Northern Ireland; together with

- the **Trade and Cooperation Agreement** that took effect from the expiry of the post-withdrawal transition period on 1 January 2021 and makes alternative (but essentially limited) provision for future EU-UK cooperation across various fields.

Section B then looks at **issues of particular relevance to the domestic legal systems** of the UK (including Northern Ireland) and of the Republic of Ireland respectively. Here, we focus on:

- the **core "Brexit legislation" enacted by the central UK authorities** to govern the UK's domestic legal systems, in an effort to plug the "constitutional gaps" left behind after withdrawal from the EU; as well as

- those **EU law obligations that remain binding on Ireland as a Member State** and may prove particularly relevant to addressing future situations and challenges on an all-island basis.

Section A: The EU-UK Withdrawal Package

In this section, we will consider the two main treaties concluded between the EU and the UK to govern post-Brexit relations. Each serves a very different purpose, consists of very different coverage and content, and produces very different legal effects for the parties.

1) The EU-UK Withdrawal Agreement (WA)

The primary purpose of the WA is to make provision for the UK's smooth and orderly withdrawal from the EU. Its ratification avoided the UK leaving on a "no deal" basis and thereby creating immediate and serious disruption/uncertainty across various sectors.[12]

Given its limited focus, the WA is also relatively restricted in terms of its substantive content. It created a post-withdrawal "transition period" during which EU-UK relations enjoyed a period of relative stability, with only limited changes to the applicable legal rules. The remainder of the WA then focuses on "winding up" whatever legal relationships had been already created or were still in progress by or on the date when that post-withdrawal transition period finally expired (on 31 December 2020). In most cases, though not all, the preferred solution adopted under the WA is to resolve those relationships based on the continued application of the relevant EU rules. For example: goods in transit between the EU and the UK were to continue and complete their journey in accordance with EU customs rules; outstanding European Arrest Warrants were to be executed and terminated in accordance with the relevant EU Framework Decision (considered further in Part 2, Case Study 3).[13]

Where it does apply, the legal effects produced by the WA are, in principle, relatively strong. Although it is an international agreement and does contain its own more traditional system of dispute avoidance and resolution between the parties as a matter of Public International Law, the WA also explicitly creates rights and obligations for individuals and authorities which should be fully enforceable through the domestic courts of both the EU and the UK – not least, using the familiar EU law principles of direct effect and primacy. So, for example, if domestic UK rules were to conflict with any specific obligations created under the WA, the UK is meant to ensure that its courts are empowered to recognise and enforce the relevant provisions of the WA, if necessary, by disapplying those conflicting rules of purely domestic law.

i) General provisions applicable to the EU and UK, including the Republic of Ireland and Northern Ireland

For present purposes, many parts of the WA are of only limited importance: for example, they only applied until the post-withdrawal transition period expired (31st December 2020), while many of the "winding up" provisions dealt primarily with events still "in progress" at the end of the transition period and have no relevance to situations or relationships arising thereafter.

However, one set of general provisions under the WA is of much greater importance and of direct and continuing relevance to the field of children's rights and interests across the island of Ireland: **Part Two of the WA on citizens' rights**.

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[12] See, for detailed analysis, e.g. M Dougan, "So long, farewell, auf wiedersehen, goodbye: The UK's withdrawal package" (2020) 57 CMLRev 631; S Peers, "The End – or a New Beginning? The EU/UK Withdrawal Agreement" (2020) 39 YEL 122; K Bradley, "Agreeing to Disagree: The European Union and the United Kingdom after Brexit (2020) 16 *EUConst* 379.

[13] European Arrest Warrant Framework Decision 2002/584 [2002] OJ L190/1 (as amended).

Part Two addresses the situation of EU citizens lawfully residing in the UK, and UK nationals lawfully residing across the EU, on the basis of EU free movement law as at the expiry of the post-withdrawal transition period. The WA seeks to ensure that, in principle, such EU citizens and UK nationals continue to enjoy the same or similar rights as they once did under EU law, i.e. even after Brexit, and for the rest of their lives. This is, however, conditional upon them fulfilling the detailed conditions laid down in Part Two. In particular, qualifying EU nationals living in Northern Ireland (or elsewhere in the UK) were obliged to register under the EU Settlement Scheme (EUSS) by 30th June 2021 in order to secure future protection of their residency and associated rights in accordance with the WA.[14]

The main exception to the system created under Part Two concerns relations between Ireland and the UK: **the WA is without prejudice to any special arrangements concerning the status and treatment of each other's nationals, related to the functioning of the Common Travel Area.** So, for example Irish nationals in the UK were not obliged to register under the EUSS – though they could still choose to do so on a voluntary basis. And there were still strong incentives for Irish nationals to engage with the EUSS, e.g. if they were married to a non-Irish/UK citizen and the latter wanted to secure their own residency and associated rights, within the UK, as the spouse of an EU citizen. They could do so in accordance with the provisions of Part Two of the WA which are, in turn, based on the EU's free movement rules, though (as we shall see shortly) subject to some important new restrictions and exceptions.

Moreover, Brexit revived long-standing and difficult questions about how far those individuals from Northern Ireland who claim Irish citizenship (either solely, or jointly with British nationality, as guaranteed under the Good Friday Agreement) should be entitled to claim the rights associated with EU free movement law vis-à-vis the UK – even if those individuals have never previously moved to / resided within another part of the EU. In the context of Brexit, that old question was now reformulated: to what extent were such Irish citizens, whose situation was effectively "wholly internal" to the UK, also entitled to register for future protection under the EUSS in their own right? Or perhaps more importantly, to what extent might their qualifying family members be entitled to claim protected status of their own, again in accordance with Part Two of the WA? In the light of the famous *De Souza* ruling,[15] and the vocal political campaign that surrounded the case, the UK Government introduced detailed changes to the EUSS specifically designed to extend the WA's family reunion rights to people from Northern Ireland, thereby respecting and reflecting the latter's citizenship choices in accordance with the GFA.[16]

Qualifying EU citizens living in the UK under the EUSS scheme, and qualifying UK nationals living across the EU under each Member State's corresponding residency scheme, are entitled to a range of legal rights and protections – based largely on the continuation of EU free movement rules as they stood upon expiry of the post-

[14] For detailed information on the implications of the EUSS scheme for children in the UK, see https://www.liverpool.ac.uk/law/research/european-childrens-rights-unit/campaigns/eu-settlement-scheme/

[15] *De Souza* [2019] UKUT 355.

[16] See https://www.gov.uk/settled-status-eu-citizens-families/family-member-eligible-person-from-northern-ireland . See, for more detailed analysis, J Bierbach, "The 'Person of Northern Ireland': A Vestigial Form of EU Citizenship? (2021) 17 *EUConst* 232.

withdrawal transition period. This includes: the right to acquire permanent residency; rights of access to and equal treatment in employment and self-employment; and rights of access to and equal treatment in education and social support etc.

However, Part Two also contains certain important limitations and exclusions. Let's take some examples.

First, the UK permitted certain EU citizens to register under the EUSS, even if those individuals did not strictly comply with the full requirements for lawful residency imposed under EU free movement rules. In particular, the UK effectively waived the standard EU requirement that non-economically active persons (e.g. students, retired persons) should have sufficient financial resources and comprehensive medical insurance for their stay in a host state, at least until they obtain permanent residency.

This raised important questions about whether such EU citizens were nevertheless fully protected under the WA, or instead to be treated as residing at the "grace and favour" of the UK itself. The CJEU has recently confirmed in ***CG v DFC***.[17] This case concerned an EU national and her children residing in Northern Ireland who were living in temporary accommodation, having escaped domestic abuse. The CJEU ruled that such individuals, and notably those who have only acquired limited residency, (i.e. pre-settled status under the UK's EU Settlement Scheme), will *not* be fully protected under the WA, e.g. as regards the possibility of claiming equal treatment from the UK authorities when it comes to accessing social benefits such as Universal Credit – at least until the claimant acquires permanent residency. However, the Court did point out that the UK can only refuse social assistance to EU citizens residing within its territory after ascertaining that this does not expose them or their children to an actual and current risk of violation of their fundamental rights as expressed in the EU Charter of Fundamental Rights, including Articles 1 (living in dignified conditions), 7 (right to respect for private and family life) and 24 (the rights of the child). While that is evidently a relatively low standard for the UK to comply with, the case has now been referred back to the Social Security Appeal Tribunal of Northern Ireland to consider how such fundamental rights – particularly the children's best interests in this case – should be determined. As things stand, in some cases, often involving the most economically and socially vulnerable children, EU citizens might be forced to make the difficult choice between leading a life of poverty and alienation in the UK, or instead leaving their UK home and returning to live in the EU.

Secondly, under the WA, associated residency rights are provided only to a more limited group of family members of qualifying EU citizens living in the UK (or qualifying UK nationals living across the EU), i.e. limited as compared to the ordinary free movement rules that apply under Union law. In particular, the UK Government insisted that restrictions be imposed upon the scope for *future* family unification, even in respect of those qualifying EU citizens registered under the EUSS, when it comes to the possible entry and residency of family members not already living in the UK at the end of the post-withdrawal transition period.[18] Specifically:

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[17] Case C-709/20, *CG*, ECLI:EU:C:2021:602.

[18] See Articles 9 and 10 WA for the full and detailed provisions on the family rights of protected EU citizens (and UK nationals).

- To benefit from future entry and residency rights under the WA, protected family members must already be directly related to a qualifying EU citizen (albeit they are resident outside the UK) before the end of the post-withdrawal transition period.

- Alternatively, to benefit from future entry and residency rights under the WA, protected family members must be born to, or legally adopted by, a qualifying EU citizen after the end of the post-withdrawal transition period *and* be under 21 years of age or dependent on that EU citizen at the time they seek residence within the UK under the WA. *In addition,* they must fulfil the condition either that both parents are qualifying EU citizens, or that one parent is a qualifying EU citizen and the other is a UK national, or that one parent is a qualifying EU citizen with sole or joint rights of custody of the child.

The WA makes special provision for a few other categories of family member, including: those already living in the UK at the end of the post-withdrawal transition period with a right to reside under EU law following the death or departure of, or divorce from, the relevant EU citizen; and those who have already acquired a right to permanent residence in the UK. But overall, when it comes to living in the UK, even as a qualifying EU citizen under Part Two, it is clear that the WA regime is significantly less generous than the previous EU free movement rules.

Thirdly, the UK also insisted upon the power to provide qualifying EU citizens, and their protected family members, with electronic-only proof of registered status under the EUSS. This was in spite of multiple warnings, including from several UK parliamentary committees, that the absence of any hard-copy proof of legal status would produce uncertainty and risk further discrimination and marginalisation.[19] Media and campaign reports suggest that such warnings were well-founded, with evidence that qualifying EU citizens and their family members do experience difficulties in accessing employment and services, directly attributable to the UK's electronic-only documentation system.[20] EU citizens from minority ethnic groups, such as the Roma Community, are known to be particularly affected.[21] And, of course, children are at heightened risk of losing track of their digital EUSS record insofar as they are less likely to hold those details themselves.

It is worth noting that the CJEU recently confirmed, in a judgment delivered on 9 June 2022, that Brexit did indeed have the automatic effect of stripping all UK nationals of their EU citizenship (unless a given individual also holds the nationality of one or more Member States).[22] In relations with the EU, UK nationals not protected under Part Two

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[19] E.g. House of Commons Exiting the EU Committee, *The Progress of the UK's Negotiations on EU Withdrawal: The Rights of UK and EU Citizens* (HC1439 of 23 July 2018); House of Commons Exiting the EU Committee, *The Progress of the UK's Negotiations on EU Withdrawal: The Withdrawal Agreement and Political Declaration* (HC1778 of 9 December 2018).

[20] E.g. https://www.theguardian.com/uk-news/2020/jan/20/unsettled-status-eu-citizens-want-card-to-prove-right-to-stay-in-uk; https://www.the3million.org.uk/_files/ugd/cd54e3_44ba5ad58fee4f54818bdb293553c759.pdf.

[21] See 'Statement on the impact of EU Settlement Scheme digital-only status on the Roma Community in the UK', Roma Support Group (October 2020), https://www.romasupportgroup.org.uk/uploads/9/3/6/8/93687016/statement_on_the_impact_of_the_eu_settlement_scheme_digital_only_status_on_roma_communities_in_the_uk_final_oct_2020.pdf

[22] Case C-673/20, *Préfet du Gers*, ECLI:EU:C:2022:449.

WA will, therefore, be treated as third country nationals in accordance with applicable EU and domestic immigration legislation. In relations with the UK, EU citizens not protected under Part Two WA will be governed by British immigration rules – though Irish citizens will enjoy a favoured status in accordance with the CTA regime. As we shall see, the international agreements now governing future relations between the EU and the UK contain only marginal provisions about the movement of natural persons. And so, **beyond Part Two WA and the CTA, it is clear that the entry and residency rights of UK nationals in the EU, and of EU citizens in the UK, have been profoundly changed and severely restricted**.

ii) specific provisions applicable to the island of Ireland

As well as making general provision to govern the UK's orderly withdrawal from the EU, **the WA also contains provisions that are specific to the situation in Ireland and Northern Ireland.** In particular, the **Protocol on Ireland/Northern Ireland (PINI)** is designed to address some of the potentially serious impacts of Brexit upon the island of Ireland, **not least by maintaining the legal conditions under which the Good Friday Agreement can continue to operate effectively.**

The main provisions contained in PINI consist of rules designed to avoid the creation of a "hard border" across the island of Ireland as a consequence of the UK's decision to leave not only the EU but also the Customs Union and the Single Market. To that end, Northern Ireland remains aligned to various EU rules concerning customs and trade in goods and, in return, retains its own privileged access to the Single Market. That allows the parties to avoid introducing checks on the movement of goods between Northern Ireland and the Republic – but it does come at the cost of requiring various controls and restrictions on the movement of goods between Great Britain and Northern Ireland.

The Protocol's trade rules have only limited direct relevance to children's rights and interests. It is, nonetheless, important and potentially valuable that many of the EU's rules governing the manufacture and marketing of goods, including those designed to protect children from physical or social harm,[23] remain fully applicable to Northern Ireland, even if they are no longer binding upon the rest of the UK. The new PINI system is also indirectly important insofar as it is designed to produce significant economic changes in Northern Ireland's trade and supply chains.

Of course, **the entire PINI system remains the subject of deep political contestation within Northern Ireland itself and has become the cause of serious and ongoing tension between the EU and the UK Government**. At the time of writing, unionist objections to the Protocol have contributed to paralysis in the resumption of devolved power-sharing even after the Assembly elections of May 2022. The UK Government's Northern Ireland Protocol Bill of June 2022 – which would unilaterally disapply large parts of the Protocol, in direct breach of the UK's international legal obligations – has caused serious consternation across the EU.[24] Tensions over the PINI dispute have already seriously disrupted EU-UK cooperation in other contexts, for example, when it

[23] An obvious example being the Toy Safety Directive, Directive 2009/48 of the European Parliament and of the Council of 18 June 2009 on the safety of toys, OJ L 170/1.

[24] For the text of the Bill as introduced in the House of Commons: https://publications.parliament.uk/pa/bills/cbill/58-03/0012/220012.pdf .

comes to full UK participation in the EU's research funding programmes – including research aimed at advancing the rights and protection of children.[25] However, major international events, not least the Russian invasion of Ukraine, and domestic UK political turmoil, appear to have downgraded the urgency surrounding the standoff over PINI. Nevertheless, the dispute itself remains very much unresolved and has the potential to cause serious additional disruption. For example, the EU could retaliate against the UK's clear breach of the WA by exercising its option to impose trade sanctions directly against the UK;[26] or, in the worst-case scenario, the UK's unilateral repudiation of the PINI system could effectively force the EU to introduce restrictions on trade from Northern Ireland to protect the integrity of the EU's own Customs Union and Single Market.

Although they attract the greatest public and political attention, the new trade rules are of only indirect interest to children's rights. Other significant aspects of PINI include:

- **A commitment by the UK that Brexit will not lead to any diminution in rights, safeguards or equality of opportunity as set out in the relevant part of the GFA (Article 2 PINI)**. That obligation certainly covers the field of non-discrimination law, since the Protocol makes specific reference to respecting many of the EU's existing equality and anti-discrimination measures. But it is a matter of debate how far the "no diminution of rights" provision in PINI might also extend to other fields or standards that are not specifically identified as such in the text of the WA, e.g. opportunities for cross-border healthcare or educational participation between Ireland and Northern Ireland (see further Part 2 of this report, Case Studies 1 and 2).

- As we saw above, an **explicit recognition that Ireland and the UK may continue to operate the CTA**, whilst recalling that Ireland must still fully respect the free movement rights provided for under EU law (which we will return to below).

- An explicit recognition that **PINI shall be implemented and applied to maintain the necessary conditions for continued North-South cooperation** in accordance with the GFA, e.g. in spheres such as tourism, sport and transport.

2) The EU-UK Future Relationship Agreements

While the WA focused on the solutions required to ensure the UK's orderly withdrawal from the EU, the broader question of future relations between the EU and the UK was left to a separate process of negotiation and resulted in a distinct international treaty.[27] That **Trade and Cooperation Agreement** (TCA) was finalised just in time to begin applying to EU-UK relations as from expiry of the post-withdrawal transition period.[28]

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[25] See, e.g. https://www.theguardian.com/politics/2022/jul/05/eu-scraps-115-grants-uk-scientists-academics-brexit-row .

[26] See the next section, below, on the Trade and Cooperation Agreement.

[27] See, for more detailed analysis, M Dougan, *The UK's Withdrawal from the EU: A Legal Analysis* (OUP, Oxford, 2021).

[28] See, for more detailed analysis, F Fabbrini (ed), *The Framework of New EU-UK Relations* (OUP, Oxford, 2021).

It is worth noting that, although the WA and the TCA are entirely separate international agreements, there are still certain linkages between the two texts. In particular, the WA explicitly envisages the possibility that, in the event of one party breaching its obligations under the WA, the other party may choose to retaliate by imposing sanctions pursuant to the TCA.[29] For example, as noted above, in the event of a breach by the UK of its obligations under the Protocol on Ireland/Northern Ireland – as indeed is now directly envisaged under the UK Government's Northern Ireland Protocol Bill of June 2022 – it would be open to the EU to reintroduce tariffs on trade in certain UK goods under the TCA.

Otherwise, the TCA is not designed to address any further post-Brexit issues relating specifically to the situation in Ireland/Northern Ireland. Indeed, across its 2000+ pages of text, the TCA contains only a handful of references specific to Ireland/Northern Ireland: e.g. recognising the distinctive nature of the Single Electricity Market on the island of Ireland, within the general provisions on future EU-UK energy cooperation;[30] and making specific reference to the particular situation of road transport for goods and persons between Ireland and Northern Ireland, within the general provisions on future EU-UK road transport cooperation.[31]

Perhaps the most important reference specific to Ireland/Northern Ireland within the TCA is **Article 492(3) TCA.** This provides that the rather limited provisions in the TCA concerning the future movement of people between the EU and the UK "are without prejudice to any arrangements made between the United Kingdom and Ireland concerning the Common Travel Area". Similarly, the Protocol on future EU-UK cooperation in the field of cross-border social security, contained within the TCA, sets out a general principle that the UK should not discriminate between the Member States of the EU – but that principle "is without prejudice to any arrangements made between the United Kingdom and Ireland concerning the Common Travel Area".[32] By those means, **the TCA (like the WA) ensures that the CTA between Ireland and the UK continues to enjoy special recognition compared to the default rules governing EU-UK relations as a whole**.

At the same time as concluding the TCA, the EU and the UK also agreed certain supplementary treaties: one on nuclear safety; and another on information security. The two parties will no doubt conclude additional international agreements on a range of issues in future years. For example, the arrangements governing the PEACE PLUS programme (2021-2027)[33] were not directly covered by the TCA as such; the necessary legal and financial provisions were instead put in place using other legal instruments.[34] It is also important to note that the TCA itself envisages a process of periodic review and possible future revision by the EU and the UK.

[29] Article 178 WA.
[30] Article 300 TCA.
[31] Articles 462 and 475 TCA.
[32] Article SSC.4 TCA. See also Article 712 TCA, which contains a similar provision in respect of the conditions for future UK participation in Union programmes and activities.
[33] PEACE PLUS is the successor to previous peace programmes established by the GFA, aimed at supporting social, economic and regional stability, as well as promoting cross-community cohesion.
[34] I.e. EU legislation establishing the programme, to be managed by the Special EU Programmes Body, with UK financial contributions assigned as external revenue.

For the time being, however, **the TCA in its original form will provide the primary legal framework within which EU-UK relations are to operate and evolve – including, for any relevant purposes, relations between Ireland and Northern Ireland.**

i) Benefits and limits of the TCA

The TCA addresses a wide range of issues, mostly grouped under two main categories. First, **economic relations:** the TCA contains detailed provisions addressing, e.g. trade in goods; services and investment; intellectual property rights; public procurement; various modes of transport; fisheries; and level playing field commitments in areas such as competition, state aid, employment rights and environmental standards.

Secondly, **cross-border cooperation on criminal matters:** again, the TCA contains detailed provisions on, e.g. EU-UK data sharing in fields such as DNA, fingerprints and vehicle registrations; a new EU-UK judicial surrender procedure to replace the European Arrest Warrant (and similar to the arrangements that were already in operation as between the EU and Norway / Iceland); plus arrangements for UK cooperation with Europol and Eurojust (as a third country). These provisions are considered further in Part 2, Case Study 3.

The TCA also contains **additional provisions** on, e.g. future EU-UK cooperation in fields such as health and cybersecurity; and as regards UK participation in a range of EU programmes and activities (such as the Horizon Europe research programme) – again as a third country.[35] The TCA also envisages, but does not itself provide for, unilateral measures to be adopted by both the EU and the UK under their respective internal powers, e.g. to facilitate cooperation in fields such as the cross-border exchange of personal data, and access to the parties' respective financial services markets.

Despite the wide and diverse range of issues covered by the TCA, the approach adopted by the parties follows a similar pattern in virtually every case. **Future EU-UK relations will be based on much more limited forms of mutual co-operation, without any direct alignment of regulatory standards between the parties.** Indeed, the UK made it a central feature of its negotiating strategy that UK law would not be formally aligned to EU law in any respect. As a result, the TCA rarely envisages anything even approaching the rights and obligations associated with EU membership. On any measure, the TCA represents a significant downgrading of EU-UK relations. Indeed, in many situations, for the institutions, actors, stakeholders and individuals involved, there may as well be no agreement at all.

Furthermore, the legal effects of the TCA are deliberately intended to be relatively weak. In principle, and unlike the approach adopted under the WA, **the TCA does not purport to create directly enforceable legal rights or obligations for individuals or authorities within the domestic legal systems of the UK, the EU, or its Member States.**[36] There are a small number of limited and partial exceptions to that general position: for example, the parties agreed to adopt domestic legislation that would allow individuals to benefit from the provisions on cross-border social security cooperation

[35] Though we already mentioned, above, that the ongoing dispute over PINI has seriously disrupted EU-UK cooperation in the field of research funding under the Horizon Europe programme.
[36] Article 5 TCA.

in proceedings before the national courts and administrative authorities (see further Part 2, Case Study 1). But even that is still not the same as the TCA creating directly effective legal rights of its own, since the relevant provisions still need first to be implemented into domestic law.[37] Instead, the TCA creates rights and obligations only for the EU and the UK, as such, and only as a matter of public international law – with complex provisions on dispute avoidance and resolution, counter-balancing measures and retaliation powers, which also differ across the various fields of cooperation covered by the TCA.[38]

In any case, it is important to note that there are still major limits to what the TCA actually covers. For example:

- the agreement contains nothing on the mobility rights of natural persons between the EU and the UK, other than on short stays for certain business purposes;

- certain specific welfare benefits are excluded from the replacement system of EU-UK cross-border social security co-ordination, such as family benefits and special non-contributory benefits (see further Part 2, Case Studies 1 and 2);

- the TCA makes no provision for cross-border cooperation in civil law matters, including as regards cross-border family law issues (see further Part 2, Case Study 4);

- there is to be no more structured EU-UK cooperation as regards foreign policy/ security and defence; and

- the UK took the deliberate decision not to participate in the EU's Erasmus programme (even as a third country).

ii) The TCA as an expression of "Hard Brexit"

The limited fields covered by the TCA, its loose approach to substantive cooperation, and its weak system of legal enforcement together reflect the UK Government's preference for a "Hard Brexit". In other words: withdrawal should lead only to relatively distant future relations between the EU and the UK. At the same time, they also reflect the EU's own insistence that, without meaningful alignment of rules and standards, and effective guarantees of compliance and enforcement, the UK could not expect "special treatment" as a third country merely because it was also a former Member State.

Moreover, while the TCA preserves the UK's autonomy to adopt divergent regulatory approaches from the EU, it goes without saying that, should the UK exercise its autonomy to diverge in ways that go beyond even the relatively loose commitments contained in the TCA, such a development could have serious consequences in terms of the longer-term sustainability of the TCA itself. The latter contains provisions not

[37] Article SSC.67 of the Protocol on EU-UK Social Security Coordination.
[38] See further, S Peers, "So close, yet so far: The EU/UK Trade and Cooperation Agreement" (2022) 59 CMLRev 49.

only on ad hoc dispute settlement, including counter-balancing and retaliatory measures, but also foresees the possibility of outright termination of the entire agreement, on a unilateral basis, by either the EU or UK. For example, the EU's ultimate response to a serious and persistent breach by the UK of the legally binding Protocol on Ireland/Northern Ireland as contained in the WA, would be for the EU to terminate the entire TCA and cease cooperation with the UK across those fields covered by the latter treaty. That would obviously be a drastic step, but it is one that lies within the EU's lawful prerogatives.

In the meantime, it is worth noting that – given the limited scope and content of the TCA, as compared to the rights and obligations of EU membership – questions have arisen about how far some of the resulting gaps in cooperation between the EU and UK might nevertheless be bridged by continuing or future UK adherence or accession to existing multilateral agreements and other international legal regimes.

For example, in order to mitigate at least some of the adverse consequences of the TCA's failure to include any provisions on EU-UK cross-border cooperation on civil law matters, in April 2020, the UK formally sought to join the existing Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[39] Even if it were successful, such UK accession would not cover other important parts of cross-border civil cooperation – including many issues directly relevant to children, such as cross-border maintenance, care and custody arrangements (see Part 2, Case Study 4). But in any case, UK accession even to Lugano's limited provisions on civil and commercial matters still requires the unanimous agreement of all of the Convention's existing parties, and the EU has thus far refused to agree to the UK's request.

In particular, the Commission is of the view that the Lugano Convention is essentially an instrument of cross-border cooperation between the EU (on the one hand, together with Denmark acting in its own right) and the EFTA states (on the other hand, currently covering Iceland, Norway and Switzerland) – justified by the close inter-relationships between those parties which have been created within and around the Single Market.[40] By contrast, the Commission believes that the much looser degree of partnership and cooperation provided for under the TCA justifies leaving EU-UK cross-border cooperation in civil matters to the default international legal regimes created under the Hague Conventions and, as far as many children's rights issues are concerned, the Council of Europe (see Case Study 4).

Section B: Particular Issues for the UK and for the Republic of Ireland

Given the massive changes brought about by UK withdrawal from the EU and the patchy and suboptimal nature of the replacement regimes contained in the various agreements that make up the withdrawal package, **Brexit places a stronger onus on**

[39] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L339/3.

[40] See Commission, *Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention*, COM(2021) 222 Final.

bilateral and unilateral action by both the UK and Ireland to secure an adequate level of protection for children's rights and interests across the island of Ireland. But here too there are major challenges and important constraints.

In this section, we will consider:

- the core "Brexit legislation" enacted by the central UK authorities to govern the UK's domestic legal systems, in an effort to plug the "constitutional gaps" left behind after withdrawal from the EU; and

- those EU law obligations that remain binding on Ireland as a Member State and that may prove particularly relevant to addressing future situations and challenges on an all-island basis.

1) UK's Core Brexit Legislation

For 50 years, the UK legal system interacted and evolved with the EU legal system. Some fields grew to be dominated by EU obligations – such as free movement and cross-border access to services. Many fields were affected to a lesser extent by EU membership – such as anti-discrimination measures, or measures aimed at reconciling work and family life. Indeed, some fields were only marginally impacted by EU law – such as education or criminal justice. But altogether, the EU and UK legal systems were characterised by close and complex integration and interdependency.

Had the UK left the EU without addressing the immediate knock-on consequences of Brexit for the smooth internal functioning of the UK's own legal and administrative structures, it would have sparked significant and widespread, not to mention deeply damaging, disruption and uncertainty. The very prospect of Brexit therefore required the UK to undertake a comprehensive review of its domestic legal systems, to identify which fields would be affected by withdrawal and how, before deciding on whatever steps seemed necessary to prepare the UK itself for the full consequences of leaving the EU.[41]

In some fields, the consequences of Brexit were so far reaching that the UK simply had to design and adopt entirely new legal regimes to replace pre-existing EU rules, as from the date of expiry of the post-withdrawal transition period. That was true, for example, across sectors such as customs, trade, (EU) immigration, agriculture, fisheries, and nuclear safety.

But besides those major sectoral initiatives, the very prospect of Brexit also required the UK to adopt two legal frameworks of more general or horizontal application to ensure the smooth functioning of the UK's domestic legal systems: **the European Union (Withdrawal) Act 2018; and the United Kingdom Internal Market Act 2020.**

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[41] For an initial report by a coalition of children's rights experts across the UK, setting out the main implications of Brexit for children, see *Making Brexit Work for Children,* November 2017; *See also the NICCY and Children's Ombudsman report, 'It's Our Brexit Too: Children's Rights, Children Voices',* presenting young people's perspectives, North and South of the Irish border, on their hopes and fears relating to Brexit, March 2018

i) European Union (Withdrawal) Act 2018 (EU(W)A)

The EU(W)A seeks to protect basic standards of regulatory continuity and legal certainty within the UK, **by providing that (unless otherwise amended, repealed or replaced) EU law as it existed upon expiry of the post-withdrawal transition period should remain an integral part of the UK legal system**.[42] This would be achieved either **by retention** (where EU rules had already been implemented into UK law) or **by incorporation** (where EU rules had not already been so implemented).[43]

"Retained EU law" now occupies a special position within the UK legal system. In principle, such measures should continue to be applied and interpreted in the same way after Brexit as they had been before. For example, all relevant CJEU caselaw is to be treated as having the same precedential status and legal value as judgments of the UK Supreme Court. Moreover, "retained EU law" should continue to benefit from the traditional EU principle of primacy, thereby taking priority over any conflicting pre-existing legislation of purely domestic provenance.

However, the UK authorities recognised that much of what would otherwise become "retained EU law" under the EU(W)A was, in fact, predicated upon and designed specifically for EU membership: for example, by involving the Commission or other EU agencies in administrative decision-making; or by providing for the domestic recognition of legal decisions which had been adopted in other Member States. As such, the EU(W)A **also conferred extensive powers upon UK government ministers to amend any measure of "retained EU law"** to render the latter more appropriate to the needs of the UK acting alone and outside the context of its former EU membership. On that basis, the UK government has indeed undertaken a vast programme of secondary legislation, amending particular provisions of "retained EU law", sometimes very extensively and with limited or no parliamentary scrutiny, across myriad sectors and fields.

The system of "retained EU law" under the 2018 Act therefore acts as a general but essentially **default legal regime that operates without prejudice to**:

- any amendments adopted by the UK government exercising its delegated powers under the 2018 Act itself;
- other primary legislation adopted by the UK parliament in preparation for the full impact of Brexit (precisely in fields such as customs, trade, immigration etc);
- any obligations assumed and implemented by the UK under the WA and the TCA;
- any future changes that might now be enacted by the central UK authorities, or the devolved institutions, so as to alter, repeal or replace any "retained EU law" in due course.

[42] As amended / supplemented, in particular, by the European Union (Withdrawal Agreement) Act 2020.
[43] See, for more detailed analysis see S. Whittaker, "Retaining European Union Law in the United Kingdom" [2021] 137 *LQR* 477.

In short, "retained EU law" is highly vulnerable to amendment, dilution or repeal altogether. Moreover, the current UK Government has proposed introducing a new "Brexit Freedoms Bill" that would both end the special characteristics conferred upon "retained EU law" under the 2018 Act and make it significantly easier for the Government to change or scrap any measure of "retained EU law" in the future.[44]

It is also important to note that the system of "retained EU law", even as directly provided for under the 2018 Act itself, is not simply a complete copy-and-paste of all EU law into the UK legal systems. The UK Government proposed, and the Westminster Parliament accepted, to reject certain parts of EU law altogether, even though the relevant provisions could easily have been retained as UK law, together with the rest of the EU's rulebook, after Brexit.

- For example, **the Charter of Fundamental Rights, which contains direct provisions and protections for children,[45] has been eliminated entirely.** It no longer has any legal status within the UK legal system. This was especially worrying, given the proposed repeal of the Human Rights Act 1998 and the consequent limitations this would have placed, in the absence of the EU Charter, on drawing children's rights protections from the European Convention on Human Rights. That proposal has recently been taken off the table, but the issue remains a contentious one in UK political life.[46]

- Similarly, the 2018 Act contains significant curbs on future UK government accountability towards its own citizens, by abolishing the system of *Francovich* liability,[47] which would otherwise have obliged UK public bodies to make financial reparation towards individual citizens for serious breaches of "retained EU law".

But in that regard, the 2018 Act merely reflects certain wider impacts of Brexit upon the UK's domestic legal systems. In particular, EU law provided the UK courts with a range of tools to promote more effective judicial review against the alleged abuse of governmental power, e.g. through the principle of proportionality; as well as the more effective enforcement of legal rights and obligations, e.g. through the principle of adequate remedies. Those tools have now largely been eliminated from UK law and it remains unclear how far the domestic courts might be willing and / or able to recreate them as a matter of purely domestic competence.

ii) UK Internal Market Act 2020 (UKIMA)

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[44] See https://www.gov.uk/government/news/prime-minister-pledges-brexit-freedoms-bill-to-cut-eu-red-tape. At the time of writing, the draft legislation has not yet been published.

[45] Not least in Article 24, which is directly inspired by the UN Convention on the Rights of the Child and (as mentioned above) is now routinely referred to by the CJEU in decisions relating to children.

[46] The UK's Bill of Rights Bill, introduced to Parliament on 22 June 2022, represented potentially the most radical overhaul (and, indeed, reduction) in human rights protections in the UK for decades. The Bill was withdrawn by the UK Government in September 2022.

[47] Cases C-6 and 9/90, *Francovich*, ECLI:EU:C:1991:428.

UKIMA was adopted by the Westminster Parliament in order to establish a new regime to manage internal trade across the UK as from expiry of the post-withdrawal transition period.[48]

Devolution for Scotland, Wales and Northern Ireland were all introduced while the UK was still a member of the EU.[49] As such, devolved powers were constrained by the need to comply with the UK's treaty obligations, while EU rules helped manage the impacts of any differences that might emerge (even within the UK) due to divergent regulatory choices by the devolved authorities.

After Brexit, there is clearly the increased potential for different parts of the UK to pursue different regulatory choices in a wide variety of fields (including those affecting children) – leading to divergences that might well create barriers to trade in goods and services within the UK itself, but without the overarching framework of EU law to provide a system for managing the impact upon cross-border trade.

UKIMA responds to that situation by creating a set of "market access principles" to govern trade between England, Scotland, Wales and Northern Ireland. However, it is important to stress that, as regards Northern Ireland, UKIMA and its "market access principles" remain subject to the obligations laid down in the Protocol on Ireland / Northern Ireland as contained in the WA.

As regards internal trade in goods, UKIMA contains two main "market access principles":

- Certain rules, e.g. governing the composition, packaging or production of goods, will be subject to the principle of mutual recognition. If the goods are lawfully made in one part of the UK, they can be lawfully sold in the rest of the UK, even if they do not comply with any local standards applicable in the territory of sale. There are only limited exceptions to the principle of mutual recognition.

- Other rules, e.g. governing the advertising, price or place of sale of goods, will be subject to the principle of non-discrimination. Goods from another part of the UK should not be treated differently, in law or in fact, to those marketed within the territory of sale. Again, there are only limited exceptions to the principle of non-discrimination.

Measures that breach the principle either of mutual recognition or of non-discrimination are to be "disapplied" in relation to imported goods. Such measures cannot be enforced in practice against goods coming from elsewhere in the UK – though the same measures would still remain fully applicable to any local producers or suppliers.

[48] See, for more detailed analysis, K Armstrong, "The Governance of Economic Unionism after the United Kingdom Internal Market Act" (2021) MLR Open Access Available at https://onlinelibrary.wiley.com/doi/10.1111/1468-2230.12706 ; M Dougan, J Hunt, N McEwen & A McHarg, "Sleeping with an Elephant: Devolution and the United Kingdom Internal Market Act 2020" (2022) 138 LQR 655.
[49] I.e. by the original Scotland Act 1998, Government of Wales Act 1998 and Northern Ireland Act 1998.

So, for example, if the Scottish Parliament were to introduce a ban on the marketing of single-use plastics, such a measure would become subject to the principle of mutual recognition (since it affects the composition of the goods). The measure could not benefit from any of the permitted exemptions (since environmental protection is not a valid derogation). The ban could not be applied to goods incorporating single-use plastics imported (say) from England – though it would still remain enforceable against manufacturers based in Scotland itself.

UKIMA contains parallel provisions, also based on the principles of mutual recognition and non-discrimination, to govern trade in services across the UK. It also makes provision for a new system on the mutual recognition of professional qualifications across the UK – a system that will be relevant to professionals working in children's services, such as teachers, social workers, nurses and other health care or therapeutic professions.

UKIMA has proved very controversial, particularly with the devolved authorities in Scotland and Wales, for a combination of two main reasons:

- First, the legislation is based on a relatively robust understanding of what is required to protect internal trade within the UK. The Act effectively starts from the presumption that any regulatory difference capable of impacting on trade in goods and services is a "problem" that needs to be eliminated. The legislation is unsympathetic to the idea that regulatory divergences often reflect legitimate local preferences (even if they do create certain internal barriers to trade).

- Secondly, the legislation fails to recognise and reflect certain unique features of the UK as an internal trade entity. The British economy is effectively dominated by England. But also in constitutional terms, the devolved authorities are at an inherent disadvantage compared to the power of the central state. In that unusual context, the strong market ethos underpinning UKIMA will not in fact operate in a neutral manner between the UK territories. Rather, UKIMA's market access principles are likely to reinforce even further England's existing economic and constitutional pre-eminence.

That said, there remain various uncertainties about how UKIMA will operate in practice and, in particular, how far fears about its potentially damaging impact on devolution might eventually materialise. For example:

- The Act is currently the subject of an ongoing legal challenge by the Welsh Government.[50]

- It remains unclear how far the general "market access principles" contained in the Act will eventually interact with the parallel programme for negotiating "common frameworks" (i.e. some form of agreement over harmonised or

[50] In February 2022, the Court of Appeal rejected the Welsh Government's appeal against the High Court's previous refusal to grant permission to seek judicial review of UKIMA (albeit primarily on procedural grounds): see *General Counsel for Wales v Secretary of State for the Department of Business, Energy and Industrial Strategy* [2022] EWCA Civ 118. At the time of writing, it is unclear whether the Welsh Government will succeed in appealing before the UK Supreme Court.

coordinated regulatory standards) between London and one or more of the devolved authorities.

- It is also uncertain how far businesses might begin actively to use the Act so as to challenge devolved legislation, and how the courts might in due course interpret some of the more complex or ambiguous provisions of the legislation.

- The interaction between UKIMA and the Protocol on Ireland / Northern Ireland is an area of particular complexity, especially while the EU and the UK have yet to finalise certain details about operationalising the Protocol, and more particularly since the UK now threatens simply to renounce its obligations under the WA altogether.

Even if the entire system created by UKIMA, read also in light of the Protocol, were to work exactly as planned, it still raises concerns about the effectiveness of certain all-island initiatives, e.g. to improve children's health based on limits to sales arrangements such as outlet or advertising restrictions. Imagine that Ireland and Northern Ireland were to seek the coordinated introduction of new sales restrictions concerning unhealthy foodstuffs. Assume that those restrictions were not incompatible with the obligations incumbent upon Ireland (as a Member State of the EU) and/or Northern Ireland (under the Protocol), i.e. they fall within the rightful competences of the Irish / Northern Irish authorities. Nevertheless, Northern Ireland's capacity to enact the jointly coordinated sales restrictions might still be challenged as incompatible with UKIMA, e.g. on the grounds that the new rules indirectly discriminate against the sale of goods coming from elsewhere in the UK; or even on the grounds that any particularly onerous restrictions should automatically fall foul of the mutual recognition principle. UKIMA might therefore hinder or at least confuse the ability of Ireland and Northern Ireland to introduce new public policy regulations on a coordinated all-island basis, even if those regulations clearly serve the rights and interests of children.

2) EU Membership Obligations of the Republic of Ireland

Ireland remains a full Member State of the EU. As such, myriad policy fields will continue to be affected by the complex system of competences allocated between the EU and its Member States.

In fields of EU competence, both the future development of internal EU-wide rules (e.g. relating to the regulation of particular goods or services, the adoption of environmental or employment protection standards, rules on consumer rights or health and safety policies etc), and the future exercise of the EU's external powers (e.g. to enter into new international agreements with the UK and / or other third countries as well as international organisations), will obviously impact upon Ireland's domestic legal system. In turn, that will affect Ireland's room for manoeuvre to adopt unilateral (or to agree with the UK bilateral) measures to address children's rights concerns, including on an all-island basis / with the authorities in Northern Ireland.

In fields where the EU lacks competence or has not exercised its competence to the exclusion of autonomous national regulatory action, Ireland will of course retain wider powers to address issues affecting children's rights or interests, whether unilaterally, or through bilateral action in agreement or coordination with the UK (for example, in the

field of education). However, even in these fields of essentially national competence, Ireland needs to remain mindful of certain general or horizontal obligations associated with EU membership. Those obligations may still prove capable of affecting the exercise (or at least altering the detailed consequences) of any unilateral action undertaken by Ireland and / or any bilateral arrangements agreed between Ireland and the UK. A good example is the so-called "*Gottardo* principle": Member States must respect the principle of equal treatment between their own nationals and other Union citizens, even when entering into their own international agreements with third countries outside the fields of EU common external action.[51]

We can already see important examples of unilateral Irish action in practice. Consider the decision of the Irish Government to offer students in Northern Ireland the continued opportunity to take part in the EU's Erasmus scheme – simply by treating those students as temporarily registered at a higher education institution within the Republic itself.[52]

Similarly, we already have important examples of bilateral cooperation between Ireland and the UK. Consider the Common Travel Area – a field crucial for the effective protection and advancement of children's rights and interests. As we know, the Protocol on Ireland/Northern Ireland contained in the WA, as well as various provisions in the TCA, recognise the continued existence of the CTA. The latter's operation is therefore essentially a matter of unilateral action and bilateral coordination between Ireland and the UK in the management of their internal border control and immigration policies – a position also confirmed by the two states' Memorandum of Understanding of May 2019.[53]

The effective operation of the CTA is enhanced, though only in a relatively patchy and suboptimal manner, by the EU-UK withdrawal package, e.g. through the replacement rules on cross-border social security coordination now provided for under the TCA. But insofar as Ireland and the UK wish further to promote smooth operation of the CTA, they remain free to do so. For example, the two states have already concluded their own separate bilateral agreement on social security coordination (February 2019);[54] as well as additional memoranda of understanding on reciprocal healthcare arrangements (December 2020),[55] and reciprocal education arrangements (July 2021).[56] See further Part 2, Case Study 1.

However, in exercising its competences, Ireland must remain mindful of certain obligations as an EU member state. For example:

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[51] Case C-55/00, *Gottardo*, ECLI:EU:C:2002:16.

[52] E.g. https://www.politico.eu/article/ireland-fund-erasmus-northern-irish-students/

[53] See https://www.dfa.ie/media/dfa/eu/brexit/brexitandyou/Memorandum-of-Understanding-Ire-version.pdf .

[54] See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778087/CS_Ireland_1.2019_Soc_Sec.pdf .

[55] See https://www.gov.uk/government/publications/memorandum-of-understanding-common-travel-area-healthcare-arrangements-between-the-uknorthern-ireland-and-ireland/memorandum-of-understanding-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-ireland-concernin .

[56] See https://www.gov.uk/government/news/british-and-irish-young-people-guaranteed-continued-access-to-education-institutions .

- the need to fully respect the free movement rights of other EU citizens under the EU treaties and associated free movement legislation – particularly as regards border checks on EU citizens and respecting the rights of protected family members;[57]

- the need to comply with EU rules on data protection, including the legislation governing transfers of personal data to third countries, which now apply also to the UK;[58]

- the requirement, under the *Gottardo* principle, to guarantee equal treatment between Irish nationals and other Union citizens when it comes to enjoying the benefits, within Ireland itself, of any international agreement contracted with the UK.[59]

Summary of Key Points and a Methodology for Assessing the Impacts (current and potential) of Brexit on Children.

When it comes to addressing children's rights concerns within and across Ireland and Northern Ireland, one of the key effects of Brexit is to have increased the sheer complexity of the legal frameworks and provisions that now govern the powers and obligations of the competent authorities in both Ireland and Northern Ireland.

In each and every case, we need to undertake a process of identifying which legal frameworks are potentially engaged:

- whether there are any relevant provisions applicable under the WA;

- whether there are any relevant obligations under the TCA or other applicable EU-UK agreements;

- which rules of domestic UK law might be engaged – covering not just the local rules applicable to Northern Ireland, but also the UK's horizontal post-Brexit regimes, e.g. concerning "retained EU law" under EU(W)A, or the "market access principles" created by UKIMA;

- which rules of domestic Irish law might be applicable – including any relevant obligations flowing directly from EU membership; and

- any relevant bilateral agreements reached between Ireland and the UK as such, e.g. relating to the functioning of the CTA.

It is only after having identified which legal frameworks are potentially engaged that we can then proceed to a more detailed examination of their more precise content and implications:

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[57] In particular, under the Citizens Rights Directive 2004/38 [2004] OJ L158/77.
[58] The EU's general data protection regime is now contained in Regulation 2016/679 [2016] OJ L119/1 and Directive 2016/680 [2016] OJ L119/89.
[59] Case C-55/00, *Gottardo*, ECLI:EU:C:2002:16.

- asking, for each applicable legal framework, which of its provisions are relevant to the situation or problem at hand;

- establishing how those different sets of provisions are intended to interact with each other and, in the event of a conflict, which should take priority;

- determining how any disagreements as to interpretation or application should be resolved; and

- knowing what avenues are available for enforcement in the event of non-compliance.

The nature, course and outcome of every such assessment will inevitably differ from situation to situation. But thanks to Brexit, there is no escaping the need to go through the same basic process in each individual case. And thanks to Brexit, the answers will, in a great many situations, be more complex, and less satisfactory, than would have been the case had the UK remained a Member State of the EU alongside the Republic.

In Part Two, we offer illustrative examples of how this evaluative process might operate in practice, using a series of more detailed case-studies inspired by a range of important children's rights issues. It is important to reemphasise that our case studies are intended primarily to illustrate the overall methodological approach now necessitated by Brexit. They do not purport to be based on a comprehensive knowledge of the detailed domestic legal provisions that might actually apply in each situation – which is a job best done by more specialist legal and policy advisors at the local level.

The more detailed case studies in Part Two concern:

1. **Children's Access to Health Care and Treatment Across Borders**

2. **Cross-Border Access to Family and Welfare-Related Benefits**

3. **Child Protection**

4. **Cross-Border Co-Operation in Family Law Matters**

PART TWO

HOW THE POST-BREXIT LEGAL REGIME APPLIES TO CHILDREN: CASE STUDIES

Case Study 1: Children's Access to Cross-Border Healthcare

Children from Northern Ireland commonly access critical, and sometimes lifesaving services in the Republic of Ireland where these are not available locally or if there is a long waiting list for services. Children from the Republic similarly access services in the UK. Facilitating cross-border access to such services is particularly crucial for children with complex needs requiring specialist treatment such as eating disorders, heart conditions, and cancer treatment.[60] Indeed, every year a number of young people from Northern Ireland seeking mental health treatment will access residential placements in the Republic due to the lack of specialist provision available for children in the North.

Following the structure and legal framework presented in Part One, this case study illustrates how we should approach children's rights to access health services across the border. The first section clarifies how children's access to healthcare is governed under current EU law (the rules that also applied to the UK pre-Brexit) before explaining how different aspects of the Brexit framework affect different categories of children and healthcare provision.

1. The Pre-Brexit Rules on Cross-Border Access to Healthcare

1.1. The EU Legal Baseline

Public healthcare services are regulated under the domestic social security system of each country. Each EU Member State is responsible for determining the content and scope of its own social security system – including who can access it, what benefits should be granted, and how individuals should contribute to it - to reflect their distinct political, economic and social needs. EU level provision, however, provides for a high degree of co-ordination and co-operation between these systems by establishing common rules and principles which have to be observed by all national authorities, social security institutions, courts and tribunals when applying national law and policy. This approach is aimed at facilitating the smooth movement of individuals between the Member States from the perspective of social security cover and access to benefits / entitlements.

The EU framework governing the co-ordination of access to social security, including health services, is contained in Regulation 883/2004 relating to cross-border social security co-ordination (the Social Security Co-Ordination Regulation).[61] Where individuals, such as workers and their families, are exercising their right to move between different EU countries, this Regulation determines whose social security rules apply and what rights individuals are entitled to expect from the applicable social security system. The social security benefits covered by the Regulation include: sickness benefits, maternity and paternity benefits, invalidity benefits, old-age benefits, survivor benefits, benefits relating to accidents at work and occupational diseases,

[60] Examples of specialist health services for children include the Paediatric Congenital Heart Service based in Glasgow and the North West Cancer Centre (London/Derry)

[61] Regulation (EC) No 883/2004 of The European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166 of 30 April 2004. Note also Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284, 30.10.2009, p. 1–42.

unemployment benefits, family benefits, and pre-retirement benefits. **Importantly, the Regulation also enables all EU migrants and their family members, dependants (including third country nationals) and stateless persons and refugees to access emergency healthcare and authorised non-emergency healthcare across borders.** Cross-border workers who are employees or are self-employed in one Member State and reside in another Member State to which they return daily or at least once a week are also covered.

The Social Security Co-Ordination Regulation is supplemented by additional **Treaty-based rights**,[62] in particular to claim reimbursement from their home Member State for certain non-authorised non-emergency treatments received in another Member State, e.g. where a patient travels abroad to have an operation that could not be provided within a medically justifiable period of time, because of waiting list problems in their home state.

Both the Social Security Co-ordination Regulation and these Treaty-based rights are overlaid by Directive 2011/24/EU on the application of patients' rights in cross-border healthcare (the Cross-Border Healthcare Directive).[63] 'Healthcare' is defined broadly to include health services provided by health professionals to patients "to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices" (Article 3).

The Directive seeks to clarify some of the more detailed conditions for exercising the right to cross-border healthcare contained in the Social Security Co-Ordination Regulation and under the Treaty, e.g. when it comes to the conditions for patients to seek reimbursement of their cross-border healthcare costs. The Directive also facilitates the effective exercise of the right to cross border healthcare, e.g. through the creation of national contact points, rights to patient information, provisions on continuity of medical treatment after the patient has returned home, and as regards the mutual recognition of medical prescriptions.

1.2.The Common Travel Area

The Common Travel Area (CTA) has allowed British and Irish citizens to take up residence in each other's territory and to access all emergency, routine and planned publicly funded health care services and benefits in the host territory on the same basis as its own citizens. In that sense, the CTA worked alongside the EU regime summarised above to ensure that children on the island of Ireland could access healthcare on either side of the border, including acute/psychiatric hospital services (day, inpatient, outpatient care) and community-based outpatient care (such as dental, ophthalmic, orthodontics, speech & language treatment).

Of particular relevance is para 9 of the 2019 Memorandum of Understanding between the UK Government and the Government of Ireland concerning the Common Travel Area and associated reciprocal rights and privileges:

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[62] See, in particular, Articles 56-62 Treaty on the Functioning of the European Union, OJ C 326/47.

[63] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, OJ L 88, 4.4.2011, pp. 45-65.

"The CTA affords British citizens residing in Ireland and Irish citizens residing in the UK the right to access emergency, routine and planned publicly funded health services in each other's state, on the same basis as citizens of that state."

Such assimilation under the terms of the CTA played out differently for children depending on their own/their parents' nationality:

For example, a British child living in the Republic of Ireland could receive healthcare in Northern Ireland on the same terms as national children both under the terms of the CTA and under the terms of EU law.
However, a French child living in Ireland or Northern Ireland could receive healthcare across the border only in accordance with the rights and conditions set out in EU law (Regulation 883/2004 and Directive 2011/24) rather than under the terms of the CTA.

2. The Post-Brexit Rules

2.1. The Withdrawal Agreement (WA)

Individuals protected under Part 2 of the Withdrawal Agreement (as fully defined under Articles 30-32)[64] will continue to benefit directly from the healthcare rules contained in the Social Security Co-ordination Regulation. For such individuals, the Social Security Co-ordination Regulation will continue to have full legal effect as between the EU and the UK, i.e. its rules on healthcare can be invoked directly before the national courts, and will prevail over any conflicting domestic rules.

However, the Treaty-based rights (e.g. reimbursement of certain non-authorised, non-emergency treatments) and those contained in the Cross-Border Healthcare Directive (e.g. information, continuity, mutual recognition etc) ceased to apply as between the EU and the UK, even for individuals protected under Part 2 of the Withdrawal Agreement, **from the date of the expiry of the Brexit Transition Period on 31st December 2020.** Those rights remain applicable only as between Member States of the EU (including, of course, between the Republic of Ireland and its EU partners).

It is worth noting the relevance of Article 2 of the Protocol on Ireland/Northern Ireland, annexed to the WA (PINI – see Part One). To recap, Article 2 PINI provides that: The UK shall ensure that no diminution of rights, safeguards and equality of opportunity as set out in the 1998 Good Friday Agreement (GFA) results from its withdrawal from the EU, including in the area of protection against discrimination as enshrined in EU law. The part of the GFA – 'Rights, Safeguards and Equality of Opportunity', on which the obligations in Article 2 I/NI Protocol rely, includes a broad range of human rights and

[64] This includes: EU citizens who are subject to the legislation of the United Kingdom at the end of the transition period, as well as their family members and survivors – so effectively those who have registered under the EU Settlement Scheme; UK nationals who are subject to the legislation of a Member State at the end of the transition period, as well as their family members and survivors (ie UK nationals and their family members living in another EU MS); EU citizens who live in the UK and are subject to the legislation of a Member State at the end of the transition period, as well as their family members and survivors. Also included within the scope of this provision are employed and self-employed EU citizens and their family members, stateless persons and refugees and their family members, and third country nationals and their family members who are in one of the situations set out in Article 30(1)(a)-(d).

can be interpreted to include the right to healthcare.[65] As such, it has been noted that the non-diminution obligation contained in Article 2 PINI could be breached if the protection of, respect for, or fulfilment of the right to health is lessened as a result of the application (or, indeed, mis-application) of the post Brexit rules.[66] Whilst a detailed review of whether domestic application of the post-Brexit rules might constitute a diminution of the rights guaranteed under the GFA is beyond the scope of this report, it is worth bearing in mind the potential to invoke this provision should evidence to that effect emerge.

2.2. The Trade & Cooperation Agreement (TCA)

For all other individuals who are excluded from the scope of the Withdrawal Agreement (for example, those not registered or who are ineligible under the EU Settlement Scheme in NI) their access to cross border healthcare is determined by domestic law or other international agreements. The main alternative applicable agreement is the EU-UK Trade and Co-operation Agreement (TCA) (explained fully in Part One of this report). This makes provision for basic cross-border healthcare coordination between the UK and the EU. Specifically**, the TCA includes a Protocol on Social Security Coordination** which allows for **emergency treatment and authorised non-emergency treatment** in the Member States, and special rules for certain groups, such as pensioners, refugees, stateless persons and family members, including dependent children.

Again, there is no equivalent under the TCA to EU law's own Treaty-based rights (e.g. as regards reimbursement for certain non-authorised non-emergency medical treatment); nor does it provide equivalent entitlement to that available under the Cross-Border Healthcare Directive (which supplements the conditions under which patients can seek cross-border health care).

> For example, a refugee child residing in Northern Ireland, or a French child residing in Northern Ireland who is not registered or does not qualify for EU Settled Status,[67] may be able to access specialist mental health services in the Republic, but if those services are deemed to be non-emergency treatment, they will have to be authorized in advance. Otherwise, the TCA does not provide for the costs to be reimbursed by the UK.

It is important to note that the provisions of the TCA are, in principle, binding only as a matter of public international law; they **do not create directly enforceable rights for individuals that can be enforced against public bodies within the individuals' domestic legal systems.** However, the TCA also explicitly states that the parties must ensure that the Protocol on Social Security has the force of law (either directly or through domestic implementing legislation) so that legal or natural persons can invoke its provisions before their domestic authorities and courts, ensuring the means to

[65] Hervey, T. 'Brexit, Health and its potential impact on Article 2 of the Ireland/Northern Ireland Protocol', March 2022. NIHRC.
[66] Hervey, T, above note, p.18.
[67] For more information on the conditions that need to be satisfied for children and their family members to qualify as EU Settled Nationals, see https://www.liverpool.ac.uk/law/research/european-childrens-rights-unit/campaigns/eu-settlement-scheme/.

effectively protect the rights it contains and seek an adequate and timely remedy for any breach. This is not the same as direct effect/primacy under EU law, however, in that States' authorities are only obliged to make such provision *in accordance with their domestic legal orders*; failure to do so still remains only a breach of obligations under TCA as a matter of public international law and it is difficult to hold states to account.

> For example, a French child in the Republic who needs emergency treatment in Northern Ireland or other parts of the UK but is wrongly denied it under the terms of the Protocol on Social Security Co-ordination, will be reliant on the UK implementing rules fully and properly in accordance with its obligations under the TCA. If the UK fails to comply with their obligations under the TCA, the young patient cannot rely directly on the TCA provisions before the UK courts to enforce their rights.

2.3. The Common Travel Area

Under the terms of the Common Travel Agreement (CTA), as confirmed in the 2019 Memorandum of Understanding, **British citizens residing in Ireland and Irish citizens residing in the UK/NI continue to have the right to access emergency, routine and planned publicly funded health services in each other's state, on the same basis as citizens of that state.**

> As such, an Irish citizen child ordinarily resident in the Republic who has cancer can continue to access cancer services in Northern Ireland or the rest of the UK and be reimbursed by the Republic's Health Service Executive for the cost of that medical treatment.

2.4. Domestic developments within NI

The Cross-Border Healthcare Directive (excluded from the Withdrawal Agreement) was replaced within Northern Ireland by a more limited domestic version – **The Republic of Ireland Reimbursement Scheme** – from 1 July 2021 until **21 September 2022**. This was very much a short-term scheme designed to reduce waiting lists for treatment in N. Ireland. It allowed all ordinary residents of N. Ireland to seek and pay for routinely commissioned treatment **in the private sector in the Republic (not in NI)** and have the costs reimbursed.

> So, an EU child resident in Northern Ireland (e.g. with a mental health condition) could access private health services in the Republic and reclaim the costs from the Health and Social Care Board in NI, provided that they have received prior authorisation. **This scheme does not cover public sector health services; nor does it cover reimbursement for non-authorised non-emergency medical treatment.**

2.5. Ongoing rights and obligations arising from the Republic of Ireland's EU membership

As a Member State of the EU, Ireland remains bound by the rights and obligations associated with EU membership. For example, as we noted above, the full body of EU rules on cross-border healthcare (the Regulation, the Treaties and the Directive) remain fully applicable in relations between Ireland and the other Member States.

But as we noted in Part One, EU membership also carries certain obligations for Member States even when the latter act as their sovereign capacity on the international stage by entering into treaty relations with third countries. That remains true also for Ireland in its bilateral relations with the UK. So, for example, Ireland remains subject to EU data protection rules, including the rules on transferring personal data outside the EU – a potentially important dimension of cross-border healthcare provision. In the event that the EU would no longer recognize the UK as having an "adequate" (i.e. equivalent) data protection regime to the EU – hardly a fanciful prospect given the controversial changes to UK data protection rules planned by the current government – this could have a significant impact on relations between Ireland and the UK, including in the field of healthcare.

Case study 2: Cross-border access to family and welfare-related benefits

Context
This case study suggests how one should approach the post-Brexit legal framework when it comes to the rules on accessing state social security – specifically family benefits such as child benefits and child raising allowances etc. It covers both access to entitlements for EU migrants and their families in the host state, and how entitlement to family benefits can be retained and 'exported' across borders for families who are separated or shuttle between different jurisdictions. It is important to note that entitlement to family benefits, as with most social welfare entitlement, is attached to the parent rather than the child directly, and so it is generally the parent's nationality/immigration, economic and residence status that determines the scope and nature of the entitlement available.

1. The Pre-Brexit Rules on access to family benefits

1.1. The EU legal baseline

All EU citizens and their family members have the right to move and reside freely within the territory of the Member States in accordance with the applicable rules of Union law.[68] The nature and extent of the additional socio-economic rights which EU citizens can access to support their families in the host state is contingent on the extent to which they are economically active or self-sufficient.

Generally speaking, for stays in other EU Member States of over three months, EU citizens and their family members – if not working – must have sufficient resources and sickness insurance to ensure that they do not become a burden on the social assistance of the host Member State during their stay.[69] This automatically limits the extent to which they might rely on state support.

By contrast, the extent to which the economically active – notably EU migrant workers and their family members – can access additional social and economic entitlement to support the upbringing of their children in the host state is set out in EU Regulation 492/2011.[70] This includes a right to access all social and tax advantages in the host state on the same basis as nationals (Article 7(2)).
Questions over what precise benefits are available to families,[71] and where to claim those benefits, raise complex issues of co-ordination and co-operation between different systems. Under EU law, the Social Security Co-Ordination Regulations[72] (discussed in Case Study 1) govern the coordination of social security systems.

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[68] Article 18, 21 and 45 TFEU; supplemented by Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *OJ L 158, 30.4.2004, p. 77–123.*
[69] Directive 2004/38, Article 7(1)(b).
[70] Regulation No 492/2011 of the European Parliament and of the Council of 5 April 2011 on Freedom Of Movement For Workers Within The Union, OJ L 141/1.
[71] This includes child benefits, childcare allowances, single parent allowances or supplements, allowances or supplements for children with disabilities etc.
[72] Regulation (EC) No 883/2004 of The European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166 of 30 April 2004; and Regulation (EC) No 987/2009

When family members live in a Member State other than the one in which the mobile person works and/or resides, entitlement to family benefits may arise in more than one Member State, effectively enabling parents to export their family benefits between their host and home state. Article 7 of Regulation No 883/2004, entitled 'Waiving of residence rules', provides:

> *'Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated.'*

Article 67 of Regulation No 883/2004 further provides that:

> *'A person shall be entitled to family benefits in accordance with the legislation of the competent Member State, including for his/her family members residing in another Member State, as if they were residing in the former Member State.*

The Social Security Coordination Regulations lay down 'priority rules' to determine the 'primarily competent Member State' which is obliged to provide the family benefit for the person concerned.[73] The rules relating to exporting family benefits are determined by a range of variables, including the number of children, the socio-economic status of the other parent/spouse, and whether the primary worker is self-employed or in receipt of a pension. Determinative also are the domestic rules of the Member States in question, since they set the eligibility criteria (universal or selective) and level of family benefits available.[74]

Importantly, **Member States are prohibited from making the grant or the amount of family benefits to which EU citizens have access contingent on the worker's family/children residing in the Member State paying for the benefit**.[75] In the same vein, more recent case law has confirmed that a Member State is not permitted to adjust the level of family benefits to those of another Member State on the sole ground that members of the beneficiary's family/children reside in the territory of that other Member State.[76]

1.2. Additional UK/Ireland provisions

laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, *OJ L 284, 30.10.2009, p. 1–42.*

[73] Art 68 Regulation 883/2004.

[74] See further European Commission, Directorate-General for Employment, Social Affairs and Inclusion, De Wispelaere, F., Pacolet, J., De Smedt, L., *Export of family benefits : report on the questionnaire on the export of family benefits : reference year 2020*, Publications Office of the European Union, 2022, https://data.europa.eu/doi/10.2767/611063.

[75] *Moser*, C32/18, EU:C:2019:752, paragraph 36; *Pinna* C41/84, EU:C:1986:1.

[76] *Commission v Austria*, C-328/20, EU:C:2012:605.

The Common Travel Area (CTA) has allowed British and Irish citizens to take up residence in each other's territory and to access all social security rights, as well as social housing, in each other's state on the same basis as its own citizens.
In addition to the CTA, Ireland and the UK have entered into a range of bilateral agreements over a number of decades to protect the social security rights of Irish and British nationals working in each other's territory. Of note, for example, is the 2007 Irish Bilateral Agreement on Social Security which mainly covers persons who have worked in parts of the UK, including the Isle of Man and the Channel Islands, who are not covered by the EU Coordination Regulations.[77]

2. The Post-Brexit Rules

2.1. The Withdrawal Agreement (WA)

Individuals protected under Part 2 of the Withdrawal Agreement (as fully defined under Articles 30-32 – see Part One of this report)[78] will continue to benefit directly from the social security entitlement rules contained in the Social Security Co-ordination Regulation. And so, **for protected EEA nationals and their family members living in Northern Ireland, the Social Security Co-ordination Regulation will continue to have full legal effect as between the EU and the UK,** i.e. its rules on social security can be invoked directly before the UK courts, and will prevail over any conflicting domestic rules. Equally, protected UK nationals with a right of residence in the EU, as well as their family members, remain within the scope of the WA's social security coordination provisions.
By these means, protected EEA nationals in Northern Ireland retain their right to any family benefits they already receive, to apply for new family benefits (provided they meet the domestic eligibility requirements), and to export family benefits between the UK and any Member State of the EU.[79]

> And so, Latvian parents with EU Settled Status living in Northern Ireland can continue to or submit a new claim for child benefits in relation to their children, in accordance with the Northern Ireland child benefit rules, on the same basis as nationals.
> Equally, a German national with EU Settled Status who is employed in Northern Ireland but whose family lives in Germany can continue to export his family-related benefits in respect of his children living in Germany.

More contentious has been the status of those EU citizens who do not fully meet the requirements for protection under Part Two of the WA, but have still been granted a temporary leave to remain by the UK authorities (e.g. those granted pre-settled status pending the completion of 5 years of continuous residency to qualify for permanent

[77] S.I. No. 701/2007 - Social Welfare (Bilateral Agreement With the United Kingdom on Social Security) Order 2007.
[78] Included within the scope of this provision are employed and self-employed EU citizens and their family members, stateless persons and refugees and their family members, and third country nationals and their family members who are in one of the situations set out in Article 30(1)(a)-(d).
[79] For further elaboration on these rules, including the various categories of persons within the partial scope of the WA (Article 32) see Guidance relating to the UK's operational implementation of the social security coordination provisions of Part 2 of the EU Withdrawal Agreement: Citizens' Rights, 29 November 2021, DWP, DHSC and HMRC.

residency under the WA, or to be granted EU Settled Status under UK law). This issue is important because, in implementing Part Two of the WA, the UK decided to "waive" the usual EU law rule that lawful residency for economically inactive persons requires sufficient resources and sickness insurance. This meant that many EU citizens were granted pre-settled status even though they did not strictly qualify for protection directly under the WA itself.

The Northern Irish case of *CG v The Department for Communities in Northern Ireland*,[80] alluded to in Part One, is particularly significant in this regard. The case concerns a Dutch-Croatian single mother of two who moved to Northern Ireland in 2018 to join the father of her children. She subsequently separated from the father following allegations of domestic abuse and moved with her children to a women's shelter. In June 2020, she and her children were granted EU pre-settled status under UK rules, but her subsequent application for social assistance benefits was rejected by the Northern Irish authorities on the grounds that pre-settled status itself does not confer the right to such benefits. In their appeal against the authorities' refusal, the Tribunal referred the question to the CJEU of whether Article 18 TFEU – the right to non-discrimination on the basis of nationality – prohibits Member States from denying equal access to social assistance to Union citizens who enjoy a right to reside under domestic law.
Confirming previous rulings, the CJEU concluded that Article 18 TFEU does not, in and of itself, create a free-standing right to equal treatment; rather, that right is qualified by the conditions laid down in the EU Citizenship Directive 2004/38, the main piece of legislation governing the rights of EU nationals to enter and reside in other EU Member States. As such, only EU citizens who fulfil the residence conditions specified in Article 7 Directive 2004/38 – i.e. by pursuing an economic activity or having sufficient financial resources and comprehensive health insurance – enjoy protection against discrimination.[81] Economically inactive citizens who do not have sufficient resources may, on the other hand, be excluded from equal access to social assistance. **The ruling confirms, therefore, that, insofar as the right of EU nationals to reside in the UK in this case is granted by virtue of UK immigration law (the EU Settlement Scheme) rather than by virtue of EU law, EU citizens are precluded from relying directly on the non-discrimination prohibition set out in either Directive 2004/38 or Article 18 TFEU.**[82]
An interesting twist in the *CG* ruling, however, and one which presents something of an opportunity for children's rights campaigners, is the Court's attention to the need for the UK to uphold citizens' rights as enshrined in the EU Charter of Fundamental Rights. **Specifically, the Court stated that those with pre-settled status cannot be denied access to social assistance if it would result in a breach of Article 1 (respect for human dignity), 7 (respect for private and family life) and 24 (respect for the rights of the child) of the Charter.** As noted in Part One, as the case returns to the NI Appeal Tribunal for further consideration, the task now is to hold the Northern Irish authorities to account, in terms of the procedural rigour it adopts and the substantive factors it weighs in the balance, in justifying whether such rights have been breached.

[80] *CG*, Case C-709/20, ECLI:EU:C:2021:602.
[81] *Dano*, Case C-333/13, EU:C:2014:2358, paras 69 and 73; *Krefeld*, Case C-181/19, **[2020] EU:C:2020:794,** para 78.
[82] See also the Supreme Court ruling in *Fratila and another (AP) v Secretary of State for Work and Pensions* [2021] UKSC 53 which confirms the inferior status of those with pre-settled status in terms of being entitled to access social security benefits.

Of course, **since the Republic of Ireland remains an EU Member State, the coordination rules on social security remain entirely intact in relations between the Republic and the rest of the EU.**

2.2. *Trade and Co-Operation Agreement (TCA)*

For all other individuals who are excluded from the scope of the WA (for example those not registered or who are ineligible under the EU Settlement Scheme in NI) their access to family benefits is determined by domestic law or other international agreements.

The main instrument dealing with future EU-UK cooperation in the field of social security coordination is the TCA. The TCA contains almost no provisions on rights to residency and equal treatment for natural persons as between the EU and the UK, however, meaning that questions of residency and entitlement to social benefits are entirely a matter of each parties' internal rules.

As far as exporting benefits is concerned, the TCA contains a Protocol on future EU-UK social security coordination which covers benefits such as healthcare and pensions,[83] but importantly access to and exportability of family benefits has been entirely excluded from the scope of that Protocol. In short, for anyone not covered by the WA, there is no prospect of claiming the cross-border payment of family benefits under the terms of the TCA, e.g. from Northern Ireland to France, or from Germany to Northern Ireland. This includes child allowances, long-term care (schemes related to institutional and informal care for dependent persons), special non-contributory benefits (e.g. social benefits linked to minimum subsistence) and assisted conception services. Access to these benefits will now be entirely dependent on domestic legislation and bilateral agreements.

2.3. *Relevant Ireland/NI Arrangements*

i. *The Common Travel Area*

Under the terms of the **Common Travel Agreement (CTA),** as reinforced by the Memorandum of Understanding between the UK Government, **British citizens residing in Ireland and Irish citizens residing in the UK/NI continue to have the right to access** all social security rights, as well as social housing, in each other's state on the same basis as its own citizens.

ii. *The 2019 UK/Ireland Convention on Social Security*[84]

This reciprocal agreement covers UK and Irish nationals moving between the UK and Ireland, and their family members, and largely applies equivalent provisions to the EU Coordination Regulations for this group for cash benefits (this does not include access to healthcare). Therefore, there will be certain individuals (notably those who

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[83] It is noteworthy that the TCA Protocol on social security coordination retains virtually all other social security benefits in more or less the same form as existed under the Social Security Co-ordination Regulation.

[84] Convention on Social Security between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland Dublin, 1 February 2019, [CS Ireland No.1/2019].

qualify under Articles 30-32 WA) who are covered by both this Convention and the WA. In such cases of dual coverage, the more generous provisions will take precedence.

Case Study 3: The Impacts of Brexit on Child Protection in Northern Ireland/Ireland

Context

One area in which the EU has proved particularly proactive in relation to children is in the field of child protection. Whilst child protection falls within the scope of domestic legal and policy competence, many child protection issues straddle jurisdictional boundaries, such as cross-border child abduction, sexual and labour exploitation, immigration and asylum. This reflects the reality that they cannot be addressed effectively by one Member State acting alone.

Developed under the EU's Justice and Home Affairs agenda, such measures reflect and reinforce existing international human rights standards as well as the EU's own human rights instrument, the EU Charter of Fundamental Rights. Specifically, legal measures adopted in this context are underpinned by the UN Convention on the Rights of the Child 1989 (UNCRC),[85] the UN Convention against Transnational Organized Crime 2000, its supplementary Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Council of Europe Convention on preventing and combating violence against women and domestic violence adopted on 7 April 2011, and the 2005 Council of Europe Convention on Action Against Trafficking in Human Beings.

Key principles underpinning EU child protection measures include: the fluid exchange of intelligence and data between Member States' authorities; interdisciplinary collaboration between different organisations and authorities, including the police, border authorities, legal and judicial authorities and civil society organisations; and the mutual recognition and enforcement of decisions so that victims can be protected and perpetrators be brought to justice in the event that either move to different Member States.

3. The Pre-Brexit Rules on Child Protection

The EU Legal Baseline

Prior to Brexit, whilst both the UK and Ireland had the option to exclude themselves from various EU initiatives adopted under the Justice and Home Affairs pillar – and indeed did so in relation to some immigration and asylum matters[86] - they chose to participate in a range of legislative and soft law child protection measures, notably to

[85] The UNCRC inspires Article 24 of the EU Charter (which specifies: that the best interests of the child should be a primary consideration driving all decisions relating to children; that they should have the right to express their views freely; and that they have a right to maintain relations with their parents); and Article 32 (which prohibits labour exploitation).

[86] Such as Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, *OJ L 251, 3.10.2003, p. 12–18;* and Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, *OJ L 348, 24.12.2008, p. 98–107.*

combat child trafficking,[87] online sexual exploitation,[88] the cross-border enforcement of protection orders,[89] and to ensure procedural justice for child victims of crime.[90] Of equal importance to the EU legislative instruments relating to child protection are the EU-level institutional **frameworks and processes** to facilitate cross-national gathering and exchange of information. These include:

- EUROJUST: a judicial co-operation body responsible for co-ordinating investigations and prosecutions across the Member States. It can assist with the swift resolution of problems concerned with conflicts of jurisdiction, extradition, admissibility of evidence, and the freezing and recovery of assets across borders.

- EUROPOL: the European Law Enforcement Agency which facilitates co-operation between the investigative authorities in the Member States to prevent and combat serious organised crime, including criminal activities involving children. It does this by gathering, storing and sharing data to support national law enforcement operations.

- The EUROPEAN ARREST WARRANT (EAW): a fast-track extradition procedure enabling the national judicial authorities of one Member State to secure the arrest and return of a person to their territory to answer charges of an offence. While the EAW was initially driven largely by a desire to track down suspected terrorists, it is increasingly used to bring to justice perpetrators of crimes against children following their move to another Member State. Prior to the introduction of the EAW, it took on average 12 months to transfer offenders across the EU[91], but under the EAW the process takes less than two months.[92] The EAW is being used with increasing regularity to bring perpetrators of historic sexual abuse to justice, particularly perpetrators that have moved to other Member States to live out their retirement to avoid detection. Indeed, prior to Brexit, the EAW was used over 200 times to extradite suspected child sex offenders from other EU countries to the UK.[93] Moreover, between 2010 and 2016, other Member States issued 831 EAW requests to the UK in relation to child sexual offences and over 1,000 in relation to parental child abduction or kidnapping.[94] **Ongoing use of the EAW is particularly important for the**

[87] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101/1.
[88] Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.
[89] Regulation 606/2013 of 12 June 2013 on the mutual recognition of protection measures in civil matters, OJ L 181/4.
[90] Directive 2012/29/EU on establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA.
[91] http://www.eu-facts.org.uk/what-does-the-eu-do/eu-policy-areas/european-arrest-warrant/ (last accessed Nov 18 2022).
[92] https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do (last accessed Nov 18 2022).
[93] Dawson, J., Lipscombe, S. and Godec, S. *The European Arrest Warrant,* Briefing Paper 07016, House of Commons, 18 April 2017.
[94]https://nationalcrimeagency.gov.uk/who-we-are/publications?search=May+2016&category%5B%5D=4&limit=20&tag=&tag= (last accessed 18 Nov 2022).

protection of children living in Northern Ireland or the Republic of Ireland, where perpetrators can cross the border in a matter of seconds on a daily basis.

- The second-generation Schengen Information System (SIS II) is an extensive database of real time alerts about individuals and objects (such as vehicles) of interest to EU law enforcement agencies. It includes information on people wanted under a European Arrest Warrant for alleged crimes against children and on missing children and is accessed over 600 million times a year by UK police alone. The SIS is a particularly important resource for recording and identifying missing children. It is an increasingly important mechanism for alerting agencies in other countries about missing children and for actively preventing children from going missing. Changes to the SIS II alerts system were introduced in 2016 to allow **preventative alerts** to be issued in cases of imminent risk of child abduction by parents. This allows authorities in Member States – including those who are not part of the Schengen zone, such as Ireland - to identify children at particular risk so that border guards can be informed and to allow children to be taken into protective custody. This is particularly crucial for tacking the **increasing number of parental child abductions from the UK and across the border between Northern Ireland/the Republic.**

> In 2021/22 for instance, the Northern Ireland Department of Health reported that a total of 37 young people who had already been identified as being at risk of child sexual exploitation went missing. The highest number related to the Western Health and Social Care Trust which borders Donegal, Leitrim, Monaghan and Cavan. Questions remain as to how the post Brexit framework will support co-operation and communication between Trusts and the Police in Northern Ireland and the Republic.

- **The European Criminal Records Information System** (ECRIS) provides an efficient system by which authorities in different Member States can exchange information on individuals with criminal convictions.[95] It establishes an electronic interconnection of criminal records databases to ensure that information on convictions is exchanged between Member States in a uniform and speedy way. It also provides judges and prosecutors with ready access to comprehensive information on the criminal history of persons concerned, regardless of the Member State in which that person has been convicted in the past. The system therefore significantly reduces the possibility of offenders slipping under the radar by moving to another country.

> The ECRIS system has been crucial for checking the criminal history of citizens from other Member States who qualified to work

[95] Council Framework Decision 2009/315/JHA on the organisation and content of the exchange of information extracted from the criminal record between Member States; Council Decision 2009/316/JHA on the Establishment of the European Criminal Records Information System in application of Article 11 of Framework Decision 2009/315/JHA.

as teachers in primary and secondary schools in Ireland and Northern Ireland. It also covers thousands of healthcare professionals, social welfare professionals and those working in civil society organisations representing children who have lived or worked in other EU countries prior to taking up posts in Ireland/Northern Ireland, as well as hundreds of workers crossing the Irish border daily to work with children.

- **European Protection Orders:**[96] these Orders protect a person against a criminal act which may endanger his or her life, physical or psychological integrity, dignity, personal liberty or sexual integrity. They ensure that protective orders put in place in one Member State for children (e.g. against a violent parent) remain in force in any other Member State to which the child or the aggressor subsequently move.

- **Passenger Name Records** (PNR):[97] PNR data is one of the more recent tools developed by the EU that assists in combatting crimes against children. Importantly, it fulfils a preventative function, insofar as it can inform pre-departure checks on passengers who may pose a risk to children (for example, those wanted in relation to child abduction or sexual exploitation).

4. The Post-Brexit Rules

Following Brexit, the UK is no longer taking part in the EU level child protection mechanisms described above to the same degree as before. The following summarises the new arrangements under the EU Brexit legal framework.

4.1. Withdrawal Agreement (WA)

Post-Brexit, the Withdrawal Agreement has little relevance to the ongoing management of cross-border child protection issues and is limited to 'winding down' existing arrangements contained in Part 3 (entitled 'Separation Provisions'). For instance, the WA provides that outstanding European Arrest Warrant requests issued should have been completed by the end of the transition period (31st December 2020) and that any personal/security data shared between the EU and the UK before withdrawal should have been managed/deleted safely and securely afterwards. Otherwise, the WA has little to say in this field; it is the Trade and Co-operation Agreement that is most relevant to this field.

4.2. Trade & Cooperation Agreement (TCA)

[96] Directive 2011/99/EU on the European Protection Order of 13 December 2011, *OJ L 338, 21.12.2011, p. 2–18.*

[97] Established by virtue of Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, *OJ L 119, 4.5.2016, p. 132–149.*

The TCA contains a large and complex set of provisions to govern future EU-UK cooperation in criminal matters covering child protection issues.[98] The main provisions concern: exchange of DNA, fingerprint and vehicle registration data; transfer of passenger name record data; cooperation with Europol and Eurojust; surrender and replacement arrangements for the European Arrest Warrant; mutual cooperation and assistance between judicial authorities; and exchange of criminal records. This is a new arrangement rather than a 'cut and paste' of what went before.[99] As such it is not expected to provide the same support for UK criminal justice authorities or the same level of reassurance for victims and the public in tackling crimes against children.

The basic rule is that the UK participates as a third country (not as a Member State) in the mechanisms described above, such as Europol and Eurojust. The EAW has been replaced with a similar system of **judicial surrender decisions**, but this is subject to additional third country limitations. For example, some Member States (such as Germany) do not extradite their own nationals outside the EU. As such, if a suspected perpetrator of child sex offences in Northern Ireland moves back to his/her home EU Member State which does not extradite its own nationals to third countries, that individual may escape trial altogether.

Of relevance also is the *Aleksei Petruhhin* ruling of the Court of Justice.[100] This confirmed that whilst extradition agreements between Member States and third countries fall within the competence of the Member States, the latter must exercise this competence in a manner that upholds EU citizens' fundamental rights under EU law. This can be the case if the EU citizen who is now the subject of a third country extradition request had previously exercised his or her right to free movement from his home State to another Member State (e.g. an Italian who has moved to the Republic of Ireland and is now subject to an extradition request from the UK). The Court of Justice ruled that in such a case, extradition of an EU citizen by the host State (Ireland) to a third State (the UK) is subject to a "Union preference" principle: extradition outside the EU cannot be justified if the home State (Italy) is prepared to accept the return of its own national for the purposes of prosecution under its own domestic law.

Subsequent case law has clarified the reach of the *Petruhhin* ruling. On the one hand, it appears that the burden on the host state is not excessively onerous: the host State (Ireland) need only alert the home State (e.g. Italy) to the possibility of taking responsibility for the return and prosecution of its own national; having kept the home State informed, the host State is not obliged to wait indefinitely for a response, but may then proceed to administer the extradition request from the third country (the UK).[101] On the other hand, the CJEU has ruled that the same "Union preference" principle applies also to EEA citizens (i.e. those of Norway, Iceland and Lichtenstein) in the same way as it benefits EU citizens – so, e.g. a UK request for extradition of a Norwegian

[98] The new provisions on law enforcement and judicial cooperation in criminal matters can be found in Part Three of the TCA at Articles 522-701.
[99] T. O'Sullivan 'The UK-EU Trade and Cooperation Agreement: Law enforcement and judicial cooperation in criminal matters', Law Society Feature, 29th December 2020.

[100] Judgment of 6 September 2016, case C-182/15 [GC], ECLI:EU:C:2016:630.
[101] E.g. Case C-191/16, *Pisciotti*, ECLI:EU:2018:222.

national from Ireland would be treated in the same way as a UK request for extradition of a German national from Ireland.[102]

Crucially, following Brexit, police officers in Northern Ireland no longer have access to the Schengen Information System II (SIS II).[103] Notably, a police officer who stops an individual or vehicle on the street will no longer have access to immediate, up-to-date Europe-wide information to identify if they are fleeing from justice, a suspected security risk, or a trafficked victim of modern slavery in need of protection. Investigative agencies will instead have to use the Interpol I-24/7 database, but this will not provide the same level of information at the same speed.[104] Indeed, the reliability and timeliness of the data available through Interpol I-24/7 will depend largely on the authorities across the EU Member States entering the same data they would routinely provide to SIS II onto Interpol I-24/7 with the same speed and rigour.

It is worth noting that the reduced co-operation in criminal matters provided for under the TCA provisions are vulnerable to wider changes in the EU-UK relationship. For example, if the UK significantly changes its data protection rules, as it suggests it might, that could lead to the loss of 'adequacy' status with the EU and seriously interrupt criminal cooperation under the TCA.[105]
Moreover, if the UK pursues any further attempts to undermine the European Convention on Human Rights, the EU has an option to terminate cross-border criminal co-operation specifically under the relevant provisions of the TCA (even if the provisions relating to trade remain operational).[106]

And if the EU should terminate or discontinue the TCA (for example in response to the UK's position on the Protocol on Ireland/Northern Ireland - PINI) this will mark an end to all criminal cooperation between the EU Member States and the UK. [107]

Important as the TCA is to the ongoing effectiveness of cross-border child protection, much depends on the extent to which EU child protection legislation has been incorporated into UK and Irish domestic law, and on the bilateral relations between the UK and Ireland.

2.3. Relevant Ireland/NI Arrangements: The Common Travel Area

Under the terms of the Common Travel Agreement (CTA), as reaffirmed by the Memorandum of Understanding between the UK and Ireland, **British children**

[102] See Case C-897/19, *I.N.*, ECLI:EU:C:2020:262.
[103] House of Lords European Union Committee *Beyond Brexit: Policing, Law Enforcement and Security,* 26 March 2021, p.22.
[104] House of Lords European Union Committee *Beyond Brexit: Policing, Law Enforcement and Security,* 26 March 2021, paras 60-74.
[105] In June 2021, the Commission adopted two data adequacy decisions for the UK enabling the free flow of data from the EU to the UK. These decisions will expire after four years at which point they will be reviewed to safeguard against any diminution of UK data protection standards. See further Commission Implementing Decision of 28.6.2021 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom, C(2021) 4800 final; and Commission Implementing Decision of 28.6.2021 pursuant to Directive (EU) 2016/680 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom, C(2021) 4801 final.
[106] See the detailed rules on termination and suspension of cross-border criminal cooperation laid down in Articles 692-693 TCA.
[107] Explained further in Section A (1)(ii) of Part One of this Report.

residing in Ireland and Irish citizens residing in the UK/Northern Ireland continue to have the right to access child protection services and support in each other's state, on the same basis as citizens of that state. Similarly, under the terms of the CTA, Irish and British workers working in child protection services can continue to work across the two jurisdictions. This is particularly important for looked-after children living in the border regions who may be placed in emergency care placements across the border.
An administrative complication is the need for frontier social workers and other child protection practitioners who are neither Irish nor British nationals to apply for a frontier worker's permit to continue working across jurisdictions. For example, a Spanish social worker living in Ireland and working in Northern Ireland will still retain the right to live and work in Ireland but will have to apply for a permit to work with children who are placed across the border in NI.[108]

The continued existence of the CTA makes it particularly important for the UK and Ireland to engage in closer bilateral cooperation over criminal matters in general and child protection in particular. The fact that the Republic remains subject to EU civil and criminal co-operation obligations as an EU Member State impacts on its scope for future cooperation with the UK in these fields, notably in relation to extradition and the ongoing application of data adequacy arrangements (see above).

2.4. Alternative domestic and international provisions

Insofar as Ireland remains part of the EU, it retains all of its commitments to and associated support under the EU child protection laws described above. Children in Northern Ireland are more vulnerable for the reasons summarised in s.2.2. but can continue to benefit from those protections through two main routes: a) through the incorporation of the relevant EU laws into Northern Ireland domestic law; b) through drawing on other parallel international instruments, notably those of the Council of Europe or the Hague Convention.

> For instance, the EU trafficking Directive[109] imposes duties on States to provide assistance and support to victims of trafficking (for instance, through the provision of appropriate and safe accommodation, material assistance, necessary medical treatment including psychological assistance, counselling and information) and must not be conditional upon their willingness to co-operate in any criminal investigation, prosecution or trial (Article 11). Importantly, the Directive singles out children, including unaccompanied children (Article 16), as a particularly vulnerable group, stipulating that their best interests shall be a primary consideration in all decisions and processes within the scope of the Directive. The child is entitled to an individual assessment that takes due account of their views, needs and concerns. That assessment should inform specific actions to assist and

[108] For a summary of some of the child protection concerns this raises, see Seanín Graham, 'Warning of Brexit impact on vulnerable children requiring cross-border social work care', *The Irish News, 4 September 2022.* (Last accessed 18 November 2022)
[109] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L101/1.

support them in their physical and psychosocial recovery, 'with a view to finding a durable solution for the child' (Article 14(1)). The child must be given access to education within a 'reasonable time' and a guardian or representative must be appointed to ensure that their best interests are upheld (Article 14(2). The Directive also obliges States to provide child victims with immediate access to legal advice and representation, and to ensure they are protected in the course of legal proceedings, for example by minimising the number of interviews, ensuring that those conducting them are appropriately trained, and protecting the child from any contact with the alleged perpetrators by providing evidence through video link (Article 15).

Many of these provisions have been incorporated into Northern Ireland domestic law by virtue of The Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 and are therefore retained. The Directive also reflects many aspects of the Council of Europe Convention on Action Against Trafficking in Human Beings 2005 (ECAT). As such, one might feel reassured that protection for child victims of trafficking in Northern Ireland will remain in place. However, the EU Directive is acknowledged as offering superior and more detailed provision for children than the ECAT.[110] Moreover, some aspects of the Directive have not been incorporated into Northern Ireland domestic law and are therefore not retained. Prior to Brexit, unincorporated provisions of the Directive would have been capable of being directly enforceable before the national authorities[111], unlike ECAT which cannot be relied upon directly unless domestic policy purports to give effect to it.[112]

A further risk is the introduction of new UK-wide immigration laws that may significantly undermine the devolved protections available to victims of trafficking, including the recent Nationality and Borders Act 2022 which does not incorporate specific acknowledgement of children's rights and vulnerabilities.[113]

[110] Harvey, A. Human Trafficking and Article 2 of the Ireland/NI Protocol, March 2022, at p. 16.
[111] Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1; Case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66.
[112] R(KTT) v Secretary of State for the Home Department [2021] EWHC 2722 (Admin) of 12 October 2021; JH Rayner (Mincing Lane) Limited v Department for Trade and Industry [1990] AC 2 AC 418. For a very detailed analysis of the impacts of Brexit on the rights of trafficking victims in NI, see Harvey, A. Human Trafficking and Article 2 of the Ireland/NI Protocol, March 2022.
[113] For a review of the implications of the Nationality and Borders Act, see ECPAT's briefing on the 'Nationality and Borders Bill: immigration outcomes for child victims of trafficking' February 2022.

Case study 4: Cross-border Co-operation in Family Law Matters

Context

Clarity on their status and entitlements post Brexit are particularly crucial for those managing relationships with family members across the border, particularly following parental separation and divorce. Insofar as the regulation of family arrangements is a matter of domestic law, EU efforts in this regard have been limited to determining jurisdiction and facilitating the mutual recognition and enforcement of decisions across EU borders. The EU rules that have evolved in this respect in relation to the Member States – and notably since the turn of the millennium – are heavily inspired by parallel private international law agreements applicable to non-EU signatory states, including the Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980; The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 19 October 1996; and The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, 23 November 2007.

5. The Pre-Brexit Rules on Cross-Border Family Cases

5.1. The EU legal baseline

EU law has been instrumental to facilitating parents' ability to maintain relationships with and support their children following divorce and separation, where those relationships are being conducted across borders. Prior to Brexit, all cross-border family matters involving individuals living in different EU Member States, including the determination of which jurisdiction was competent to rule on a cross-border family dispute, cross-border recognition and enforcement of agreements relating to divorce, child residence, contact, as well as cross-border parental child abduction and care (child protection) placements, were dealt with under the EU Brussels IIa Regulation (Brussels IIa).[114] Similarly, the cross-national recognition and enforcement of child maintenance arrangements was regulated under the EU Maintenance Regulation.[115] Both instruments apply to cross-border family proceedings between all EU Member States with the exception of Denmark, which exercised its right to opt out of these instruments.[116]

[114] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, OJ L338, 23.12.2003, p.1. A revised version of this Regulation was brought into effect on 1st August 2022 - see Council Regulation (EU) 2019/1111, OJ L 178/1. Amendments introduced include more efficient procedures in the event of cross-border abductions of children by one of the parents. The Regulation also reinforces the right of the child to be heard in all proceedings concerning the child.

[115] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.1.2009, p.1.

[116] See Treaty on the Functioning of the European Union Protocol (No 22) on the position of Denmark, *OJ C 326, 26.10.2012, p. 299–303, Article 1, Annex*. Both the UK and Ireland chose to opt into these instruments.

This regime provides children with certainty and security around contact, care and financial support and avoids the delays and costs associated with securing new orders in other countries to which either party subsequently moves. It also prevents parents from evading their obligations by moving to another country by ensuring that decisions on such matters reached in one jurisdiction could be automatically recognised and enforced in any other Member State to which any of the parties subsequently moved.

The EU regime offers an enhanced level of protection compared to those other private international law instruments in both substantive and procedural terms. In substantive terms, the EU instruments are grounded explicitly in the children's rights obligations contained in the UN Convention on the Rights of the Child and the EU Charter of Fundamental Rights. For instance, a key objective driving Brussels IIa is to promote the best interests of the child in accordance with Article 3 UNCRC and Article 24(2) of the EU Charter.[117] It also reinforces states' obligations to ensure that the child is given an opportunity to be heard, in accordance with their age and maturity, before an order for child contact residence and return will be automatically enforceable in other Member States. These obligations have been reinforced by the Court of Justice in proceedings relating to child abduction,[118] and in the recast version of the instrument.[119]

The EU framework also includes some procedural efficiencies to reflect children's specific vulnerabilities and the need for resolution as soon as possible. Specifically in abduction proceedings, Brussels IIa (BIIa) provides that a decision as to whether a child should be returned to their habitual residence must be reached within six weeks "except where exceptional circumstances make this impossible."[120]

These EU laws also regulated parental responsibility, maintenance and parental abductions between Northern Ireland and the Republic and, although they are fully incorporated into domestic law, were directly enforceable by individuals before the national courts in the absence of any domestic implementing measures.

Brexit raises a number of questions in relation cross-border family matters including: which country has jurisdiction to determine cases concerning children in cases straddling the UK/NI and Ireland and the UK/NI and other EU Member States; how decisions reached in one jurisdiction will be recognised and enforced in another; and whether cases can be expedited given their time sensitive nature and the vulnerabilities of any children involved.

6. The Post-Brexit Rules

6.1. <u>The Withdrawal Agreement (WA)</u>

[117] See Recital 12 Preamble and Articles 12(3)(b), 15(1) and (5), 23(a) which defer to the best interests of the child as a mediating principle guiding decisions under this instrument.
[118] CJEU, C-491/10 *PPU, Joseba Adoni Aguirre Zarraga v. Simone Pelz*, 22 December 2010.
[119] Eg. Articles 26, 27(1) Regulation 2019/1111.
[120] Article 11(3) Regulation 2201/2003. This is further reinforced in Article 24 of the recast version, Regulation 2019/1111.

EU rules relating to cross-border family issues have now been revoked as far as the UK jurisdictions are concerned. The new rules are set out under Article 67(1) (Title VI Part 3) of the WA. These provisions specify that the ongoing effects of the pre-Brexit rules depend on whether the proceedings commenced before or after the end of the transition period (December 31st 2020).

In summary, for proceedings involving the UK, instituted before the end of the transition period, the EU rules continue to apply. This remains the case even if the judgment was handed down after the end of transition period. The pre-Brexit rules also apply to judgments handed down (either by a UK or an EU Member State court) before the end of the transition period, even if they have not been enforced before the end of the transition period; and to judgments declared enforceable in an EU Member State or the UK/NI before the end of the transition period but not yet enforced in an EU Member State or the UK/NI before the end of the transition period.

Courts in Northern Ireland will continue to recognise divorces and child-related arrangements granted in EU Member States (including Ireland) under the terms of the Brussels IIa and Maintenance Regulations if the proceedings started, or the divorce was granted, before the end of the transition period.

The EU Regulations will no longer apply to cases between parties: in Northern Ireland/Ireland; Northern Ireland/the rest of the EU; or the rest of the UK/Ireland where the original proceedings have been instituted **after the end of the transition period**. In such cases, parties living in NI/Ireland will defer to relevant private international law conventions to which they are parties and/or to the domestic law of the jurisdiction in question (noting that Northern Ireland law relating to family disputes differs from that of the other UK jurisdictions).

The Trade and Co-Operation Agreement (TCA) contains no reference to this area of law at all.

Of course, insofar as Ireland remains part of the EU, it will continue to adhere to the EU framework for cases involving other EU Member States (apart from Denmark).

2.2. *Alternative International Conventions*

The fall-back regulatory framework for cross-border family cases issued since the transition period is the same for internal border (Northern Ireland/Ireland) cases as it is for Northern Ireland/EU cases, which in turn, is the same framework as that which governed cases between NI and non-EU Member States even prior to Brexit. These interact with the relevant domestic legislation in place in each jurisdiction. So, for example:

- For proceedings relating to child protection and other private family arrangements (contact/residence) the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children will apply.
- **For child maintenance proceedings** the UK will defer to 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/NI and Denmark.

- **Child abduction proceedings** will be dealt with under the terms of the Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980.

It is worth noting also that the UK has signed a range of Council of Europe instruments which are applicable to cross-border family cases.[121] In the absence of their direct incorporation into domestic law, however, these are notoriously difficult to enforce and are largely superseded by the Hague framework in practice.

The impacts of Brexit on this area of law seem, at first glance, relatively straight forward compared with other issues affecting children: parties, their legal representatives and the courts can fall back on an established private international law regime that has, for some time, operated reasonably well in relation to disputes concerning non-EU Member States. However, there is no doubt that the loss of the EU family regime brings with it a loss of certainty, predictability, and expeditious decision-making. The Hague regime is simply not as streamlined as the EU framework because not all Member States have signed up to all Conventions. Moreover, Member States are much more fragmented in their coverage of jurisdictional rules, automatic recognition, and enforcement. As such, families will have to navigate the complex interaction between the private international legal instruments and domestic law applicable in each contracting state to avail of their protection.

More importantly, the Hague framework is simply not as explicit or far-reaching in its references to children's rights as the EU framework.[122] The latter has undergone significant amendment to reflect the principles and obligations enshrined in the UNCRC and the EU Charter, highlighting in particular the need to act in the child's best interests, and to ensure that the child is heard and their views given due weight in all decisions affecting them. The fact that such rights are obscured in the post-Brexit arrangements makes it all the more difficult to ensure they are upheld in practice.

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[121] Notable examples include The 2003 Council of Europe – Convention on Contact concerning Children (ETS No. 192); The 1996 European Convention on the Exercise of Children's Rights (ETS No. 160); The 1980 European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children (ETS No. 105).

[122] For a detailed review of the children's rights substance of the EU framework, see Stalford, H. *Children and the European Union: Rights, Welfare and Accountability,* 2012 (Oxford: Hart), chapters 4 and 5. See also the Handbook on European law relating to the rights of the child, 2022 edition (FRA), chapter 5.