

## The Abused and Neglected Child in the EU Family: Risk, Borders, and Public Law Child Protection

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### 11.1 INTRODUCTION

Discussion of European family law and the conception of the European family originally focussed on the rights of free movement, the processes of migration, and experience of cross-national difference or convergence.<sup>1</sup> As the European Union (EU) secured competence over private international family law and adopted a range of legislation governing jurisdiction, choice of law, and the recognition of judgments in various contexts, including divorce, matrimonial property, and maintenance, the scope of European family law broadened considerably.<sup>2</sup> It directly addresses children within the family, regulating both the consequences of international child abduction, and the jurisdiction, and recognition of judgments in parental responsibility matters,<sup>3</sup> making the child and the child's welfare a direct subject of European family law.<sup>4</sup> The child is also the subject of direct rights protections under Article 24<sup>5</sup> of the EU Charter of Fundamental Rights.<sup>6</sup>

<sup>1</sup> See, for example, E. Caracciolo di Torella and A. Masselot, 'Under construction: EU family law' (2004) 29 *European Law Review* 32; L. Ackers, *Shifting Spaces: Women, Citizenship and Migration within the European Union* (Policy Press 1998).

<sup>2</sup> European Commission, Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions, and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM(2022) 695 final is the latest proposal in this field and would regulate the cross-border recognition of parental status, however acquired, in relation to a child.

<sup>3</sup> Council Regulation (EU) No 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) [2019] OJ L178/1.

<sup>4</sup> H. Stalford, *Children and the European Union: Rights, Welfare and Accountability* (Hart Publishing 2012).

<sup>5</sup> See R. Lamont, 'Article 24' in S. Peers and others (eds), *The Charter of Fundamental Rights of the European Union* (Hart Publishing 2021).

<sup>6</sup> [2012] OJ C326/2.

The migration of families with children between Member States has meant that children, for the purposes of EU law, may be caught between two (or sometimes more) legal systems. The private international law rules developed by the EU are intended to address this directly, providing certainty of jurisdiction and recognition and enforcement of judgments between the Member States. These rules were conceptualised as mainly dealing with private law disputes between family members, normally parents, disputing arrangements for custody or access in the aftermath of a relationship breakdown. However, the public law aspects of cross-border family life have also become highly significant to the operation of EU family law. Children abused or neglected by their family have also been caught between legal systems: whilst identified as being at risk of harm in one legal system, they may have close links (through nationality or other reason) to another legal system.

This chapter will examine how the scope of European private international law now encompasses child protection and will consider the status of the abused and neglected child within the European concept of family. The child protection system and legal framework in each Member State may be very different, making legal borders still highly important in this legal context. The chapter will examine the evolution of the private international law rules in this context, the particular problems evident in practice, and will then seek to explore the tension that still exists in regulating the family between European law and the domestic law of the Member States. It will be argued that the child as a victim of abuse or neglect within the family is not clearly 'seen' within EU international family law, in associated policy or legal frameworks. Whilst children as victims are paid close attention in cross-border criminal contexts<sup>7</sup> and asylum law,<sup>8</sup> the role of the state in combatting violence against children through public family law has received little attention despite evident but legitimate differences in national legal systems managing child protection issues.

## 11.2 CROSS-BORDER PUBLIC LAW CHILD PROTECTION WITHIN THE EUROPE UNION

Family law is often identified as an area of law quintessentially domestic in character and closely related to the religious, cultural, and legal history of the

<sup>7</sup> See, for example, P. Fussey and P. Rawlinson, *Child Trafficking in the EU: Policing and Protecting Europe's Most Vulnerable* (Routledge 2017).

<sup>8</sup> C. Smyth, *European Asylum Law and the Rights of the Child* (Routledge 2014).

State concerned.<sup>9</sup> The harmonisation of private international family law rules within the EU<sup>10</sup> has opened the debate on potential for convergence or even eventual harmonisation of substantive family laws across Europe. In relation to the harmonisation of private international law rules on divorce, the particular emphasis on civil law approach to divorce and procedure has been identified as having an influence on the common law legal systems.<sup>11</sup> The private international law rules and the migration of persons opens up new cross-border understandings of family law and how disputes should be managed and resolved. This can have an impact on the content of Member State family law,<sup>12</sup> though it has arguably had relatively limited impact on child law. The primacy of the child's best interests as the basis for decision-making over children allows for legitimate broad-ranging difference. The open-textured nature of an assessment of the child's best interests, and application of the concept to the facts of a case, provides significant flexibility to domestic courts.<sup>13</sup>

The role of the European Court of Human Rights in adjudicating on Article 8 of the European Convention on Human Rights 1950 (ECHR), the right to respect for private and family life, has arguably been more influential on the convergence of family law standards and the expectations placed on signatory States in relation to family life across Europe.<sup>14</sup> The ECHR has placed positive obligations on signatory States to intervene to prevent the abuse of a child under Article 3, the prohibition on torture and inhuman and degrading treatment, and this includes abuse originating from within the family structure.<sup>15</sup> The law of each EU Member State will contain measures

<sup>9</sup> M. Antokolskaia, 'Harmonisation of substantive family law in Europe: Myths and reality' (2010) 22 *Child and Family Law Quarterly* 397, 399.

<sup>10</sup> The influence of EU law on domestic family law is also broader than just private international law rules. The free movement of citizens within the Union has based family migration on specific categories of family relationship, requiring Member States to adapt their domestic law to accept certain categories of relationship as the basis of free movement rights for children; see C-129/18 *SM EU:C:2019:248* on the kafala form of adoption of a child. See also Chapter 2 by Alina Tryfonidou, Chapter 7 by Michael Bogdan, and Chapter 9 by Geoffrey Willems.

<sup>11</sup> M. Harding, 'The harmonisation of private international law in Europe: Taking the character out of family law?' (2011) 7 *Journal of Private International Law* 203.

<sup>12</sup> See, for example, *Radmacher v Granatino* [2010] UKSC 42 on enforceability of prenuptial agreements in English law on division of assets on divorce. The prenuptial agreement under dispute was concluded in Germany, where it would have been enforceable and the parties expected it to be binding, a factor accounted for in the decision of the Supreme Court regarding the influence of the agreement on the division of assets under English law.

<sup>13</sup> *Stalford* (n 4) 37.

<sup>14</sup> For a full assessment, see C. Fenton-Glynn, *Children and the European Court of Human Rights* (Oxford University Press 2021).

<sup>15</sup> *E v the United Kingdom*, Application no 33218/96.

for child protection in some form to provide a method of intervention in the family to prevent or stop abuse and neglect. The child protection framework will respond in accordance with particular standards defined in domestic law. The methods and processes of intervention, along with the terminology and standards upon which intervention is legitimated by national law vary considerably, consequently making comparison and cooperation between national systems highly challenging.<sup>16</sup>

In general, practical terms, once a child has been identified as at potential risk of harm within the family, the state will engage with the child and the wider family through social service provision and support for the family to address sources of harm. If the risk cannot be ameliorated or addressed within the family structure, the state may take legal measures, usually through public law civil proceedings, but also potentially through the criminal law. Measures will often provide for the removal of the child from the situation of risk within their family and place the child, often in a kinship placement (frequently with grandparents), or with other carers, such as foster carers and/or, in some systems, pursue formal adoption of the child, potentially severing ties with the child's birth family. It is important to acknowledge this role of the state in relation to the family, and the potentially very serious consequences if there are failures in intervention. However, both the standards determining the point at which intervention may take place and the forms interventions take will be different depending on the Member State.

In terms of how we perceive the family, families subject to state intervention for the protection of a child are not susceptible to our common conception of family and family life. Family as the primary site of care and affection for children does not conform with the reality of a child abused within the family, and child protection practice is set apart from other aspects of family law. This has also led to difficulties surrounding the definition of issues such as parental chastisement of children, where physical harm by parents is legitimated by law.<sup>17</sup> Traditional conceptions of divided and gendered parental roles have also led to problematic characterisation of parental action, particularly for mothers,<sup>18</sup> and different characterisation dependent on legal context, either private law disputes over parenting, or intervention in the family to protect the

<sup>16</sup> See N. Parton, 'Comparing child protection systems' in P. Dolan and N. Frost (eds), *The Routledge Handbook of Global Child Welfare* (Routledge 2017).

<sup>17</sup> Fenton-Glynn (n 14) 164.

<sup>18</sup> E. Kuskoff and others, 'Of good mothers and violent fathers: Negotiating child protection interventions in abusive relationships' (2023) *Violence Against Women* (online first).

child through public law.<sup>19</sup> In families of different cultural origins, understanding and responses to state intervention may also vary enormously, posing particular problems in the context of children with links abroad to other legal systems.

This context, along with the increasingly cross-border nature of family life, has meant that it is relatively common, particularly in some Member States with high levels of inward migration, for children to be subject to care proceedings in a State other than that of the child's nationality.<sup>20</sup> The protection of the welfare of the at-risk or abused child is now a challenge for EU private international family law where it regulates the cross-border family. The International Court of Justice in the 1958 *Boll* case observed that the social purpose of child protection law applies to all children, not just nationals of a particular state.<sup>21</sup> As such, the abused or at-risk child has to lie within the conception of cross-border family in law, and, more importantly, identified as having specific needs for the promotion of their welfare.

#### 11.2.1 *The Significance of the Foundations of EU Family Law to Child Protection*

The adoption of private international family law measures by the EU originated in the desire to address the consequences of the free movement of persons between the Member States. The fundamental freedom to migrate within the physical European space had promoted the movement of not just workers, but their families<sup>22</sup> and consequentially, between legal systems and legal spaces. In the European context, the family has been recognised as 'pivotal' to migration choices, and the increasingly less uniform and homogeneous nature of family life has an impact on the social, cultural, and legal structures regulating such migration.<sup>23</sup>

<sup>19</sup> L. Thompson, 'Impossible expectations? Abused mothers' experiences of the child protection and family court systems' (2020) 32 *Child and Family Law Quarterly* 31, 34.

<sup>20</sup> R. Lamont, 'Care proceedings with a European dimension under Brussels IIa: Jurisdiction, mutual trust and the best interests of the child' (2016) 28 *Child and Family Law Quarterly* 67, 69.

<sup>21</sup> *Netherlands v Sweden (Application of the Convention of 1902 Governing the Guardianship of Infants)* [1958] I.C.J. Reports 55.

<sup>22</sup> Now: Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77. See also Chapter 7 by Michael Bogdan.

<sup>23</sup> A: Bailey and P. Boyle, 'Untying and retying family migration in the New Europe' (2004) 30 *Journal of Ethnic and Migration Studies* 229, 234.

Beyond regulating the structural elements of family relationships legitimising the key entitlement to free movement in European law,<sup>24</sup> the EU did not clearly seek to regulate the reasons for migration. Since the introduction of the concept of European citizenship<sup>25</sup> by the Treaty of Maastricht in 1993, individuals are able to move with motivations beyond purely the economic. This is of interest to family lawyers where motivations for migration were directly related to maintaining or breaking family relationships through the use of legal borders and differences. It has particular significance in relation to children who do not necessarily have control over their migration and the reasons for it,<sup>26</sup> which can take a number of forms. For example, migration may constitute an unlawful attempt to separate a child from a parent through parental child abduction, or moving a child across an international border may form part of an attempt to avoid intervention by child protection agencies by moving abroad.<sup>27</sup>

One of the ways in which European law acknowledged the impact that the free movement of persons was having on family life was to seek to regulate private international law rules, alongside the internal EU migration framework. McEleavy has highlighted that the integration of private international family law rules in the EU was motivated to specifically and directly affect the life of the European citizen, making the legal status and familial consequences of their migration to another Member State simpler.<sup>28</sup> In family law (as opposed to commercial law, where there was a clearer link to facilitating litigation associated with the creation of the internal market), the initial interventions were controversial. The economically derived basis for seeking to address the consequences of the free movement of persons and potentially encourage future migration was regarded as problematic.<sup>29</sup> Family law was

<sup>24</sup> F. Banda and J. Eekelaar, 'International conceptions of the family' (2017) 66 *International and Comparative Law Quarterly* 833, 834.

<sup>25</sup> Article 20 TFEU (ex Article 17 of the Treaty establishing the European Community (TEC)).

<sup>26</sup> See M. Moskal and N. Tyrrell, 'Family migration decision-making, step-migration and separation: Children's experiences in European migrant worker families' (2016) 14 *Children's Geographies* 453.

<sup>27</sup> R. Lamont, 'The development of child protection across international borders for children at risk of harm' in G. Douglas, M. Murch, and V. Stephens (eds), *International and National Perspectives on Child and Family Law* (Intersentia 2018) 242.

<sup>28</sup> P. McEleavy, 'The Brussels II Regulation: How the European Community has moved into family law' (2002) 51 *International and Comparative Law Quarterly* 883, 892.

<sup>29</sup> P. McEleavy, 'Private international law: Brussels IIbis matrimonial matters, parental responsibility, child abduction and mutual recognition' (2004) 53 *International and Comparative Law Quarterly* 503, 505.

regarded as having been ‘instrumentalised’<sup>30</sup> in achieving the internal market goals of the Union, along with giving further substance to the emerging concept of European citizenship derived from Article 20 of the Treaty on the Functioning of the EU (TFEU). However, for the EU to assume competence over private international family law, it is necessary to demonstrate a link to the needs of the internal market.<sup>31</sup>

The consequence of this foundation for European family law was a particular emphasis in the underlying policies towards cross-border families, which informed the determination of the international family ‘problems’ to be addressed by EU law. The conception of the ‘problem’ to which economic family migration may give rise was centred on the consequences of migration for family ties, primarily parental ties. It was noted that, in potentially placing extra pressure on family relationships, the migration context may contribute to relationship breakdown between the parents, with associated consequences for any children of the family. The legal framework developed by the EU then focused on addressing the consequences of the breakdown of relationships between parents in a previously extant family, and the resulting cross-national movement and litigation.<sup>32</sup> The potential for abuse or neglect of children within the family structure, and the impact on children of having links to more than one Member State as a result of their family’s migration, was not clearly in focus.

This has had a significant impact in relation to public law child protection, where it is the state intervening to protect a child and seeking legal authority to provide for their welfare, rather than the anticipated dispute between holders of parental responsibility over their obligations towards the child between one another. Despite a long history of public law disputes over children between countries,<sup>33</sup> the academic engagement and research into the cross-border links of children subject to child protection proceedings is of relatively recent origin.<sup>34</sup> It is an area where national law and policies may vary widely and the children subject to public law intervention by the state may face

<sup>30</sup> J. Meeusen, ‘Instrumentalisation of private international law in the European Union: Towards a European conflicts revolution?’ (2007) 9 *European Journal of Migration and Law* 287, 300.

<sup>31</sup> Article 81 TFEU (ex Article 65 TEC).

<sup>32</sup> The regulation of matrimonial property regimes, choice of law on divorce, and on cross-border maintenance claims affecting children could be said to add to this focus on the practical consequences of cross-border relationship breakdown between parents.

<sup>33</sup> *Netherlands v Sweden (Application of the Convention of 1902 Governing the Guardianship of Infants)* (n 21).

<sup>34</sup> S. Mustasaari, ‘Introduction to Special Issue on transnational child protection’ (2022) 34 *Child and Family Law Quarterly* 333, 333.

enormously different surrounding circumstances and personal histories.<sup>35</sup> The increasingly global links maintained by children within their family networks means that the potential for a child to have family members abroad, or significant familial links to another country, is higher. The law and the procedures for providing outcomes for children deemed at risk of neglect or abuse from their family have to be able to respond to these global links to effectively secure the welfare of the child. This is the context in which European family law has operated.

#### 11.2.2 *Developing Cross-Border Child Protection within the EU Family Law Framework*

Regulation 2201/2003,<sup>36</sup> or *Brussels IIbis*, was the first significant and effective piece of EU legislation impacting on family law between the Member States. It created jurisdiction rules for divorce and disputes over parental responsibility including contact and custody within the EU. On the assumption that jurisdiction would be uniformly assumed, recognition of the resulting judgments was almost automatic. The Regulation also created an additional framework for child abduction, building on the Hague Convention on the Civil Aspects of International Child Abduction 1980, to encourage the return of a child unlawfully removed or retained between Member States. These rules are now embodied in the updated and revised Regulation 2019/1111, known as *Brussels IIbis Recast*.<sup>37</sup> The legal framework centres on the consequences of this process of breakdown in relationships between parents, that is, the private law aspects of family conflict.

After the adoption of Regulation 2201/2003, the first question posed to the Court of Justice of the European Union (CJEU) regarding the interpretation of the Regulation was regarding its material scope. In Case C-435/06 C,<sup>38</sup> the mother of two children appealed against the decision of the Finnish court to transfer legal responsibility for her children from the Finnish court to the

<sup>35</sup> S. Mustasaari, 'Children abroad: A relational analysis of cross-border child protection cases in the Finnish Central Authority' (2022) 34 *Child and Family Law Quarterly* 361, 365.

<sup>36</sup> 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 [2003] OJ L338/1. For an assessment of the Regulation, see T. Kruger and L. Samyn, 'Brussels IIbis: Successes and suggested improvements' (2016) 12 *Journal of Private International Law* 132.

<sup>37</sup> Council Regulation (EC) No 2019/1111 on jurisdiction, the recognition, and enforcement of decisions in matrimonial matters and the matters of parental responsibility and on international child abduction (recast) [2019] OJ L 178/1.

<sup>38</sup> Case C-435/06 C EU:C:2007:714.

Swedish authorities. The two children both had Finnish nationality, and the elder child also had joint Swedish nationality. They had been taken into care in Sweden in February 2005, but their mother had moved them to Finland in March 2005. The Swedish authorities sought the enforcement of the decision to take the children into care in Finland.<sup>39</sup> The CJEU confirmed that since the decision related to the attribution, exercise, delegation, restriction, or termination of parental responsibility under Article 1(1)(b), Regulation 2201/2003, it was within the material scope of the Regulation.<sup>40</sup> This meant that EU law relating to jurisdiction and the recognition of judgments under Regulation 2201/2003 applied to the public law judgment to take the children into the care of the Swedish state, since this decision affected the exercise of parental responsibility over the child.

The available European family law legislation was not clearly directed at governing jurisdiction over these children. Both *Brussels IIbis* and the updated *Brussels II Recast* create a distinction between jurisdiction over disputes affecting parental responsibility, including placement in foster or educational placements, and decisions on adoption which are expressly excluded from the material scope of the Regulation.<sup>41</sup> Adoption, either in kinship placements or outside the birth family, can be a common outcome from care proceedings in some Member States. This makes the initial decision to assume jurisdiction over a child identified as at risk of harm within the family extremely important because it affects the potential outcome for the child in determining the available family arrangement options when the court makes substantive decisions in relation to the child's future. The preparatory proposals for *Brussels IIbis* did not envisage that public law proceedings would feature heavily in cross-border disputes, instead focusing on clarity in divorce jurisdiction and resulting private law disputes over children.<sup>42</sup> Arising from the evidence in practice under the original Regulation, the Commission's proposals for the Recast Regulation after ten years of operation of *Brussels IIbis* acknowledged specific challenges in the effective and efficient placement of children abroad for their welfare required revisions to the legislative framework.<sup>43</sup> Despite this

<sup>39</sup> Ibid, paras 14–23.

<sup>40</sup> Ibid, para 26.

<sup>41</sup> Article 1(4) of Regulation 2019/1111 (n 3).

<sup>42</sup> See European Commission, Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation 1347/2000, COM(2002) 222 final.

<sup>43</sup> Problems in securing timely consent for placement in the foreign jurisdiction were specifically identified. European Commission, 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), COM(2016) 411 final.

acknowledgment and amendments to the governing framework, the risks posed to children within the family and the need for state intervention for the child's protection are incidental to the conception of family life.

The focus on the breakdown of parental relationships meant that circumstances affecting the child within the extant family, and the role of the state in intervening in family life, had not been fully considered. The increasing movement of families and children has meant that children involved in child protection proceedings, governed by the domestic public law of the Member State, often have links to foreign jurisdictions. Even if the child was born in the country where they are made subject to care proceedings, their parents may be nationals of other countries and they may have significant close family members in other countries, for example, grandparents. Alternatively, the child may have been born abroad and migrated along with the family, or there may be an attempt to avoid domestic child protection proceedings by moving the children to another state (as appears to have been the case in C-435/06 C<sup>44</sup>). In other circumstances, a child at risk of harm may have been placed with institutions abroad for specialist care and support unavailable in their home country.<sup>45</sup>

This aspect of cross-border family life had emerged as a serious concern in practice under the Brussels IIbis Regulation.<sup>46</sup> Article 15 of the Regulation, allowing transfers of jurisdiction over parental responsibility proceedings in the best interests of the child between the Member States assumed particular importance in relation to child protection where the child had links to another Member State. When the host state instituted proceedings for their protection, the question arose as to the circumstances where the case should be transferred to the foreign court, usually the court of the child's nationality. In Case C-428/15 *Child and Family Agency*,<sup>47</sup> the CJEU made it clear that Article 15 of Regulation 2201/2003 could apply to the transfer of public law proceedings to a different Member State than to that first seised. In determining whether the alternative court with a particular connection to the child was 'better placed' to hear the case, the CJEU directed that the analysis should focus on whether it provided 'genuine and specific added value',<sup>48</sup> accounting for rules of procedure that justifies transferring jurisdiction from the child's habitual residence, the primary ground of jurisdiction.<sup>49</sup> The assessment of

<sup>44</sup> C (n 38).

<sup>45</sup> See Case C-92/12 *HSE* EU:C:2012:255.

<sup>46</sup> Lamont (n 20).

<sup>47</sup> Case C-428/15 *Child and Family Agency* EU:C:2016:819.

<sup>48</sup> *Ibid*, para 57.

<sup>49</sup> Article 8 of Regulation 2201/2003 (n 36).

whether the transfer of jurisdiction is in the child's best interests is a truncated assessment, limited to whether the transfer will be 'detrimental to the situation of the child'.<sup>50</sup> This can include whether the transfer will affect the child's right of freedom of movement within the EU, but not how the interests of other parties, for example, the child's parent, may be affected by the transfer.<sup>51</sup>

Much of the litigation in relation to transfers of jurisdiction under Article 15 occurred in England and Wales, partly because it was a common migration destination country within the EU, and partly because it maintains a system of closed adoptions where the child does not maintain links with the birth family without the consent of the child's birth parent(s) where this is deemed to be in the child's best interests.<sup>52</sup> In England and Wales, if a foreign national child was habitually resident in England under Article 8 *Brussels IIbis*, the English court could adopt orders under Children Act 1989 to protect the child<sup>53</sup> in England.<sup>54</sup> The question of whether jurisdiction over the care proceedings should be transferred to the Member State of the child's nationality under Article 15 of the Regulation should always be considered in care proceedings involving a foreign national child.<sup>55</sup> Under Article 15, the court had to consider whether the foreign court was better placed to hear the proceedings and whether the transfer was in the child's best interests, accounting for the impact of the transfer on the welfare of the child, but not the potential outcome of substantive proceedings, that is, the long-term future of a child deemed to be at risk if care is maintained in their family.<sup>56</sup>

Concerns were expressed within the EU over the differences in law and practice in relation to child protection in the different Member States.

<sup>50</sup> *Child and Family Agency* (n 47), para 63.

<sup>51</sup> *Ibid*, paras 66–67.

<sup>52</sup> Children and Adoption Act 2002 (England and Wales).

<sup>53</sup> If the threshold criteria under s.31(2), Children Act 1989 are met, a range of possible disposals are available.

<sup>54</sup> Since the UK's withdrawal from the EU, jurisdiction in England and Wales would be assumed on the basis of the child's habitual residence under Article 5 the Hague Convention on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children 1996 which also allows for transfers of jurisdiction under Article 8: see R. Lamont, 'Child protection in international family law and the determination of where the child 'belongs' for the purpose of jurisdiction' (2022) 34 *Child and Family Law Quarterly* 401. Regulation 2201/2003 was informed by the terms of the 1996 Convention in drafting, but arguably the 1996 Convention is clearer in defining the process of transfer of jurisdiction over a parental responsibility case: see P. Beaumont 'Private international law concerning children in the UK after Brexit: Comparing Hague Treaty Law with EU Regulations' (2017) 29 *Child and Family Law Quarterly* 214, 220.

<sup>55</sup> *In Re E (A Child) (Care Proceedings: European Dimension)* Practice Note [2014] EWHC 6 (Fam).

<sup>56</sup> *Re J (Children) (Brussels II Revised: Article 15)* [2016] UKSC 15.

In English care proceedings there has been increasing willingness to transfer jurisdiction over a child national to another Member State to respect the interest of the other country in protecting their nationals, but this transfer should only occur when transfer is in the child's best interests.<sup>57</sup> Where a child is at risk, the English court is obliged to act for the child's protection, but other countries regard the English law approach of placing children removed from their parents' care in adoption and preventing contact with the birth parents as highly problematic.<sup>58</sup> This approach to adoption as an outcome from child protection proceedings in England and Wales attracted significant criticism from other Member States<sup>59</sup> and encouraged the English court to consider transfer of jurisdiction to enable the Member State of which the child was a national to determine the long-term future of the child.

There have also been practical difficulties in the execution of the process for transferring jurisdiction to the foreign court which will hopefully be addressed to some degree by Regulation 2019/1111, the Recast Regulation.<sup>60</sup> Between EU Member States, transfers of cases between jurisdictions are now managed under Article 12, Regulation 2019/1111, which now contains specific time limits for informing the foreign jurisdiction of a potential transfer and instituting proceedings, and jurisdiction can be accepted by the foreign court if it is in the best interests of the child. Practical concerns relating to the production of social workers reports regarding issues such as assessment and organisation of kinship placements in the foreign state, and cooperation between social work services between the Member States may however still be difficult to coordinate.<sup>61</sup>

The experience of cross-border family disputes in the EU has demonstrated that the impact of family violence and child abuse has a significant cross-border dimension. However, the legal framework, along with systems of cooperation between key actors in child protection services such as social workers, has not been conceptualised with this issue in mind. EU private international family law has been developed with private law disputes as the

<sup>57</sup> Ibid.

<sup>58</sup> C. Fenton-Glynn, 'Adoption without consent', Report for the European Parliament PETI Committee (2015) <[www.europarl.europa.eu/RegData/etudes/STUD/2015/519236/IPOL\\_STU\(2015\)519236\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519236/IPOL_STU(2015)519236_EN.pdf)>.

<sup>59</sup> R. Lamont and C. Fenton-Glynn, 'Cross-border care and adoption proceedings in the European Union' (2016) 38 *Journal of Social Welfare and Family Law* 94.

<sup>60</sup> *Re HA (A Child)* (Brussels IIA Art. 15) [2015] EWHC 1310 (Fam).

<sup>61</sup> M. Wright, 'Working the international child protection case: A snapshot of local authorities' experiences within an evolving legal context' (2019) 41 *Journal of Social Welfare and Family Law* 15, 28.

focus, where it is most often the case that the best interests of the child are secured through protecting and supporting family relationships post relationship breakdown between the parents. The complexity of the child's circumstances where the child is at risk of abuse or neglect poses additional challenges when a cross-border link is also evident and the role of the state in intervening in the family changes the nature of the dispute. The substantive outcomes for the child themselves, and their wider family, may be significantly different depending on the country where the dispute is heard and the available options for a child deemed to be at risk of abuse or neglect.

### 11.3 THE EUROPEAN CHILD AND THE ABUSIVE OR NEGLECTFUL FAMILY

In recent years, there has been far greater focus within the EU on the rights of the child and how these can be protected and mainstreamed throughout EU law.<sup>62</sup> The European Commission's recently published 'Strategy on the Rights of the Child'<sup>63</sup> identifies combatting violence against children and ensuring child protection as a priority. The impact of violence occurring within the family is highlighted as a concern. The Commission seeks the promotion of integrated child protection systems, working together to protect and support the child in their best interests.<sup>64</sup> They direct attention to prevention measures, particularly family support designed to maintain and safeguard the child in their family environment. These are key factors for effective cross-border child protection, since there should be a framework for clear routes of cooperation between state authorities for the welfare of the child. The Commission also asks Member States to promote national strategies for family- and community-based care with a focus on preparing children to leave public care.<sup>65</sup> Despite this engagement at a policy level, the child as a victim of abuse and neglect within the family is not clearly defined within the European conception of the family and remains an oblique factor in developing European family law rules.

The key factor for the EU in building child protection mechanisms is its limited competence to do so in this field. Children as victims of violence or

<sup>62</sup> See Lamont, 'Article 24' (n 5).

<sup>63</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Strategy on the Rights of the Child, COM(2021) 142 final.

<sup>64</sup> Ibid 11.

<sup>65</sup> Ibid 12.

risk of harm has been an issue in other legal contexts, particularly the trafficking of children,<sup>66</sup> and the child as a victim of crime.<sup>67</sup> These measures are based on the EU competence in relation to cross-border criminal law under Title V TFEU.<sup>68</sup> It has engaged with violence against children in the context of the Daphne research funding programme which supported research projects that aimed to protect children, young people, and women against violence.<sup>69</sup> The funding calls included transnational projects seeking to build professional capacity in child protection,<sup>70</sup> but had very broad scope covering a range of different research priorities. The Fundamental Rights Agency has produced a guide to the protection of children found outside of parental care in a Member State other than that of their nationality, although this largely focuses the specific and specialised needs of children trafficked within the Union.<sup>71</sup>

The recognition that the child may face significant abuse and violence within the family environment is partial and fragmented across the EU legal competence and policy framework. The child harmed within the family is a victim of crime, yet state intervention through social work support and monitoring, and family law child protection frameworks is usually the priority response where a child is identified at risk of abuse or neglected within this environment. The nature and approach of this framework in responding to child abuse and neglect obviously lies within the competence of the Member State. However, the experience of abuse and neglect by children with family

<sup>66</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1.

<sup>67</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57; Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA [2011] OJ L335/1.

<sup>68</sup> Article 83(1) TFEU.

<sup>69</sup> Decision No 779/2007/EC of the European Parliament and of the Council of 20 June 2007 establishing for the period 2007–2013 a specific programme to prevent and combat violence against children, young people, and women and to protect victims and groups at risk (Daphne III programme) as part of the General Programme Fundamental Rights and Justice.

<sup>70</sup> See European Commission, Action grants to support transnational projects aiming to build capacity for professionals in child protection systems and legal professionals representing children in legal proceedings – JUST/2015/RCHI/AG/PROF <[https://ec.europa.eu/justice/grants1/calls/2015\\_action\\_grants/just\\_2015\\_rchi\\_ag\\_prof\\_en.htm](https://ec.europa.eu/justice/grants1/calls/2015_action_grants/just_2015_rchi_ag_prof_en.htm)>.

<sup>71</sup> EU Fundamental Rights Agency, 'Children deprived of parental care found in an EU Member State other than their own' (2019) <<https://fra.europa.eu/en/publication/2019/children-deprived-parental-care-found-eu-member-state-other-their-own>>.

links in more than one country may add a distinct European dimension to child protection in the cross-border family, strongly in evidence in the practice of the Brussels IIbis Regulation. The family as an abusive environment is out-of-focus, only obliquely acknowledged by European law in fragmented diverse contexts. This is partly due to the significant differences in child protection regimes across the Member States and the challenges associated with assessment of risk and cultures of protection.

### 11.3.1 *Differences in Family Laws and Understandings of Child Protection*

Despite elements of harmonisation within the EU and Council of Europe legal frameworks, it is evident that family laws across the European legal space remain different. This is the case in relation to both their underlying approach (beyond the distinctions between common law and civil law systems) and in decision-making processes in disputes relating to children. This is particularly the case in public law and arrangements for children under child protection measures provided by the state, broadly conceived. In this context, methods of cooperation are not closely developed between states, despite the existence of International Social Services,<sup>72</sup> designed to assist children and families with social problems arising from migration, and the work of charities such as Children and Families across Borders within this framework.<sup>73</sup> The potential for intra-State controversies over the differences in approach have been made evident in the EU context, with significant political concern expressed over the English practice of adoption as an outcome of child protection proceedings by other EU Member States.<sup>74</sup> The approach to child protection across the Member States is highly variable with different emphasis on family engagement, placement, and use of adoption in different legal systems within different underlying political legal cultures.<sup>75</sup>

The perception and understanding of risk to children exposed to violence, abuse, and neglect is heavily influenced by culture. The response to evidence of risk can differ both in the broader legal culture and regulatory environment, but also on the ground practice and experience of the social workers and, if necessary, legal actors. Weston and Mythen have explored how professions involved in child protection understand and perceive the risks posed to

<sup>72</sup> <[www.iss-ssi.org/index.php/en/](http://www.iss-ssi.org/index.php/en/)>.

<sup>73</sup> <<http://cfab.org.uk>>.

<sup>74</sup> Lamont and Fenton-Glynn (n 59) 98.

<sup>75</sup> T. Spratt and others, 'Child protection in Europe: Development of an international cross-comparison model to inform national policies and practices' (2015) 45 *British Journal of Social Work* 1508, 1513.

children in the context of child sexual exploitation.<sup>76</sup> In a localised domestic study, they found that interactions with children and perceptions of the risks to their welfare are influenced by the practitioners' background assumptions and the context of the decision-making. In particular, they found that personal opinions seeped into professional assessments and decisions relating to children, in assessing the nature of the risks posed, its source, and appropriate interventions. They demonstrate that in assessing risk, and choosing state intervention in the family, the influence of localised legal and professional culture is very strong. Walklate and Mythen identify (in relation to domestic abuse) that: '... those deemed at risk are not forensically measured ... they are constructed within a logic of norms and values that are felt'.<sup>77</sup> The tendency within child protection practice has been to broaden the understanding of what poses a risk to a child since the turn of the century,<sup>78</sup> but the assessments determining risks posed to children remain strongly individualised.

The response of the domestic legal system to a child at risk in the family is therefore heavily informed by (potentially highly) localised cultures and practices. It has been suggested that perceptions of risk in determining abuse are too individualised and localised, rather than addressing the general causes of harm to children.<sup>79</sup> However, these broader contextual factors could also have an influence on how the professionals involved regard and interpret the parenting practices of a non-national family, or assess a placement for the child in another Member State. How to effectively coordinate these systems at both a social work and legal level has been left largely unexamined, remaining a sub-concern in the management of cross-border cases though there is a rising number. The EU conception of family life, in obscuring and only partially engaging with family violence and abuse of children in this context, has meant these concerns are left outside of the scope of policy formation for effective consideration and engagement.

Private international family law has always operated to partially obscure the differences between legal systems. As a system of law that is designed to accommodate and manage the impact one legal system may have on another,

<sup>76</sup> S. Weston and G. Mythen, 'Disentangling practitioners' understandings of child sexual exploitation: The risks of assuming otherwise?' (2022) 22 *Criminology and Criminal Justice* 618, 630.

<sup>77</sup> S. Walklate and G. Mythen, 'Beyond risk theory: Experiential knowledge and "knowing otherwise"' (2011) 11 *Criminology and Criminal Justice* 99, 108.

<sup>78</sup> N. Parton, 'Child protection and safeguarding in England: Changing and competing conceptions of risk and their implications for social work' (2011) 41 *British Journal of Social Work* 854, 867.

<sup>79</sup> B. Featherstone, A. Gupta, K. Morris, and J. Warner, 'Let us stop feeding the risk: Towards a social model of "child protection"' (2018) 7 *Families, Relationships and Societies* 7, 10.

private international law rules are often designed to limit the focus on differences between both substantive legal rules and processes for dispute resolution. However, the EU has sought to use private international law as a means to *encourage* migration and integration within Europe. The emphasis on uniform assumption of jurisdiction is to encourage the mutual recognition of resulting judgments within the European judicial space. However, Meeusen has questioned the extent to which this approach is suitable for family law, pointing out, 'The very strict regime of mutual recognition now obliges Member States to accept the content of family law decisions originating in other Member States as if they were indifferent to the substantive outcome of these cases.'<sup>80</sup> He argues that European private international law '... radically liberalizes international family law in a somewhat hidden way, while Member States are at the same time unable to reach agreement on common substantive principles and rules of family law'.<sup>81</sup> In the context of children at risk of abuse within the family, this criticism is particularly pertinent. This aspect of European private international family law has placed the tension between assumption of jurisdiction over children and the legal indifference to substantive outcomes for the child under particular pressure.

#### 11.4 CONCLUSIONS

The European Commission's Strategy on the Rights of the Child states that its '... overarching ambition is to build the best possible life for children in the European Union and across the globe'.<sup>82</sup> The range of policy and legal engagement with children across the breadth of EU competence demonstrates an ongoing strong commitment to securing children's rights within Europe, even if there are difficulties in practice for the achievement of this ambition.

The limitations on this ambition and of European engagement with children in the family are demonstrated by considering cross-border child protection where a child is identified in one Member State as at risk of abuse or neglect in their family environment. Legal borders are still significant for these children and families. There are considerable differences between the Member States in the practice of child protection and the perception and understanding of risk and risk management. In this sphere, the substantive

<sup>80</sup> Meeusen (n 30) 303.

<sup>81</sup> Ibid 304.

<sup>82</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Strategy on the Rights of the Child, COM(2021) 142 final.

outcomes of legal systems still really matter and are significantly different. Parents who abuse or neglect their children have not been perceived as an aspect of the EU conception of family life, where rights are associated with securing opportunities, rather than also recognising a concomitant need to prevent and protect children from harm by the family. The tension between the indifference of private international law rules, and the significance of the substantive decision for the child and family concerned, deserves further reflection and consideration in the future practice of EU law and development of cross-border policies on cooperation over children and their welfare.