The potential implications of Brexit for Child Protection

Helen Stalford

European Children’s Rights Unit, School of Law and Social Justice, University of Liverpool

To fully appreciate the potential impact of Brexit on child protection it is important to understand what precisely the EU has achieved in this area and why EU intervention in this area has been considered to be necessary and valuable. It is also important to appreciate the precise nature of EU child protection activity, both legal and non-legal.

This is by no means intended as an exhaustive summary of the key areas of EU law and policy that relate to child protection. Sources of more detailed information are listed at the end and throughout this paper where relevant.

1. Introduction – What authority does the EU have in the field of child protection and where does this authority come from?

In general terms, EU powers in the field of child protection are clearly defined and delimited by the EU Treaties. In some areas, the EU imposes legal obligations which all of the Member States are bound to implement at the domestic level, particularly in relation to child protection issues with a cross-border element (such as child trafficking, forced migration and forms of sexual exploitation). In other areas, the EU shares competence or supports the Member States in developing their child protection systems, with a view to fostering cooperation and minimum standards of protection (for example in the field of family law or domestic criminal justice).

EU action to combat such issues is seen as offering the most appropriate means of addressing the unintended consequences of the economic, legal and geographical expansion of the EU. EU action in these areas also reflects Member States’ inability to tackle some of the most odious forms of child abuse and exploitation by themselves, and their desire to harness the EU’s unique political and economic resources to formulate a supra-national response to what are typically trans-national phenomena.

1 stalford@liv.ac.uk
The EU has acquired increasing legal and political authority to enact measures in the field of child protection, particularly since the entry into force of the Treaty of Lisbon in December 2009.\(^2\) While the EU’s constitutional commitment to protecting children’s welfare is bold and unequivocal, substantive EU measures in this area have emerged in a characteristically gradual and piecemeal fashion and have necessarily been confined to key areas that intersect with the operation of EU law. In that sense, legislative attention has largely concentrated on the child protection implications of EU internal market measures such as the free movement of goods, services and persons and, latterly, with the growing asylum and immigration acquis.\(^3\) Accompanying this, however, is a raft of non-legislative measures which have proved equally, if not more effective, in tackling various forms of child abuse and exploitation.

2. **Binding EU Child Protection Law**

The EU has the power to enact binding laws (which have to be implemented across the Member States) with a view to:

- combating sexual exploitation (Art 79(2)(d) TFEU)
- combating human trafficking (Article 83(1) TFEU)
- approximating procedures for identifying perpetrators and victims of sexual exploitation and trafficking
- facilitating the cross-national exchange of information between the relevant authorities on convicted offenders (Articles 82-89 TFEU).

The EU also regulates child protection issues that arise in the context of broader policy areas such as cross-border family law,\(^4\) immigration and asylum law,\(^5\) and criminal justice proceedings.\(^6\)

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\(^2\) For further detail on the changes brought about by the Treaty of Lisbon as regards the EU’s child protection competence, see *H. Stalford and M. Schuurman ‘Are We There Yet?: the Impact of the Lisbon Treaty on the EU Children’s Rights Agenda’* *International Journal of Children’s Rights* 19 (2011) 381–403 (available on request)

\(^3\) A range of other, more sporadic initiatives have emerged in the context of consumer protection and health and safety, the details of which fall outside the scope of this paper.

\(^4\) For a full discussion of the role (and limitations) of the EU in the context of cross-border family proceedings see Lamont, R and Fenton-Glynn, C. ‘Cross-Border Public Care and Adoption Proceedings in the European Union’ *JSWFL* Issue 38(1) 94-102

\(^5\) For a recent, succinct summary of the EU measures relating to child asylum seekers that are binding on the UK see the House of Lords report by the EU sub-committee on Home Affairs, (2016) *Children in crisis: unaccompanied migrant children in the EU*

\(^6\) See notably, the EU Victims Directive establishing minimum standards on the rights, support and protection of victims of crime. This includes significant protective provision for child victims. See also *DIRECTIVE 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings*. Note that the UK has opted out of the latter Directive. For CRAE’s analysis of the potential benefits this instrument would have brought for children in the UK, see *Joint position paper on the proposed directive on procedural safeguards for children suspected or accused in criminal proceedings* (2014)
These changes have led to a number of binding EU laws relevant to child protection. The key instruments are as follows:

2.1. **Sexual Abuse, Exploitation and Child Pornography**


This Directive harmonises around twenty criminal offences against children and introduces a comprehensive approach to preventing and addressing child sexual abuse, exploitation and child abuse images. The Directive significantly enhances provisions to support child victims of sexual abuse and exploitation, **obliging Member States to provide assistance, support and protection taking into account the best interests of the child (Article 18)**. Measures must be taken to ensure that professionals can, and know how to, report suspicion that a child is a victim of child sexual abuse or exploitation. Assistance and support must be provided as soon as competent authorities have indication that abuse or exploitation has taken place, and should be extended to parents or guardians if appropriate (Articles 18-20).

The Directive moreover includes **specific emphasis on preventative measures**, ranging from reducing demand, to disqualification, to supporting offenders and preventing recidivism (Articles 10, 22, 23, 24). This includes, for example, education and training targeting a public audience through information and awareness-campaigns, research and education programmes on a child rights based approach (Article 23(2)). **Regular training for officials shall be provided in order to better enable professionals to identify and address cases of child sexual abuse and exploitation** (Article 23(3)) and information services providing information on how to recognise “signs” of sexual abuse and exploitation (Paragraph 45, Preamble) should be set up. Member States are also encouraged to create mechanisms for data collection or focal points which, together with civil society, should observe and evaluate both prevalence and action to combat child sexual abuse and exploitation (Paragraph 44, Preamble). A role is envisaged for the EU to contribute to developing methodologies and data collection to secure comparable data across the EU. **Other mechanisms of a transnational character include exchange of information from criminal records between Member States and collaboration across borders to combat child abuse images** (‘child pornography’) as well as ‘sex tourism’ (Articles 10(3) and 21).

The Directive also includes a broad set of provisions to ensure child friendly justice. **Member States must ensure that children have free and easy access to legal remedies**. This includes, for example, **free legal counselling and representation**. A special representative must be appointed in special circumstances, for example, if there is a conflict of interest between the child and the holders of parental responsibility or if the child is separated or unaccompanied (Article 20). **Other provisions aim to prevent children’s participation in criminal investigations proceedings causing additional trauma, for**
example as a result of interviews or visual contact with offenders. Member States must also take necessary measures to ensure non-prosecution or non-application of penalties to victims (Article 20(3), (4) and (5)). Children’s right to be heard is also addressed in the context of establishing appropriate action to assist and support victims. Measures should be taken in the best interest of the child on the basis of an adequate assessment of the individual case, taking due account of the child’s views, needs and concerns (Articles 18 (1) and 19 (3) CRC).

Therefore, it is clear that the Directive has made a significant contribution towards bringing EU legislation in this area closer to the CRC and the Optional Protocol on the sale of children, child prostitution and child pornography. This includes clear definitions of terms such as 'child' as “any person below the age of 18 years” (Article 2 (a)) and ‘child pornography’ (Article 2 (c) and 5). The Directive also sets out provisions for the application of the CRC guiding principles, for example “best interest of the child” (Paragraph 2, 6 and 30 Preamble, and Article 18.1). Other important elements include the provisions on, for example, attempt (Article 7.2), confiscation of proceeds (Paragraph 23, Preamble and Article 11) and assistance and protection of victims (Paragraph 31, Preamble, Articles 18 and 19).

Note that the provisions of this Directive are heavily inspired by the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention). They are also, while less detailed and more limited in scope, in line with the Council of Europe Guidelines on Child-Friendly Justice. Furthermore, the Directive also echoes the approach and content of General Comment No 13 of the UN Committee on the Rights of the Child and covers a number of elements that contribute towards building child protection systems, beyond providing a legal framework for prohibiting and addressing sexual abuse and exploitation. The added value of EU law in this area, however, is that it integrates these obligations into a single, comprehensive document, and imposes binding legal obligations which can be directly enforced by children at domestic level before their domestic authorities. This EU legislation is probably the best means of advancing compliance by the UK with these international instruments which, otherwise, have limited enforceability.

2.2. EU Law Protecting Victims of Child Trafficking

the Directive arguing that the UK already complies with much of the provisions contained in the draft EU Directive. However, it later applied to opt-in to the Directive and its request was accepted by the European Commission. The date of entry into force of the Directive for the UK was on 18 October 2011. Most of the provisions have been incorporated into UK domestic law, but not all. For instance the obligation to provide a legal guardianship for child victims of trafficking contained in Art 14 has been implemented in Scotland, with legislation in the pipeline in N. Ireland, but not in England and Wales.

2.3. **Child Protection Law and the EU Internal Market**

- Child protection has also featured, albeit in a much more subtle way, in **EU free movement law** governing the mobility of both EU nationals and goods between the Member States. Specifically, legislation governing the free movement of persons protects migrant children against expulsion from the host state, even if this would otherwise be justified on grounds of public policy or public security. This is based on a desire to protect children’s welfare by preventing any unnecessary separation from their family in the host state.\(^9\) Similarly, the regulatory framework governing the free movement of goods between the EU Member States,\(^10\) while it does not contain an explicit reference to protecting children, does allow national restrictions to be imposed on imports or exports on grounds of, *inter alia*, ‘public morality, public policy or public security; the protection of health and life of humans’.\(^11\)

3. **EU child protection only goes so far and is by no means perfect...**

Whilst the EU regulatory framework has provided a much-needed, co-ordinated response to these complex, shared transnational problems, it has been criticised on a number of grounds:

- It has been argued that, in enacting these measures, the EU and Member States’ primary concern has been less on protecting the rights of children and more on

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\(^10\) Title II, Part III (arts 28-37) TFEU (ex. Title I, Part III (arts 23-31) EC).

\(^11\) Art 36 TFEU (ex. art 30 EC). See further the case of *Dynamic Medien* for an example of how the Court of Justice of the EU interpreted these provisions by reference to children’s best interests, and specifically Article 17 CRC.
enhancing border security, pursuing perpetrators and streamlining administration. As such, many of the children’s rights obligations contained in EU law are vague.

- Second, while EU legislation is binding on Member States, its implementation at national level usually takes a significant amount of time (sometimes many years) and is subject to national interpretation. This arises because EU directives (the most common form of legislative expression of EU child protection measures) typically contain general obligations which are then transposed into the national legal framework, leaving Member States with much discretion to identify the appropriate means for their implementation. There are numerous examples of the UK’s failure to implement its child protection guarantees under EU asylum law or to water them down.  

- The UK has been allowed to opt out of a significant proportion of EU child protection legislation, including most of the recast immigration and asylum provisions that enhance protection for vulnerable migrants, as well as the new criminal procedural safeguards directive (see footnote 4).

- EU measures relating to the protection of children have developed in a highly fragmented way in disparate policy areas. For example, the obligations contained in the child victims directive have not been robustly applied in the context of EU law relating to child immigrants and asylum seekers. That said, the EU has focused in more recent years on supporting the development of a more integrated approach to child protection. 

4. ...But EU intervention extends far beyond binding law

4.1. The EU Child Protection Infrastructure

The EU has always acknowledged that binding laws, however robust, can only operate if supported by a sturdy child protection infrastructure to facilitate the cross-national gathering and exchange of information relating to both victims and perpetrators. Among the mechanisms that have been set up by the EU in this regard are the following:

- EUROJUST was set up in February 2002 as a judicial co-operation body responsible for co-ordinating investigations and prosecutions across the Member States (the UK is a member of this body). Its activities primarily focus on organised criminal activity that crosses borders, particularly human trafficking.

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12 See for instance the findings of the House of Lords report on unaccompanied minors, referred to above at footnote 4.

• **EUROPOL**, the European Law Enforcement Agency, facilitates co-operation between the investigative authorities in the Member States with a view to preventing and combating serious organised crime, including criminal activities involving children.

• The EU introduced the European Arrest Warrant in 2002 to provide a fast-track extradition procedure enabling the national judicial authorities of one Member State to secure the arrest and return of a person to their territory to answer charges of an offence. While the EAW was initially driven largely by a desire to track down suspected terrorists, it has also assisted in bringing to justice perpetrators of crimes against children following their move to another Member State.¹⁴

• **ECRIS**, the European Criminal Records Information System, was established in April 2012 to create an efficient exchange of information on criminal convictions between Member States. It establishes an electronic interconnection of criminal records databases to ensure that information on convictions is exchanged between Member States in a uniform, speedy and easily computer-transferable way. It also provides judges and prosecutors with easy access to comprehensive information on the criminal history of persons concerned, regardless of the Member State in which that person has been convicted in the past. By removing the possibility for offenders to escape their criminal past simply by moving from one EU country to another, the system could also serve to prevent crime.¹⁵ Plans are afoot to extend this system to centralise data relating to non-EU nationals.

### 4.2. Other Non-Legal Initiatives

To complement the measures described above, there has been significant EU investment since the early 1990s in research, campaigning and knowledge exchange initiatives spanning issues such as:

• **online child abuse:**
  o Europol’s [European Cybercrime Centre](https://www.europol.europa.eu/) plays a pivotal role in providing operational support for the EU Member States and producing threat assessments related to online child sexual abuse
  o The European Commission’s ‘Strategy for a Better Internet for Children’, also known as ‘Better Internet for Kids- BIK’, has pursued a series of actions to be undertaken by the European Commission, EU Member States and by the related ICT industry, aimed largely at awareness raising and preventative action.
  o The [European Framework for Safer Mobile Use by Younger Teenagers and Children](https://www.eurocrimesafe.eu/), developed by the European mobile industry with the endorsement

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¹⁵ Click [here](https://www.gov.uk/government/collections/national-crime-agency-statistics) a review of how this system has been implemented across the Member States, including the UK.
of the European Commission, has encouraged leading European mobile providers and content providers to implemented processes to prevent children from being subjected to illegal, harmful content.

- missing children:
  - Missing Children Hotline: The EU has implemented the 116 000 hotline to report missing children and to provide social support services for children and families when a child goes missing. This is now operational in all 28 member States.\(^{16}\)

- violence:
  - The Daphne Programme has been running since 2000 and has provided millions of pounds in funding for a range of child protection activities aimed at: supporting grass roots child protection work by NGOs; research and data gathering relating to violence against children; designing and testing educational materials; and developing and implementing support programmes for victims as well as intervention programmes for perpetrators.

5. So will Brexit really impact on child protection?

- Notwithstanding the limitations set out above, the EU’s distinctive, global contribution to child protection should not be underestimated. For a start, it exercises significant political and legal leverage to garner the support of Member States to ensure effective, uniform implementation of international recommendations and obligations.

- EU measures can achieve much better compliance with international children’s rights standards than our simple obligations under the CRC or Council of Europe Instruments.

- The EU also has significant financial and institutional resources at its disposal to resource research, data-collection, monitoring and evaluation and cross-border co-operation and knowledge exchange.

- That said, a much more detailed analysis is needed to fully appreciate the gaps in child protection that may be left by Brexit.

Further reading
For a quick overview of what the EU does in different areas of children’s rights: FRA handbook on European law relating to the rights of the child

\(^{16}\) For a review of missing hotline data, see the Missing Children European report from 2015

For an explanation of EU law introducing special safeguards for child suspects in criminal proceedings see Chapman, H. ‘The New European Union Law Protecting Over A Million Children In Court’

For a list of EU sources of relevance to children more generally, see the European Commission’s EU Children’s Rights Acquis (although this is not completely up-to-date).