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Commentary

Drifting apart: Family law matters and the 'Politics of Brexit'

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Abstract

The UK and the EU have no formal agreement on civil justice cooperation on family matters despite both sides agreeing on the need to cooperate post-Brexit during the negotiations. Not only does the Trade and Cooperation Agreement (TCA) make no provisions on cross-border family law matters, but the EU also rejected the UK's request to accede to the Lugano Convention, which would have largely replicated provisions that existed when the UK was a member state. Instead, uncertainty means UK and EU citizens could face delays and increases in legal costs for cross-border cases. This paper examines how the political dynamics of EU exit hinder cooperation on family law matters because the principle of reciprocity is trumped by political considerations. The paper also contextualises post-Brexit cooperation by highlighting how the 'politics of Brexit' dovetail with internal EU sensitivities on the EU's external action in civil justice cooperation in family matters.

Keywords: *Brexit; civil justice cooperation; family law matters; external differentiated integration; EU-UK relations*

Introduction

Despite the preferences of both parties in the negotiations and the functional drivers for cooperation post Brexit, not only does the Trade and Cooperation Agreement (TCA) make no provisions on cross-border family law matters, but the EU has also rejected the UK's request to accede to the Lugano Convention. An instrument that facilitates both internal differentiated integration (Denmark) and external differentiated integration (Norway, Iceland and Switzerland) in civil justice cooperation[2], the Lugano Convention would have broadly allowed for replicating provisions that existed when the UK was a member state, in particular for the automatic recognition and enforceability of judgments (Jones, 2021).

Instead of an externally differentiated outcome post-Brexit, the EU and the UK have fallen back on a patchwork of pre-existing international conventions under the Hague Conference on Private International Law (HCCH) and, when there are no conventions in place, the

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2 Civil justice cooperation pertains to matters of private international law, which is the set of rules governing cross-border legal disputes between citizens or other private entities, ranging from international family disputes through to commercial matters (UK Law Societies, 2021). These rules include jurisdiction (the courts of which country or countries can resolve the case), which country's law should be used to determine a dispute, and whether a judgment of a court in one country will be recognised and enforced in another country.

domestic law of the UK and each of the 27 member states, but without any reciprocal arrangements (Beaumont, 2021; Isidro, 2022). Not only is the outcome more fragmentation, but the change in regime inevitably leads to an increase in costs and possible delays for EU and UK citizens involved in cross-border cases, leaving the weaker financial party in a less favourable situation (Mehta and Blain, 2021). It also means legal uncertainty surrounding divorce jurisdiction and divorce recognition and presents less favourable provisions around maintenance and maintenance recovery (European Union Committee, 2017; 2021; Mehta and Blain, 2021; Walker, 2019). Despite the gaps, the normative rationale for closer cooperation under the HCCH regime – HCCH members are committed to principle of 'the progressive unification of the rules of private international law' (HCCH 1955) – has proven elusive in family law since the end of transition period.

The effective 'sectoral hard Brexit' in civil justice cooperation (Bert, 2020), suboptimal cooperation post-Brexit and the potential impact for both EU and UK citizens, make civil justice cooperation in family matters a particularly interesting case for examining the normative implications of each party's negotiation strategies and the political dynamics of withdrawal on external differentiated (dis)integration (Martill, 2021; Martill and Sus, 2022a; 2022b; 2023; Schimmelfennig, 2024). Through a study of each party's positions and concrete developments since the end of the transition period, this paper examines how family law matters ended up not being included in the TCA, although both parties stated the need to cooperate in this area during the negotiations. The paper also sketches the reasons why, despite the normative and functional drivers post-Brexit for closer cooperation, the EU and the UK have not pursued a policy for closer civil justice cooperation in family law matters, whether through external differentiated integration or a more proactive use of the HCCH conventions.

The paper expands the understanding of 'the politics of withdrawal' for external differentiated (dis)integration (Martill, 2021; Martill & Sus, 2022a; 2022b) to emphasise the role of narratives and the symbolic dimensions of the politics of Brexit. The politics of Brexit are conceptualised as two self-reinforcing dimensions: the interests of each party, as outlined in the UK and EU's so-called red lines; and a symbolic dimension, in which narratives are crafted and perpetuated to make sense of the event and to frame action and decisions over each party's negotiating approach. Taken together, these two dimensions delimitate the opportunity structures for cooperation. The paper finds that the use of the principle of mutual recognition, which facilitates external differentiated integration, is subordinate to the political dynamics of the process of withdrawal from the EU. At the same time, the lack of impetus for deepening cooperation under the existing HCCH conventions since Brexit in the field of family law matters – the normative rationale – suggests that the 'politics of Brexit' dovetail with internal EU political sensitivities on the EU's external action on civil justice cooperation in this area, potentially reinforcing a sectoral hard Brexit. Thus, on the one hand the paper underscores the normative implications of choices made by negotiators going beyond strategic concerns. On the other hand, it contextualises the UK-EU Brexit negotiations and highlights the political limitations to international cooperation that derive from path dependent processes in European integration for civil justice cooperation in family matters rather than the Brexit process per se.

The paper starts by putting forward a conceptualisation of the 'politics of withdrawal' which accounts for the symbolic dimension, not only the material interests of each party in the negotiations, and outlines the main narratives used by the UK and the EU for framing Brexit. In a second section, the paper presents the EU's system of (external) differentiated integration for civil justice cooperation in family law matters as well as the EU's engagement in the external dimension of private international law. Thirdly, the paper examines how the politics of Brexit led to a sectoral hard Brexit in civil justice cooperation in family matters and emphasises the role of narratives in shaping each party's red lines. A fourth section covers the trends in post-Brexit EU-UK cooperation on civil justice cooperation in family law matters, and suggests that the EU's approach to the external dimension in this area complicates prospects for any swift resolution to barriers post-Brexit. A final section concludes with a reflection on the impact of the politics of Brexit for cooperation in other sectors based on principles of reciprocity and mutual recognition.

Defining the politics of Brexit

The literature on the politics of differentiated (dis)integration' underscores how the outcome of the Brexit negotiations are a function of the dynamics of withdrawal, whereby the negotiations are about moving further away from each other as opposed to closer and how the departing country is necessarily in a weaker bargaining situation (Martill, 2021; Schimmelfennig, 2018; 2024). In their work on 'the politics of withdrawal' and external differentiated integration applied to security policy, Martill and Sus (2022a; 2022b) demonstrate how the strategic rationale for cooperation in an increasingly unstable geopolitical environment is subordinated to the political rationale specific to the Brexit negotiations. These works take a rational choice approach to the examination of the politics of withdrawal and their effect on the negotiations. Preferences are assumed to derive from rational choice motivations, although Martill (2021) recognises that the EU's perception of the UK's strategy shaped the Union's negotiation approach. What is less accounted for in these conceptualisations of the politics of withdrawal is how the politics of Brexit are also a function of the extraordinary character of the event and what this means for theorising decision making. Brexit was an unprecedented occurrence of such magnitude that it required not merely interpretation by the actors involved but a sensemaking process (Weick, 1995), whereby new meaning is generated and narratives are crafted and perpetuated to frame action and decisions in a self-reinforcing dynamic over time. Sensemaking involves 'the active authoring of the situations in which reflexive actors are embedded and are attempting to comprehend' (Brown et al., 2015: 267). Plausibility matters more than accuracy in sensemaking, and the process is ongoing (Weber and Glynn, 2006: 1642). Thus, narratives are not just about a strategic framing of the hard bargaining process; they are needed to make sense of the situation and, in turn, shape and constrain the options and strategies in the negotiations. From this perspective, the politics of Brexit are not only a function of the dynamics of withdrawal, whereby the departing member state is in a weaker bargaining position (Martill, 2021; Schimmelfennig, 2018), and each party's red lines is a reflection of respective interests and negotiation strategies. Red lines also take on a more symbolic dimension because they are embedded in and performed through the narratives created and used for making sense of the event of Brexit.

On the EU side, the outcome of the referendum on UK membership was an existential threat to the Union and potentially hugely destabilising for domestic politics (Schelkle et al.,

2024). It triggered an unprecedented inter-institutional sensemaking process, whereby the perceived existential crisis of Brexit was framed as a UK problem not an EU one, and the negotiation process as a 'third country in the making' (Laffan and Telle, 2023). This framed the EU27 so-called red lines – an agreement based on 'a balance of rights and obligations' and access to the Single Market contingent on 'acceptance of all four freedoms' (European Council, 2016a, 2016b) – and its approach throughout the negotiations. But the narrative of a 'third country in the making' has also taken on a symbolic dimension, serving a legitimizing function of the EU project itself (Beaumont, 2019; 2020a). The need to ensure that the UK does not end up enjoying the same benefits as it did as a member but without the constraints of pooled sovereignty and financial obligations is not only the function of a rationalist understanding of the EU pursuing its interests; it also stems from a sensemaking process. It is the story that frames the EU's collective action and, as such, carries powerful symbolism.

In the UK, the persistent lack of a domestic consensus on the meaning of Brexit for future relations with the EU led to a crystallisation over a pre-existing 'cakeist' narrative characterised by the notion that 'cross-border cooperation on trade could be reconciled with the preservation of UK sovereignty' (Glencross, 2023: 1001; see also Convery and Martill 2024). This narrative allowed for overcoming inaction by silencing the trade-offs of the decision to leave the EU. Theresa May combined her ambition to secure a new strategic partnership and a bespoke ambitious trade agreement with her red lines on leaving the customs union, the single market and the jurisdiction of the Court of Justice of the EU. Under Johnson and Frost, the UK combined the promise of a clean break from the EU with maintaining access to the single market and frictionless trade[3]. While Theresa May imbued the cakeist narrative with a focus on 'mutual interest' and the unique starting point of the UK in her negotiation approach, UK negotiators under Johnson argued their case on the basis that the UK should benefit from similar existing agreements and instruments accorded to other third countries. Neither though could depart from the 'cakeist imaginary' of UK-EU relations, whereby the trade-offs between sovereignty and cross-border integrated trade with the single market are silenced. Thus, cakeism is not simply a function of cognitive bias and policy fiasco (Dunlop et al., 2020; Figueira and Martill, 2020) but the story that has allowed for collective action in the absence of a sensemaking process following the referendum.

The EU and Civil Justice Cooperation

Although family law remains the competence of EU countries and the EU has no competence on the substance of the law, the EU can legislate if there are cross-border implications[4]. Legislation has developed to facilitate civil justice cooperation within the Area of Freedom, Security and Justice and aims to avoid parallel legal proceedings, i.e. cases

[3] Boris Johnson even described the TCA as 'having your cake and eating it' in an interview by L. Kuenssberg (BBC): "Critics have said 'you couldn't have free trade with the EU unless you conformed with the EU's laws […] that that was having your cake and eating it. That has turned out not to be true, I want you to see that this is a cakeist treaty." (BBC 30/12/2020). Available at: https://www.bbc.com/news/uk-politics-55486081. Accessed 10 March 2025.

[4] European Commission webpage "Overview of family matters". Available at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/civil-justice/family-law/overview-family-matters_en. Accessed 10 March 2025.

covering the same litigants, and the same facts brought forward in two different member states (see Calabuig, 2019 for a critique). Access to cross-border justice is facilitated by the principle of mutual recognition, based on mutual trust between member states and direct judicial cooperation between national courts[5]. As a result, the EU has developed a body of private international law that covers civil and commercial matters, set up the e-Justice Portal[6], a one-stop shop in the area of justice, and the European Judicial Network in Civil and Commercial Matters to support direct collaboration between judicial authorities[7]. Nevertheless, judicial cooperation in civil matters is an area of differentiated integration: the UK, until it left the EU, and Ireland have an opt-out in all Justice and Home Affairs (JHA) matters, including judicial cooperation in civil matters, and Denmark is outside the regime (Protocols 21 and 22 annexed to the Treaties). Moreover, civil justice cooperation in family law matters is especially sensitive for EU member states (Beaumont, 2009). Although measures in the field of judicial cooperation in civil matters are subject to the ordinary legislative procedure (Article 81 TFEU), family law remains subject to a special legislative procedure: the Council acts unanimously after consulting the European Parliament (Article 81.3 TFEU).

The EU's regime in private international law in family matters is commonly referred to as the 'Brussels regime' and consists of two Regulations: the Brussels IIa Regulation[8] (for proceedings started on or after 1 August 2022, Brussels IIa Regulation has been replaced by Brussels IIb Regulation[9]) and the Maintenance Regulation[10] (Beaumont, 2017; 2020b). The Brussels IIa Regulation 2003 ensures recognition and enforcement in divorce, legal separation, marriage annulment, and parental responsibility including rights of custody, access, guardianship, and placement in a foster family or institutional care[11]. The Maintenance Regulation 2009 rules address matters relating to maintenance obligations[12].

The EU also has a system of external differentiated integration for civil justice cooperation which is facilitated through the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Signatories are Iceland,

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[5] European Parliament webpage "Fact Sheets on the European. Judicial cooperation in civil matters Union". Available at: https://www.europarl.europa.eu/factsheets/en/sheet/154/judicial-cooperation-in-civil-matters. Accessed 10 March 2025.

[6] European e-Justice Portal webpage "Home page". Available at: https://e-justice.europa.eu/home?plang=en&action=home. Accessed 10 March 2025.

[7] Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters 2001/470/EC. Available at: https://eur-lex.europa.eu/eli/dec/2001/470/oj/eng.

[8] 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 [2003] OJ L338.

[9] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast).

[10] 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 [2009] OJ L7/1

[11] Regulation (EC) No 2201/2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. Available at: https://eur-lex.europa.eu/EN/legal-content/summary/matrimonial-and-parental-judgments-jurisdiction-recognition-and-enforcement-brussels-iia.html

[12] Summary of Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. Available at: https://eur-lex.europa.eu/EN/legal-content/summary/maintenance-obligations.html

Norway and Switzerland as well as Denmark (Figure 1). Based on the principle of mutual recognition, the Lugano convention covers the free movement of judgments in civil cases, including family law, between all parties to the Convention (Mańko, 2021). It clarifies which national courts have jurisdiction in cross-border civil and commercial disputes and ensures that judgments taken in such disputes are enforceable across a single legal space. Before Brexit and despite the UK's differentiated relationship in this area (see Figure 1 and Figure 2), the UK had opted into key EU legislation, notably the Brussels IIa and the Maintenance Regulation (Isidro, 2019). Nevertheless, it did so in a less systematic way than for civil justice cooperation in commercial matters (Carruthers and Crawford, 2017: 5–6), where the EU's broader regime in civil justice cooperation played an important role in the UK's lucrative and important market for legal services, legal advice and commercial litigation (European Union Committee, 2017; 2021).

Figure 1: EU's system of (external) differentiated integration in civil justice cooperation until 31 December 2020[13]

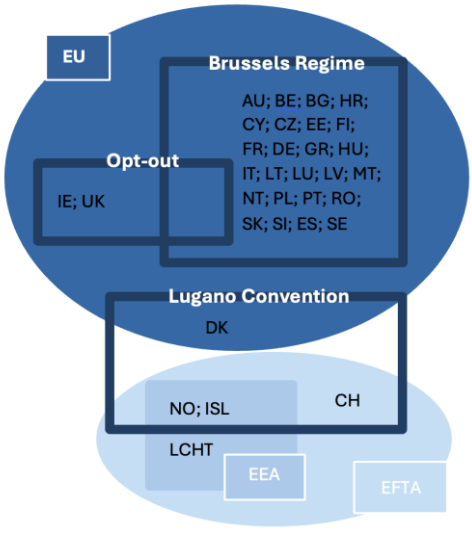
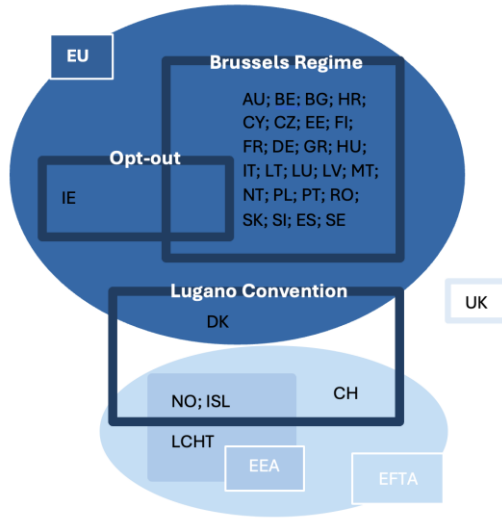


Figure 2: EU's system of (external) differentiated integration in civil justice cooperation since 1 January 2021



Methods and Data

The sections below recount the different positions of the UK government and the EU on civil justice cooperation in the Brexit process and examine the potential for cooperation now the UK is outside of any differentiated relationship with the EU. The first section shows how narratives created or used to frame the Brexit process on both sides

[13] All cases initiated during the transition period (1 February 2020 to 31 December 2020) fell under the Brussels regime, even though the UK no longer participated in the EU decision-making processes.

compounded the effects of the politics of withdrawal and led to the sectoral hard Brexit in this field. Findings draw on a range of primary and secondary sources, including HM government and EU official documents and speeches; transcripts of hearings and correspondence of specialised Committees in the House of Lords and House of Commons; the UK in a Changing Europe Witness Archive; and press coverage. Elite interviews with EU officials involved in the Brexit negotiation process and with UK actors[14] served to gather general background to further contextualise the negotiations. The second section presents the EU's approach to the external dimension of civil justice cooperation to highlight the political and legal constraints that make compensating for Brexit through the HCCH conventions challenging. Findings draw on secondary sources in private international law scholarship and on primary sources, notably EU official documents since the launch of the Tampere programme in 1999.

The politics of Brexit and failed external differentiated integration in family law

The EU's position in the negotiations

The EU's position on civil justice cooperation remained consistent throughout the negotiations. The EU always included a reference to civil justice cooperation on family matters in documents outlining its preferences for the future relationship, but clearly decoupled family matters from other commercial aspects, which were never included in any negotiating mandates (see Table 1). EU documents always mention civil justice cooperation on family matters under the general heading of 'mobility' and usually emphasise that the UK's position 'as a third country' will be taken into account (Council of the European Union, 2020: 18; European Council, 2018: 5; Task Force for Relations with the UK, 2020). The negotiating directives for the future relationship refer to existing international family law instruments in the HCCH but also acknowledge that 'options for enhanced judicial cooperation' could be explored beyond the existing Hague Conventions (Council of the European Union 2020: 18). In 2020, the Task Force for Relations with the UK put forward a very narrow proposal for cooperation. Its draft agreement referred to the 'common interest to continued cooperation' in family matters 'via the existing international family law conventions (Hague Conventions)' (Task Force for Relations with the UK, 2020: 172). The draft added that the EU would invite the UK 'to attend relevant meetings of the European Judicial Network in civil and commercial matters as a third country observer… when family law matters related to international agreements, to which the UK and the EU are parties, are discussed by the Network.' (Task Force for Relations with the UK, 2020: 172).

[14] Interviews were carried out with EU officials involved in the Brexit negotiations from the European Commission, including former members of the EU taskforce on Article 50 and on the future relationship and representatives of EU member states in the Council working party on the UK. Repeated interviews took place with 15 EU officials between March 2021 and April 2024 (March 2021, April 2022, February–March 2023, June 2023, October 2023 and April 2024). Interviews were also done with five UK officials involved in relations with the EU, including during the negotiations (between February 2024 and May 2024). These interviews provided an understanding of the broader context of the negotiations and how the EU and UK designed and approached the negotiations. All interviews were conducted with Professor Hussein Kassim as part of ESRC funded research projects 'Negotiating the Future' and 'Living with the Neighbours'. The author also carried out seven interviews between November 2020 and July 2024 with UK actors who have knowledge of the specific area of civil justice cooperation and Brexit (three from the House of Lords, two from the former Brussels office of the Law Societies of England and Wales in Brussels, and two officials from the Scottish government).

The UK's position in the negotiations

The May government recognised that the Hague conventions would fall short of replicating the conditions the UK had as a member state of the EU (Select Committee on the EU, 2018) and sought 'a new bespoke agreement' that would mirror closely the substantive principles of the framework it benefited from as a member states (HM Government, 2017; 2018). It took the view that acceding to the Lugano Convention would help mitigate the loss of reciprocity, but that a bespoke agreement 'going beyond Lugano' was also necessary (HM Government, 2018) not only in family law matters, but to cover 'the full range of civil judicial cooperation' (HM Government, 2018). Johnson also sought to maintain a high degree of cooperation in this area post-transition. However, he removed any intention to explore options within the negotiations on the future relationship, despite the short reference in the Political Declaration to 'explore options for judicial cooperation in matrimonial, parental responsibility and other related matters' (Chapter IX, point 56). Instead, his negotiating team proposed to cooperate with the EU through 'multilateral precedents set by the Hague Conference on Private International Law and through the UK's accession as an independent contracting party to the Lugano Convention 2007' (HM Government, 2020: 30), without mentioning family matters specifically. On 8 April 2020, the UK formally applied to become an independent contracting party to Lugano. Whilst Norway, Iceland, and Switzerland had consented to the UK's request by early 2021, the European Commission held back from issuing a recommendation on the UK's application until May 2021 after the formal adoption of the TCA (see Table 1). To the UK government's consternation who dubbed the Commission's recommendation 'ideological' (Buckland, 2021), the UK's request to accede to Lugano was rejected.

Analysis

Acceding to Lugano was in line with the UK's red lines. From a legal point of view, acceding to Lugano is not contingent on single market membership (HM Government, 2020d) – and therefore on alignment with the Court – because the Convention 'does not affect the substantive law of rules and regulations of the Single Market' (Barnard and Merrett, 2020). And the principle of reciprocity at the heart of the Lugano Convention means that acceding to Lugano would indeed have compensated for much of the shortfalls of the UK leaving the Brussels regime (European Union Committee 2017; 2021; Jones, 2021). However, it would also have allowed for the UK jurisdictions to continue to benefit from their privileged situation as a 'litigation hub', without having to align with EU rules, because Lugano covers civil and commercial matters not only family law matters. This came up against the EU's concerns about opening a 'back door' to the benefits of the single market in legal services not only from a material perspective but also from a symbolic one, i.e. the fact that the UK had chosen to be a third country without any alignment with the EU legal order:

> …the Lugano Convention supports the EU's relationship with third countries which have a particularly close regulatory integration with the EU, including by aligning with (parts of) the EU acquis. Though the Convention is, in principle, open to accession of "any other State"…it is not the appropriate general framework for judicial cooperation with any given third country (European Commission, 2021).

Thus, the European Commission's recommendation to reject the UK's request to join Lugano as an independent signatory is consistent with the EU's red line on preserving the integrity of the single market, not necessarily on a legal basis, but in terms of demonstrating and securing the benefits for EU members first.

May's position did not address possible incompatible demands between seeking a bespoke agreement and her red lines on exiting the single market and on the Court of Justice of the EU, or the very narrow view taken in the 2018 Council Guidelines. Whilst confidence in securing special treatment coupled with very high demands is consistent with analysis of the May government's approach to negotiations (Figueira and Martill, 2020), the emphasis on the 'unique starting point of the UK' and on 'mutual interest' (HM Government, 2018; Select Committee on the EU, 2018) as compelling arguments for her sought after bespoke deal is consistent with her specific version of cakeist imaginary. The Johnson government also ignored the EU's position on decoupling family law matters from other civil and commercial matters. For the UK, acceding to Lugano presented the double advantage of covering reciprocity in both family law and broader civil and commercial matters with no EU oversight. This approach is consistent with the specific brand of cakeist imaginary of the Johnson government – the assumption is that the UK would be able to use existing instruments guaranteeing mutual recognition without the oversight of the Court of Justice. This position, however, was at opposite ends from the EU's, who had consistently decoupled family matters from other aspects of civil justice cooperation and adopted a very narrow position on continued cooperation. Nevertheless, under Johnson, various UK government ministers continued to stress the functional argument for cooperation when quizzed over Lugano, always underlining how it would be in the 'mutual interest', 'to the mutual benefit' of both parties (Buckland, 2021; EU Security and Justice Sub-Committee, 2020; Justice and Home Affairs Committee, 2021). The possibility that there may be a trade-off between the argument of 'mutual interest' on the one hand and the EU's red lines on the single market, does not appear to have been envisaged.[15]

Table 1: Timeline of the EU-UK negotiations on civil justice cooperation

August 2017	HM Government publishes paper: 'Providing a cross-border civil judicial cooperation framework A FUTURE PARTNERSHIP PAPER'
March 2018	European Council publishes 'European Council (Art. 50) guidelines on the framework for the future EU-UK relationship EUCO XT 20001/18'
June 2018	HM Government publishes 'Framework for the UK-EU partnership

15 In September 2020, Lord Keen, spokesperson for the Ministry of Justice in the House of Lords, recognised that the ongoing fraught negotiation between the UK and the EU might delay accession to Lugano. But he also stated that 'he could not see any reasons why' the UK may not ultimately be granted accession because it 'would be in the mutual interest of all EU members' (EU Security and Justice Sub-Committee 2020).

	Civil judicial cooperation'
7 October 2019	**EU and UK agree the Withdrawal Agreement that guarantees that all cases initiated before the end of the transition period (31 December 2020) will be covered by the Brussels II regime**
	Political Declaration has one sentence that refers to cooperation on matrimonial and parental issues under the section on mobility largely reflecting the Council's position.
25 February 2020	Council Negotiating Directives: one sentence that refers to cooperation on matrimonial and parental issues under the section on mobility
27 February 2020	UK Command Paper on negotiating objectives: civil justice cooperation not included in negotiations for future relationship; position is to accede to Lugano
17 March 2020	Task Force for Relations with the UK Draft: narrow proposal for cooperation in matrimonial, parental responsibility and related family law matters under section on mobility, which includes UK being observer member of the Judicial network
20 April 2020	**UK applies to become a party to the Lugano Convention**
11 September 2020	Switzerland consents to UK accession to Lugano
26 December 2020	**UK and EU reached agreement on TCA: no provision on any civil justice cooperation in civil and commercial matters = 'sectoral hard Brexit'**
26 February 2021	Iceland consents to UK accession to Lugano
30 March 2021	Norway consents to UK accession to Lugano
1 May 2021	TCA formally comes into force after the European Parliament (28 April) and Council (29 April) adopt it.
4 May 2021	**European Commission recommends rejecting UK's request to accede to Lugano**
28 June 2021	EU formally rejects UK accession to Lugano

Falling back on the multilateral international regime under the HCCH

Private international law on family matters is a very complex area with multi-level fragmentation across different regulation levels (domestic, EU and international) especially pronounced even without Brexit. But the UK's departure from the EU means further fragmentation in the short term, with cases initiated before the end of the transition period falling under the EU Brussels II regime because of the provision in the Withdrawal Agreement, and those initiated from the 1 January 2021 falling outside of the EU regime (Kruger, 2024: 174). For those cases that are initiated after the end of the transition period, existing international conventions to which the EU and/or EU member states and the UK are signatory now apply (for a list of these conventions, see Beaumont, 2021). Legal scholars differ in their views on the extent to which these conventions can ensure smooth and efficient judicial cooperation (Beaumont, 2020b; 2021; Isidro, 2022; for a review, see Isidro & Amos, 2018). Nevertheless, they all agree that they do not cover the full range of what exists under EU private international law. Furthermore, when HCCH conventions do exist, not all member states are party to all or the same conventions – for instance, only 12 member states are party to the 1970 Convention on the Recognition of Divorces (Ní Shúilleabháin and Holliday, 2022; Ní Shúilleabháin and Trimmings, 2024). In areas where there is no international convention, the domestic law of each member state and of the UK applies, meaning there is no reciprocity. UK and EU citizens face the possibility of lengthier and costlier legal suits (European Union Committee, 2021; Mehta and Blain, 2021) and problems with enforcement of judgments (Walker 2019) that will only become apparent as cases are brought to courts. Overall, there is a loss in 'legal certainty' that affects smaller parties and individual citizens more (Isidro, 2019; Mehta and Blain, 2021).

During the negotiations, both parties repeatedly emphasised the role of the HCCH conventions as tools for compensating for some of the friction as a result of Brexit. Cooperation on civil and commercial matters through the HCCH Conventions has been bolstered post-Brexit, but remains elusive in family law matters. The UK officially ratified the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters[16] in June 2024, to which the EU is already a contracting party. But this Convention excludes family law matters meaning that there still is no mechanism for the automatic mutual recognition and enforcement of foreign judgments in family law matters. An attempt by the HCCH secretariat in 2020-2021 to put a questionnaire to its members on the practical operation and the potential benefit of increased promotion of the 1970 HCCH convention on divorce recognition did not get the approval of the HCCH members. Meanwhile, the EU has not encouraged EU member states that are not yet party to accede to the 1970 convention on divorce recognition.

Hurdles to cooperation with the UK stem from the way in which the external dimension of EU civil justice cooperation has developed rather than Brexit. The EU engages with the external dimension of civil justice cooperation since the Tampere programme kick-started

[16] Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention). Available at: https://www.hcch.net/en/instruments/conventions/specialised-sections/judgments

the EU's justice and home affairs (JHA) policies in 1999. Its approach has evolved from envisaging multilateral cooperation through international conventions *as well as* bilateral agreements with individual third countries with 'no hierarchy' in the preferred means of cooperation in the mid-2000s (Council of the European Union, 2006: 3) to one that is much more exclusively based on cooperation through multilateralism in the HCCH (see explanation for COM/2023/65 final, 2023). This follows an institutionalisation of the EU's interaction with the HCCH which grew out of a concern over the EU increasingly gaining external competence in matters to do with private international law (Wagner, 2013). The EU became a full member of the HCCH in 2007 and has promoted accession of EU member states to Hague conventions that pre-date the EU becoming a full member of the HCCH (for instance the HCCH 1980 Child Abduction Convention) or developed its own rules in conjunction with HCCH rules (see Beaumont, 2009 on the EU Maintanance Regulation).

Crucially, the EU also has external competence to negotiate and conclude international agreements on behalf of Member States. Indeed, the Court's jurisprudence means that areas of private international law internal to the EU where EU legislation has been adopted become an exclusive external competence of the EU, including in family law matters (Cremona, 2016; Franzina, 2016). Opinion 1/13 (2014) clarifies that this implied external exclusive competence also covers the competence over the request of a third country to accede to international conventions in the area of civil justice cooperation and, by extension, the competence to enter into an agreement with a third country (Cremona, 2016). Following this, member states are now required to get authorisation to be able to negotiate bilateral agreements in civil law matters, including family law, with third countries, in areas where the EU has developed a body of law internally, even if the treaties do not explicitly list the area as an exclusive external competence[17]. Moreover, because of the legal basis for implied exclusive external competence in the treaties, the procedure for any external agreements on family law matters requires unanimity in the Council (excluding Denmark and Ireland) as it mirrors the special procedure internal to EU decision making. Another hurdle stems from the fact that the EU can only 'encourage' member states to sign up to HCCH conventions that pre-date its official membership of the HCCH[18]. Thus, despite a coordinated EU approach in international organizations such as in the HCCH, it is particularly difficult to move ahead in this area. These challenges come on top of the fact that EU policy has not been particularly concerned with the external dimension of civil justice cooperation. The development of EU private international law, including the external dimension, is driven much more by a concern with the deepening of the internal European market rather than 'the connective capacity of private international law beyond Europe' (Abou-Nigm, 2019: 3).

[17] See for instance France's request to open negotiations with Algeria for a new bilateral agreement concerning judicial cooperation in civil and commercial matters 'to modernize and consolidate in one instrument the three existing instruments of judicial cooperation between France and Algeria concluded in 1962, 1964 and 1980' (COM/2023/65 final, 2023)

[18] See for instance how the EU has repeatedly 'encouraged member states' to join the 2000 HCCH Convention on the protection of vulnerable adults. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ%3AC%3A2021%3A330I%3AFULL

Conclusion

An examination of the role of the 'politics of Brexit' in the specific area of civil justice cooperation has highlighted the normative implications of each party's negotiation stance. A sectoral hard Brexit for cooperation in family law matters, with a fall back on a much more fragmented system of private international law, leaves both EU and UK citizens potentially facing higher costs and delays as well as legal uncertainty.

Johnson's approach to the negotiations, which focused on independent access to the Lugano Convention, came at the expense of any prospect of an enduring formal bilateral cooperation on these matters through the TCA. A full sovereigntist approach does not quite explain his decision to remove the narrow provisions in the Political Declaration on civil justice cooperation in family matters off the table of the negotiations on the future relationship. Rather, Johnson's negotiation strategy displayed a certain version of cakeism which consists of seeking to obtain similar agreements and instruments already accorded to other third countries based on the principle of mutual recognition but without the requirements to align with the Court. Defining cakeism as a narrative that allows for silencing the trade-offs specific to the UK's political choice to withdraw from the EU helps understand continuities in the UK's approach to it relations with the EU despite the changes in UK leadership.

The EU's decision not to grant the UK access to the Lugano Convention is indicative of how the politics of Brexit crystallised the bloc's understanding of its relations with non-EU member states into harder categories. The European Commission's explanation for rejecting the UK's request confirms that it viewed accession to Lugano through the prism of its existing *political* relations with neighbouring countries and the degree to which they are prepared to be externally integrated with the EU rules on the single market. This political rationale, underpinned not only by material interests but by a narrative specific to the Brexit process, trumped the functional and normative rationale for cooperation on civil justice cooperation with a loss of legal certainty for EU citizens. This calls for more empirical research on whether the imaginaries crafted for making sense of Brexit shape not only the EU's approach to the UK, but also its approach to its neighbours. It also calls for comparative work on how the politics of Brexit constrain the opportunity to use cross-border instruments based on the principle of reciprocity in other areas of EU-UK relations, for instance on mutual recognition for professional qualifications or on equivalence in financial services.

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