

STUDY

Requested by the JURI committee



The Future Relationship between the UK and the EU following the UK's withdrawal from the EU in the field of family law



Policy Department for Citizens' Rights and Constitutional Affairs
Directorate General for Internal Policies of the Union
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Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Legal Affairs, explores the possible legal scenarios of judicial cooperation between the EU and the UK at both the stage of the withdrawal and of the future relationship in the area of family law, covering the developments up until 5 October 2018. More specifically, it assesses the advantages and disadvantages of the various options for what should happen to family law cooperation after Brexit in terms of legal certainty, effectiveness and coherence. It also reflects on the possible impact of the departure of the UK from the EU on the further development of EU family law. Finally, it offers some policy recommendations on the topics under examination.

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RESPONSIBLE RESEARCH ADMINISTRATOR

Roberta PANIZZA
Policy Department for Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: poldep-citizens@europarl.europa.eu

AUTHORS

Marta REQUEJO ISIDRO, Senior Research Fellow, Max Planck Institute Luxembourg/Altair Asesores,
Tim AMOS, Barrister, Collaborative Lawyer and Resolution Mediator/Altair Asesores, United Kingdom
Pedro Alberto DE MIGUEL ASENSIO, Professor, Complutense University of Madrid/Altair Asesores, Spain
Anatol DUTTA, Professor, Ludwig Maximilians University of Munich/Altair Asesores
Mark HARPER, Partner at Hughes Fowler Carruthers, Academy Court, United Kingdom/Altair Asesores

Implemented by: Altair Asesores S.L, Madrid, Spain.

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LIST OF ABBREVIATIONS

- Art.** Article
- BOE** Boletín Oficial del Estado (Spain)
- Brussels IIbis Regulation** 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, repealing Regulation (EC) No 1347/2000 OJ L 338/1, 23.12.2003
- CJEU** Court of Justice of the European Union
- DWA** Draft Withdrawal Agreement EU/UK (as of June 19, 2018)
- EU** European Union
- EWCA** England and Wales Court of Appeal
- WHC** High Court of England and Wales
- ff.** Following
- Maintenance Regulation** 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 7/1, 10.1.2009
- MS** Member State(s)
- OJ** Official Journal of the European Union
- Para** Paragraph
- TEU** Treaty on European Union
- TFEU** Treaty on the Functioning of the European Union
- UK** United Kingdom of Great Britain and Northern Ireland

EXECUTIVE SUMMARY

The requested study explores the possible legal scenarios of judicial cooperation between the EU and the UK at both the stage of the withdrawal and of the future relationship in the area of family law, covering the developments up until October 5th, 2018.¹ More specifically, it assesses the advantages and disadvantages of the various options for what should happen to family law cooperation after Brexit in terms of legal certainty, effectiveness and coherence. It also reflects on the possible impact of the departure of the UK from the EU on the further development of EU family law. Finally, it offers some policy recommendations on the topics under examination. The European instruments in the area of family law affected by Brexit will be the Regulation (EC) No 2201/2003 for matrimonial and parental responsibility matters (Brussels IIbis); and the Regulation (EC) No 4/2009 of 18 December 2008 (Maintenance Regulation) for maintenance matters. Other EU instruments in force touching upon family matters are in practice irrelevant.

A. For proceedings underway on the exit date (taken as 30/3/19), in the best case scenario the EU and the UK would already have agreed on all separation issues before the exit date. For the purpose of this study the relevant provisions of the DWA (as of June 2018), Arts. 62-65, have all been agreed at the negotiators' level. The most important rule, Art. 63, gives rise to doubts: both interpretative, and in relation to the solution retained. Regarding the former, at this stage of the negotiation process technical improvements are still possible; a clearer wording could be adopted - assuming the interpretative concerns qualify as mere technicalities. As for the latter, Art. 63 provides that the rules regarding recognition and enforcement of the Brussels IIbis and Maintenance Regulations shall apply to judgments given after the end of the transition period in legal proceedings instituted before. Whereas the solution grants individuals and families the benefit of the current regime for cross-border disputes, in the context of withdrawal it is not without risks; safeguards to ensure that the UK courts do apply EU law properly are of the essence. At present, however, key issues of the DWA about its uniform interpretation, monitoring its implementation, and settling the role of the CJEU, are still pending.

In the worst case scenario no withdrawal agreement would be reached on March 30, 2019, and the two year period contemplated under Art. 50 (3) TEU would not be extended. The consequences for disputes or cooperation procedures underway are unclear. The parties involved are well advised not to assume that their current expectations vis-à-vis the applicable legal regime will materialize. The legal setting would look different on either side of the Channel. From the UK perspective, the European Union (Withdrawal) Act 2018 was enacted in June 2018 to smooth the transition by retaining EU law as domestic law. Subsequent information discloses the Government's intention to repeal most of the EU rules relating to family law cooperation; nonetheless, cases ongoing on exit day will continue to proceed under the current rules. From the EU perspective, should the EU and the UK not reach an agreement, the UK would be considered as a third State for the purposes of civil judicial cooperation as of March 30, 2019. Therefore the intervention of the EU legislature, setting-out in a legal form some sort of unilateral transition regime, is strongly advised.

B. A first possible scenario for the future of EU/UK judicial cooperation in family matters would be characterised by no agreement between the parties and no replication of the current European *acquis* in domestic UK law. International conventions binding on the UK and the EU (or some of the MS) could provide for a fallback solution. It is however disputed whether all of them would apply automatically upon the UK leaving the EU, or whether further steps would be required.

In a second scenario EU law is kept in the UK as 'retained EU law' under the EU (Withdrawal) Act 2018. At present, the chances of this situation occurring are slim. According to the latest information disclosed by the UK's Government, only the jurisdictional rules set out in Article 3 of Brussels IIbis would be replicated in English, Welsh and Northern Irish domestic law so that these bases apply for England, Wales and Northern Ireland for all cases. The uniform interpretation and application of the rules are not ensured; moreover both the EU rules and the UK domestic law may be amended at any time leading to diverging outcomes thereafter.

¹ The validity in time of our conclusions is therefore subject to further developments at the political and legal levels. In this regard it must be recalled the recent request from a Scottish Court for a preliminary ruling on the reversibility of Article 50 (case number: C-621/18). A request to apply the accelerated procedure was also submitted. The date of the lodging of the application initiating proceedings is October 3rd.

A third option would be a bespoke agreement retaining the key features of the current judicial cooperation system. As things stand now there is a considerable gap between the expectations of the UK and the Council's Guidelines on the issue under examination; legal and political hurdles are to be expected on both sides. The replication of the Brussels IIbis and the Maintenance Regulations in whatever agreement is possible as regards the jurisdictional provisions; conversely controls should be imposed for the recognition and/or enforcement of UK decisions, to be performed by the requested MS.

C. The UK has opted-in to the majority of the EU Regulations in civil and commercial matters. Conversely, in family matters the 'opt-in' decision has been much more limited. The corollary of this restricted participation in EU family law on the side of the UK is that not much will be lost in terms of substantive input for promoting harmonization after exit – but not much will be gained in terms of faster negotiations either.

INTRODUCTION. NEGOTIATIONS EU/UK - BACKGROUND AND STATE OF PLAY

Background - From June 23, 2016, to date

On June 23, 2016 a referendum was held in the UK to decide whether the UK should leave or remain in the European Union; leave won by 52% to 48%. On March 29, 2017, Sir Tim Barrow, the British ambassador to the EU, delivered the official 'Art. 50 notice' to European Council President Donald Tusk starting the exit mechanism provided in Art. 50 TEU. Hence why the prospective exit date is taken as March 30, 2019: the moment of exit falls at 11pm UK Time on March 29, 2019.

The negotiations for an orderly withdrawal of the UK from the EU started in June 2017. On the side of the EU the Commission acts as the negotiator on instructions given by the Council for a two-phased process: the first phase intends to provide clarity and legal certainty regarding the separation of the UK from the EU; at the second stage the negotiations aim at reaching an agreement on a future relationship. Moving from the first phase to the second was declared conditional upon the positive assessment by the EU27 leaders and the European Parliament of the evolution of the first phase. This positive assessment was made in December 2017.²

Phase 1: Withdrawal. Following the Council Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, approved on 22 May 2017, the Commission's Position paper transmitted to EU27 on Judicial Cooperation in Civil and Commercial Matters, of June 29, 2017, communicated to the UK on July 12, 2017, set out the main principles to be applied on the withdrawal date to the winding down of the existing relationship between the EU and the UK. In response to this document the UK Government produced a paper entitled *Providing a cross-border civil judicial cooperation framework. A future partnership*, on August 22, 2017, stressing the need to agree on a new civil judicial cooperation framework for future cases mirrored on existing provisions. Judicial cooperation in civil and commercial matters in the context of separation was addressed in an Annex.

A Joint report from the negotiators of the European Union and the United Kingdom Government regarding Phase 1 of the talks under Art. 50 TEU was adopted on December 8, 2017. Subsequently, a first Draft Withdrawal Agreement by the European Commission was transmitted to EU27 on February 28, 2018, and to the UK on March, 13. On March 19, 2018, a coloured text was published reflecting the progress made in the negotiation round with the UK between 16 and 19 March:³ in green, the text is agreed at negotiators' level and will only be subject to technical legal revisions at a later stage. In yellow, the text is agreed on the policy objective but drafting changes or clarifications are still required. In white, the text corresponds to proposals by the Union on which discussions are pending as no agreement has yet been found. Title VI of Part Three, entitled 'Ongoing judicial cooperation in civil and commercial matters', was coloured green except for Art. 63 - jurisdiction, recognition and enforcement of judicial decisions, and related cooperation between central authorities-, which remained white. On June 19, 2018, a joint statement from the negotiators of the European Union and the United Kingdom Government on progress of negotiations under Art. 50 TEU on the United Kingdom's orderly withdrawal from the European Union (incorporating a Draft Withdrawal Agreement, hereinafter DWA), announced further progress;⁴ and a new Art. 63 was enclosed, coloured in green.

Phase 2: Future relationship. The European Council (Art. 50) adopted on March 23, 2018, the guidelines on the framework for post-Brexit relations with the UK, which will help the EU negotiator to start discussing the framework for the upcoming reports. Cooperation on civil and commercial matters in the broad sense is not mentioned therein; only family matters are, in Guideline 10.

² European Council (Art. 50) guidelines of 15 December 2017 for Brexit negotiations; European Parliament resolution of 13 December 2017 on the state of play of negotiations with the United Kingdom ((2017/2964(RSP)), P8_TA(2017)0490. Documents available at: see Annex I.

³ Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community highlighting the progress made (coloured version) in the negotiation round with the UK of 16-19 March 2018. Available at: see Annex I.

⁴ Available at: see Annex I.

In the meantime, on March 6, 2018, the UK published a Technical note: Other separation issues Phase 2, as a follow up to the 2017 document *Providing a cross-border civil judicial cooperation framework - a future partnership paper*, reiterating the will to achieve an agreement for the future. On July 12, 2018, the Government delivered a White Paper entitled *The future relationship between the United Kingdom and the European Union*. Paras. 145-148 of Chapter 1 - Economic Partnership -, devoted to Civil Judicial Cooperation, are governed by the overarching intention of ensuring that cooperation can continue in these areas so as to keep the mutual advantages existing under the current situation.

State of play. Political and legal developments on both sides

Up to date, the state of play regarding the EU/UK cooperation in civil law matters is defined by the following elements:

In relation to the withdrawal agreement the consensus on the sole provision left open on March 2018, Art. 63 DWA, is a major step forward. However, the caveat remains 'nothing is agreed until everything is agreed'. The settlement of the pending issues - in particular, but not only, the Protocol on Northern Ireland/Ireland - is proving anything but simple. The European Council meeting at the end of June 2018 admitted to lack of substantial progress in the discussion; the prognosis of reaching a final agreement by October 2018 looks unrealistic.⁵ The final text must still undergo the constitutional procedures required for approval on both sides (see Art. 50(2) TEU, for the EU). So far, no detailed 'plan B' has been put forward at the EU level for the case where no agreement is reached in time; the European Council has nevertheless called upon the Member States, Union institutions and all stakeholders to work on preparedness at all levels for the consequences of the UK withdrawal, taking into account all possible outcomes;⁶ in response a Communication from the Commission was published on July 19, 2018 (corrected on August 27, 2018),⁷ and the European Parliament is organising a series of workshops analysing the consequences of a hard Brexit.⁸ On the side of the UK, in anticipation of a non-agreement scenario legislation has been enacted- the European Union (Withdrawal) Act 2018, of June 26, 2018 -⁹ to repeal the European Communities Act 1972, allowing for the incorporation of all existing EU legislation into domestic UK law so as to ensure a smooth transition on the day after Brexit, and bestowing the Government with the necessary competences to intervene in order to prevent or to remedy deficiencies in retained EU law. Technical notes have followed on September 13, 2018, explaining how family law cooperation will be affected by a Brexit without agreement:¹⁰

In relation to the future partnership, as already stated only family matters are mentioned in the Council Guidelines of March 2018. The discrepancy with the UK's position is apparent from a reading of the much more ambitious para. 148 of the White Paper of July, 2018. As of October 2018 how the legal frame of the future cooperation (if any) between the EU and the UK will look like is a completely open issue.

⁵C.C. Cirlig, L. Tilindyte, S. Mazur, 'The EU-UK withdrawal agreement Progress to date and remaining difficulties', PE 625.110- July 2018, under 10.1, fn. 89.

⁶ See European Council (Article 50), 23 March 2018, available at: see Annex I.

⁷ Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic And Social Committee, the Committee of the Regions and the European Investment Bank *Preparing for the Withdrawal of the United Kingdom from the European Union on 30 March 2019*, COM(2018) 556 final/2. In November 2017 the Commission had already prepared a Notice to Stakeholders entitled *Withdrawal of the United Kingdom and EU Rules in the Field of Civil Justice and Private International Law*: see below, under 2.2.2.

⁸ Three research papers from F. Fabrini, M. Dougan and F. Dehousse, on the institutional consequences of different forms of Brexit were presented on May and July 2018, and are available at: see Annex II.

⁹ 2018 (UK) c. 16.

¹⁰ Available at: see Annex II. The Technical Notes only set out information; while they are themselves deprived of any legal value, they express the purposes of the UK government and are published by the Ministry of Justice in order to (as per their own wording) 'allow businesses and citizens to understand what they would need to do in a 'no deal' scenario'. They are thus of the outmost relevance for the purpose of this study.

1. RELEVANT INSTRUMENTS IN THE AREA OF FAMILY LAW. MAJOR PROBLEMS ARISING FROM THE WITHDRAWAL

KEY FINDINGS

- The European instruments in the area of family law affected by Brexit will be the Council Regulation (EC) No 2201/2003 of 27 November 2003 (Brussels IIbis Regulation) for matrimonial and parental responsibility matters; and the Council Regulation (EC) No 4/2009 of 18 December 2008 (Maintenance Regulation) for maintenance matters. The Regulation No 606/2013 (on protective measures), and the European Protection Order Directive 2011/99/EU introducing the European Protection Order, must also be recalled although their application is practically non-existent, at least so far.
- For proceedings under way on exit date, in the best case scenario the EU and the UK would have agreed upon all separation issues and the agreement would have been approved by the competent bodies on both sides before the official exit date. Doubts may arise, though, regarding the interpretation of the provisions.
- In the worst case scenario no withdrawal agreement would be reached on March 30, 2019, and the two year period contemplated under Art. 50 (3) TEU would not be extended. The consequences for disputes or cooperation procedures under way are unclear. The parties involved would be well advised not to assume that in such a scenario their current expectations as to the applicable legal regime will materialize.
- Should a permanent arrangement for UK-EU future relations not have been approved by exit date, the existence of a withdrawal agreement would still provide for some respite and a period for the negotiations to go on until December 31, 2020. If no arrangement is reached at that point the UK will be a third State for all purposes. However, if the current DWA is adopted, proceedings initiated under the transition phase but on-going after December 31, 2020, and decisions given after this date as a consequence of proceedings instituted before, would still be regulated by EU law.

1.1. Outline of the instruments

Strictly speaking, the European instruments in the area of family law affected by Brexit will be the Brussels IIbis Regulation, for matrimonial and parental responsibility matters¹¹, and the Maintenance Regulation, for maintenance matters.¹² The Regulation on mutual recognition of protection measures in civil matters (606/2013), on measures to protect those at risk of domestic violence or harassment, and the European Protection Order Directive introducing the European Protection Order (Directive 2011/99/EU),¹³ must be recalled although their application is practically non-existent - practitioners consider that the very existence of these instruments nevertheless influences behaviour positively. The UK did not opt-in to the Council's decision to adopt the 2007 Hague Maintenance Protocol, nor to the Council Regulation (EU) No 1259/2010 - the Rome III Regulation -, nor to the Successions Regulation, nor to the most recent ones on matrimonial property regimes and the property consequences of registered partnerships; it is therefore not bound by them¹⁴.

¹¹ 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, repealing Regulation (EC) No 1347/2000, OJ L 338/1, 23.12.2003.

¹² 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 7/1, 10.1.2009.

¹³ Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, OJ L338/2, 21.12.2011; Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters OJ L 181/4, 29.06.2013.

¹⁴ Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (OJ L 343/10, 29.12.2010); Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ L 201/107, 27.7.2012), Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters

The Brussels IIbis and Maintenance Regulations apply to cross-border disputes and provide uniform rules on international jurisdiction, a simple regime of automatic recognition and enforcement (without exequatur, as the case may be),¹⁵ and enhanced administrative cooperation, in the following areas of family law: divorce, legal separation and nullity of marriage; financial provision after divorce for both spouses and children, in particular payment and enforcement of maintenance; child arrangements between separated parents; child abduction; child protection (guardianship, placement in foster family or institutional care).

Like all EU Regulations, those in the field of international family law are directly applicable in the Member States (MS) and prevail over domestic law. As a rule, in the relations between MS they prevail over the international Conventions existing at the time they enter into force (Art. 60 Brussels IIbis; Art. 69(2) Maintenance Regulation).

1.2. Legal problems arising from Brexit

1.2.1. Early impacts. Examples of judicial reaction in anticipation of Brexit

According to statistics compiled in 2017, there are approximately one million British citizens living in other EU MS, some three million EU citizens living in the UK, and approximately 16 million international families in the EU who could engage in cross-border litigation¹⁶. At present, family conflicts before the courts of the MS are regulated by a legal framework fully applicable since 2005 (Brussels IIbis Regulation; its predecessor, Regulation 1347/2000, had entered into force in 2001) and 2011 (Maintenance Regulation); lawyers and judges are used to it - some even may have dealt only with them in their entire professional career.

In the light of it, the fear that the UK's exit from EU family law instruments will create major problems is not just a working hypothesis. Interestingly, giving up the EU regulations could entail consequences also within the UK (although the EU (Withdrawal Act) is silent in this regard): jurisdiction for purely domestic matrimonial proceedings is currently determined by the Brussels IIbis regulation as a consequence of the Domicile and Matrimonial Proceedings Act 1973, Part II (England and Wales) and Part III (Scotland); in Northern Ireland a similar outcome results from the amendment to Art. 49 of the Matrimonial Causes (Northern Ireland) Order 1978 by The European Communities (Matrimonial Jurisdiction and Judgments) (Northern Ireland) Regulations 2001. On the contrary, however, the Regulation does not apply to intra-UK cross-border proceedings. Conversely, the Maintenance Regulation does, according to Schedule 6 of The Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.¹⁷

Previous experience with changes in family law demonstrates the need for massive training, preferably in advance, in new instruments;¹⁸ the situation will be more or less complicated depending on whether reciprocal arrangements are concluded, and on their contents. In the absence of solutions guaranteeing continuity and mutuality the situation will be presided by uncertainty, hence litigation coming up on how to deal with transition cases can be anticipated. The increased complexity of the questions before the courts will require additional time and generate further costs; the concern that litigants may neither be able to afford them nor be eligible for legal aid, thus turning up at courts unrepresented, comes on top.¹⁹

of matrimonial property regimes (OJ L 183/1, 8.7.2016); Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (OJ L 183/30, 8.7.2016). The EU MS (in the case of the instruments implementing enhanced cooperation: the participating EU MS) will apply the conflict of law rules to situations involving the UK as a consequence of the universal scope of the instruments.

¹⁵ See Arts. 40 ff Brussels IIbis Regulation for some decisions granting the right of access and ordering the return of an abducted child.

¹⁶ *Providing a cross-border civil judicial cooperation framework: a future partnership paper*, at p. 5. Available at: see Annex I.

¹⁷ The practical outcome of the lack of consistency among the jurisdictional rules (including those on *lis pendens*) applicable to matrimonial crisis and maintenance claims has been proven by the recent case *Villiers v Villiers*, [2016] EWHC 668 (Fam), [2018] EWCA Civ 1120, widely reported.

¹⁸ House of Lords, Select Committee on the European Union, Justice Sub-Committee, Oral evidence - *Civil justice co-operation post Brexit—follow-up inquiry*, May 22, 2018, Q13, available at: see Annex II. The need for training of judges and practitioners in EU law is acknowledged at the EU institutional level: for cross-border cases see Art. 81 (2)(h) TFEU. All recent research projects on the EU instruments for cross-border cases highlight the lack of familiarity on the side of judges, authorities and practitioners.

¹⁹ House of Lords, above fn. 18, Q13.

As a matter of fact, the impact of uncertainty is already there. Three preliminary references are pending before the CJEU which, albeit related to the transfer of an asylum seeker²⁰ and a surrender in compliance with a European Arrest Warrant,²¹ bear witness to the current and general state of mind of the authorities and courts in the face of the insecurity as to the arrangements which will be put in place between the European Union and the UK to govern relations after the departure of the UK – thus, uncertainty as to the extent to which the individuals concerned would be able to enjoy rights under the Treaties, the Charter or relevant legislation.

1.2.2. Different scenarios and foreseeable difficulties

A. *Ongoing judicial cooperation in civil and commercial matters: best-case scenario.* In the best case scenario the EU and the UK would have agreed upon all separation issues and the agreement would have been approved by the competent bodies on both sides before the official exit date - March 30, 2019 (March, 29, 11 pm UK time) as mentioned above. A transition phase would be open starting on the date of entry into force of the agreement and ending in approximately two years (Art. 121 DWA, in green, indicates December 31, 2020). Should the green parts of the DWA as they stand today be kept, parties to civil and commercial cross-border disputes both in the UK and in the remaining MS would find therein the solutions to be applied during this period; situations initiated under the transition phase but on-going after December 31, 2020, would be regulated as well. Difficulties may arise, though, regarding the interpretation of the withdrawal agreement (below, under 2.1.2).

B. *Ongoing judicial cooperation in civil and commercial matters: worst-case scenario.* In the worst case scenario no withdrawal agreement is reached two years after the UK's notification of the intention to withdraw. Under Art. 50(2) TEU the Treaties will then cease to apply to the UK. Indeed, according to Art. 50(3) TEU, the European Council, in agreement with the MS concerned, could still decide to extend the period; it should be noted however that the decision requires unanimity in the Council. In the no-extension setting, from the EU point of view the UK would become a third State as of March 30, 2019. The consequences for disputes or cooperation procedures opened under the 'old' regime and still under way are unclear. The parties involved would be well advised not to assume that their expectations as to the applicable legal regime will materialize: the question whether open (in the sense of pre-existing) cooperation-procedures, e.g. for assistance in locating the whereabouts of a child with habitual residence in the UK, who has been abducted to a MS, will go on according to Brussels IIbis, other Conventions, national law (in the case of the UK, under the European Union (Withdrawal) Act 2018), or not at all, is unsettled. Many scenarios would be riven with similar insecurities. By way of example: should a UK court seised for divorce proceedings after the exit date stay them of its own motion when a court of a MS has been seised between the same parties a couple of days before, until such time as the jurisdiction of the latter is established? After the exit date, is a MS's court obliged to issue a certificate under Art. 41 Brussels IIbis Regulation in relation to the right of access granted in a judgment given before in the same MS, in order to ease its enforcement in the UK? Is a MS obliged to accept such a certificate in relation to a UK judgement given after the exit date as a consequence of proceedings instituted before, and thus to enforce such judgment without the need for a declaration of enforceability and without any possibility of opposing its recognition? What about the recognition of a divorce decision given, for the sake of argument, on April 1, 2019, as a consequence of a claim filed in 2018? Would the answer be the same for a decision given on April 2020 as a consequence of proceedings instituted in March, 29, 2019?

C. *Future relationships.* Regarding the permanent arrangements for UK-EU future relations, in the scenario of no final agreement on the exit date, the situation should not be qualified as desperate provided a withdrawal agreement exists giving some respite and a quiet period for the negotiations to go on until December 31, 2020. If no arrangement is reached at that point either, the UK will be a third State for all purposes: therefore

²⁰ Case C-661/17, *M.A. and Others*, referred on November 27, 2017.

²¹ Case C-191/18, *KN*, referred on March 16, 2018; C-327/18 PPU, *Minister for Justice and Equality v RO*, EU:C:2018:733. The Court's judgement in relation to the latter was given on September 19, 2018, closely following the AG's Conclusions: the mere notification by a Member State of its intention to withdraw from the EU does not have the consequence that, in the event that that Member State issues a European arrest warrant with respect to an individual, the executing Member State must refuse to execute that European arrest warrant or postpone its execution pending clarification of the law that will be applicable in the issuing Member State after its withdrawal from the European Union. At the domestic level see Cour de Cassation, chambre criminelle, Audience publique du mercredi 2 mai 2018 N° de pourvoi: 18-82167, at <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000036900182&fastReqlid=1561028715&fastPos=1>, also quoted by the AG, on whether to stay proceedings pending a reply from the CJEU in Case C-191/18.

requests for administrative cooperation received after that date, or for the recognition and enforcement of decisions as a consequence of proceedings instituted after that date, will fall under the scope of existing multilateral or bilateral conventions or under national law, as the case may be.²² The same applies to new proceedings before the UK courts; on the contrary however, MS would still look first at the Regulations to determine their jurisdiction even in situations involving the UK (see below, under 3.2.1).

In what follows we will come back to each scenario and provide a deeper analysis.

²² Provided the DWA has been adopted, proceedings initiated under the transition phase but on-going after December 31, 2020, and decisions given after this date as a consequence of proceedings instituted before it, would still be regulated by EU law as stated in the Agreement: see Art. 121 DWA and below under 2.1.

2. SEPARATION ISSUES AND TRANSITIONAL ARRANGEMENTS

KEY FINDINGS

- The basic separation problems regarding the EU regulations concern the dates from which they will no longer apply to situations and proceedings previously governed by them. Arts. 62 to 65 DWA address this point. In June 2018 consensus was finally reached at the negotiators' level on the contents of the provisions.
- The wording of Art. 63 DWA raises interpretative doubts, in particular regarding the reference to 'legal proceedings instituted before the end of the transition period'; the notion of 'situations involving the UK', and 'the scope of the provisions regarding jurisdiction'. At this stage of the negotiation process technical improvements are still possible, therefore clearer formulae could be adopted – assuming the concerns just described qualify as mere technicalities.
- According to Art. 63 DWA, the current provisions on jurisdiction will apply in the UK and in the MS in situations involving the UK in respect of legal proceedings instituted before the end of the transition period.
- The rules regarding recognition and enforcement of the Brussels IIbis and Maintenance Regulations shall apply to judgments given after the end of the transition period in legal proceedings instituted before it. The solution grants individuals and families the benefit of the current regime for cross-border disputes. However, in the context of the withdrawal of a MS it is not without risks; appropriate precautions are hence required.
- Should an agreement not be reached on the separation issues in time, the legal setting will look different on either side of the Channel. According to information disclosed by the UK Government, broadly speaking cases ongoing on exit day will continue to proceed under the current rules. From the EU perspective, should the EU and the UK not get to an arrangement, the latter would be considered as a third State for the purposes of civil judicial cooperation as of March 30, 2019; the impact on proceedings under way on the exit day is significantly unclear.
- The DWA must provide adequate guarantees that the uniform interpretation of the Brussels IIbis and Maintenance Regulations will be preserved as regards their extended application by UK courts after the end of the transition period on December 31, 2020. A mere reference to an obligation of the UK courts to pay due account to the case law of the CJEU would not be sufficient in this context.

2.1. The Draft Withdrawal Agreement

2.1.1. Background, outline and main features

The basic separation issues regarding the EU regulations on judicial cooperation in civil matters concern the dates from which the relevant instruments shall no longer be applicable to situations and proceedings previously governed by them. From the EU perspective, the UK becoming a third state with regard to the Brussels IIbis and Maintenance Regulations requires establishing when and in what situations their provisions on jurisdiction cease to apply in order to determine the MS whose courts are competent thereafter. Moreover, it becomes necessary to establish a time limit determining which judgments and public documents benefit from the reciprocal recognition and enforcement rules provided in the EU instruments. Finally, the need to ascertain when the EU provisions on judicial cooperation procedures are no longer applicable also arises. An agreement on separation issues between the EU27 and the UK seems essential to provide certainty as to the circumstances under which the UK courts will cease to apply the relevant EU instruments.

The above mentioned issues were first addressed in detail by the EU in its Position paper on *Essential Principles on Ongoing Judicial Cooperation in Civil and Commercial matters* of July 12, 2017.²³ The UK Government's response was delivered in Annex A to its paper *Providing a cross-border civil judicial cooperation framework – a future partnership paper*, published on August 22, 2017.²⁴ The EU and the UK had the same view as to the material scope of the Withdrawal Agreement in this regard and the instruments to be considered in the field of family law - the Brussels IIbis Regulation, the Maintenance Regulation and the Regulation on protection measures in civil matters (606/2013). On the contrary however, the EU Position paper and the response of the UK Government in the Annex A showed differences in approach, particularly concerning the time limit determining which judgments benefit from the EU instruments on recognition and enforcement.²⁵ According to the EU, the provisions on recognition and enforcement 'should continue to govern all judicial decisions given *before the withdrawal date*' (italics added). In the UK's view, the existing EU rules on recognition and enforcement should also apply to those given after the withdrawal date in proceedings which were instituted before it.

A Joint report from the negotiators of the EU and the UK Government on progress during Phase 1 of the negotiations under Art. 50 TEU was published on December 8, 2017.²⁶ The report reflected that the previous negotiations had enabled good progress to be made in identifying areas of convergence and divergence. A brief reference was made to cooperation in civil and commercial matters: para. 91 merely mentioned that there was agreement to provide legal certainty as to the circumstances under which the corresponding EU instruments on those areas 'will continue to apply, and that judicial cooperation procedures should be finalised'.

Subsequently, as set out above, on March 19, 2018 the coloured text of a Draft Withdrawal Agreement was published reflecting the progress made in the negotiation round with the UK 16-19 March.²⁷ The document is structured in a Preamble (not yet included), six Parts [Common Provisions (arts. 1-7), Citizens' Rights (arts. 8-35), Separation Provisions (arts. 36-120), Transition (arts. 121-126), Financial Provision (arts. 127-150), Institutional and Final Provisions (arts. 151-168)], two Protocols (on Ireland/Northern Ireland and relating to the Sovereign Base Areas in Cyprus) and several Annexes. Title VI of Part Three on Separation Provisions, comprising Arts. 62 to 65, is devoted to 'Ongoing judicial cooperation in civil and commercial matters'. For the purposes of the present analysis the key provision is Art. 63 on jurisdiction, recognition and enforcement of judicial decisions, and related cooperation between central authorities, on which the negotiators could not get to an agreement in March, 2018. In June 2018 a Joint Statement announced that consensus had been reached on the contents of the provision²⁸.

If approved, the DWA will enter into force on March 30, 2019, as laid down in Art. 168 (in yellow). Notwithstanding this, Part Three DWA and in particular Arts 62 to 65 will apply as from the end of the transition period, which according to Art. 121 (in green) will start on the date of entry into force of the DWA and end on December 31, 2020. EU law will be applicable to and in the UK during the transition period, unless otherwise provided in the DWA (Art. 122, in green). In this regard, the applicable EU law covers the EU instruments in the area of family law affected by Brexit.

2.1.2. In particular, Art. 63 DWA

Art. 63 DWA addresses the applicability of the provisions on jurisdiction, recognition and enforcement of judicial decisions, and related cooperation between central authorities.

A. Interpretation: some doubts. The wording of Art. 63 raises some interpretative doubts. To start with, reference is made under Art. 63(1) and (2) to 'legal proceedings instituted before the end of the transition period', and to 'requests and applications received by the central authority of the requested State before the end of the

²³ Available at: see Annex I.

²⁴ Pp. 10-11, available at: see Annex I.

²⁵ A further divergence relates to choice of forum agreements (arguably of limited significance in family law disputes, save in relation to pre-nuptial agreements). According to the EU paper 'choices of forum made prior to the withdrawal date should continue to be assessed against the provisions of Union law applicable on the withdrawal date'. For the UK, 'where a choice of court has been made prior to withdrawal date the existing EU rules should continue to apply to establishment of jurisdiction, and recognition and enforcement of any resulting judicial decision, where a dispute arises to which such a choice applies, whether before or after withdrawal date.'

²⁶ Available at: see Annex I.

²⁷ Available at: see Annex I.

²⁸ Available at: see Annex I.

transition period', under Art. 63(3), but no indication is provided as to how to determine when legal proceedings have been instituted (or when a request is deemed to have been received). The provisions of the EU Regulations on pending cases refer primarily to the contexts of *lis pendens* and related actions and use a different terminology (Art. 16 Regulation Brussels IIbis, Art. 9 Maintenance Regulation.) The possibility of extending the criteria to the situation now in question is disputable.²⁹ On the other hand, in the absence of an autonomous definition, recourse to the national procedural law of the forum will be needed, leading to different outcomes in practice.

The notion of 'situations involving the UK', as the requirement for the MS to apply the provisions of Art. 63, gives rise to doubts as well. The formula is rarely used in the DWA, but it may be found in other provisions (see Art. 58, Art. 59). In Art. 63 the expression tries to cover too much at the expense of clarity and accuracy. It is here submitted that it is intended to encompass, in one go, all the situations – and only the situations - before the court of a MS in which the connection to the UK would have determined the application of the EU Regulations, had the UK not stepped out of the EU. By way of example: the provisions on recognition and enforcement regulate the recognition and enforcement of a judgment given in a court of a MS on the territory of another MS. But if the UK is the State of origin of a divorce or a maintenance decision, and recognition is asked for in (let's say) Spain, Italy or France, under the DWA those MS would apply the EU Regulations. That the case at hand may have further connections with the UK, even significant ones - for instance that the habitual residence of one of the parties involved is located there -, is unimportant. In other words, the fact that a situation 'involves' the UK will be of interest when the type of involvement matches the (or one of the) Regulation's applicability criteria; otherwise the connection to the UK is immaterial, and does neither trigger nor impede the application of the EU regulations by a (remaining) MS.

At any rate, the vagueness of the notion 'situations involving the UK' is to be deplored. In certain areas, such as recognition and enforcement of judgments, it seems possible to define in a much more precise way the situations in which the application of the relevant instruments will be affected as a consequence of the UK leaving the EU. It should be recalled that Art. 63 is coloured in green, thus technical improvements are still possible - assuming the concerns just described are considered mere technicalities.

B. Jurisdiction. Regarding jurisdiction Art. 63 approach is in line with the (to a large extent) concurring views expressed by the EU and the UK in their previous position papers. The basic rule in Art. 63(1) is that the existing provisions on jurisdiction, including those of the Brussels IIbis and the Maintenance Regulations, shall apply 'in the UK, as well as in the MS in situations involving the UK, in respect of legal proceedings instituted before the end of the transition period'. The application of the existing jurisdiction rules to proceedings instituted before the relevant time limit –the end of the transition period- is fully consistent with previous practice concerning transitional provisions in EU regulations on judicial cooperation in civil matters. This is illustrated by the content of Art. 64(1) Brussels IIbis Regulation and Art. 75 Maintenance Regulation: both establish that only legal proceedings instituted after their respective dates of application fall under the scope of their jurisdictional rules, hence the previous regimes continue to apply to proceedings instituted before those dates.

In light of its consistency with the transitional provisions of the relevant EU Regulations, the solution laid down in Art. 63(1) DWA seems appropriate in terms of legal certainty. However, it is to be noted that it leads to the application by the UK courts of the EU rules for jurisdiction after the end of the transition period - although limited to proceedings instituted before that date. This raises some concerns in connection with the rules on recognition and enforcement, which are closely linked to those on jurisdiction: we will come back to this below (see under C).

The 'provisions regarding jurisdiction' comprise indisputably the grounds for jurisdiction established in each EU Regulation. However, doubts may arise about choice of court clauses, which in the UK are not uncommon in pre-nuptial agreements in higher asset cases. Under Art. 63(2) DWA March 2018, Art. 4 Maintenance Regulation would have applied in respect of the assessment of the legal force of agreements of jurisdiction or choice of court

²⁹ For an example of the complexity of the issue see CJEU case C-173/16, *MH v MH*, EU:C:2016:542: Art. 16.1 Brussels IIbis '(...) must be interpreted to the effect that the 'time when the document instituting the proceedings or an equivalent document is lodged with the court', within the meaning of that provision, is the time when that document is lodged with the court concerned, even if under national law lodging that document does not of itself immediately initiate proceedings.' In the UK see the recent decision under the citation [2018] EWHC 2035 (Fam), with the decision still pending as to whether/how the case is to be reported.

agreements concluded before the end of the transition period; the provision has not been retained in the June version. Doubts may be expressed as well regarding rules which do not aim directly at distributing jurisdiction among the MS, but rather at indicating how to exercise it under specific circumstances. Significant examples are Art. 11 Brussels II bis, Arts. 17 and 18 of the same Regulation, or Arts. 10 and 11 Maintenance Regulation. Before June 2018, the rules on *lis pendens* and related actions in both Regulations raised similar doubts. In this respect the text of Art. 63 DWA in June 2018 entails a significant development in comparison with the wording which was used in March 2018: it clarifies that Art. 19 Brussels IIbis and Arts 12 and 13 Maintenance Regulation will apply in respect of proceedings or actions related to legal proceedings instituted before the end of the transition period. This explanation is particularly important since the coexistence of several courts having jurisdiction is expressly provided for in those Regulations,³⁰ and legal certainty in the treatment of parallel actions is of the essence. Although – again - the provision could have been more explicit, it seems that the only sensible interpretation is the following: Art. 19 Brussels IIbis and Arts 12 and 13 Maintenance Regulation apply to parallel/related proceedings when the claim before the court second seized was brought after the end of the transition period, on condition that the later proceedings are related to proceedings instituted before the end of the transition period.³¹

Retaining Art. 19 Brussels IIbis and Arts. 12 and 13 Maintenance Regulation under Art. 63(1) will help minimize the possibility of irreconcilable judgments that would undermine the free circulation of judicial decisions between (and within) the EU and the UK. In this connection, it is noteworthy that the transitional solutions agreed in Art. 63 (on *lis pendens*/related actions and recognition and enforcement of judgments) are in harmony: in both areas the existing rules apply to legal proceedings instituted before the end of the transition period. The application of the rules currently in-force in respect of *lis pendens* and related actions to situations in which the second proceedings were brought after the end of the transition period is consistent with the transitional provisions on recognition and enforcement of the DWA. Under those provisions, recognition and enforcement of the judgment rendered by the court first seized in the State where the second lawsuit was filed shall be governed by the existing rules.

C. Recognition and enforcement. As already mentioned (above under 2.1.1), in the domain of recognition and enforcement of judgments a significant divergence in approach could be found between the EU Position paper of 13 July 2017 and the UK Government's response of 22 August 2017. The June 2018 Joint statement shows that an agreement has been reached that the provisions regarding recognition and enforcement of the Brussels IIbis and Maintenance Regulations shall apply to judgments given in legal proceedings instituted before the end of the transition period.

Under Art. 63(2) DWA the Brussels IIbis and Maintenance Regulations shall apply as well to authentic instruments formally drawn up or registered and court settlements approved or concluded before the end of the transition period. Moreover, Regulation (EC) No 805/2004 – which only partially applies to family matters-³² shall apply to judgments given in legal proceedings instituted before the end of the transition period, provided that the certification as a European Enforcement Order was applied for before the end of the transition period.

Allowing all judgments given in legal proceedings instituted before the end of the transition period, regardless of the date of pronouncement, to benefit from the reciprocal regimes of recognition and enforcement of existing EU instruments, matches the approach previously adopted by some EU instruments where the transitional provisions extend the scope in time of the regimes they supersede. In particular, pursuant to Art. 66(2) of Regulation (EU) 1215/2012 that repeals Regulation (EC) No 44/2001, the latter 'shall continue to apply to judgments given in legal proceedings instituted' before 10 January 2015 (the date on which Regulation (EU)

³⁰ See, e.g., CJEU Judgment in case C-168/08, *Hadadi*, EU:C:2009:474, with regard to the system of jurisdiction established by the Brussels IIbis Regulation concerning the dissolution of matrimonial ties.

³¹ As already said -see 2.1.1 *in fine*- EU law shall be applicable to and in the UK during the transition period, thus any other interpretation would render the mention of the provisions redundant.

³² Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143/15, 30.4.2004, is relevant in matters relating to maintenance obligations since it was not replaced by the Maintenance Regulation with regard to European Enforcement Orders on maintenance obligations issued in a Member State not bound by the 2007 Hague Protocol, such as the UK - see Art. 68(2) Maintenance Regulation.

1215/2012 became applicable).³³ Moreover, it is in line with the most recent practice of EU institutions. In fact, the same approach has been proposed by the Commission regarding the reform of the Brussels IIbis Regulation. Pursuant to Art. 78(2) of the Recast Proposal, 'Regulation (EC) No 2201/2003 shall continue to apply to decisions given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to agreements approved or concluded before [the date of application of this Regulation] which fall within the scope of that Regulation'.³⁴ It should be noted, though, that this is not the case either under Art. 64 Brussels IIbis or Art. 75 Maintenance Regulations, which tend rather to extend their own scope of application backwards, i.e., to decisions given after their date of application but as a consequence of proceedings initiated before it - or even to decisions given in a MS before the date of application of the Regulations, under certain conditions.

The application of the existing rules on recognition and enforcement to judgments given after the end of the transition period as a result of proceedings commenced before such date grants individuals and families the benefit of the current favourable and efficient regimes for cross-border disputes - exequatur has even been abolished in some contexts.³⁵ Therefore, in principle the option is to be welcomed: the more so if Art. 63 is interpreted as to comprise all provisions related to jurisdiction, including those on examination as to jurisdiction and admissibility (but see our doubts above, under 2.1.1 A), and if Art. 63 DWA is construed in all respect of the connection between the rules on recognition and enforcement in those instruments, the rules on jurisdiction and the mechanisms which protect the defendant's rights during the declaratory proceedings in the State of origin.

Notwithstanding this, in the context of the withdrawal of a MS that option would still pose certain risks and require appropriate precautions.³⁶ The rules on recognition and enforcement laid down by the EU Regulations on judicial cooperation in civil matters are based on mutual trust in the administration of justice in the European Union. As the CJEU has noted, the principle of mutual trust 'requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other MS to be complying with EU law and particularly with the fundamental rights recognised by EU law'.³⁷ In the field of family law the European Council Guidelines of March 23, 2018, have stressed that future judicial cooperation with the UK in matrimonial, parental responsibility and other related matters would require strong safeguards to ensure full respect of fundamental rights.³⁸ In this regard, the implementation of mechanisms guaranteeing the correct application of EU law by UK courts after the end of the transition period with respect to proceedings commenced before that date is of the essence. Only if adequate safeguards are established in that respect will it be appropriate to allow judgments rendered after the end of the transition period to benefit from the simplified rules of recognition and enforcement laid down by the Brussels IIbis and Maintenance Regulations. Negotiations on other issues not yet agreed in the DWA take on special relevance in this context, particularly those concerning the application of EU rules by UK courts by virtue of the DWA after the end of the transition period (below, under 2.1.3).

D. Cooperation. Finally, Art. 63(3) deals with separation issues concerning cooperation procedures. Its basic approach is that the existing EU rules shall apply to requests received by the UK or a remaining MS before the end of the transition period.³⁹ This applies to Chapter IV Brussels IIbis Regulation and Chapter VII Maintenance Regulation on cooperation between central authorities (Art. 63(3)(a) and (b) DWA). The position agreed favours the application of the current regimes since it does not subject the application of the cooperation mechanisms to additional requirements. Pursuant to Art. 63(3)(f) DWA, Regulation (EU) 606/2013 on mutual recognition of protection measures in civil matters shall apply to certificates issued before the end of the transition period.

³³ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351/1, 20.12.2010.

³⁴ Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), 30.6.2016, COM(2016) 411 final, p. 72.

³⁵ Above, fn. 15.

³⁶ A. Dickinson, 'Back to the future: the UK's EU exit and the conflict of laws', (2016) *Journal of Private International Law* 195, at p. 208, and P.A. De Miguel Asensio, 'Reglamento Bruselas I: Perspectivas en relación con la retirada del Reino Unido', (2017) *Anuario español de Derecho internacional privado* 71, at pp. 70-80.

³⁷ CJEU Judgment, C-681/13, *Diageo Brands*, EU:C:2015:471, paras. 40 and 63, with further references.

³⁸ Guideline 10 in fine, document available at: see Annex I.

³⁹ Above, under A, on the absence of guidance as to what this exactly means.

2.1.3. Outstanding issues (as of September 2018)

According to the Joint statement from the negotiators of the EU and the UK Government published on June 19, 2018, the rules currently in-force on recognition and enforcement will apply to judgments given by UK courts after the end of the transition period as a consequence of proceedings instituted before. As already hinted, such a solution calls for a commitment on the side of the UK to apply the relevant EU provisions on jurisdiction, including the safeguards for defendants, to those proceedings. At present, though, key issues regarding the mechanisms ensuring the application in the UK of Union law where the DWA so requires remain open. Significant outstanding subjects in this regard are those dealt with in Art. 4 DWA on the methods and principles relating to the implementation of the DWA, which remains in white. The same applies to Art. 83 DWA, on the jurisdiction of the CJEU to give a preliminary ruling in cases before a court or tribunal in the UK relating to facts that occurred before the end of the transition period, and to Art. 85 DWA, which deals with the binding force and enforceability of judgments and orders of the CJEU handed down after the end of the transition period. Art. 153, on the jurisdiction of the Court of Justice of the European Union concerning Parts Three and certain provisions of Part Five, applicable without prejudice of Art. 83, has not been agreed either. A satisfactory agreement on those issues is nevertheless a necessary precondition for the implementation of the separation provisions agreed in Art. 63 DWA on jurisdiction and recognition and enforcement of judicial decisions.

2.2. 'Nothing is agreed until everything is agreed'. Brexit without agreement

An agreement has already been reached in the DWA on the separation issues concerning the relevant EU Regulations in family law. However, the negotiations are taking place under the caveat that nothing is agreed until everything is agreed. In the present circumstances, a scenario of Brexit without agreement cannot be ruled out. As previously discussed, the keyword would then be 'uncertainty'. As of September 2018, this would be especially true for the procedures under way in the (remaining) MS, in spite of the Commission's efforts to date.⁴⁰ On the side of the UK, the situation looks *a priori* easier thanks to the initiatives taken to be prepared for all eventualities, including 'no deal'. This notwithstanding, a number of issues remain still undecided - or/and are subject to further legislative action.⁴¹ The information published by the UK Government in September 13, 2018, regarding ongoing cases on exit date in the event of 'no deal', is superficial, and individuals with cases in progress are encouraged to seek legal advice from lawyers who are likely to be puzzled themselves.

2.2.1. UK: the European Union (Withdrawal) Act 2018, and beyond

While the negotiations EU/UK are going on to agree on the terms of the UK's withdrawal and of its future relationship with the EU, the UK has started to prepare a UK statute book for life outside the EU. Already in October 2016 the UK Prime Minister promised a 'Great Repeal Bill', the aim of which would be to repeal the European Communities Act 1972 (by which the UK joined the EU, then the EEC), and to smooth the transition by ensuring that all laws remain in force until specifically repealed. The Bill received the Royal assent and became an Act of Parliament -the European Union (Withdrawal) Act- on June 26, 2018. The European Communities Act 1972 is repealed (Section 1 of the Act), and EU regulations replicated into UK domestic law (Section 3(1) of the Act). At first sight, the relevant family law instruments – the Brussels IIbis and the Maintenance Regulations- would appear to fall within the category of 'retained EU law' for the purposes of the Act,⁴² and in the case of there being no withdrawal agreement, according to Section 3 (1) they would form part of domestic law on and after exit day in so far as operative immediately before exit day. However, the Act also enables amendments to be made to the laws that would otherwise no longer operate appropriately once the UK has left.⁴³ Under the heading 'Family law

⁴⁰ See above fn. 7.

⁴¹ The legal bases for such actions are currently unclear: on the one hand, Ministers have been empowered to modify retained law if needed - see Section 8 EU (Withdrawal) Act 2018; see as well Explanatory Notes, para. 2, available at: see Annex I. On the other hand, Section 7 of the Act determines the future status of the retained EU law and stipulates that the transferred EU law is at least subject to any Act of the UK Parliament. If the Brussels IIbis and the Maintenance Regulation fall within the category of 'retained direct principal EU legislation', they could only be modified under Section 7(2) of the Withdrawal Act.

⁴² On the meaning and doubts surrounding the notion of retained law see W. Ernst, 'Retained EU-Law. Probleme einer neuen Rechtserscheinung', (2018) *Zeitschrift für die gesamte Privatrechtswissenschaft* 369.

⁴³ Above, fn. 41.

cooperation without corresponding Hague Conventions' the Technical Note published by the UK Government in September 13, 2018, already indicates EU family law rules which will be either repealed or replicated (not surprisingly, rules based on the logic of reciprocity will be repealed;⁴⁴ but not only those ones.)

In this context it has to be noted that there are three devolved legislatures in the UK -Scotland, Northern Ireland and Wales- with different levels of autonomy. Upon Brexit, devolved administrations will (or should) see their decision-making power increased in the areas of devolved powers which are currently the competence of the EU. This is subject to the resolution of the intra-UK constitutional wrangle as to the so-called "power grab" or "Westminster power grab" by which, so it is feared, the Government could repatriate from Brussels powers which have since 1973 been devolved to the regions, rather than handing those powers on/back to the relevant regions as part of their devolved powers. Further, the devolved administrations will be entitled to amend retained EU law if deemed convenient, except when prevented from doing so by regulations made by UK Ministers. This may entail consequences in the domain of Private International Law: subject to the caveat just mentioned, retained EU Regulations in that field may be amended in a different way within the UK.⁴⁵

In addition to the abovementioned rubric 'Family law cooperation without corresponding Hague Conventions', the Technical Note of September 13, 2018, includes a separate heading on ongoing civil and family cases; it can therefore be safely assumed that the former is meant for proceedings initiated after March 30, 2019, and the latter for procedures underway on exit day. These are addressed with one sentence: 'Broadly speaking, cases ongoing on exit day will continue to proceed under the current rules', coupled with the explicit recognition that no certainty exists as to how the EU will react. There is no explanation as to what is meant by 'current rules'.

2.2.2. EU: an unforeseen case

The no-agreement possibility has indeed triggered reactions at the EU level;⁴⁶ however, the outcome is in need of further elaboration. Already in November 2017 the Commission had prepared a Notice to Stakeholders entitled *Withdrawal of the United Kingdom and EU Rules in the Field of Civil Justice and Private International Law*⁴⁷ according to which 'Subject to any transitional arrangement that may be contained in a possible withdrawal agreement, as of the withdrawal date, the EU rules in the field of civil justice and private international law no longer apply to the United Kingdom.' In other words, in the absence of arrangement, the UK would be considered as a third State for the purposes of civil judicial cooperation as of March 30, 2019; unfortunately, the Notice does not go into the details of a no-agreement scenario for proceedings under way; the same applies to a request for recognition/enforcement of a decision given after the exit day as a consequence of proceedings started before, and even to requests relating to decisions given before the exit day, if they are filed post-Brexit⁴⁸. It should be acknowledged from the outset that a straight-forward, "one-size fits all" answer, is unlikely. In any event, it is undoubtedly in the interest of all parties involved that an answer is provided by the EU lawmaker:⁴⁹ certainty for all and the uniform application of the Regulations in the MS are at stake.⁵⁰ In this context, the first solution that

⁴⁴ See J. Carruthers, E. Crawford, 'Divorcing Europe: reflections from a Scottish perspective on the implications of Brexit for cross-border divorce proceedings', (2017) *Child and Family Law Quarterly* 244: 'With regard to bilateral or reciprocal private international law arrangements, it is meaningless, indeed delusional, to say that the UK will convert the *acquis* into British law.' Also, House of Lords European Union Committee, *Brexit: justice for families, individuals and businesses?*, 17th Report of Session 2016–17, pp. 21–22; at p. 32: 'We are concerned that, when this point was put to him, the Minister did not acknowledge the fact that the Great Repeal Bill would not provide for the reciprocal nature of the rules contained in these Regulations'. House of Lords, Select Committee on the Constitution, *European Union (Withdrawal) Bill*, 9th Report of Session 2017–2019, at para 27: many EU law rights (for example those relating to the internal market and citizenship) are reciprocal in nature; they might make little sense, if any, post-Brexit (para. 27). Documents available at: see Annex II.

⁴⁵ The Technical Note of September 13, 2018, acknowledges that this may be the case regarding jurisdiction for divorce in Scotland, as civil law, understood as to comprise private international law, falls under the legislative competence of the Scottish Parliament (see Scotland Act 1998).

⁴⁶ Above, fn. 6, 7, 8.

⁴⁷ Available at: see Annex II.

⁴⁸ It could be claimed that the transitional provisions of the Regulations are only applicable provided the Regulations themselves apply, and therefore do not allow for the use of the regime of recognition and enforcement to requests filed once they are no longer in force between the State giving the decision (the UK) and the requested MS (the remaining ones).

⁴⁹ Judicial cooperation in civil matters is not (or not yet) a policy area under examination by the Commission, according to the document *Pending and planned legislative proposals for the purposes of Brexit preparedness (state of play 12 June 2018)*, available at: see Annex II.

⁵⁰ This does not necessarily entail that one and the same solution should be adopted for all the EU regulations pertaining to the European Area of Freedom, Security and Justice: compare C-514/10, *Wolf Naturprodukte GmbH*, EU:C:2012:367, and C-527/10, *ERSTE Bank Hungary Nyrt.*, EU:C:2012:417, on the temporal scope of the Regulations 44/01, on civil and commercial matters, and 1346/00, on insolvency, respectively. In

comes to mind would be to continue “business as usual”. In practice, this would amount to a unilateral application of the DWA. The difficulty of this proposal lies first -but not only- at the level of the principles inspiring the EU Regulations. Technically, under Art. 64.1 Brussels IIbis/Art. 75.1 Maintenance Regulations their provisions apply to legal proceedings instituted after their respective date of application; it could be argued that they remain applicable until the very end of the proceedings, regardless of whatever change in the circumstances in the meantime. However, it is doubtful that this scenario was in the mind of the drafters of the transitional rule; therefore the question whether the UK, having been a MS when the proceedings were instituted, should be considered a MS until they come to an end, is legitimate. Ultimately, the Regulations have been enacted with one common overarching objective - maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured- which the UK will no longer share after the exit date.

On the other hand, it would be sensible to acknowledge that the crux of the matter lies elsewhere, namely in the protection of the individuals involved and - as always in times of change- of legal certainty. A combination of this argument with the abovementioned one on the principles may be better reflected in a proposal for different solutions depending on the specific issue under examination:

A. *On-going proceedings, declaratory stage.* MS courts already seized before the exit day should keep on applying the jurisdictional rules of the Regulations, including the ones meant specifically for the protection of the defendant/respondent (such as Arts. 17, 18 Brussels IIbis Regulation; Arts. 10, 11 Maintenance Regulations), regardless of whether the case presents close connections with the UK leading to presume recognition/enforcement will be requested there. In this respect it is worth recalling that any MS decision is eligible to circulate freely in the European area: in other words, the interest at stake is not only recognition and enforcement in the UK.

B. *Exception for specific provisions.* Rules of the Regulations which focus on scenarios involving two MS may require a more sophisticated approach if one of them is the UK after exit day: Arts. 11 (return of a child), 15 (transfer to a court better placed to hear the case), or 19 (*lis pendens* and dependent actions) of the Brussels IIbis Regulation provide an example. It is submitted that the answer may be different depending on the rule at stake and the specific circumstances: for instance, the best interest of the child may advise that the courts of a MS accept jurisdiction after exit day upon a request made by a UK court seized before, on the basis of Art. 15(1)(b). However, for *lis pendens* and related or dependent-actions situations where the jurisdiction first seized is the UK, the strong connection between the rules applicable to these settings and the ones on recognition and enforcement advocates an answer linked to what is decided as regards recognition and enforcement.

C. *Recognition and enforcement.* In this context, it is reasonable to assume that UK decisions made before the exit date respect all guarantees accorded to the parties in the Regulations; therefore they should be admitted to the regime of the latter without further ado, just as if Brexit had not happened. For decisions given after exit day as a consequence of actions filed before, the application of the Regulations - which, as said, would amount to the unilateral application of Art. 63(2) DWA- is *a priori* not appropriate.⁵¹ In default of an agreement between the EU and the UK, a more restrictive approach should prevail, and the application of those instruments by the courts of the MS limited to the recognition and enforcement of UK judicial decisions given before the withdrawal date (i.e. March 30, 2019).⁵² Only in this way would it be possible to take due account of the close connection between the simplified rules of recognition and enforcement laid down by the EU Regulations and their provisions on jurisdiction and guarantees provided to the defendant in the original proceedings.⁵³ Such close connection requires an effective agreement between the EU and the UK, whereby the UK courts commit to abide by the rules on jurisdiction and the mechanisms that protect the defendant's rights during the original proceedings enclosed in the Brussels IIbis and Maintenance Regulations. In the absence of such an agreement, the simplified regime of recognition and enforcement endorsed in the EU instruments should not cover the

both cases the issue under exam was the recognition/enforcement of a decision rendered in a EU MS at a time when the Regulations had not entered into force in the requested MS. The CJEU gave a different answer for each situation, having in mind the specificities of each legal domain.

⁵¹ Technically, since the UK would be a third State a UK decision would not be ‘a judgment given in a Member State’, as required by Arts. 21.1 Brussels IIbis and Art. 23.1 Maintenance Regulations.

⁵² This would be in line with the initial EU proposal, see above under 2.1.1.

⁵³ CJEU, Case C-514/10, *Wolf Naturprodukte GmbH*, EU:C:2012:367, paras. 26-32.

judgments rendered by UK courts after the withdrawal date, even in proceedings instituted before. The balance of interests between the parties laid down by those regulations would no longer be guaranteed, and the principle of mutual trust on which the simplified recognition and enforcement of judgments is based could no longer apply. In other words: if a EU unilateral transitional regime is to be set up for the recognition and enforcement of UK decisions, it may be advisable to make it conditional upon the respect in the case at hand of a level of protection of the parties equivalent to the one currently provided by the Regulations, as interpreted by the CJEU.

D. *The EU (Withdrawal) Act 2018*. It would be fair to ask whether the application of the 'current rules' (above, under 2.2.1 in fine) would support a different, more lenient position on the side of the EU. The expression is nevertheless too vague to be sure about its real scope, i.e., as to the real equivalence of the UK and the EU rules. In addition, the so-called 'retained EU case law' (which is defined in Section 6(1)(a) of the Withdrawal Act as encompassing 'any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before exit day') will not be binding for all UK courts, and in particular not for the UK Supreme Court - see Section 6(4)(a) of the Withdrawal Act. Rather the UK Supreme Court according to Section 6(5) of the Withdrawal Act must in 'deciding whether to depart from any retained EU case law, (...) apply the same test as it would apply in deciding whether to depart from its own case law'. This independence of the UK courts from the case law of the CJEU creates uncertainty as to the coincidence of their interpretation with the one prevailing in the MS.

2.2.3. International Conventions

The current EU MS are contracting parties to some multilateral Conventions for cross-border cases: in the field of interest, the 1970 Hague Convention on the recognition of divorce and legal separations,⁵⁴ and the 1980 Hague Child Abduction Convention.⁵⁵ Besides, they have ratified the 1996 Hague Child Protection Convention on the interest of the European Community;⁵⁶ and are bound by the 2007 Hague Convention as a consequence of the ratification by the EU.⁵⁷ The 2007 Lugano Convention, adopted by the EU,⁵⁸ is also binding on them. The significance of these Conventions is addressed in this paper mainly in relation to the future EU/UK relationships (below under 3). However, they may also be of interest in the scenario of no withdrawal agreement, taking over to ensure that pending administrative cooperation procedures go on uninterrupted by Brexit; or providing for recognition and enforcement regimes to be applied to decisions given after the exit date as a consequence of proceedings instituted before. It must nonetheless be borne in mind that the outcome of the combination of EU/non-EU rules may not necessarily be satisfactory: they might not fit, or not provide for a straightforward, easy-to-predict, answer. Let's take the following example: the divorce of a couple composed of an English national and a Spanish one, both living in London for one year, would be decided by a Luxembourgish court under the Brussels IIbis regime if the Spanish spouse, having worked in Luxembourg for more than five years before moving to London, gets back to her former position, and a joint application is filed in the Grand Duchy eleven months later (see Art. 3.1 a), fifth hyphen). If the decision is given after the exit date the Brussels regimen would be over in the UK. Whether the Hague Convention 1970 on the recognition of divorce and legal separations comes into play will depend on several conditions: first, it should be deemed a 'dormant' Convention, apt to 'come back to life', thus not derogated by the Brussels IIbis Regulation.⁵⁹ Should this be the case the temporal condition may also stand in the way, for the UK made a reservation to Art. 24 of the Convention. Should the hurdles be surmounted, the answer to the request for recognition will be subject to the terms of the Convention, starting with Art. 2: however, the jurisdictional ground in our example does not match any of the criteria contemplated therein. Indeed, it should be noted that the provision does not prohibit recognition in these circumstances (on the contrary, its wording imposes recognition whenever one of the criteria is met). This philosophy is best explained in Art. 17,

⁵⁴ Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations, implemented by provisions in the Family Law Act 1986.

⁵⁵ Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

⁵⁶ Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

⁵⁷ Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.

⁵⁸ Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 147/5, 21.12.2007; Council Decision of 27 November 2008 concerning the conclusion of the 2007 Lugano Convention OJ L 147/1, 21.12.2007.

⁵⁹ Likely to be so: See Art. 61, 'In relations between Member States, this Regulation shall take precedence...'. The Convention has not been denounced by either country. See table of status as well as declarations and reservations at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=80>.

which allows in general for the application of a more favorable regime; the measure is to be greeted, except for the dose of uncertainty it carries with it. The recognition of the decision may be saved in this way, or not: it will depend on whether other rules in force in the UK offer better conditions. For the record: under the Hague Convention the question of what law was applied in the country of origin would not justify the denial of recognition as the UK has not made a reservation to Art. 19; but it might in the reciprocal scenario (i.e., a request in Luxembourg for the recognition of an English divorce; Luxembourg, like many other European contracting countries, has made the reservation).

2.3. Governance and interpretation

Part One DWA (Art. 4) and Part Six (Arts 151-168) contain provisions on the interpretation and application of the DWA (including the jurisdiction of the CJEU concerning Part Three, thus also Arts. 62 to 65), institutional aspects with the establishment of a Joint Committee, comprising representatives of the EU and of the UK, and the settlement of disputes between the EU and the UK vis-a-vis the interpretation or application of the DWA. The text of most of these provisions have been agreed at negotiators' level: not, however, those concerning the settlement of disputes which remain in white and hence reflect text proposed by the EU on which no agreement has yet been reached. The same goes for some of the rules on interpretation.

Under the DWA, during the transition period applicable EU law will produce in respect of, and in, the UK the same legal effects as those which it produces within the Union, and shall be interpreted and applied in accordance with the same methods and general principles (Art. 122.3 DWA, in green). Moreover, any reference to MS in the applicable EU law shall be understood as including the UK, unless otherwise provided in the DWA (id. loc.). According to Art. 126 DWA (in green) on supervision and enforcement, the CJEU shall have jurisdiction in relation to the UK and natural and legal persons residing or established in the UK as provided for in the Treaties. This shall also apply during the transition period as regards the interpretation and application of the DWA.

This notwithstanding, uncertainty remains as to the role of the CJEU regarding the interpretation of EU rules by UK courts in situations in which they are obliged to interpret EU rules pursuant to the DWA. Consensus has been not reached in relation to Art. 4 - except for para 2. of Art. 4(1)-, which means lack of agreement on how to interpret the provisions of the DWA referring to concepts or provisions of Union law, in particular regarding conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period, and the duty to have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period.

Art. 153 DWA on the jurisdiction of the CJEU concerning Part Three has not yet been agreed either. Neither has Art. 83, in relation to the ability of courts of the UK before which new cases are brought, relating to facts that occurred before the end of the transition period, to request a preliminary ruling from the CJEU if a question is raised concerning the interpretation of the Treaties or the validity or interpretation of acts of the institutions, bodies, offices or agencies of the Union, and the court considers that a decision on that question is necessary to enable it to give judgment in that case. The same is true for Art. 85 DWA, on the binding force and enforceability of judgments and orders of the CJEU handed down before the end of the transition period, as well as after in proceedings referred to in Articles 82 and 83. It has already been explained (above, under 2.1.3) that these provisions are of particular relevance with regard to the implementation of Art. 63 DWA and the solutions agreed on the separation issues raised by the rules on jurisdiction and recognition and enforcement of judgments. The DWA must provide adequate guarantees that the uniform interpretation of the Brussels IIbis and Maintenance Regulations will be preserved as regards their extended application by UK courts after the end of the transition period on December 31, 2020. A mere reference to an obligation of the UK courts to pay due account to the case law of the CJEU without curtailing their freedom to deviate from it, in line with the solution adopted in Protocol No 2 to the Lugano Convention, would not be sufficient in this context.⁶⁰

⁶⁰ See B. Hess, 'The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit', Max Planck Institute Luxembourg for Procedural Law Research Paper Series, N° 2018 (2).

3. OUTLOOK INTO THE FUTURE

KEY FINDINGS

- A first possible scenario for the future of EU/UK judicial cooperation in family matters would be defined by no agreement between the parties and no replication of the current European acquis in domestic UK law. International conventions binding on the UK and the EU (or some of the MS) could provide for a fallback solution. It is however disputed whether they would apply automatically upon the UK leaving the EU or whether further steps would be required.
- In a second scenario EU law is kept in the UK as 'retained EU law' under the EU (Withdrawal) Act 2018. At present, the chances of this situation occurring are slim. According to the latest information disclosed by the UK's Government, only the jurisdictional rules set out in Article 3 of Brussels IIa would be replicated in English, Welsh and Northern Irish domestic law so that these bases apply for England, Wales and Northern Ireland for all cases. The uniform interpretation and application are not ensured; moreover both the EU rules and the UK domestic law may be amended at any time leading to diverging outcomes thereafter.
- A third option -the UK's favourite- would be a bespoke agreement retaining the key features of the current judicial cooperation system. As things stand now there is a considerable gap between the expectations of the UK and the Council's Guidelines on the issue under examination; legal and political hurdles are to be expected on both sides. At any rate, the replication of the Brussels IIbis and the Maintenance Regulations in whatever agreement should be limited to the jurisdictional provisions.

3.1. EU and UK respective stance: where the emphasis is placed

As of today, there is still no common position between the EU and the UK regarding the judicial cooperation in civil and commercial matters after the transitional period (see above section 2): not only in the area of family law, but in general. It appears that both sides recognise the value of the current European acquis regarding the judicial cooperation in family matters; however, a consistent plan how to keep the current system is missing.

The Council Guidelines of 23 March 2018 on the framework for the future EU-UK relationship⁶¹ do indeed address family law: Guideline 10 states: '(...) In this context, options for judicial cooperation in matrimonial, parental responsibility and other related matters could be explored, taking into account that the UK will be a third country outside Schengen and that such cooperation would require strong safeguards to ensure full respect of fundamental rights'. Taking into account that no other field of private law is mentioned in those Guidelines, and that a Draft of 7 March 2018 for the Guidelines⁶² did not include any reference to judicial cooperation in civil matters at all (but only to judicial cooperation in criminal matters), the current document shows that the EU is aware of the importance cross-border cooperation in family law has. However, there is no clear indication as to how to proceed and reach the desired outcome in the time left.

On the side of the UK, in the policy paper of the UK government of August 2017 entitled Providing a cross-border civil judicial cooperation framework – a future partnership paper⁶³ the UK government expressed its intention to seek 'an agreement with the EU that allows for close and comprehensive cross-border civil judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework'. The paper stresses that the '[e]xisting international conventions can provide for rules in some areas, but they would not generally provide the more sophisticated and effective interaction, based on mutual trust

⁶¹ Available at: see Annex I.

⁶² Note from the General Secretariat of the Council to Permanent Representatives Committee (Art.50), XT 21022/18, available at: <https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2018/03/European-council-Art.50-23-March-2018-Draft-Guidelines-1.pdf>.

⁶³ Available at: see Annex I.

between legal systems, that currently benefits both EU and UK business, families and individual litigants'.⁶⁴ Also the White Paper of the UK government on the future relationship between the United Kingdom and the European Union of July 2018 stresses the previous position and clarifies the wish to conclude a bilateral agreement: 'The UK is therefore keen to explore a new bilateral agreement with the EU, which would cover a coherent package of rules on jurisdiction, choice of jurisdiction, applicable law, and recognition and enforcement of judgments in civil, commercial, insolvency and family matters. This would seek to build on the principles established in the Lugano Convention and subsequent developments at EU level in civil judicial cooperation between the UK and MS. This would also reflect the long history of cooperation in this field based on mutual trust in each other's legal systems. (...)'.⁶⁵ The disparity with the Council Guidelines, of a much more limited scope and much more cautious, is apparent.

The European Union (Withdrawal) Act of June 2018 replicates the EU regulations into UK domestic law (Section 3(1) of the Act), and they remain operative immediately before the exit day by virtue of Section 3(3) of the Withdrawal Act. By a Technical Note published in September 13, 2018, the UK Government has already signalled the intention to repeal partially the Brussels IIbis regulation, and completely the Maintenance Regulation.⁶⁶

3.2. Legal options, description and assessment

Against this background there are three scenarios how the future judicial cooperation in family matters could be arranged.

3.2.1. The 'no agreement' option: Fall-back solutions

In a first scenario there would be no agreement between the EU and the UK at all and no transfer of the current European *acquis* into domestic UK law. This notwithstanding, judicial cooperation between the UK and the MS of the EU could still be possible. To the extent that the UK has become a party to international conventions also binding on the EU (or some of the MS), those instruments could provide for a fallback solution.

A. *Explanation.* In the domain of the European family law *acquis* currently in place between the EU and the UK the most relevant special multilateral conventions are

- the 2007 Hague Maintenance Convention; the United Kingdom is bound by the Convention as a result of the approval by the European Union. It should be noted that the 2007 Hague Maintenance Protocol which deals with the applicable law only supplements the 2007 Convention and the Maintenance Regulation; the UK did not opt into the decision of the EU to adopt the Protocol;
- the 1996 Hague Child Protection Convention, which was, upon request of the EU, signed and ratified by the MS – including the UK – in the interest of the European Community;
- the 1980 Hague Child Abduction Convention, which was signed and ratified by all MS as Contracting States.

As will be shown below, also some of the general conventions on judicial cooperation could cover family matters – albeit only in relation to maintenance. However, the exit of the UK will raise complex issues of public international and primary EU law, as the competence for, and the administration of, the private international law conventions over the past decades has been more and more shifted from the MS level to the European Union. It is therefore still an open issue how far the applicability of the conventions will be automatic upon the UK leaving the EU or whether it would require signature and ratification by the UK or a new agreement, which on the side of the EU is likely to fall under the scope of the EU exclusive competence.⁶⁷

⁶⁴ Paras. 17-20.

⁶⁵ Available at: see Annex I.

⁶⁶ Available at: see Annex II. Civil Protection Measures adopted from EU countries would be unilaterally recognized in all parts of the UK, to ensure that vulnerable individuals would continue to be protected.

⁶⁷ Opinion 1/13 of the CJEU of 14 October 2014, EU:C:2014:2303, regarding the 1980 Hague Child Abduction Convention makes clear that external relations in areas covered by EU international family law are within the exclusive competence of the European Union. See nevertheless P. Beaumont, 'Interaction of the Brussels IIa and Maintenance Regulations with [possible] litigation in non EU States: Including Brexit Implications', Center for Private International Law, Working Paper Series, No 2018 (1), p. 11, claiming the Hague Convention 1980 would apply immediately in relations between the UK and the remaining Member States. At any rate, the withdrawal of the UK put the possibilities

The 'no agreement option' may have different consequences for the MS and the UK, depending on the subject matter under consideration:

- In matters of parental responsibility, both UK and MS courts would apply the 1996 Hague Child Protection Convention. Yet before the MS courts the 1996 Hague Convention would still be superseded by the Brussels IIbis Regulation, at least partially. UK decisions in child matters, being decisions of a mere Contracting State rather than a MS, would be recognised and enforced only on the basis of the Hague Convention. However, Art. 61 lit. b of the Brussels IIbis Regulation clarifies the position regarding jurisdiction that the Regulation only takes precedence over the Hague Convention in the MS courts in cases where the child concerned has his or her habitual residence in a MS. Hence, children with a habitual residence within the EU would still be subject to the jurisdictional rules in Art. 8 et seq. of the Brussels IIbis Regulation even if the case has strong connections to the UK, for example, because one or both of the parents habitually reside in the UK or the parties have UK nationality. As a consequence, for children habitually residing in the EU the UK courts and the MS courts would apply different jurisdictional provisions which could diverge, even if not to a large extent. Just as an example: under Art. 8(1) of the Regulation the last habitual residence of the child 'at the time the court is seised' is relevant for the general jurisdiction whereas Art. 5(2) of the Convention refers to the habitual residence at the time of the court decision. Hence, if a child changes habitual residence from the EU to the UK after the EU proceedings have been started, there would be jurisdiction in the UK and the EU due to different jurisdictional rules. Those conflicts may be solved by the *lis pendens* rules (those of the Regulation, the Convention or national procedural law) but they will give room for forum shopping.
- Conversely, jurisdiction for matrimonial matters is not covered by any of the Hague Conventions mentioned above. The MS will still apply the provisions of the Brussels IIbis Regulation even in cases with strong connections to the UK;⁶⁸ the UK will not. No common *lis pendens* rule will survive: Art. 12 of the 1970 Hague Divorce Convention may provide a solution for parallel proceedings involving the UK courts and the courts of the 12 MS which are contracting parties to the Convention.⁶⁹ For the rest, national solutions will apply which might differ in the MS: compare Art. 39 of the Spanish Law on Civil Judicial Cooperation, which closely follows Art. 33 of Regulation 1215/2012,⁷⁰ with the French solution, where both the stay and the dismissal of the proceedings remain discretionary for the French court seized in the second place.⁷¹
- For the recognition of UK or EU decisions in matrimonial matters, in particular in divorce matters rendered after Brexit, the 1970 Hague Divorce Convention comes to mind; however, as already said it has not been adopted by all the remaining MS. It should be noted here that the MS can no longer ratify the 1970 Hague Divorce Convention individually, at least not without the consent of the European Union. The CJEU's Opinion 1/13 regarding the 1980 Hague Child Abduction Convention makes clear that external relations in areas covered by EU international family law are within the exclusive competence of the European Union.⁷²
- Regarding disputes on maintenance, with the exception of Art. 18 the 2007 Hague Maintenance Convention sets no jurisdictional rules. The recognition and enforcement on the continent of UK decisions in maintenance matters are currently subject to exequatur according to the Maintenance Regulation, as the UK is not bound by the 2007 Hague Maintenance Protocol. After Brexit, continental courts will no longer apply the Maintenance Regulation to UK decisions, but it is unclear on what basis maintenance decisions from the UK will then be treated in the remaining MS. Some argue that, after the

for enlargement of the Convention's scope at a risk: whenever the accession of a new contracting party gives rise to an acceptance procedure, a separate decision will be required from the UK and the EU.

⁶⁸ The habitual residence/domicile in the UK of one of the parties will nevertheless impact on the applicability of the grounds of jurisdiction: see Arts. 6 and 7, and the ruling of the CJEU of 29 November 2007 in case C-68/07, *Sundelind Lopez*, EU:C:2007:740.

⁶⁹ See the status table at www.hcch.net/en/instruments/conventions/status-table/?cid=80.

⁷⁰ Ley 29/2015, de 30 de julio, de cooperación jurídica internacional en materia civil, BOE no 182, 31 July 2015.

⁷¹ The leading case is *Miniera di Fragne*, Cass. Civ. 1 re, 26 November 1974, (1975) *Revue Critique de Droit International Privé* 491; (1975) *Journal du Droit International* 108.

⁷² Above, fn. 67.

exit of the UK, the 1968 Brussels Convention⁷³ will apply.⁷⁴ This Convention has never formally been abolished by the MS, although it was replaced by the Brussels I and the Brussels Ibis Regulation. The 1968 Convention covers maintenance matters as a type of civil matter.⁷⁵ However, the Convention would only bind some of the remaining MS, being the “old” MS who individually ratified the 1968 Convention. Notably, the new MS in Eastern Europe – which will probably be often affected by cross-border cases in the UK, owing to the high rate of migration from those states to the UK after the 2004 and 2007 EU enlargements – acceded to the European Union after the adoption of Brussels I and so were never a party to the 1968 Convention. The 1973 Hague Maintenance Convention could be applicable in relation to some of the remaining MS.⁷⁶ However, the 2007 Lugano Convention will not apply because this instrument was adopted by the European Union solely, not by the individual MS;⁷⁷ the UK, like the other MS, was never a party to that Convention, having opted into the Convention and applying it as part of EU law. The UK cannot join the Lugano Convention unilaterally: Iceland, Norway, Switzerland and the European Union as the other Contracting States have to agree to an accession of the UK to the Convention.⁷⁸ The previous 1988 Lugano Convention⁷⁹ might apply,⁸⁰ but again, this convention would only cover some of the remaining MS and, of course, Iceland, Norway and Switzerland as third states. Also the Hague Maintenance Conventions will not replace the European Maintenance Regulation fully. The 2007 Hague Maintenance Convention was again only adopted by the EU for its MS;⁸¹ hence, the UK would have to ratify that convention, and of course it could do that only after Brexit would have taken effect and the UK had reacquired its external competences, which it lost when opting into the EU's adoption of the 2007 Convention.⁸²

- Finally, for child return proceedings in case of child abduction, the MS will cease to apply the special provisions for return proceedings contained in Art. 11 of the Brussels Ibis Regulation regarding children abducted from the UK, and will instead apply the ‘ordinary’ return proceedings under the 1980 Hague Child Abduction Convention.

B. *Assessment.* Interestingly, the assessment of the ‘no agreement’ option in terms of smooth and efficient judicial cooperation differs considerably from one author to another. Some UK scholars are convinced of the superiority of the 1980, 1996 and even 2007 Hague Conventions, in comparison to the EU instruments, to the point of claiming that the only parts of Brussels Ibis and the Maintenance Regulation that could usefully be kept as part of UK law are the jurisdiction provisions.⁸³ This, however, appears not to be the position of the UK government keeping in mind the statements cited above (above section 3.1).

The similarities between the Brussels Ibis Regulation and the 1996 Hague Child Protection Convention cannot be doubted, as already indicated. However, the devil is in the detail: for instance, regarding the grounds for non-recognition – the jurisdiction of the court of origin is only subject to control by the requested State under the Convention. Besides, under Art. 26 of the Convention, between the UK and the MS certain access and return

⁷³ Convention of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters OJ L 299/32, 31.12.1972.

⁷⁴ See, for example, M. Lehmann, D. Zetzsche, ‘Die Auswirkungen des Brexit auf das Zivil- und Wirtschaftsrecht’ (2/2017) *Juristenzeitung* 62, at p. 70; A. Dickinson, ‘Back to the future: the UK's EU exit and the conflict of laws’ (2016) *Journal of Private International Law* 12 195, at p. 200 ff; for a different view see, for example, B. Hess, ‘Back to the Past: BREXIT und das europäische internationale Privat- und Verfahrensrecht’ (2016) *Praxis des Internationalen Privat- und Verfahrensrechts* 409, at p. 413 ff; G. Rühl, ‘Die Wahl englischen Rechts und englischer Gerichte nach dem Brexit’ (2/2017) *Juristenzeitung* 72, at p. 77 ff.

⁷⁵ See, for example, Art. 5.2 of the Brussels Convention which contained a special rule on jurisdiction in maintenance matters.

⁷⁶ The interpretation of Art. 3(2) TFEU in Opinion 1/13 may hinder the reactivation of the 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations between the UK and remaining Member States which are contracting parties as well: see S. Álvarez González, ‘Consecuencias del Brexit para la cooperación en materia civil: Derecho de la persona, de familia y de sucesiones’, (2017) *Anuario Español de Derecho Internacional Privado*, 181, at p. 190.

⁷⁷ Above, fn. 58.

⁷⁸ Cf. Arts. 70(1)(c), 73(3) of the 2007 Lugano Convention.

⁷⁹ Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters OJ L 319/9, 25.11.1988.

⁸⁰ See the references above, fn. 74.

⁸¹ See Council Decision of 9 June 2011 on the approval, on behalf of the European Union, of the 1996 Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, OJ L 192/39, 22.07.2011.

⁸² According to the Technical Note of September 13, 2018, the UK intends to take the necessary steps to formally re-join the 2007 Hague Maintenance Convention, and anticipates that it would come into force by 1 April 2019 (an optimistic forecast). Document available at: see Annex II.

⁸³ P. Beaumont, ‘Private international law concerning children in the UK after Brexit: comparing Hague Treaty law with EU Regulations’ (2017) *Child and Family Law Quarterly* 213; *id.*, ‘Interaction of the Brussels Ila and Maintenance Regulations with [possible] litigation in non-EU States: Including Brexit Implications’, Centre for Private International Law, University of Aberdeen, Working Paper Series No 2018 (1).

orders will no longer be enforced without a declaration of enforceability by the local authorities, unlike under Art. 40 ff. Brussels IIbis Regulation. As for the 1980 Hague Child Abduction Convention, Art. 11 Brussels IIbis Regulation was adopted with a view to improving the situation under the former instrument, especially as regards MS which tended to be rather reluctant in applying it. It has already been mentioned elsewhere⁸⁴ that the 'UK never belonged to this group of MS. On the contrary, [the UK] has always been a model Contracting State of the Hague Convention. Hence, even if Art. 11 Brussels IIbis were repealed by [the UK] Parliament in the future, little would probably change as regards children abducted from the remaining EU to the UK. There might, however, be changes for children abducted from the UK, at least if they had been abducted to MS that struggle to follow the spirit of the Hague Convention. Here, the pressure exercised by Art. 11 Brussels II bis would be lifted'. And in addition, the Brussels IIbis Regulation is currently undergoing a recast procedure intended to do away with some of its flaws.⁸⁵

A comprehensive comparative evaluation of the international and European instruments would go beyond the scope of this paper. There are, however, some factual advantages of the European instruments which should be borne in mind: Although the Hague Conventions under examination are all in-force rules, there is not much practical experience, in particular with the 2007 Hague Maintenance Convention and the 1996 Hague Child Protection Convention, where still the majority of Contracting States are at the same time MS of the European Union. Both instruments were, between the MS, mainly superseded by the Brussels IIbis Regulation and the Maintenance Regulation which have triggered extensive case-law of the MS courts and the Court of Justice of the European Union. Hence, many contentious issues – which are still open as to the Hague conventions – have been clarified for the Regulations. Furthermore, some drawbacks common to international treaties are clear from the outset - including slow negotiations, reservation possibilities, the lack of a uniform application safeguarded by a supranational court, and cumbersome reforms.

It should not be overlooked, though, that not only multilateral conventions might step in if the 'no agreement' solution will be adopted. The UK is still party to bilateral treaties on recognition and enforcement of judgments with some MS. Those treaties became 'dormant' as a consequence of the EU instruments: For example, there is a treaty with Germany from 1960.⁸⁶ This treaty covers also family law matters (see Art. IV(1)(c) of the convention). However, the convention is rather outdated, for example, by limiting in its Art. II(2) its scope to decisions 'pronounced by a superior court in the territory of one of the High Contracting States'. Art. I(2)(a) and (b) of the convention explicitly excludes decisions from the German *Amtsgerichte* and decisions from the UK county and magistrates courts, which are in Germany and England and Wales important family law courts.⁸⁷

3.2.2. The 'continuity' option

A. *Incorporating the EU law into UK law.* A second scenario would be that the UK keeps the Brussels IIbis and the Maintenance Regulation as 'retained EU law' under the European Union (Withdrawal) Act 2018. However, pursuant to the Technical Note of September 13, 2018, the UK intention for the case of no agreement with the EU is to repeal most of the rules relevant in the field of family law, in particular those based on the logic of reciprocity, which would not work properly as one-sided norms.⁸⁸ Always according to the Note, the bases for divorce jurisdiction set out in Article 3 of Brussels IIa would be replicated in English, Welsh and Northern Irish domestic law so that these bases apply for England, Wales and Northern Ireland for all cases; the additional basis of sole domicile of either party would be available for all cases. As a consequence, the scope of the 'continuity' option becomes extremely restricted - one may even wonder whether the 'continuity' tag still applies. Our comments below are worded to reflect the situation as it follows from the Note; they would nevertheless be accurate as well for a 'continuity' option of a broader reach.

⁸⁴ A. Dutta, 'Brexit and international family law from a continental perspective', (2017) *Child and Family Law Quarterly* 199, p. 207.

⁸⁵ Above, fn. 34. See below, under 4.2., on the position of the UK on the negotiations of the recast.

⁸⁶ Convention between the Federal Republic of Germany and the United Kingdom of Great Britain and Northern Ireland for the reciprocal recognition and enforcement of judgments in civil and commercial matters of 14 July 1960.

⁸⁷ Cf. B. Hess, *loc. ult. cit.*, at p. 416.

⁸⁸ Document available at: see Annex II. In the mind of the UK Government, the 'continuity' option only comes into play where no coverage is given by The Hague Conventions -currently in force or to be (immediately) ratified: see fn. 82.

B. *Assessment*. At first sight the continuity option would allow for the consistent operation of the same jurisdictional rules for claims regarding divorce in cross-border cases in spite of the UK's withdrawal. However, this may not happen. First, with all probability in the UK the rules will apply to cases connected with the remaining EU MS as if they were (for they will actually be) "normal" cross-border cases: as a result, common-law specific doctrines and institutions rejected under the EU regulations, such as forum non-conveniens, will come to play. Secondly, both the EU regulations and the UK domestic law may be amended at any time provoking diverging outcomes. As already indicated within the UK even changes on the regional level are possible. EU law will certainly develop.⁸⁹ This applies in particular to the area of family law; the Brussel IIbis Regulation is under review for the third time after its first adoption.⁹⁰ On the side of the UK, the 'continuity' option would always come in combination with the 'no agreement' option and would lie entirely in the hands of the UK lawmaker. A unilateral guarantee of immovability in UK law seems unlikely (the same for the adoption of future amendments of EU law: the idea that the UK would blindly copy the amendments to the EU Regulations without having had a say in them – or worse, without necessarily sharing the policy concerns justifying such amendments – looks implausible.) Moreover, Section 5(1) of the Act stipulates that the 'principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day'.

Secondly, the identical understanding of the Regulations is assured by the interpretation of a single body, the CJEU, upon requests for preliminary rulings; it is worth recalling that the CJEU takes care of ensuring the overall systemic consistency of the European legal frame. The decisions of the CJEU would not be binding for the UK courts anymore under the European Union (Withdrawal) Act 2018. Section 6(1)(a) of Act enunciates that the UK courts are 'not bound by any principles laid down, or any decisions made, on or after exit day by the European Court', fulfilling the pledge that Brexit will bring an end to the jurisdiction of the Luxembourg court.⁹¹ Even the so-called 'retained EU case law' (which is defined in Section 6(1)(a) of the Withdrawal Act as encompassing 'any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before exit day') will not be binding for all UK courts. This independence of the UK courts from the case-law of the CJEU creates doubts as to the coincidence of their interpretation with the one binding on the MS. In this context the traditional gap between the common law and the continental systems cannot be ignored, the more so as Paragraph 2(3) of Schedule 1 to the Withdrawal Act stipulates that after Brexit general principle of EU law – principles which are particularly important when interpreting the Brussels IIbis Regulation⁹² – shall not be part of the UK's domestic law. The scenario is not far-fetched that a retained Brussels IIbis Regulation–replicated by the UK legislature – will be applied rather differently in the UK and the remaining MS.⁹³

3.3. A bespoke agreement

A third option appears to be the UK government's favourite (see above section 3.1), and may be considered the best in terms of legal certainty: a bespoke agreement which is based on the European *acquis* and retains the most important features of the current judicial cooperation system in civil matters including family matters.

3.3.1. Prospects: a realistic option?

A. *Lengthy negotiations in view*. Such a bespoke agreement is – as a kind of European 'orbit instrument'⁹⁴ – not without problems. First, there seems to be a considerable gap between the expectations of the UK and the Guideline the Council has set to lead the European Commission in the negotiations of Phase 2,

⁸⁹ The likely-to-be future development of PIL and EU procedural law has been addressed in the EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union, COM(2014)144 of 11 March 2014, where codification, consolidation and complementing the *acquis* are the keywords.

⁹⁰ See above fn. 85.

⁹¹ See the among many other places UK's Government paper *Enforcement and Dispute Resolution: a Future Partnership*, of August 2017, para. 1, available at: see Annex I.

⁹² A. Dutta, A. Schulz, 'First cornerstones of the EU rules on cross-border child cases: The juris-prudence of the Court of Justice of the European Union on the Brussels IIa Regulation from C to Health Service Executive', (2014) *Journal of Private International Law* 10, at p. 38 ff.

⁹³ Just one hint: according to the Technical Note of September 13, 2018, not only the EU 'lis pendens' rules would be repealed for all parts of the UK, but 'instead the courts in each UK jurisdiction would decide which is the most appropriate court to hear a case, as they currently do for cases outside the scope of Brussels IIa.'

⁹⁴ See in general A. Dutta, 'Orbitrechtsakte – eine Idee für das internationale Privatrecht der Europäischen Union?' (3/2017) *Zeitschrift für das Europäische Privatrecht* 533.

where the third-State quality of the UK is stressed, and explicit reference is made to safeguards to ensure 'full respect of fundamental rights'. Contents-wise, the wording evokes the Charter of Fundamental Rights of the EU; from the technical point of view, the Council appears to be alluding to the public policy clause, the *lois de police*, and the intermediate procedure of *exequatur*. As a consequence, it is to be expected that a long time will be required to consider, negotiate and put into place any bilateral agreement between the UK and the EU - and this even if it is addressed separately from the general negotiations framework.

B. *Legal obstacles*. Furthermore, an agreement between the UK and the EU would respond to an unprecedented form of cooperation; therefore it is likely to face many legal and political hurdles. Apart from the Lugano Convention, already mentioned, there has been so far no instrument in the area of private international law by which parts of the European *acquis* have been extended to third States, which are not MS of the European Free Trade Association, and hence have no legal ties to the EU. Also such a UK-EU treaty on private international law would not be comparable with the conventions concluded with Denmark on the extension of some of the European instruments.⁹⁵ Although Denmark is a third state when it comes to the judicial cooperation in civil matters, it is still a MS in which the European fundamental rights and freedoms apply without reservation and which is subject to the case-law of the Court of Justice of the European Union. In this regard, it should also be noted that on the EU side the special legislative procedure for measures in the area of family law – family law instruments have to be adopted by the Council unanimously after consulting the European Parliament, cf. Art. 81(3) TFEU – will apply. This requirement will cause high hurdles – the two most recent family law initiatives (Rome III and the MPR instruments) could not be realized for all MS but succeeded only within Enhanced Cooperation. It has been said that if 'one recalls the existing cultural clashes between the remaining Member States (...), one can anticipate difficulties in future cooperation on family matters with the UK. It is unlikely, for example, that some Eastern European Member States would agree to a 'Brussels II bis'-like cooperation with the UK if the future instrument also covered same-sex marriages'.⁹⁶ And a mere Enhanced Cooperation between the UK and only some of the MS does not appear to be satisfactory.

A second difficulty will probably lie with the differing opinion of each party on the role of the Court of Justice. The UK's original intention to dispense with the CJEU (in order to 'bring about an end to the direct jurisdiction of the Court of Justice of the European Union', which, according to the UK Government, entails that the CJEU rulings will no longer have the status of binding authority for UK courts)⁹⁷ will be hard to accept for the remaining MS. Beyond the political, symbolic dimension of the institution, there is the functional one: from the practical point of view the CJEU is not easily expendable. The Court gives cohesion to the EU system and ensures the uniformity and coexistence of the EU legal instruments, delimiting them, interpreting them to preserve the internal consistency of the whole.⁹⁸ This applies, in particular, to European family law instruments where the CJEU has been very active in the past years, notably regarding the child law parts of the Brussels IIbis Regulation. Besides, it is settled that international agreements concluded by the European Union (as opposed to those signed by the MS) form an integral part of its legal order and can therefore be the subject of a request for a preliminary ruling by the MS.⁹⁹ In principle, the UK would not be allowed to file requests,¹⁰⁰ but fragmentation of interpretation of the agreement – as of international agreement itself – must be avoided; how will consistency be preserved? The UK's Government paper on enforcement and dispute resolution¹⁰¹ set out some details of various models of cooperation agreements with third countries, which provide for a close relationship without the CJEU having direct jurisdiction over those countries. A recent report by the UK upper parliamentary chamber analyses them,

⁹⁵ See, for example, the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 299/62, 16.11.2005; see also the amendment in OJ 2015 L 182/1.

⁹⁶ A. Dutta (2017a), at p. 208.

⁹⁷ Above fn. 91.

⁹⁸ Preliminary references submitted to the CJEU focus on single EU rules; however, the Court does not usually elaborate on them as isolated instruments, but with the system in mind: See for instance case C-92/12, *Health Service Executive*, EU:C:2012:255, para 142, recalling principles elaborated under regulation Brussels I to apply them to the interpretation of regulation Brussels IIbis.

⁹⁹ See para. 60 of case C-533/08, *TNT Express Nederland BV*, EU:C:2010:243.

¹⁰⁰ Although it has been said that the possibility exists, in the light of Opinions 1/91, 1/92 and 1/00, for an extension by an international agreement concluded with third countries of the powers of the EU Courts to give binding preliminary rulings on the interpretation of such agreement, and of the rules established pursuant to it, on questions submitted by courts of the third States concerned. See A. Rosas, 'The National Judge as EU Judge: Opinion 1/9', in: P. Cardonnel, A. Rosas and N. Wahl (eds.), *Constitutionalising the EU Judicial System. Essays in Honour of Pernilla Lindh* (Hart Publishing 2012) 105, at pp. 112-117.

¹⁰¹ Available at: see Annex I.

assesses their pros and cons, and concludes that 'There is no 'one-size-fits-all' solution to dispute resolution after Brexit';¹⁰² for the mutual recognition of civil, family and commercial judgments the UK proposed mechanism would be 'docking' with the EFTA Court. Under the more recent Government White Paper of July 2018,¹⁰³ the solution leans on the courts of the UK and of the MS taking into account the relevant case law of the courts of the other party (see para. 33 of Chapter 4).¹⁰⁴ In addition, a Joint Committee would keep under review the case law of both the senior courts of the UK and the CJEU, and (apparently) have the final say in case of discrepancy (see para. 34 of Chapter 4). The EU has not yet expressed an opinion on this point, but an agreement seems unlikely - see below under 3.4.2.

Another foreseeable hurdle relates to an essential feature of the EU legal instruments: they complement and reinforce one another.¹⁰⁵ Any proposal to reproduce single, isolated elements of the system in a bilateral convention ignores this fact. There is indeed much more to cross-border judicial cooperation than meets the eye. The EU family law system for cross-border relations does not start, nor does it end, in the Brussels IIbis and Maintenance Regulations; there are other instruments as well. It could therefore be advisable 'to allow the UK to enter the club in some new capacity only if it takes the full international family law *acquis* - not only Brussels II bis and the Maintenance Regulation but also the Maintenance Protocol, the Rome III, the Succession and the Matrimonial Property Regulations.'¹⁰⁶ This would be likely to collide with the fundamental UK objection to application law in family law matters (although not in other areas of law).

There is still a fourth point of concern. A bespoke agreement could lead to a petrification. A UK-EU bilateral ad hoc convention would probably mirror (at least to some extent, see below 3.3.2) the content of the existing instruments in their current state. The remaining MS would be, of course, free to amend the existing *acquis* between themselves. Reforms of the bilateral arrangement might prove difficult in the future because, in the relationship between the UK and the EU, it would not be the principles of primary EU law which would be applicable but rather the general rules on the making of international treaties. At the same time, the advantages of the bespoke agreement would be lessened if they do not conform to the rules otherwise in place. Furthermore, any new agreement, if different from the EU instruments, would add more complexity for judges and citizens when confronted with the already rather complex mishmash of EU instruments, treaties and national law in the areas covered by the Brussels IIbis and the Maintenance Regulations.

3.3.2. Proposal on contents

If there is a will of the UK and the EU to conclude a bespoke agreement, the question arises which contents such a treaty should have. The agreement could be based on the Brussels IIbis Regulation and the Maintenance Regulation. This applies without reservation to the jurisdictional provisions of both instruments.

There are, however, areas of the Regulations which require a closer inspection, in particular, the enforcement provisions insofar as they allow a cross-border enforcement of decisions without *exequatur*, which concerns mainly the enforcement of certain access and return orders under the Brussels IIbis Regulation. Those enforcement provisions are not only based on the mutual trust between the MS in their judicial systems. They also presuppose that certain constitutional guarantees are in place in the participating States. For example, the special child abduction provisions of the Brussels IIbis Regulation provide in Art. 11(8) that if a return to the MS of origin is rejected on the basis of Art. 13 of the Hague Child Abduction Convention, for example because of a grave risk of harm to the child, the courts of the MS of origin can order the return. This return order has then to be enforced without *exequatur* proceedings in the MS of refuge, cf. Art. 42 of the Regulation. Hence, the EU rules grant the MS of origin the last word on the return of the child. The Court of Justice justified this rather harsh system not only with the principle of mutual trust between the MS but also with the common fundamental rights standards. The courts of a MS must trust that the courts of the other MS also guarantee 'equivalent and effective'

¹⁰²House of Lords, European Union Committee, *Dispute resolution and enforcement after Brexit*, 15th Report of Session 2017-19, para. 55, available at: see Annex II.

¹⁰³ Available at: see Annex I.

¹⁰⁴ But see as well para. 35, which may be read as limiting the taking-into-account to the areas of law where the UK and the EU retain a common rulebook.

¹⁰⁵ M. Requejo Isidro, 'On Private International Law, the EU and Brexit', in: V. Ruiz Abou-Nigm, M.B. Noodt Taquela (eds.), *Diversity & Integration. Exploring Ways Forward, forthcoming*.

¹⁰⁶ A. Dutta (2017a), at p. 210.

protection of fundamental rights,¹⁰⁷ and hence for instance also adhere to Art. 24 of the Charter of Fundamental Rights. This, however, will not be true anymore for the UK, because the European Union (Withdrawal) Act provides in Section 5(4) that the 'Charter of Fundamental Rights is not part of domestic law on or after exit day.'

3.4. Governance and interpretation

Both the EU and the UK acknowledge that institutional and governance arrangements need to be put into place to ensure the proper functioning of the future cooperation arrangement, meaning it is correctly applied and consistently interpreted.

Setting up monitoring mechanisms is foreseen in the EU Council Guidelines of March 23, 2018: 'The governance of our future relationship with the UK will have to address management and supervision, dispute settlement and enforcement, including sanctions and cross-retaliation mechanisms' (Guideline 15). The specific design has not yet been dealt with.

In the UK, the White Paper of July 2018 describes the future relationship as likely to consist of a number of separate agreements, each covering different elements of economic, security and cross-cutting cooperation. Under the White Paper cooperation in civil and commercial matters belongs to the economic prong of the negotiations, and should be addressed via a new bilateral agreement (see Chapter 1, para. 128, paras. 145-148).¹⁰⁸

Regarding governance, the Paper proposes a structure around an overarching institutional framework, with a Governing Body providing political direction and a Joint Committee to underpin its technical and administrative functions (para. 4, 6, Chapter 4); it also foresees that the future structure draws on precedents from other international agreements (para. 8 Chapter 4).¹⁰⁹ The Paper recognizes as well the importance of a uniform understanding of the future agreements. In this regard para. 34 of Chapter 4 suggests that both parties encourage and facilitate dialogue between their respective judiciaries. This is a proposal which definitely will not guarantee the uniform understanding of the legal terms. Indeed, para. 34 indicates as well that 'The Joint Committee should also keep under review the case law of both the senior courts of the UK and the CJEU, where this was relevant to the interpretation of the agreements. If significant divergences were found between respective courts' interpretation of the agreements, the Joint Committee could be empowered to act to preserve the consistent interpretation of the agreements.' The scope of the empowerment to 'act to preserve the consistent interpretation' and what the action would consist of are not defined, but whatever this may be, acceptance by the EU of such a proposal is highly improbable to the extent it would affect the competences and powers of the CJEU. It should be borne in mind that any agreement with the UK in the field of judicial civil cooperation will be in close connection - some provisions might even be identical - with the Regulations currently in force; that, since the agreement will fall under the scope of the exclusive competence of the EU, it will be signed by the EU and form an integral part of its legal order; and that the homogeneity of the EU requires that the last word on its interpretation (for the EU MS) lies with the CJEU. In sum: the idea of transferring the interpretative task to a different body creates both constitutional and practical concerns.¹¹⁰

Bestowing a Joint Committee with the power to ensure the uniform interpretation of an agreement to which the EU is a party is not new: a close precedent is found in Art. 105 EEA Agreement.¹¹¹ Interestingly, though, if the Joint Committee, composed of States' representatives, does not directly manage to achieve uniform interpretation, Article 111 EEA Agreement will apply: the Joint Committee will transmit the divergence to the CJEU, which will in turn deliver a 'ruling on the interpretation of the relevant rules' to be followed by the Joint Committee. Hence, the interpretation of the CJEU finally prevails. In a similar vein, a Joint Committee is established under the European Common Aviation Area Agreement to ensure uniform interpretation, which in addition has to be in

¹⁰⁷ See CJEU, case C-491/10 PPU, *Aguirre Zarraga*, EU:C:2010:828, para. 70.

¹⁰⁸ Para. 128.g and 147 Chapter 1 reflect the UK's wish seek to participate in the Lugano Convention after exit, but recognizing that some of its provisions have been overtaken and also its limited scope, it expresses the preference for a new bilateral agreement.

¹⁰⁹ An in-depth study of those precedents can be found here: A. Fernández Tomás, 'The settlement of disputes arising from the United Kingdom's withdrawal from the European Union', PE 596-819, available at: see Annex II.

¹¹⁰ Differences aside, see CJEU Opinion 2/13, on the draft accession agreement to the ECHR, recalling the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law.

¹¹¹ OJ L 1/3, 3.1.1994. The Agreement entered into force on January 1, 1994. See as well CJEU Opinion 1/92.

conformity with the case law of the CJEU.¹¹² Under para. 34 Chapter 4 of the White Paper there is (as yet) nothing similar.

¹¹² OJ L 285/1, 16.10.2006. See Art. 16 of the Agreement, which entered in force on December 1, 2017. See as well CJEU Opinion 1/00.

4. HARMONIZATION OF FAMILY LAW IN THE EU WITHOUT THE UK: PROS AND CONS

KEY FINDINGS

The UK has opted-in to the majority of the EU Regulations in civil and commercial matters. Conversely, in family matters the 'opt-in' decision has been much more limited. The counterpart of this restricted participation in EU family law on the side of the UK is that not much will be lost in terms of substantive input for promoting harmonization after exit- but not much will be added in terms of expeditiousness either.

4.1. The UK and the harmonization of (international) family law

The announcement of Brexit was regretted by continental scholars from the very beginning.¹¹³ The contribution of British lawyers, courts and academics to the development of EU law has been a major one; the uniqueness of its legal system within a Community/Union for a long time composed primarily of countries of Roman tradition is proverbial. The consequences of this very specific position have been twofold: on the one hand, the UK could exercise a distinctive influence on the drafting of EU law. On the other, the chances of a clash between the UK and the rest of the EU MS in legal areas have always been higher.

In the light of this and with Brexit knocking at the door it is sensible to ask how much of the current EU family law is due to the UK influence and how much is not; in other words, how much is the EU losing in terms of future harmonization of EU (international) family law due to Brexit. To a large extent, the question amounts to whether Brexit will change substantially the dynamics in the EU institutions in this particular field of law: something we cannot aim at answering here for obvious reasons, a decisive one being lack of access to the fora of negotiation. Nonetheless, no one would contest that the specific position of the UK in the AFSJ is per se a hindrance to harmonization. Under Articles 1 and 2 of the Protocol No 21 on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union,¹¹⁴ the UK may decide whether to opt in to individual measures, the only criterion being whether it is in the UK's interest or not. So far, the UK has opted in to the majority of the EU Regulations in civil and commercial matters -albeit not to all of them, and this even after having actively participated in the negotiations.¹¹⁵ Conversely, in family matters the 'opt in' decision has been much more limited: regarding the last two Regulations - Regulations (EU) No 2016/1103 and No 2016/1104, aiming at clarifying the rules applicable to property regimes for international married couples and registered partnerships - the Proposals of the Commission were submitted in March, 2011; already on June 30, 2011 a Written Ministerial Statement was made to Parliament confirming that the UK would not be opting in to them. As for the Maintenance Regulation, the UK decided in 2006 not to opt-in; the same applied to the Proposed Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, brought forward by the Commission in June 2006.¹¹⁶ Later, by letter of 15 January 2009, it notified to the Commission its wish to accept the Maintenance Regulation. However, the UK's position therein is a very specific one: as it did not adopt the 2007 Hague Protocol on Applicable Law Applicable to Maintenance Obligations, Art. 15 of the Maintenance Regulation on applicable law does not apply in the country, and UK decisions in other MS are subject to an exequatur procedure pursuant to Chapter IV, Section 2. Finally, the only EU instrument to which the UK is fully participant -and willing to continue, see below under 4.2- is the Brussels IIbis Regulation.

¹¹³ B. Hess, above fn. 74. M. Requejo Isidro, 'Continental perspectives on Brexit', updated June 2017, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2985430.

¹¹⁴ OJ C 326/295, 26.10.2012.

¹¹⁵ That was the case of the Regulation (EU) No 650/2012; Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (OJ L 189/59, 27.6.2014). Recently (9 July 2018) a communication was made of not opting in regarding the Proposal for a Regulation on the law applicable to the third-party effects of assignments of claims (COM/2018/096 final).

¹¹⁶ COM(2006) 399 final.

The counterpart of this restricted participation to EU family law on the side of the UK is logically that not much will be lost in terms of substantive input for promoting harmonization after exit; it should be added that not much will be added in terms of expeditiousness either. The delay in international family law harmonization (a number of areas are not covered yet,¹¹⁷ and no legislative initiative exists so far to improve the situation), and the traditionally slow lawmaking rhythm are mainly due to the special legislative procedure in the field, requiring unanimity at the Council and consultation with the European Parliament (Art. 81.3 TFEU). The first Rome III proposal provides an illustration: no consensus could be achieved despite two years of arduous negotiations mainly because one of the Member States involved could not accept the (possible) application of foreign divorce laws that would be less liberal than its own. It should be remembered that at this point the UK and Ireland had already decided not to exercise their right to opt-in, hence took no part in the discussions.

4.2. A word on the Brussels IIbis recast Regulation

As already indicated, the amendment (recast) of the Brussels IIbis Regulation is under way.¹¹⁸ Interestingly, the UK Government decided in October 2016 (after the Brexit referendum) to opt in to the renegotiation of the Brussels II bis Regulation. It was said that in this way 'when the law is transferred into UK law it is the very latest law and we are part of the Brussels I recast and Brussels IIa as well as the current arrangements'; and also, that 'even after a UK exit the regulation will affect UK citizens, principally in other member states, and it is in the UK's interests to influence the negotiations'.¹¹⁹

A future Brussels IIbis recast may be retained law in the UK, provided it is operative immediately before exit day. In this regard, it is worth recalling that the latest EU regulations on procedural law for cross border cases applies in a staggered way over time, entering into force on one date, but putting off the application of the majority of their provisions to a later stage. The EU (Withdrawal) Act 2018 ensures that, so far as a relevant instrument has entered into force and applies before exit day, it will be converted into domestic legislation. On the contrary, if a provision is 'stated to apply' from a later time, and that time falls on or after exit day, the provision will not be converted.

¹¹⁷ The existence, validity, effects and recognition of registered partnerships and marriages; names; filiation; adoption; protection of adults.

¹¹⁸ On a Note of November 24, 2017, the Presidency of the Council took the opinion that a policy debate at ministerial level on the key issue of the abolition of exequatur is still necessary for future work at expert level, and that the Working Party Civil Law Matters (Brussels IIa) should continue to work on all other elements of the proposed Brussels IIa Recast Regulation. As for the Parliament, in November 30, 2017 the JURI committee adopted its report on the proposal (rapporteur: Tadeusz Zwiefka), suggesting several changes. The report was discussed in plenary on January 17, 2018, and endorsed the next day without amendments.

¹¹⁹ Sir O. Heald, EU proposal amending the Brussels IIa Regulation on family law: Written statement - HLWS225, available at: see Annex III.

5. POLICY RECOMMENDATIONS

5.1. Scenario 1: in the absence of any agreement

In a Brexit without agreement on the separation issues relevant for cross-border family matters, uniform detailed instructions as to how to deal with ongoing proceedings are vital to preserve legal certainty. A reaction from the EU lawmaker, preferably in the form of a law, addressing the many doubts already expressed by practitioners and academics, is therefore of the essence. In this context, as explained under section 2.2.2 above, the unilateral application by the MS of solutions currently present in the DWA is advised against - in particular, but not only, any unilateral application of Art. 63(2) DWA concerning *lis pendens*/dependent actions involving a UK court, and the recognition and enforcement of UK judgments. In any event, a unilateral EU regimen for the transition should retain a certain degree of flexibility to take into account the exceptionality of the circumstances, and should be capable of implementing the policy objectives of the Regulations themselves -such as the interest of the child in a given case, or the protection of the maintenance creditor.

In the absence of any agreement for the future UK/EU relationship, the UK would become a third state for the purposes of the regulations. No intervention is needed on the side of the lawmaker for the Regulations to be applied (or not, as the case may be) against this background. This notwithstanding, an explanatory document or guide from the Commission may help the courts and practitioners in the MS to be clear regarding the new setting. The document could also address the situation vis-à-vis the Hague Conventions to which the EU is a party or which have been signed by the MS on her behalf.

5.2. Scenario 2: for an agreement on the transitional period only

The wording of Art. 63 DWA requires improvement and the current expressions 'legal proceedings instituted before the end of the transition period', 'requests and applications received by the central authority of the requested State before the end of the transition period', and in particular 'situations involving the UK' need to be replaced by more precise ones.

The applicability of the existing rules on recognition and enforcement to all judgments given in legal proceedings instituted before the end of the transition period poses particular challenges. The implementation of mechanisms guaranteeing the correct application of EU law by UK courts (to promote uniform application across the European continent) after the end of the transition period with respect to proceedings commenced before that date is an essential supplement to Art. 63 DWA.

5.3. Scenario 3: for the negotiation of a future agreement

A bespoke UK/EU agreement on cross-border family issues would be the best option in terms of legal certainty. Negotiations are likely to be tough; they should be led so as to include a mechanism ensuring the uniform interpretation and application by all actors. Any solution entailing the CJEU being put aside - such as the UK 'paying due regard to' or 'taking due account of' the Court's case law- would be very much a second best - and an unworkable second best.

A bespoke agreement could replicate without further ado the currently in-force rules on jurisdiction in matrimonial and parental responsibility matters, as well as in maintenance claims. The same goes for the solutions regarding administrative cooperation. However, provisions allowing the cross-border enforcement of decisions without exequatur – and more generally: solutions based on the mutual trust among the MS in their judicial systems and presupposing the existence of constitutional guarantees- would not any longer be appropriate. In this context it should be recalled that the European Union (Withdrawal) Act provides in Section 5(4) that the 'Charter of Fundamental Rights is not part of domestic law on or after exit day.' As a consequence a certain degree of oversight by the MS where recognition and/or enforcement are concerned (or applied for) seems unavoidable.

ANNEXES

Annex I Legal Documents

Negotiation Papers (Chronological order)

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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Legal Affairs, explores the possible legal scenarios of judicial cooperation between the EU and the UK at both the stage of the withdrawal and of the future relationship in the area of family law, covering the developments up until 5 October 2018. More specifically, it assesses the advantages and disadvantages of the various options for what should happen to family law cooperation after Brexit in terms of legal certainty, effectiveness and coherence. It also reflects on the possible impact of the departure of the UK from the EU on the further development of EU family law. Finally, it offers some policy recommendations on the topics under examination.

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