St Andrews Law Journal
Institute of Legal and Constitutional Research

# The St Andrews Law Journal

## Volume 3, Issue 1

## August 2023

ISSN 2634-5102

Published under the
Institute of Legal and
Constitutional Research
71 South Street

# Contents

# OPENING REMARKS BY THE 2022-2023 MANAGING EDITORS

The 2022-23 academic year saw an almost entirely new editorial board for the St Andrews Law Journal. Everyone had insightful ideas on how to continue the development of the Journal. We decided to focus on establishing a wider readership and engagement with the Journal. We have updated the website and increased our social media presence and activity to facilitate this. So far, we are pleased with the result; it shows the continued strength of legal interest at St Andrews.

This year marks the third issue of the St Andrews Law Journal, and we were keen to uphold the high standards of the previous issues. We pride ourselves on the double-blind peer review process, which ensures integrity and professionalism. These are two of the core values of the Journal. We thank our editors for all their hard work and attention to detail, making this rigorous process possible. We are impressed by the quality and variety of the submissions this year. The five articles cover highly topical issues, including AI legislation, Post-Brexit enforcement of judgements, UK and EU mutual assistance in criminal matters, rape law and state prevention of persons attracted to minors. Indeed, the latter submission is provided by a student outside of the University of St Andrews, attesting to the growing interest and awareness in the Journal.

Moreover, the success of the Journal owes a great deal to the continued support of the Institute of Legal and Constitutional Research. Thanks must also be given to the former Managing Editors Jacob Joad and Karen Katiyo, who have guided us through the handover process and were always available to offer help and advice. It is greatly appreciated. We look forward to the next academic year, where we will continue to build upon our current progress.

Yours faithfully,

*Inci Fassa* — **Editor-in-Chief, 2022-23**

Freja Stamper — **Journal Manager, 2022-23**

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We thank the following individuals for their exceedingly valuable contributions to this Issue of the St Andrews Law Journal. Their commitment to expanding the wealth of legal scholarship at St Andrews is vastly appreciated:

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University of St Andrews Law Journal
Institute of Legal and Constitutional Research

Title: AI Systems and Liability: An Assessment of the Applicability of Strict Liability & A Case for Limited Legal Personhood for AI

Author(s): Louisa McDonald

Source: *University of St Andrews Law Journal* 3, no. 1 (August 2023):5-21.

Published by: Institute of Legal and Constitutional Research, University of St Andrews

Stable URL: https://doi.org/10.15664/stalj.v3i1.2645

DOI: 10.15664/stalj.v3i1.2645



ISSN 2634-5102

# AI SYSTEMS AND LIABILITY: AN ASSESSMENT OF THE APPLICABILITY OF STRICT LIABILITY & A CASE FOR LIMITED LEGAL PERSONHOOD FOR AI

by Louisa McDonald

## I. Introduction: Machine Learning Algorithms and Product Liability

Under a classic conception of product liability, if a defective product causes damage to persons or property, the manufacturers and other persons involved in creating the product are liable for the damage caused[1]. If the plaintiff is able to prove that the damage was caused by the product, then those involved in producing the product are strictly liable and owe the victim compensation[2]. This is the position of EU legislation on liability for defective products, formalised by the EU Product Liability Directive [1985], a defective product causes any physical damage to consumers or their property, the producer has to provide compensation irrespectively of whether there is negligence or fault on their part[3].

Even in cases of strict (rather than fault-based) liability for products, a causal connection between the producers or operators and the damage caused is assumed. However, this assumption becomes more problematic in the case of recent AI technologies, which exhibit a degree of autonomy that may mean that they are able to perform acts – including acts in the law – which the human agents involved (programmers, manufacturers, operators, etc.) could not possibly foresee.

Previously, electronic agents could be simply regarded as tools and the correlative legal issues that arose from their usage could be entirely attributed to human agents. The Uniform Electronic Transactions Act (UETA) [1999][4] recognises electronic agents as being limited to a 'tool' function[5] . However, recent AI systems can no longer be classed as mere 'tools' in this way because of the use of machine learning algorithms, which lead to the AI system having a degree of autonomy.

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[1] Jonathan Law and Elizabeth A. Martin, "Product Liability" in A Dictionary of Law (7th Edition), Online Version, (Oxford, 2014)
[2] Law and Martin, "Product Liability"
[3] European Commission, *Council Directive 85/374/EEC of July 25 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (Product Liability Directive)* OJ L210/29 (1985)
[4] National Conference of Commissioners on Uniform State Laws, "Uniform Electronic Transactions Act (UETA)" (1999) 1/20/00
[5] Pınar Çağlayan Aksoy, "AI as Agents: Agency Law." in *The Cambridge Handbook of Artificial Intelligence: Global Perspectives on Law and Ethics*, eds. Larry A. Di Matteo, Cristina Poncibo and Michel Cannarsa (Cambridge University Press, 2022): 147

Machine learning enables systems to learn and improve from experience[6]. Machine learning algorithms work by employing artificial neural networks: these are simplified models of the brain composed of large numbers of units together with weights which measure the strength of connections between the units[7]. A simple neural network has an input, hidden, and output layer. Deep neural networks – the kind that enable machine learning – have more than one hidden layer[8]. Such deep neural networks exhibit machine learning capacities which can move significantly beyond the original programming. For example, a Deep Q-Network program used reinforcement learning to learn to play Atari 2600 games with no prior knowledge, discovering strategies not known to its programmers[9].

The autonomous AI of today can perform acts which bring about legal consequences. This is especially pertinent in the stock market with the increasing prevalence of trading bots, some of which, such as 'B-Cube AI', can perform trades autonomously[10], so that operators might not even be aware of the trades[11]. The UETA does not cover such algorithmic contracts, because machine learning algorithms are not programmed by people and therefore fall outside of its scope[12].

If AI systems can engage in activities such as producing contracts, then it appears that they can perform acts in the law: they can "produce legal rights and obligations through their acts and actions"[13]. However, since AI is not currently granted legal personhood, they do not have legal capacity and cannot be party to a legal transaction[14].

We are therefore faced with a dilemma for AI liability. Either certain kinds of autonomous AI are granted legal personhood, and therefore are legal agents and can be liable for their actions, or the liability for the actions of an AI system rests entirely on the human agents which contributed to its production and operation, even if the actions of the AI could not possibly have been foreseen by humans. Fenwick and Wrbka propose two potential models for AI liability:

Personhood model: victims are granted compensation directly from the AI: AI is accorded legal personhood.

[6] Expert.AI, "Expert.AI: What is Machine Learning? A Definition" (March 2022) https://www.expert.ai/blog/machine-learning-definition/
[7] Cameron Buckner and James Garson, "Connectionism: The Stanford Encyclopedia of Philosophy" (2019) https://plato.stanford.edu/archives/fall2019/entries/connectionism/
[8] Buckner and Garson, "Connectionism"
[9] DeepMind Technologies, "Playing Atari with Deep Reinforcement Learning." (2015) https://www.cs.toronto.edu/~vmnih/docs/dqn.pdf.
[10] B-Cube-AI, "Cutting-Edge AI Crypto Trading Bots" (Accessed 2023) https://b-cube.ai/
[11] Aksoy, "AI as Agents: Agency Law": 146
[12] *Ibid.,* 148.
[13] Aksoy, "AI as Agents: Agency Law", 147
[14] *Ibid*

Liability model: AI is not accorded independent legal personhood and victims receive compensation from some other legal person (human person or company)[15]

In this essay, I will ultimately defend the personhood model, on the grounds that the liability model confers unfair consequences both on victims of the actions of AI and on those responsible for producing the AI. I will begin by giving a definition of legal personhood as a cluster concept which can comprise more than just natural persons, following Kurki's analysis of legal personhood as a cluster of passive and active incidents. I will then explain the EU's AI Liability Directive[16] and present the arguments given by the Commission as to why a liability model is apt. Next, I will counter the Commission's claim by presenting two pressing problems for liability models, before making a positive case for the personhood model. Finally, I will counter some common objections to AI personhood.

## II. Legal Personhood: The Cluster Concept View

### i) The Nature of Legal Personhood

It is important to distinguish a legal person from a natural person: rather than being defined by any kind of ontological considerations, a legal person is simply an entity which is treated as a person by the law and has the relevant rights and capacities. The Oxford Dictionary of Law defines a legal person as either "a natural person (i.e. a human being) or a juristic person"[17] where a juristic person is "an entity, such as a corporation, that is recognized as having legal personality, i.e. it is capable of enjoying and being subject to legal rights and duties."[18] If AI were to be granted legal personhood, it would fall under the category of a juristic person.

Visa Kurki understands legal personhood as an institutional fact. This term is taken from Searle, who used it to refer to facts in the world which depend on human institutions but are nonetheless objective facts, such as the fact of being a US citizen[19]. Kurki observes that "a necessary condition for the legal personhood of any entity is that the entity is treated as a legal person by the prevailing legal system"[20]. Whether an entity is

[15] M. Fenwick and S. Wrbka, "AI and Legal Personhood." In *The Cambridge Handbook of Artificial Intelligence: Global Perspectives on Law and Ethics*, eds. Larry A. Di Matteo, Cristina Poncibo and Michel Cannarsa (Cambridge University Press, 2022): 288

[16] European Commission, *Proposal for a Directive of the European Parliament and of the Council 2022/0303 of 28 September 2022 on adapting non-contractual civil liability rule to artificial intelligence (AI Liability Directive)* OJ C496, (2022)

[17] Jonathan Law and Elizabeth A. Martin, "Legal Person" in *A Dictionary of Law (7th Edition), Online Version*, (Oxford, 2014), https://www.oxfordreference.com/display/10.1093/acref/9780199551248.001.0001/acref-9780199551248;jsessionid=3CA80E5E8BCEF2DD0614AC49860DB61F

[18] Jonathan Law and Elizabeth A. Martin, "Juristic Person" in *A Dictionary of Law (7th Edition), Online Version*, (Oxford, 2014)

[19] John R. Searle, *The Construction of Social Reality* (Penguin, 1995): 1

[20] Visa A.J Kurki, *A Theory of Legal Personhood* (Oxford Academic, 2019): 92

granted legal personhood is determined by the actions of legal institutions, such as in the landmark US case Citizens United v. FEC [2010][21], which set the precedent for corporations being granted free speech rights in the same way as human persons.

### ii) Legal Personhood as a Cluster Concept

Kurki also conceives of legal personhood as a cluster concept[22]: a cluster concept is comprised of a weighted list of criteria, such that none of these criteria alone is either necessary or sufficient for membership. A famous example given by Wittgenstein is the concept 'game': our uses of the word vary so much that no one unifying quality can pick out everything denoted by the word 'game', and therefore we should instead think of it as a cluster concept which varies based on each instance[23]. Legal personhood can be seen as a cluster concept because it consists in a cluster of rights and responsibilities which vary based on the type of legal person in question. For example, a child may be subject to a number of rights but may not possess certain legal competences until they reach a certain age, e.g., they cannot vote until they reach the age of eighteen.

Kurki terms the constituent components of the cluster property 'incidents', meaning non-procedural claim-rights and liabilities that can be held or acquired by an entity[24]. He divides up these incidents into passive and active incidents[25]. Roughly speaking, to possess a passive incident of legal personhood is to be able to be subject to rights and legal protections[26]. Active incidents, on the other hand, concern being able to administer legal competences (e.g., enter into a contract) and what Kurki terms 'onerous legal personhood' (having legal responsibilities in tort and criminal law)[27].

### iii) Dependent and Independent Personhood

An implication of the cluster concept view is that it allows for the passive and active incidents to vary based on the legal person in question: no one passive or active incident will be individually necessary or sufficient

[21] *Citizens United v. Federal Election Commission* [2010] *558 U.S. 310 (2010*)
[22] Kurki, *A Theory of Legal Personhood*: 93
[23] Ludwig Wittgenstein, *Philosophical Investigations*, eds. and trans. P.M.S. Hacker and Joachim Schulte (Oxford: Wiley-Blackwell, 1953, ed. 2009): 65
[24] Kurki, *A Theory of Legal Personhood*: 95
[25] *Ibid.*
[26] *Ibid.*
[27] *Ibid.,* 96

to constitute personhood. Importantly, the cluster concept view allows for legal persons to be both dependent and independent.

Whilst an independent legal person can exercise some or all its rights through its own agency, a dependent legal person can only act through the agency of another legal person in exercising some or all its rights[28]. It is important to note that dependent legal persons can still consist of active legal positions and can be duty-bearers as well as rights-bearers[29]. This is a plausible way of characterising the type of legal personhood that corporations have, since they are dependent on the agency of their constituent members, but nonetheless can be subject to both passive and active incidents of legal personhood. I would equally argue that if AI systems were given legal personhood, it would be a kind of dependent legal personhood, because they are dependent on the agency of programmers and manufacturers in order to exercise their legal capacities.

The status of dependent legal personhood is not undermined by the AI systems having autonomy. An analogy can be made with corporations. Groups can have agency separate from the sum of that of their members, even though their agency depends on that of their individual members. Consider the following example:

A hiring committee is looking for a candidate who fulfils all the following criteria: X, Y and Z. Three people are on the committee. In each instance, if the majority believe that the candidate fulfils the relevant criterion, the verdict will be a 'yes':

| **Panellist** | **(i)** | **(ii)** | **(iii)** | **Verdict** |
|---|---|---|---|---|
| **X** | Yes | Yes | No | Yes |
| **Y** | Yes | No | Yes | Yes |
| **Z** | No | Yes | Yes | Yes |

Note that none of the constituent members individually believe that the candidate fulfils all the relevant criteria. However, the group verdict is that he does. We can thereby see how group agency can come apart from individual agency, even though it depends on the agency of individuals. Similarly, although the agency of AI systems might depend on its creators, it can come apart from it

## III. The 2022 EU AI Liability Directive: A Liability Model

[28] Claudio Novelli, "Legal Personhood for the Integration of AI Systems in the Social Context: A Study Hypothesis." in *AI & Society* 1, (2022): 6
[29] *Ibid.*, 7

The European Commission acknowledges the challenges that come with autonomous AI systems when it comes to personal responsibility. The EU website for the Regulatory Framework Proposal on Artificial Intelligence states that, "it is often not possible to find out why an AI system has made a decision or prediction and taken a particular action. So, it may become difficult to assess whether someone has been unfairly disadvantaged, such as in a hiring decision or in an application for a public benefit scheme"[30].

The EU's AI Liability Directive (2022)[31] attempts to deal with the problem of autonomous AI systems causing harm by introducing a framework of strict rather than fault-based liability for developers, producers, and users of AI technology. The Directive mainly builds on and adapts the Product Liability Directive (1985)[32]. It roughly consists of: (i) measures to ease the burden of proof for victims trying to prove their liability claim, and (ii) a review mechanism to re-assess, in particular, the need for harmonising strict liability for AI use cases with a particular risk profile[33].

### (i) Easing the burden of proof: the 'presumption of causality'

The argument for (i) is rooted in the acknowledgement that general fault-based liability, whilst appropriate for other kinds of product liability, is defective in the case of autonomous AI. It typically requires the person to prove a negligent or intentionally damaging act or omission by the person potentially liable for that damage, and finding this proof can be more complicated in the case of AI systems since, if the system acts autonomously, no one identifiable person has caused the damage[34]. The status quo is that it would be excessively difficult for victims to meet the burden of proof, and therefore the burden of proof ought to be made lighter. The Directive aims to do this by introducing a 'presumption of causality', defined by the Commission as follows: "if victims can show that someone was at fault for not complying with a certain obligation relevant to the harm, and that a causal link with the AI performance is reasonably likely, the court can presume that this non-compliance caused the damage."[35]. Note that the 'presumption' still requires proof of some party not complying with an obligation, and proof of a causal link between the AI and the harm.

[30] European Commission, "Regulatory Framework Proposal on Artificial Intelligence" (2021) https://commission.europa.eu/document/f9ac0daf-baa3-4371-a760-810414ce4823_en
[31] European Commission, *AI Liability Directive*
[32] European Commission, *Product Liability Directive*
[33] European Commission, *AI Liability Directive*: 14-16
[34] *Ibid.*, 13
[35] *Ibid.*

### iii) Encouraging progress: harmonising liability laws

The motivation for (ii) stems from the observation that AI liability laws are not harmonised across the national civil liability laws of EU member states, which is likely to hinder overall technological progress, since it is difficult for businesses and developers to anticipate how liability rules will be applied to their software[36]. Since the EU Artificial Intelligence Act (2021) already provides risk categories for AI[37], AI liability laws should be harmonised across the EU according to these risk categories. The 'presumption of causality' is applied in various ways according to the level of risk of the AI concerned, for example, in the case of non-high-risk AI systems, the court must first determine that it is excessively difficult for the claimant to produce the causal link[38]. By creating a unified framework of liability legislation that operates across the EU, the Directive therefore claims that it will improve conditions for developers of AI systems "by preventing fragmentation and increasing legal certainty through harmonised measures at EU level, compared to possible adaptations of liability rules at national level."[39]

The legislation is therefore supposed to be beneficial both to victims seeking compensation for harm caused by AI systems and for developers seeking to produce AI systems in accordance with liability laws. In the next section, I will call both assumptions into question.

## IV. Problems with the Liability Model

The AI Liability Directive is correct to observe that fault-based liability schemes are not appropriate for autonomous AI. However, I would further argue that Directive's liability model goes wrong in assuming that a system of strict liability will be the optimal model for AI liability legislation. This is because a system of strict liability is likely to have undesirable consequences both for those involved in producing AI systems and for those harmed by AI systems seeking compensation. It is thereby unlikely to achieve the Commission's main aims: it is unlikely to encourage progress in the development and production of AI systems, and it is unlikely to actually be beneficial for victims seeking compensation.

[36] *Ibid.,* 17
[37] European Commission, *Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artifical Intelligence Act) and amending certain union legislative acts* 2021/0106 (COD) (2021)
[38] *Ibid.,* 13
[39] *Ibid.,* 4

### (i) Consequences for Progress in the Development of AI Systems

Whilst the Directive claims that the harmonisation of AI liability laws will make production easier, this alone is not strong enough to encourage production if the laws themselves are a hindrance to innovation and to progress. With a system of strict liability, costs are systematically placed on a single party regardless of fault. This may place unfair constraints on human agents and lead to undesirable consequences for technological progress. Novelli points out that not only would such a system potentially disincentivise production, but they might also "discourage consumer diligence as someone else will always be held liable"[40]; the system of strict liability proposed in the Directive appears to shift the burden almost entirely to those involved in producing the AI system and does not leave much room for responsibility on the part of the consumer, making an apparently arbitrary distinction.

Whilst it is in everyone's interests to prevent the emergence of harmful AI, hindering the progress of AI development on a more general level is not desirable. There are many examples of AI which can transform human life for the better, including the World Bee Project, which uses AI technology to monitor pollinator and biodiversity declines in order to help find long-term solutions to the problem[41]. Another example is Facing Emotions, a project designed by Huawei together with the Polish Blind Association which allows the visually impaired to 'see' emotions on people's faces by translating them into sound[42]. It is important to remember the opportunities that come with the emergence of AI technologies as well as the risks; a liability system that subjects developers to conditions that are overly harsh risks suppressing potentially beneficial AI systems.

### (ii) Consequences for Victims of AI Systems Seeking Compensation

Perhaps more significantly, it is not clear that a system of strict liability would have the intended effect of making it easier for those harmed by AI systems to seek compensation.

The 'presumption of causality' proposed by the Directive still requires that the defendant show that "someone was at fault for not complying with a certain obligation relevant to the harm, and that a causal link with the

[40] Novelli, "Legal Personhood for the Integration of AI Systems", 4
[41] The World Bee Project, *The World Bee Project: Protecting Pollinators, People & The Planet* (Accessed 2023) https://worldbeeproject.org/
[42] Campaigns of the World, *Campaigns of the World: Huawei Facing Emotions* (Accessed 2023) https://campaignsoftheworld.com/technology/huawei-facing-emotions/

AI performance is reasonably likely, the court can presume that this non-compliance caused the damage."[43]. The presumption is therefore applied to the causal link between the non-compliance and the damage caused; proof that someone acted in a non-compliant way (and that this is reasonably likely to be causally linked to the performance of the AI system) is still required. As Novelli points out, proving such matters can be overly onerous for the victim[44]. This is because, in the case of autonomous AI systems, which are produced, used, and developed by multitudinous actors, it can be difficult or even impossible to identify one person that is responsible for the non-compliance. It may even be the case that no individual person can plausibly be identified.

To illustrate this difficulty, an analogy can be made with corporate personhood. In English Common Law, the offence of corporate manslaughter was created to overcome the limitations of the Common Law offence of gross negligence manslaughter when applied to corporations[45]. The offence of corporate manslaughter was created by Section 1 of the Corporate Manslaughter and Corporate Homicide Act (2007)[46]. Previously, under the Common Law, for a corporation to be guilty of such an offence, it was necessary to identify a 'controlling mind', i.e., a senior individual who could be said to embody the company and bear the responsibility for the gross negligence[47]. This created problems when no such individual could be identified. In the case of R v P&O European Ferries (Dover) Ltd, a ferry – the Herald of Free Enterprise – capsized, and 190 passengers were killed as a result[48]. However, manslaughter charges were dismissed since the director of P&O ferries had not appointed anyone to be responsible for health and safety; no 'controlling mind' could be identified[49]. The company ended up getting away with no charges. The 2007 Act aimed to widen the scope of the offence so that the focus shifted to the overall management of the organisation's activities, rather than the actions of individuals[50].

The example of R v P&O Ferries pertains to the criminal rather than civil law, but nonetheless demonstrates how the need to identify a responsible individual can be disadvantageous to victims seeking compensation, because in cases where no such individual can be identified, the outcome could be that the victim simply cannot receive compensation at all. In the case of AI systems, even when a 'presumption of causality' is in place, it may be similarly difficult or even impossible to identify an individual or set of individuals who caused the damage to take place. Furthermore, if the AI system acted autonomously and no individual

[43] European Commission, *Questions & Answers: AI Liability Directive* https://ec.europa.eu/commission/presscorner/detail/en/QANDA_22_5793
[44] Novelli, "Legal Personhood for the Integration of AI Systems": 4
[45] Crown Prosecution Service, *Legal Guidance, Violent Crime: Corporate Manslaughter* (July 2018) https://www.cps.gov.uk/legal-guidance/corporate-manslaughter
[46] *Corporate Homicide Act (2007)* (CMCHAct)
[47] Crown Prosecution Service, *Legal Guidance, Violent Crime: Corporate Manslaughter*
[48] R v P&O Ferries [1991] 93 CAR 72
[49] *Ibid.*
[50] Crown Prosecution Service, *Legal Guidance, Violent Crime: Corporate Manslaughter*

could possibly have foreseen its actions, then it seems even the causal link is missing between the human agents and the damage caused by the AI system, and therefore it is difficult to see how the victim can claim compensation.

The AI Liability Directive's solution of strict liability therefore does not adequately meet the challenges posed by liability for advanced AI. It risks hindering developmental progress and, more importantly, creating further problems for victims seeking compensation. In the next chapter, I will therefore give a positive consequentialist argument for adopting an alternative model for AI liability: the personhood model

## V. A Case for the Personhood Model

An alternative model to the liability model is the personhood model: that is, to grant AI the status of legal persons. Since legal personhood is largely a functional concept that concerns what kind of legal responsibilities and rights an entity can be subject to, it is apt to use a pragmatic-consequentialist line of reasoning. The argument I will advance here is that granting legal personhood to autonomous AI systems could result in legal simplification which would make it easier for injured parties to claim compensation than it would be on the liability model.

### i) Legal Simplification and Compensation

Fenwick and Wrbka point out that it has been claimed that the fact that 'someone' is responsible for building the AI system that causes harm is a reason for not granting legal personhood to the AI[51]. There are several problems with this line of reasoning. First, as has been argued in the previous chapter, it can be exceedingly difficult to trace back the harmful actions of the AI to a specific, easily identifiable person. AI technologies involve multitudinous actors, and it is not clear that any one party can be designated as causally responsible for the harm or non-compliance[52]. Furthermore, the same observation – that there are human actors ultimately causally responsible for the harm occurring – could be made of corporations, yet corporations are granted legal personhood[53]. Moreover, as has been demonstrated in the previous chapter, affording the status of legal personhood to corporation can be beneficial to those seeking compensation because otherwise it would be difficult to identify a responsible individual or responsible individuals. Similarly, granting a

[51] Fenwick and Wrbka, "AI and Legal Personhood": 294
[52] *Ibid.*
[53] *Ibid.*

situation-specific form of legal personhood to AI may offer greater clarity and, presumably, more opportunity to seek compensation for harm[54].

Arguing similarly on the basis of legal simplification, Novelli argues that the responsible party in the case of AI liability ought to be the AI itself, which would make it far less costly and complicated to identify the liable party[55]. If the AI itself, rather than the human agents involved in its manufacture and deployment, is held to be the liable party, then the type of legal personhood granted to such an AI system must allow for the victim to receive adequate compensation given that the system itself is liable.

### ii) What AI Personhood Would Look Like

If legal personhood is to be conferred on certain kinds of AI systems, it would clearly be a different kind from that conferred on natural persons, since an AI system has different capacities and is not capable of conscious thought.

As has been demonstrated in (I), one important way in which legal personhood can vary based on entities is that it can be dependent or independent, and AI personhood would need to be of the dependent kind: this acknowledges that the AI can only act through the agency of another legal person in exercising some or all of its rights. AI personhood would therefore function in a similar way to corporate personhood. Importantly, dependent legal personhood of this kind can still consist of active legal positions: dependent legal persons can be duty-bearers as well as right-bearers[56]. Following MacCormick[57], Novelli suggests that the two most important legal positions that AI personhood would need to incorporate would be transitional capacity – the power to enter into and create legally salient relationships – and liability capacity – the susceptibility to legal imputations for civil wrongdoings or criminal offences[58]. This tracks autonomous AI's current capacities, e.g., entering into contracts through trading.

An initial concern about an AI itself having liability capacity is that machines lack assets, and therefore it is difficult to see how they would be able to help victims recover losses. A plausible model of AI personhood would therefore have to either bestow assets on AI through

[54] *Ibid.*
[55] Novelli, "Legal Personhood for the Integration of AI Systems": 5
[56] *Ibid.,* 7
[57] Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press, 2007)
[58] Novelli, "Legal Personhood for the Integration of AI Systems: 7

state-enforced minimum asset requirements or impose some kind of mandatory liability insurance for AI[59]. Both of these solutions recognise the dependent legal status of AI systems. If AI were granted assets with which to compensate victims, these could be the sum of a mandatory contributions from all those involved in producing and deploying the system, and the combined pool of the assets would legally belong to the AI; a minimum requirement for this would "oblige other parties to provide the funds necessary to satisfy potential damages claims"[60]. Alternatively, a policy of mandatory liability insurance for AI would be provided by the other natural and legal persons involved in the production and deployment of the AI system[61]. Both a policy of mandatory insurance and a mandatory minimum asset requirement for AI would ensure that there was a clear way to compensate victims who had successfully sued the AI system for damages.

### iii) Objections to AI Personhood & Responses

AI personhood can be objected to on ontological grounds. Although autonomous AI systems can do some of what humans can do, they lack traits such as consciousness and moral responsibility and therefore cannot be legally responsible in the same sense as natural persons.

However, this objection misunderstands the nature of legal personhood. Fenwick and Wrbka point out that it is important to disentangle personhood in the legal sense from ontological questions about how similar AI systems are to natural persons[62]. Legal personhood, as we have seen in (II), depends not whether an entity instantiates a given set of qualities, but rather is a status attributed by a particular legal system which varies in its nature depending on what active and passive instances can be attributed to the entity. What counts towards an entity being given legal personhood therefore lies not in its similarity to human persons, but in the extent of its capacities. In the case of AI, it appears that the capacity for autonomy, which includes being able to perform actions that constitute acts-in-the-law, is a key consideration; some degree of autonomous decision making would seem to be a pre-condition of active legal personhood[63]. Novelli points out that autonomous AI systems thereby challenge the traditional legal distinction between things and persons because they are "equipped with an epistemic and practical authority over their behaviour"[64].

There are also instrumentalist objections to legal personhood, the most common being that it could allow for the natural persons involved in AI production to evade responsibility and liability. Furthermore, the evasion

[59] Fenwick and Wrbka, "AI and Legal Personhood": 301-2
[60] *Ibid.,* 302
[61] *Ibid.*
[62] *Ibid.,* 292
[63] *Ibid.,* 289
[64] Novelli, "Legal Personhood for the Integration of AI Systems: 5

of liability could bring about the wrong kind of incentives for those involved in producing and developing AI, since they would no longer have to take such great precautions, knowing that they would not be held liable.

Whilst this objection is more compelling than the ontological objection, I believe the concerns can be adequately addressed by placing the kind of constraints I have described in (ii) on those involved in creating autonomous AI systems: either the provision of assets or mandatory liability insurance. This would translate into a financial burden on those creating the AI which would disincentivise them from negligence in the production or use processes. It is beyond the scope of this essay to establish whether the long-term effects on incentives for producers and developers are better under a personhood model as opposed to a liability model, but I would argue that we have no definitive reason to believe that they would be worse, given the financial constraints the producers and developers would be subject to under a personhood model.

## VI. Conclusion

I have sought to demonstrate in this essay that a model of strict liability is not appropriate for the kinds of AI systems we are increasingly confronted with, which exhibit a degree of autonomy that means they are not necessarily under the control of the human persons involved in producing and developing them. I have attempted to provide an alternative model for AI liability: granting autonomous AI systems a kind of legal personhood. If AI personhood were to become a reality, it would need to be characterised in a lot more detail than I have gone in to here, but at very least, I have aimed to sketch the beginnings of a model for AI personhood, and to show that it is not an option that ought to be ruled out.

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Title: The Post-Brexit Need for a Data Adequacy Decision to Engage in Mutual Assistance in Criminal Matters with the EU

Author(s): Matthew G T Bruce

Source: *University of St Andrews Law Journal* 3, no. 1 (August 2023):23-37.

Published by: Institute of Legal and Constitutional Research, University of St Andrews

Stable URL: https://doi.org/10.15664/stalj.v3i1.2646

DOI: 10.15664/stalj.v3i1.2646



ISSN 2634-5102

# THE POST-BREXIT NEED FOR A DATA ADEQUACY DECISION TO ENGAGE IN MUTUAL ASSISTANCE IN CRIMINAL MATTERS WITH THE EU

by Matthew G T Bruce

## Mutual assistance and data protection laws as they apply to member states

Mutual assistance in criminal matters between EU member states is primarily governed by an EU convention.[65] This convention builds on existing Council of Europe (CoE) conventions on mutual criminal assistance.[66] The EU convention states that mutual assistance shall be afforded in proceedings brought by member states' authorities, or in connection with proceedings where a person may be liable in the requesting member state.[67] Title II provides a framework for specific forms of assistance including restitution, hearings via videoconference and covert investigations.[68] Member states are free to conclude further bilateral arrangements.[69]

While a member state, the UK's data protection laws, including in the area of criminal cooperation, originated from the EU. Law enforcement data protection law is set out in Directive 2016/680 (LED).[70] The LED was incorporated into domestic UK law by Part 3 of the Data Protection Act 2018. It is not as stringent as the General Data Protection Regulation (GDPR),[71] regarding commercial and personal data, and affords member states a margin of appreciation when implementing its provisions domestically.[72] The LED only applies when member states are acting within the scope of EU law.[73] Member states' national security agencies are not subject to EU law as they remain in the post-Lisbon Area of Freedom, Security and

[65] Council Act of 29 March 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union [2000] OJ C 197/1 (CMA).
[66] CMA, art 1(1)(a).
[67] CMA, art 3.
[68] CMA, Title II.
[69] CMA, art 22.
[70] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [2016] OJ L127/18 (LED).
[71] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L 119/1; Thomas Marquerie, 'The Police and Criminal Justice Authorities Directive: Data protection standards and impact on the legal framework on the legal framework' (2017) 33(3) Computer Law & Security Review 324, 337.
[72] Celine C Cocq, 'EU data protection rules applying to law enforcement Activities: towards an harmonised legal framework?' (2016) 7(3) New Journal of European Criminal Law 263, 275; Matthias M Hudobnik, 'Data protection and the law enforcement directive: a procrustean bed across Europe' (2020) 21 ERA Forum 485.
[73] LED, art 2(3)(a).

Justice.[74] The LED does not apply to EU agencies either.[75] EU agencies which deal with criminal matters, such as Europol, are subject to their own data protection regimes.[76] The Europol Regulation is arguably stricter than the LED regrading data protection.[77] The LED, therefore, allows for member states to operate at a lower data protection level than they would if they cooperated solely through Europol.[78] When implemented domestically, the rights of data subjects do not apply during criminal investigations and proceedings.[79] The provisions apply to UK law enforcement when operating cross-border with other states.[80] It is argued that this implementation worked well with UK Government policy when cooperating in mutual assistance in criminal matters pre-Brexit.[81]

An area in which there is a significant legal framework regarding the transfer of data is for passenger name records (PNR).[82] The PNR Directive sets out provisions for harmonisation of law relating to the receiving, processing and sharing of PNR data for law enforcement and security purposes.[83] The main purpose of the PNR Directive is for extra-EU flights,[84] but member states can apply its provisions for all or selected intra-EU flights.[85] The PNR Directive requires compliance with the LED when transferring data to third countries.[86]

The PNR Directive sets out that member states should have regard to relevant Court of Justice of the European Union (CJEU) decisions regarding privacy, proportionality and fundamental rights.[87] The CJEU does apply such law stringently to the EU's PNR and data adequacy arrangements.[88] Van de Heyning

[74] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C 202/47 (TFEU), art 73; Mireille M Caruna, 'The reform of the EU data protection framework in the context of the police and criminal justice sector: harmonisation, scope, oversight and enforcement' (2019) 33(2) International Review of Law, Computers & Technology 249, 256.
[75] LED, art 2(3)(b).
[76] Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA [2016] OJ L135/53 (Regulation 2016/794).
[77] Cocq (n 9), 266.
[78] *Ibid.,* 275.
[79] Data Protection Act 1998 (DPA 1998), s 43(3); LED, recital (20); Caruna (n 11), 259.
[80] DPA 2018, s 72; LED, recital (74); Caruna (n 11), 252.
[81] Rosemary Davidson, 'Brexit and Criminal Justice: The Future of the UK's Cooperation Relationship with the EU' (2017) 5 Criminal Law Review 379, 383.
[82] Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime [2016] OJ L119/132 (Directive 2016/681).
[83] Directive 2016/681.
[84] Directive 2016/681, art 1(1)(a).
[85] Directive 2016/681, art 2.
[86] Directive 2016/681, art 11.
[87] Directive 2016/681, recital (22).
[88] *Opinion 1/15 of the Court (Grand Chamber)* [2017] ECLI:EU:C:2017:592.

concludes that the CJEU takes a stricter view than other EU institutions when assessing member states' application of data protection law in criminal matters.[89]

## Law underpinning data adequacy decisions

Adequacy decisions are made by the European Commission to allow for the transfer of data between the EU and a third country.[90] They are not unique to post-Brexit Britain. The Commission has granted decisions to a number of third countries.[91] The UK is unique in that it has been received two separate decisions under the GDPR[92] and LED.[93] The purpose of decisions is to show that there is an equivalence of data protection laws between the EU and a third country.[94] The UK is not treated differently having previously been a member state, although domestic data protection laws implement the most recent EU legislation.[95]

Decisions are not long-term guarantees of the free movement of data. The LED decision is valid for a period of four years, after which it must be reassessed and reissued by the Commission.[96] By granting an adequacy decision, the Commission has assessed, *inter alia*, the UK's: legislation concerning public and national security;[97] law pertaining to the onward transfer of data to other third countries and international organisations;[98] independent supervisory authorities;[99] and, legally binding commitments.[100]

There is no guarantee of the longevity of decisions. The seminal case of *Schrems* made this clear.[101] There are three main elements of the CJEU's judgement in this case. First, that member states' national supervisory bodies, not just the Commission, are able to investigate a third country's data adequacy.[102] Second, that the handling of data by a third country's national security agencies, of which member states'

[89] Catherine Van de Heyning, 'Data protection and passenger name record in judicial criminal matters under the EU-UK Trade and Cooperation Agreement' (2021) 12(2) New Journal of European Criminal Law 257, 264.
[90] GDPR, art 45; LED, art 36.
[91] 'Adequacy Decisions' (European Commission) https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en accessed 15 February 2023.
[92] Commission Implementing Regulation (EU) 2021/1772 of 28 June 2021 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom (notified under document C(2021)4800) (Text with EEA relevance) [2021] OJ L360/1.
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[94] n 36-49.
[95] Edoardo Celeste, 'Cross-Border Data Protection After Brexit' (2021) DCU Brexit Institute Working Paper 4/2021, 3 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3784811 accessed 15 February 2023.
[96] LED, art 36(3).
[97] LED, art 36(3)(a).
[98] LED, art 36(3)(b).
[99] *Ibid*.
[100] LED, art 36(3)(c).
[101] Case C-362/14 *Schrems v Data Protection Commissioner* [2015] ECR-I 00000.
[102] *Schrems* (n 38), [51]-[52].

are not within the competence of the EU,[103] is subject to the EU's adequacy requirements.[104] Third, the CJEU is able to strike out an adequacy decision if it finds that a third country is not providing adequate data protection.[105] *Schrems* also made clear that 'adequate data protection laws' mean laws that are 'essentially equivalent' to those of the EU.[106] The same applied to adequate protection of PNR data in third countries, with a decision granted to Canada annulled.[107]

EU case law has developed strict rules relating to data protection. The CJEU has held that it is incompatible with the Charter of Fundamental Rights of the European Union (CFREU)[108] for telecommunications companies to be under a general and indiscriminate obligation to retain communications data,[109] due to the precise conclusions that can be drawn from it.[110] Derogations are allowable if the retention is necessary, appropriate and proportionate in a democratic society.[111] In *Privacy International*,[112] the Court held that the Charter precludes an obligation on companies carrying out an indiscriminate transmission of data to security and intelligence agencies.[113] Most recently *Schrems II* makes alternatives to adequacy decisions, such as standard contractual clauses, more difficult to maintain.[114] These must still be adequate in relation to EU law.[115] This case dealt with the transfer of commercial data but is provides guidance on how the CJEU could act in response to litigation regarding LED decisions.[116]

The CJEU's rulings have been described as a 'bridle' over the UK.[117] The UK must maintain equivalence to EU law to maintain its adequacy decision while carefully monitoring all aspects of its domestic data protection laws and obligations.[118] Although the LED adequacy decision relates specifically to the transfer of data in criminal matters, it is not just the domestic UK data protection laws relating to criminal matters that are under observation by the EU. Constitutional arrangements such as the rule of law;[119] respect for human rights and the independence of supervisory bodies;[120] and international commitments of the UK will be

[103] n 11.
[104] *Schrems* (n 38), [25].
[105] *Schrems* (n 38), [106].
[106] *Schrems* (n 38), [73].
[107] Joined Cases C-317/04 and C-318/04 *European Parliament v Council of the European Union and European Parliament v Commission of the European Communities* [2006] ECR I-4795.
[108] Charter of Fundamental Rights of the European Union [2016] OJ C202/389.
[109] Joined Cases C-203/15 and C-698/15 *Tele2 Sverige* [2017] 2 CMLR 30, [92]; Case C-293/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources* [2014] 3 CMLR 44.
[110] *Tele2* (n 46), [99].
[111] *Tele2* (n 46), [95].
[112] Case C-623/17 *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2020] ECR-I 00000.
[113] *Privacy International* (n 49), [50].
[114] Case C-311/17 *Data Protection Commissioner v Facebook Ireland Ltd* [2021] 1 CMLR 14 (*Schrems II*).
[115] *Schrems II*, [H4].
[116] Lorna Woods, 'Schrems II' (2020) 25(4) Communications Law 239.
[117] Celeste (n 32), 9.
[118] *Ibid.*
[119] LED, art 36(2)(a).
[120] *Ibid.*

under EU observation.[121] With all of these aspects under constant review there is the risk that if one fails in the courts, it could nullify the entire the LED data adequacy decision.[122]

The European Parliament has made clear that the UK should be cautious when developing its domestic law to avoid the same result as the *Schrems* cases: recognising this result will be detrimental for mutual assistance.[123] It is argued that that the investigatory powers of EU institutions removes certainty from decisions issued. [124] Case law in this area allows for NGOs and the public to be disruptive through litigation.[125] Therefore, the only feasible way to maintain an adequacy decision is to keep closely aligned to EU law and principles.[126]

**Adequacy decisions and future legal development in post-Brexit Britain**

As of now, the data protection law in the UK is deemed equivalent to the EU's. However, the legal relationship between the UK and EU has changed post-Brexit and consequences of divergence may be more significant than would be for an EU member state. While a member state, certain aspects of member states' institutions, notably their security services, are outside the scope of EU law with a degree of flexibility for the UK when determining data protection in these areas. Though not referred to in the LED, the actions of national security agencies will now be observed to comply with data protection law.[127] In the UK, Part 4 of the 2018 Act sets out six principles that must be observed when processing data related to national security:[128] data processing must be lawful, fair and transparent; for a legitimate purpose; relevant; kept up to date; kept for no longer than necessary; and done in a manner including appropriate safeguards. Part 4 may have sufficed while the UK was a member state, however, to maintain equivalence with EU law as a third state the UK must have regard and implement decisions of the CJEU.[129] These go much farther in setting out protections.

A notable difference between the UK and other third countries is the TCA, which contains provisions on cooperation in criminal matters including PNR, the exchange of criminal record information and relations

[121] LED, art 36(2)(c).
[122] Andrew D Murray, 'Data transfers between the EU and UK post-Brexit' (2017) 7(3) International Data Privacy Law 149.
[123] European Parliament resolution of 20 May 2021 on the ruling of the CJEU of 16 July 2020 – Data Protection Commissioner v Facebook Ireland Ltd and Maximillian Schrems (Schrems II), Case C-311/18 (2020/2789 (RSP)), [3] and [21]; Hendrik Mildebrath, 'At a Glance: The CJEU judgement in the *Schrems II* case' (European Parliamentary Research Service 2020).
[124] Theodore Christakis, 'EU-US negotiations on law enforcement access to data: divergences, challenges and EU law procedures and options' (2021) 11(2) International Data Privacy Law 81.
[125] *Ibid.*
[126] Clowance Wheeler-Ozanne, 'Deal or no-deal: does it matter? Data protections for post-Brexit Britain' (2020) 24(2) Edinburgh Law Review 275, 281.
[127] *Schrems* (n 38).
[128] DPA 2018, ss 86-91.
[129] LED, recital (3).

with Europol. The TCA sets out that data protection is subject to each party's legal framework.[130] It provides the principles which data protection should be based on rather than a specific means of doing so.[131] Each separate title on cooperation must be considered individually to assess the framework of data protection required.

The TCA sets limits on the use of PNR data;[132] ensures its free movement from the EU;[133] and obliges the UK to ensure its security.[134] It is suggested that for operation of the TCA's PNR provisions there must be an adequacy decision in place,[135] based on the EU framework for PNR data referring to compliance with the LED for transfers to third countries.[136] The TCA PNR provisions place the UK in a strong position as a third country.[137] The same is true for the transfer of criminal record information,[138] with conditions in place for the transfer of requested information.[139] This title is intended to supplement Council of Europe conventions on mutual assistance in criminal matters.[140] The Europol title details that the sharing and storage of data between Europol and UK competent authorities should be dealt with under the respective parties' domestic legal frameworks.[141] None of these titles make reference to the specific need for an adequacy decision to enable their operation. Cooperation under the TCA is less detailed than it is for member states, but high standards of data protection are built in which may, in practice, be conditional for the operation of the TCA.[142]

Should the UK adequacy decision be nullified by the CJEU, it would automatically halt the free movement of data for criminal matters between the EU and the UK. Nevertheless, there are provisions built into the LED which still allow for the transfer of data in criminal matters between member states and third countries. If, in the UK, there are appropriate safeguards in a legally binding instrument, or the data controller deems such safeguards to exist, data may be transferred to a third country.[143] If there are no safeguards and no adequacy decision, data may be transferred if: it protects the vital interests of a person;[144]

[130] TCA, art 525(2).
[131] TCA, art 525(2)(a)-(h).
[132] TCA, art 544 and annex 40.
[133] TCA, art 545(1).
[134] TCA, art 549.
[135] Van de Heyning (n 26).
[136] Directive 2016/681, art 11.
[137] Paul Arnell, Stefanie Block, Gemma Davies and Liane Wörner, 'Police cooperation and exchange of information under the EU-UK Trade and Cooperation Agreement' (2020) 12(2) New Journal of European Criminal Law 265.
[138] TCA, arts 643 – 651; TCA, annex 44.
[139] TCA, art 651.
[140] TCA, arts 643(2)(a) – (b).
[141] TCA, art 570(3).
[142] Wolfgang Schomburg and Anna Oehmichen, 'Brexit: First observations on the EU-UK Trade and Cooperation Agreement' (2021) 12(2) New Journal of European Criminal Law 193, 200.
[143] LED, art 37.
[144] LED, art 38(1)(a).

safeguards the legitimate interests of the data subject;[145] prevents an immediate threat to the public;[146] or for the prevention, investigation, detection or prosecution of a crime.[147] However, in the event the adequacy decision is nullified, these provisions may be difficult to exercise if there has been any significant change in UK law.

The UK is no longer party to the EU convention on mutual assistance. It is, however, still party to the CoE convention on mutual assistance.[148] This is not as extensive as the EU convention, but it does oblige contracting parties to 'undertake to afford' mutual assistance when requested.[149] The CoE convention does not contain provisions on specific assistance and is not binding on contracting parties in the same way as EU law.[150] The UK could request mutual cooperation in a bilateral or multilateral manner on the basis of this convention.

As is clear from the above analysis, the UK government's future policy decisions could have a detrimental effect on the LED adequacy decision, or the renewal of any future decision. The UK Government has recently concluded a deal with Amazon Web Services to hold intelligence data of three UK intelligence agencies, GCHQ, MI5 and MI6.[151] This, and the Five Eyes intelligence alliance,[152] are aspects of domestic UK policy that may negatively affect the longevity of the LED decision.[153] While most UK law is now outside the jurisdiction of the CJEU and CFREU, the European Court of Human Rights is developing data protection law which the UK is still bound by.[154] Strasbourg jurisprudence may act as an equivalence between the UK and the EU, provided the UK follows its judgements.[155]

[145] LED, art 38(1)(b).
[146] LED, art 38(1)(c).
[147] LED, arts 38(1)(e) and 1(1).
[148] Council of Europe, European Convention on Mutual Assistance in Criminal Matters, European Treaty Series No 30, Strasbourg 20.IV.1959, (ECMA).
[149] ECMA, art 1(1); Davidson (n 18), 385.
[150] Anne Weyembergh, 'Consequences of Brexit for European Union criminal law' (2017) 8(3) New Journal of European Criminal Law 284, 295.
[151] Rajeev Syal, 'Priti Patel pressed to explain award of spy agencies cloud contract to Amazon' *The Guardian* (London, 27 October 2021) <https://www.theguardian.com/uk-news/2021/oct/26/amazon-web-services-aws-contract-data-mi5-mi6-gchq > accessed 15 February 2023.
[152] Celeste (n 32).
[153] *R (on the application of Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22; Wheeler-Ozanne C (n 62), 278.
[154] Irena Ilc, 'Post-Brexit limitations to government surveillance: does the UK get a free hand?' (2020) 25(1) Communications Law 31; *Big Brother Watch v United Kingdom* (58170/13, 62322/14, 24969/15) [2021] 5 WLUK 463.
[155] Ilc (n 91).

## Conclusions

There is overwhelming consensus that an adequacy decision concluded under article 36 of the LED is needed to maintain positive and efficient mutual assistance between the UK and EU in criminal matters.[156] However, it is not the only way of achieving this aim. The law relevant to adequacy decisions has undergone significant litigation in the CJEU, resulting in strict data protection requirements which must be met by third countries. The current legal framework underpinning adequacy decisions and mutual assistance with third countries could be self-limiting for the EU's own interests.[157] By creating a much stricter framework for third countries, it is becoming increasingly more difficult to maintain adequacy decisions. Therefore, the EU must balance its own need for mutual assistance with the UK while upholding EU data protection principles.[158]

The TCA puts the UK in a unique position amongst third countries.[159] None of its provisions mention the need for a data adequacy decision for their operation. While not being as efficient and detailed as intra-EU provisions, this demonstrates that for the UK there are a number of options available. While the TCA may be a sufficient fallback in the absence of an adequacy decision, its titles too could face restriction or unilateral suspension depending on UK conduct in the area of data protection.[160] The TCA's provisions are not isolated from EU law either;[161] the UK may still need to maintain equivalence with the EU, such as compliance with the CJEU as detailed in the PNR Directive,[162] for TCA provisions to operate effectively.[163] EU member states and institutions are still bound by EU law; much of which does make reference to adequacy decisions under the LED as the preferred option for cooperation in criminal matters with third countries.

This analysis shows that there are several options available to maintain cooperation in criminal matters. However, the LED adequacy decision provides the most efficient method of achieving this: despite its vulnerabilities. There are other routes available under the TCA and LED but without an adequacy decision

[156] Valsamis Mitsilegas, 'A new 'special relationship' or damage limitation exercise? EU-UK criminal justice cooperation after Brexit' (2021) 12(2) New Journal of European Criminal Law 105.
[157] Laura Drescher, 'Wanted: LED adequacy decisions. How the absence of any LED adequacy decision is hurting the protection of fundamental rights in a law enforcement context' (2021) 11(2) International Data Privacy Law 182.
[158] *Ibid.*
[159] 'The EU-UK Trade and Cooperation Agreement' (European Commission) <https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en - press-material> accessed 15 February 2023.
[160] TCA, Title XIII and art 700; Wolfgang Shomburg, Anna Oehmichen and Katrin Kayß, 'Human rights and the rule of law in judicial cooperation in criminal matters under the EU-UK Trade and Cooperation Agreement' (2021) 12(2) New Journal of European Criminal Law 246.
[161] Annegret Engel, 'The long-awaited deal between the EU and the UK – expectations and realities' (2020) 1 Nordic Journal of European Law 25.
[162] n 22-24.
[163] Engel (n 98).

in place these too could face difficulties or suspension. There is, therefore, a need for a data adequacy decision to maintain efficient mutual assistance in criminal matters.

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ISSN 2634-5102


Title: State Prevention Targeting Persons Attracted to Minors in Europe

Author(s): Aleydis Nissen

Source: *University of St Andrews Law Journal* 3, no.1 (August 2023): 38-58.

Published by: Institute of Legal and Constitutional Research, University of St Andrews

Stable URL: https://doi.org/10.15664/stalj.v3i1.2647

DOI: 10.15664/stalj.v3i1.2647



ISSN 2634-5102

# STATE PREVENTION TARGETTING MINORS IN EUROPE

by Aleydis Nissen

## Introduction

To this day, displaying or engaging in sexual activities with children – one of the most destructive events for child development – is tolerated in various contexts and situations, while stigma, misplaced guilt and powerlessness keep survivors from speaking out. [164] For example, Japanese convenience stores display magazines with women that 'appear to be' minors on the cover. [165] Various minors in legal marriages in Morocco are required to have sexual relations with their adult husbands against their will (but without legal avenues to claim redress). [166]

In the 1970s, radical feminists in the United States started questioning such approaches by making child sexual abuse visible. By considering child sexual abuse as a political and social issue,[167] they brought 'prevention' of child sexual offences (CSOs) into the mainstream.[168] Preventive programmes have focused on potential victims, survivors, persons who (fear they will) commit offences, situations and communities.[169]

There are primary and secondary preventive programmes. Primary prevention initiatives, such as World Vision's Child Safe Tourism initiative, focus on general deterrence and developmental prevention. [170] Secondary prevention initiatives stage interventions when there is a more imminent risk. [171] For example, there are banners and pop-ups on various search engines that make it more difficult to access websites designed to promote children for sex. Less known are secondary intervention programmes for persons who fear that they might commit child sexual abuse and exploitation. Such programmes are specifically targeted

[164] Nancy Whittier, *The Politics of Child Sexual Abuse* (OUP 2009) 24 and 36; Jerusha Sanjeevi and others, 'A Review of Child Sexual Abuse: Impact, Risk and Resilience in the Context of Culture' (2018) 27 Journal Child Sexual Abuse 622.
[165] X, 'Concern About "Sexualise" Children Often Misses The Point' *The Economist* (21 July 2018), https://www.economist.com/international/2018/07/19/concern-about-sexualised-children-often-misses-the-point; Ciaran Varley, 'Is Japan Turning a Blind Eye to Paedophilia' *BBC* (7 March 2018), https://www.bbc.co.uk/bbcthree/article/57eaaf23-0cef-48c8-961f-41f2563b38aa. See Mark McLelland, 'Negotiating "Cool Japan" in Research and Teaching' in M McLelland (ed.), *The End of Cool Japan: Ethical, Legal and Culture Challenges to Japanese Popular Culture* (Routledge 2017).
[166] Alexia Sabbe, 'Determinants of Child and Forced Marriage in Morocco: Stakeholder Perspectives on Health, Policies and Human Rights' (2013) 13 BMC International Health and Human Rights 1.
[167] Whittier (n 164) 21-22 referring to, amongst others Sandra Butler, *Conspiracy of Silence: The Trauma of Incest* (Volcano 1985).
[168] Whittier, id., 63
[169] Kieran McCartan and others, 'Ethics and Issues of Secondary Prevention Efforts in Child Sexual Abuse' (2018) 62(9) International Journal of Offender Therapy and Comparative Criminology 2548, 2551.
[170] *Ibid*., 2550.
[171] *Ibid*.

at people who have a sexual preference for minors (as opposed to situational child sexual abusers that are driven by other motivations). [172]

A decade ago, instruments that create state obligations to offer preventive programmes and measures for persons who fear that they might commit child sexual abuse or exploitation were adopted in Europe. The Council of Europe included such obligations in Article 7 of the Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse ('the Lanzarote Convention') in 2010, while the European Union (EU) has included them in Article 22 of Directive 2011/93 EU on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography ('Directive 2011/93 EU'; 'the Directive'). [173] The Council of Europe has 47 member states, including the 27 Member States of the EU. This article aims to review these supranational obligations and their implementation.

The structure of this article is as follows. The first section of this article summarizes current debates in psychiatry and public health. These debates frequently overlook that there exist state obligations in Europe to provide support to persons who fear that they might commit child sexual abuse and exploitation. After breaking down these legal obligations, this article explains the benefits that these obligations can bring to minors, persons who fear that they might offend and the rest of society. However, the last section of this article sets out that the stigma around pedophilia hampers progress at the individual, interpersonal and structural levels in the Member States of the Council of Europe and the EU. In addition, targeted programmes and measures for specific target groups of PAMs, such as women or people with disabilities, are identified as a blind spot. Finally, there is room for improvement in the cooperation between these two international organizations.

## Current Debates in Psychiatry and Public Health

The World Health Organization used to define pedophilia as 'a sexual preference for children, boys or girls or both, usually of *prepubertal or early pubertal* age' in the tenth edition of the International Statistical Classification of Diseases and Related Health Problems (ICD-10). [174] However, the most recent edition of this Classification (ICD-11) refers only to pedophilic disorder, a sustained, focused, and intense pattern of sexual

[172] United Nations Human Rights Council (HRC), 'Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography' (2015) UN Doc. A/HRC/31/58 para 26.
[173] Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (adopted 25 October 2007, entered into force 1 July 2010) CETS 201; EU (European Parliament and Council), Directive Nr 2011/93/EU 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 L 335.
[174] World Health Organization, International Statistical Classification of Diseases and Related Health Problems (10th edition, 2010) para 65.4 (emphasis added).

arousal involving *prepubertal* children.[175] Hebephilia – attraction to children who are in the early to mid-stages of pubertal development – is thus no longer included in the World Health Organization's Classification.[176] In order for pedophilic disorder to be diagnosed, the individual must have acted on thoughts, fantasies or urges or be markedly distressed by them. (This diagnosis does not apply to sexual behaviours among pre- or post-pubertal children with peers who are close in age.) The ICD-11 definition is clearly inspired by the fifth edition of the Diagnostic and Statistical Manual of Mental Disorder (DSM-5), the standard classification of mental disorders.[177] To be diagnosed as a person with pedophilic paraphilia, the individual needs to experience intense sexually arousing fantasies or urges involving sexual activity with prepubescent children over a period of at least six months and have 'acted on' these sexual urges, or, alternatively, the urges have caused serious distress. The DSM-5 extends the prepubescent age to 13. But the diagnosed person should be at least 16 years of age and at least 5 years older than his or her victim (unless it concerns an individual in late adolescence who is 'involved in ongoing sexual relationships with, say, 12 or 13-year-olds'). The DSM-5 has been criticized for not accounting sufficiently for hebephilia.[178] I will not discuss this issue further. It suffices to state here that one of the reasons why it is not included in the DSM-5 would be the potential forensic impact.[179] A more comprehensive conceptualization might allegedly be 'used and misused in legal and clinical decision-making'.[180]

Due to the many misconceptions and stigmas that exist around the term 'pedophilia', there has been a search for another term. The NGO B4U-Act used the term 'Minor-Attracted Person' at a conference in 2011.[181] This term refers to individuals who may not fully relate to the term 'pedophile' but feel a sexual (or emotional) attraction to children or adolescents.[182] I will, however, use the term 'Persons Attracted to Minors' (PAM) in this article because this formulation is less ambiguous.

[175] World Health Organization, International Statistical Classification of Diseases and Related Health Problems (11th edition, 2019) para 6D32 (emphasis added). Note that it valuable that this definition does no longer refer to gender constructs such as 'boys' and 'girls'.
[176] ECPAT International, 'Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse' (2016), https://www.ohchr.org/documents/issues/children/sr/terminologyguidelines_en.pdf86-87.
[177] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorder (5th edition, 2015) (DSM-V).
[178] Ray Blanchard and others, 'Pedophilia, Hebephilia, and the DSM-V' (2009) 38(3) Archives of Sexual Behaviour 335. See Robert Prentky and Howard Barbaree, 'Commentary: Hebephilia—A Would-be Paraphilia Caught in the Twilight Zone Between Prepubescence and Adulthood' (2011) 39(4) Journal of the American Academy of Psychiatry and the Law, 506.
[179] Patrick Singy, 'Hebephilia: A Postmortem Dissection' (2015) 44 Archives of Sexual Behaviour 1109, 1115.
[180] Skye Stephens and Michael Seto, 'Hebephilic Sexual offending' in A Phenix and H Hoberman (eds), *Sexual Offenders: Predisposing Antecendents, Assessments, and Management* (Springer 2016), 31.
[181] B4U Act, 'Pedophilia, Minor-Attracted Persons, and the DSM: Issues and Controversies' Symposium, Baltimore, MD, 17 August 2011. This concept has also been spelled as 'Minor Attracted Person' in the literature (e.g Candice Christiansen and Meg Martinez-Dettamanti, 'Prevention of Action: Exploring Prevention Initiatives and Current Practices' in R Lievesley and others (eds), *Sexual Crime and Prevention* (Springer 2018) 27, 29).
[182] Christiansen and Martinez-Dettamanti id.; Natasha Knack and others, 'Primary and Secondary Prevention of Child Sexual Abuse' (2018) 31 International Review of Psychiatry 181, 183.

Since the 1980s, researchers from the disciplines of public health and psychiatry have turned their attention to preventive strategies to support people who self-identify as PAMs and want to work to not commit a CSO.[183] There is currently no evidence of whether pedophilic paraphilia is curable.[184] But, there is a consensus that most PAMs can manage their behaviour. PAMs can, amongst others, learn self-control, cope with shame and stigma-related stress, and improve the quality of their lives.[185] Trained professionals can support them in taking such steps. Programmes have been set up by civil society organizations and medical facilities in various countries around the world. For example, in a research project that was funded by the European Commission, users of the Dutch and British Stop it Now! Helplines said they were better able to understand the problematic and illegal nature of CSOs, to identify triggers, to manage behaviour, and to put in place protective factors that could reduce their risk of offending.[186] Ideally, such support is offered in a setting where PAMs who have not offended are not mixed with PAMs who have offended.[187] More research on such programmes is needed. There is currently no reliable empirical evidence for or against the impact of a specific programme in preventing CSOs.[188] There are considerable methodological problems. For example, PAMs who seek help are a self-selected sample of motivated people, so it is hard to measure differences. There is also an ethical problem which makes it difficult to put PAMs in a control group in which no treatment is offered.

In various countries, PAMs are advised to seek help from healthcare professionals in general practices (as opposed to specialized medical facilities).[189] Unfortunately, such professionals are not always able or willing to provide help.[190] The treatment of PAMs is frequently not incorporated in training curricula of healthcare professionals.[191] In addition, some professionals are resentful of PAMs due to stigmatization. In a recent survey amongst 427 therapists in community practice in Switzerland, 45 percent of those surveyed stated that they would be unwilling to treat PAMs, even if this PAM had not committed a CSO.[192] Healthcare professionals in general practice who want to work with PAMs can, nevertheless, do valuable work because

[183] E.g. Kirsten Jordan and others, 'Sexual Interest and Sexual Self-Control in Men with Self-Reported Sexual Interest in Children—A First Eye Tracking Study' *(2018)* 96 *Journal of Psychiatric Research 138*.
[184] Paul Fedoroff, 'Pedophilia: Interventions that Work' (2016) 33(7) Psychiatric Times.
[185] Kris Vanhoeck, 'Preventieve Hulp voor Mensen met Pedofiele Gevoelens' (2015) 45/3 Tijdschrift Klinische Psychologie 167.
[186] EU (Commission), 'Preventing Child Sexual Abuse: Evaluating and Implementing a European Model of Stop it Now!' (2011) JUST/2011/DAP/AG/3031 https://ec.europa.eu/justice/grants/results/daphne-toolkit/content/preventing-child-sexual-abuse-evaluating-and-implementing-european-model-stop-it-now_en.
[187] Susanna Niehaus, Delia Pisoni and Alexander Schmidt, 'Präventionsangebote für Personen mit Sexuellen Interessen an Kindern und ihre Werking' (2020) Forschungsbericht 4/20, https://www.bsv.admin.ch/bsv/de/home/sozialpolitische-themen/kinder-und-jugendfragen/kinderschutz/praevention-paedosexuelle.html, 68.
[188] Niehaus et al. (n 187) 65; Rosanna Di Gioia and Laurent Beslay, 'Fighting Child Sexual Abuse: Prevention Policies for Offenders – Inception Report' (2018) EUR 29344 EN, 7.
[189] Lanzarote Committee, '2nd Implementation Report Protection of Children Against Sexual Abuse in the Circle of Trust' (2018) T-ES(2017)12_en final, 104.
[190] Amandine Scherrer and Wouter van Ballegooij, 'Combatting Sexual Abuse of Children Directive 2011/93/EU' (2017) PE 598.614, 34
[191] Niehaus et al. (n 187) 69.
[192] *Ibid., p* 73.

the geographical and other barriers to access general services are lower than those of specialized programmes. Such professionals need specific training to acquire knowledge of the therapeutic management of PAMs. These professionals should also benefit from the support of a larger network, and have sufficient time to reflect upon their behaviour during therapy to avoid any judgmental and stigmatizing attitudes. [193] It is a particularly difficult balancing act for professionals to master the skill of helping PAMs to cope with their stigmatized tendencies, while minimizing potential risk against children. If they alienate the PAM, there is a risk that the PAM's mental health deteriorates. [194]

**Legal Framework**

A number of international law provisions are relevant. The 1959 Declaration of the Rights of the Child states 'The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form'. [195] It was not until the United Nations (UN) Convention on the Rights of the Child (1989) – which has since been ratified by all states apart from the United States and Somalia – that human rights law seriously engaged with the distinctiveness of childhood. [196] This Convention obliges States Parties to protect children from all forms of sexual exploitation and abuse, abduction, sale and trafficking, any other form of exploitation and from cruel or inhuman treatment. [197] States Parties shall take legislative, administrative, social and educational measures for prevention. [198] More specifically, Article 9(1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000) determines that States Parties shall adopt, strengthen or implement measures to prevent the three abuses to which its name refers. [199] The Convention and the Optional Protocol do, however, not list specific measures for prevention. [200] In her interpretation of the Optional Protocol, the former UN Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography Maud de Boer-Buquicchio has, nevertheless, referred to preventive programmes for PAMs who want to seek support when they fear that they would be capable of committing a CSO. [201] She mentionned the German 'Dunkelfeld project', a project that offers pharmacologic treatment and psychotherapy to PAMs. Furthermore, the

[193] Di Gioia and Beslay (n 188) 9; Scherrer and van Ballegooij (n 190) 32; Robert Lehmann, Alexander Schmidt and Sara Jahnke, 'Stigmatization of Paraphilias and Psychological Conditions Linked to Sexual Offending' (2020) 4 The Journal of Sex Research 438.
[194] Niehaus et al. (n 187) 66.
[195] Declaration of the Rights of the Child (adopted 20 November 1959), General Assembly Res. 1386 (XIV).
[196] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1989) 1577 UNTS 3 (CRC); However, he pertinent provisions of this Convention, like those in Articles 1, 11, 21 and 32-37, are formulated in general and broad terms (Jacqueline Bhabha, 'The Child: What Sort of Human' (2006) 121(5) PMLA 1526, 1528.)
[197] Art 34 CRC.
[198] Art 19(2) CRC.
[199] Art 9(1) Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 25 May 2000, entered into force 18 January 2002) 2171 UNTS 227.
[200] See Wouter Vandenhole and others, *Children's rights* (Edward Elgar 2019) 336.
[201] A/HRC/31/58 (n 172) 51; HRC, 'Sale and Sexual Exploitation of Children. Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, including Child Prostitution, Child Pornography and other Child Sexual Abuse Material' (2020) UN Doc. A/HRC/43/40 para 64.

Stockholm Declaration and Agenda for Action of the First World Congress (1996) – an influential instrument on the issue of sexual exploitation and sexual abuse in the commercial field – contains one preventive provision that targets potential offenders. [202] It encourages, in particular, the targeting of 'those involved with commercial sexual exploitation of children with information, education and outreach campaigns and programmes to promote behavioral changes to counter the practice'. [203]

More concrete obligations were stipulated in regional charters, in particular in Europe. [204] In 2010, de Boer-Buquicchio – then Council of Europe Deputy Secretary-General – stressed the importance of regional instruments because existing international instruments were simply 'not working'. [205] All 47 Council of Europe Member States are States Parties to the Lanzarote Convention. It entered into force on 1 July 2014, and the last state to ratify was Ireland, in 2020. Tunisia was the first non-Council of Europe Member State to accede to the Convention. Directive 2011/93 EU was intended to transpose the Lanzarote Convention into EU Member State legislation. [206] The Directive was adopted in 2011 and all EU Member States were held to implement it by 18 December 2013. [207] Measures that are adopted to implement the Directive shall contain a reference to the Directive or be accompanied by such a reference on the occasion of their official publication. [208]

The 'age of sexual consent' is 'the age below which, in accordance with national law, it is prohibited to engage in sexual activities with a child'. [209] The Lanzarote Convention and the Directive determine that a 'child' is any person under the age of 18 years. [210] The age of sexual consent is determined in the national context, and ranges from 14 to 18 in Council of Europe (and EU) Member States. [211] For most states that have an age of sexual consent at the lower end of this range, there are various circumstances in which a child can still not give consent. There are, amongst others, exemptions for children who have reached the age of sexual consent, but are not 'mature'. In addition, consent is often not possible when children who have reached the age of sexual consent engage in sexual activities with persons in a position of authority. Furthermore, there are

[202] World Congress against Commercial Sexual Exploitation, Stockholm Declaration and Agenda for Action (1996), http://www.csecworldcongress.org/en/stockholm/Outcome/index.html.
[203] *Ibid.,* para 3.l.
[204] Cf Ton Liefaard and Julia Sloth-Nielsen, '25 years CRC: Reflecting on Successes, Failures and the Future' in T Liefaard and J Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child Taking Stock After 25 Years and Looking Forward* (Brill 2017) 1, 2
[205] Daniel Edelson, 'Accountability and Responsibility: Why South Korea Should Support a Regional Convention Modeled after the Council of Europe on the Protection of Children Against Sexual Exploitation and Sexual Abuse' (2014) 27 Korea University Law Review note 63.
[206] Scherrer and van Ballegooij (n 190) 22.
[207] Art 27.1 Directive.
[208] Art 27.3 id.
[209] Art 18.2 Convention; art 2.b Directive.
[210] Art 3.a Convention; art 2.a Directive.
[211] Art 18.2 Convention; art 2.b Directive; Guangxing Zhu and Suzan van der Aa, 'Trends of Age of Consent Legislation in Europe: a Comparative Study of 59 Jurisdiction on the European Continent' (2017) 8 New Journal of European Criminal Law 14, 22.

close-in-age exemptions for sexual activities between (young adults and) minors, even when they are younger than 14 in various states (such as Cyprus and Italy). [212]

Article 7 of the Lanzarote Convention explains that *persons* who fear that they might commit sexual offences against children may have access, where appropriate, to effective intervention programmes or measures designed to evaluate and prevent the risk of such offences being committed. Article 22 of Directive 2011/93 EU echoes this provision. There should be support for PAMs who fear that they will engage in, aid or abet sexual abuse (including sexual corruption, causing children to witness sexual abuse or sexual activities, even without having to participate), solicitation of children for sexual purposes, child prostitution, child pornography or the participation of a child in pornographic performances. While these offences are covered by both instruments, the definitions of such offences are not exactly the same in the Convention and the Directive. They are, generally speaking, slightly more elaborate in the Directive.[213]

The scope of preventive programmes and measures for PAMs is not entirely clear, because the jurisdiction clauses in both legal instruments – Article 25 of the Lanzarote Convention and Article 17 of Directive 2011/93 EU – refer to the criminalization of CSOs that *have been* committed, aided, abetted or attempted. It is, therefore, likely that all PAMs who *fear that* they would commit, aid, abet or attempt a CSO within the jurisdiction of the Convention and/or the Directive need to be able to benefit from preventive programmes or measures. The non-binding Explanatory Report to the Lanzarote Convention agrees with this interpretation.[214] This report furthermore stresses that persons who have committed CSOs but have not been brought to the attention of the authorities also need to benefit, if they so wish, from preventive intervention. [215] Article 7 of the Lanzarote Convention thus applies to all PAMs who are not being investigated or prosecuted or serving a sentence. (PAMs who are being investigated, prosecuted or serving a sentence fall within the ambit of Article 16 of the Lanzarote Convention.)

Accordingly, there exist state obligations to offer preventive programmes and measures to PAMs in the following instances under Article 25 of Lanzarote Convention and Article 17 of Directive 2011/93 EU. First, all offences committed by nationals of States Parties to the Convention (or EU Member States) are regulated. This means that such nationals need to be able to access programmes when they fear committing abuses against children. This includes nationals who fear that they will engage in sex tourism outside Europe.

[212] See art 18(2) Convention; art 8 Directive. For a discussion see, Hoko Horii, 'Adolescents' "Consent" to Sex: Law and Morality in the Age of Consent Laws' *Leiden Law Blog* (20 May 2020), https://www.leidenlawblog.nl/articles/adolescents-consent-to-sex-law-and-morality-in-the-age-of-consent-laws.
[213] Scherrer and van Ballegooij (n 190) 22.
[214] Council of Europe, 'Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse' (adopted 25 October 2007) CETS 2011, 64.
[215] Council of Europe (n 214) 64.

Second, the Convention extends jurisdiction to persons who have a habitual residence in the territory of a Council of Europe Member State. [216] All Council of Europe Member States, apart from those who have made reservations to this type of provision (Germany, Hungary, Ireland, Latvia, Montenegro, Poland, Slovenia and Switzerland), thus need to extend their programmes to habitual residents who are not nationals. Third, all CSOs – in whole or in part – committed in the territory of the State Party to the Convention (or the EU Member State) are regulated. [217] This includes offences on board a ship flying the flag of that State Party, or on board an aircraft registered under the laws of that Party. [218] This means that PAMs (all over the world) who fear that they will commit (part of) of a CSO against children located in the territory of the State Party to the Convention should be able to access support. Online preventive programmes can be particularly useful for PAMs who are not nationals or habitual residents in Europe (but target children who are located there). Finally, European states can choose to extend jurisdiction to offences committed against children who are its nationals or are habitual residents on its territory, or when the offence is committed to the benefit of a legal person established in its territory. [219] They can, of course, decide to provide preventive programmes for other PAMs. It is also important to keep in mind that this analysis of the scope of the jurisdictional clauses might be a mere academic exercise, as both Article 7 of the Convention and Article 22 of the Directive determine that programmes and measures should only be offered to PAMs 'where appropriate'.

Particular challenges arise for healthcare professionals when there is an imminent risk to children, or when a PAM says that they committed a CSO that has not been reported to the authorities. The Convention clarifies that hotlines should be established and that a multi-agency approach should be promoted. [220] The Lanzarote Committee – which monitors the implementation of the Convention – urged States Parties to put in place a tool or a procedure to assess the dangerousness and possible risk of repetition of CSOs. [221] Such tools need to help professionals when presumed offences or acute danger to children becomes known. In addition, professionals might need to comply with legal standards to report past CSOs to the authorities. Article 12(2) of the Convention and Article 16(2) of the Directive require that 'any person' who knows about or suspects, in good faith, a CSO should be encouraged to report this to the services responsible for child protection. Furthermore, the Convention and the Directive explain that confidentiality rules for professionals shall not obstruct disclosure to the services responsible for child protection of any situation where they have reasonable grounds for believing that a child is the victim of sexual exploitation or sexual abuse. [222] These

[216] Art 25.1e and 25.3 Convention; art 17.2.a Directive.
[217] Art 25.1.a Convention; art 17.1.a Directive.
[218] Art 25.1.b and 25.1.c Convention.
[219] Art 25.2 Convention; 17.2.a and 17.2.b Directive.
[220] Arts 10 and 13 Convention; Council of Europe (n 214) 77 and 92; Renée Kool, Senna Kerssies and Tessa van der Rijst, 'Mind the (Knowledge) Gap': Towards a Criminal Duty to Report Child Sexual Abuse' (2021) 17 Utrecht Law Review 33, 38.
[221] Lanzarote Committee (n 189) 8.
[222] Art 12(1) Convention; art 16(2) Directive.

provisions are, however, limited to 'professionals working with children'. There are considerable differences in national regulations relating to mandatory reporting, and in the procedures for reporting CSOs. [223] Renée Kool and her co-authors note that France and the Netherlands are exceptional because these countries have enacted a duty to report to criminal justice authorities. [224] The French criminal duty to report applies to all CSOs, but there are certain exceptions for those bound to secrecy. [225] The Dutch criminal duty to report is limited to the offence of rape. [226] One plausible reason why there are no rigid or criminal reporting obligations in the Convention and the Directive is that it has been hypothesized that some prevention programmes and measures – such as the above-mentioned Dunkelfeld project – have been able to produce some innovative results because there are less rigid reporting obligations for therapists. [227] Evaluating the different regulatory approaches, Kool and her co-authors conclude that 'the specific nature of the case and the ethical dilemmas require room for manoeuvre'. [228] Susanna Niehaus and her co-authors proposed anonymous treatment as a pragmatic way to deal with this ethical dilemma. [229]

The Lanzarote Convention and the Directive do not contain specific models for prevention measures and programmes targeting PAMs. The States Parties to the Convention shall 'ensure', while the EU Member States shall take the 'necessary measures to ensure' that intervention programmes or measures are available to PAMs who wish to use them. [230] In its 2018 implementation report, the Lanzarote Committee provided further guidance. It recommended that States Parties to the Convention need to pay special attention to minors who fear they may offend. [231] In so doing, the Committee acknowledged that PAMs and their needs vary widely. Unfortunately, however, the Committee did not go far enough. For example, it did not question Austria's programmes and measures, which only provide specialized preventive services for 'men and boys' who fear that they might offend. It even endorsed the fact that female PAMs in Austria can only seek help from 'general mental health services', without mentioning the need for specialized training for healthcare professionals in general practice. While female PAMs are a minority, accessible and differentiated programmes for all genders are required. There are various other groups of PAMs who require special attention, including PAMs with intellectual disabilities.[232]

[223] Kool et al. (n 220) 33.
[224] *Ibid*., p 33.
[225] *Ibid.,* p 33 referring to art 434(3) Criminal Code (FR).
[226] Kool et al. (n 220) 33 referring to art 424 Criminal Code (NL).
[227] A/HRC/31/58 (n 172) 51; Niehaus et al. (n 187) 62.
[228] Kool et al. (n 220) 44.
[229] Niehaus et al. (n 187) LVI.
[230] Art 7 Convention; Art 22 Directive.
[231] Lanzarote Committee (n 189) para 106.
[232] *See* for a similar argument in relation to sex offenders, see Bernadette Rainey, 'Special Offender Groups and Equality – A Duty to Treat Differently' in K Harrison and B Rainey (eds), *The Wiley-Blackwell Handbook of Legal and Ethical Aspects of Sex Offender Treatment and Management* (Wiley 2013), 63-81.

**Benefits of Swift Implementation**

While programmes and measures in the sense of Article 7 Lanzarote Convention and Article 22 Directive would require substantial investment, stalling such investment is even more costly. There are four reasons. These provisions have the potential to prevent trauma of the current and next generations of children, to help PAMs to lead more productive and fulfilling lives, and to save both the criminal justice and the healthcare system substantial resources.

First, trying all means to prevent CSOs is a top priority. Such offences are serious violations of fundamental rights that are destructive to children's health, including their psycho-social development. [233] The scope of this problem should not be underestimated. Between 15.0 and 19.7 percent of women and between 7.6 and 8.0 percent of men are estimated to be survivors of child sexual abuse worldwide. [234] The sexual abuse of boys remains more invisible due to widespread and harmful myths that boys cannot be sexually used or abused. [235] In addition, children whose activity choices, interests, and pretend play fall outside the behaviour typically expressed by their gender face an increased risk of being sexually abused. [236] Minors that are disadvantaged due to multiple and interlocking systems of power, including ethnicity and class, are particularly at risk.[237] Short-term effects of child sexual abuse can include anxiety, aggression and sexually inappropriate behaviour. The impairment of health of survivors can continue well into adulthood. [238] Long-term effects can include poor self-esteem, self-destructive behaviour, feelings of isolation and stigma, gynaecological disorders, heightened risk of the development of post-traumatic stress disorder and personality disorders, dependence on drugs, poor parenting, suicidal ideations and sexual problems. [239]

Second, treatment can support PAMs in being more productive and prosocial members of society. [240] PAMs will often need support to cope with their thoughts, behaviour and stigma-related stress. [241] Preventive programmes and measures do not just need to exist, they also need to be advertised and accessible. Shame and fear of consequences are considerable barriers for PAMs to search for help online or in person. [242] PAMs

[233] McCartan et al. (n 169) 2549.
[234] Sanjeevi et al. (n 164) 624
[235] 1in6, 'Myths and Facts About Male Sexual Abuse and Assault', https://1in6.org/get-information/myths/
[236] Andrea Roberts and others, 'Childhood Gender Nonconformity: A Risk Indicator for Childhood Abuse and Posttraumatic Stress in Youth' (2012) 129(3) Pediatrics 410.
[237] Nancy Whittier, Putting Child Sexual Abuse Back on the Feminist Agenda (2016) https://gendersociety.wordpress.com/2016/02/18/putting-child-sexual-abuse-back-on-the-feminist-agenda/
[238] Angela Browne and David Finkelhor, 'Impact of Child Sexual Abuse: A Review of the Research' (1986) Psychological Bulletin 66; Josie Spataro and others, 'Impact of Child Sexual Abuse on Mental Health' (2018) 184(5) The British Journal of Psychiatry 416.
[239] *Ibid.*
[240] Knack et al. (n 182) 186.
[241] Niehaus et al. (n 187) 66.
[242] McCartan et al. (n 169) 2556.

can have concerns about (real or presumed) reporting obligations, stigma and their privacy. [243] Preventive programmes and measures were especially important during the COVID-19 pandemic. There has been a worrying surge in CSOs during this crisis. [244] During the extended lockdown periods, children who live with PAMs have been particularly at risk. Furthermore, children were spending more time than before online, which increased the risk of getting in touch with PAMs. PAMs are known to be more likely to be in danger of committing CSOs when they feel isolated. [245] In response to perceived or real inaction of the authorities during the COVID-19 pandemic, some people started targeting PAMs online to meet up, harass them in real life encounters and expose them on social media. Such encounters had various undesirable consequences, including considerable misinformation. For example, after a Flemish actor admitted upon provocation that he had sexually assaulted children, a magazine published a polemic and viral op-ed to defend the actor with wrong information on, amongst others, the age of consent in Germany. [246]

Third, prevention saves considerable resources for the criminal justice system. [247] The Directive determines that all CSOs should be criminalized with imprisonment. Prosecution, police services and incarceration are expensive to society.[248] The total costs depend on national practices. The median amount spent for one inmate per day of detention in custody was EUR 64 (EUR 23,360 per year) in the Council of Europe Member States in January 2020. [249] Furthermore, offenders are at risk of psychological and physical violence at expense to the state.[250] While it is difficult to find numbers for Europe, Robert McGrath and his co-authors found that the estimated benefit-to-cost ratio is USD 4.13 saved for every dollar spent on treatment services for PAMs in the US. [251]

[243] *Ibid.*
[244] UN Committee on the Rights of the Child, 'General Comment No. 25 on Children's Rights in Relation to the Digital Environment' (2021) UN Doc. CRC/C/GC/25 para 80.
[245] Sara Jahnke, Roland Imhoff and Jürgen Hoyer, 'Stigmatization of People with Pedophilia: Two Comparative Surveys (2015) 44(1) Archives of Sexual Behavior, 21.
[246] Delphine Lecompte, 'Het Lijkt Me Wijzer om te Aanvaarden dat Pedofilie in Elk van Ons Huist' *Humo* (3 August 2021), https://www.humo.be/meningen/het-lijkt-me-wijzer-om-te-aanvaarden-dat-pedofilie-in-elk-van-ons-huist~b6c4973c/; Delphine Lecompte, 'Delphine Lecompte Reageert: 'Verschrikkelijk Dom om Alle Pedofielen te Demoniseren' *Humo* (12 August 2021), https://www.humo.be/meningen/delphine-lecompte-reageert-verschrikkelijk-dom-om-alle-pedofielen-te-demoniseren~b2e0101f/
[247] McCartan et al. (n 169) 2549.
[248] Robert Prentky and Ann Burgess, 'Rehabilitation of Child Molesters: a Cost-Benefit Analysis' (1990) 60 American Journal of Orthopsychiatry, 108.
[249] Marcelo Aebi and Mélanie Tiago, 'Prisons and Prisoners in Europe 2020: Key Findings of the SPACE I Report' (2021), https://wp.unil.ch/space/files/2021/06/210329_Key_Findings_SPACE_I_2020.pdf. (This cost of imprisonment does not consider differences in the cost of living and other economic indicators across countries).
[250] Tony Ward and Chelsea Rose, 'Punishment and the Rehabilitation of Sex Offenders – An Ethical Maelstrom' in K Harrison and B Rainey (eds), *The Wiley-Blackwell Handbook of Legal and Ethical Aspects of Sex Offender Treatment and Management* (Wiley 2013), 273 referring to Victor Tadros, *The Ends of Harm: the Moral Foundations of Criminal Law* (OUP 2011) 1; Joshua Long, 'Targeted Violence in Correctional Facilities: the Complex Motiviations of Prisoners Who Kill Child Sexual Abusers' (2022) 8 Journal of Criminal Justice 1.
[251] Robert McGrath and others, 'Current Practices and Trends in Sexual Abuser Management: The Safer Society 2009 Nationwide Survey' (2010) 13.

Fourth, prevention saves considerable resources for the healthcare system. [252] The many possible physical and mental consequences of sexual abuse tax this system. Such consequences lead to a loss of productivity – including unemployment and reduced earnings – of both survivors and offenders. [253] These costs are trumped by the intangible costs of loss of quality of life caused by CSOs.[254] Aliya Saied-Tessier estimated that the total costs amounted to GBP 3,051,000,000 for child sexual abuse survivors alone in the United Kingdom for the fiscal year 2013. [255]

**Implementation**

Despite these forecasted advantages, Member States of the Council of Europe and the EU have, to date, largely failed to implement their legal obligations to offer preventive programmes to PAMs who fear committing an offence. It is likely that states have failed to implement these obligations due to the taboo surrounding 'pedophilia'. In a 2014 questionnaire on the implementation of Article 7 Lanzarote Convention, most States Parties to the Convention failed to report any measures or reported irrelevant measures. Azerbaijan referred to children who are exploited as beggars; Bulgaria referred to punishment for offenders; France discussed the traffic of children; and Italy interpreted the concepts 'intentional conduct' and 'sexual activities'. [256] Despite a call by the European Parliament to implement Article 22 of the Directive, [257] prevention programmes for PAMs who fear that they might offend, and who have offended, remain the least implemented part of the Directive to date. [258] In 2020, the European Commission observed that various types of practitioners in the field do not communicate sufficiently with each other on best practices and the effectiveness of preventive programmes. [259]

In its Security Union Strategy (2020), the Commission announced two measures to speed up the implementation of Article 22 Directive. First, the European Commission promised to continue to make use of its enforcement powers under the Treaties through infringement procedures, as necessary, to ensure swift implementation. [260] Second, the Commission planned to work on setting up a prevention network of relevant

[252] McCartan et al. (n 169) 2549.
[253] Elizabeth Letourneau and others, 'The Economic Burden of Child Sexual Abuse in the United'(2018) 79 Child Abuse & Neglect 413.
[254] Ronald Donato and Martin Shanahan, 'The Economics of Child Sex-Offender Rehabilitation Programs: Beyond Prentky and Burgess' (2001) 71 Annual Journal of Orthopsychiatry 134.
[255] Aliya Saied-Tessier, 'Estimating the Costs of Child Sexual Abuse in the UK' (2014) http://hdl.handle.net/11212/1637.
[256] Lanzarote Committee, 'State Replies of the 1st Monitoring Round' (2014) https://www.coe.int/en/web/children/state-replies -{"12442583":[0]}
[257] EU (European Parliament), Motion for a European Parliament Resolution on the Implementation of Directive 2011/93/EU of the European Parliament and the Council of 13 December 2011 on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography (2016) 2015/2129(INI), 22.
[258] EU (Commission), 'EU Strategy for a More Effective Fight Against Child Sexual Abuse' (2020) COM(2020) 607 final, 3 and 10.
[259] *Ibid.,* p 9.
[260] *Ibid.,* key action 1.

and reputed practitioners and researchers to support EU Member States in putting in place usable, rigorously evaluated and effective prevention measures. [261] Although the network would cover all areas related to preventing child sexual abuse, it would have a strong focus on prevention programmes for offenders and for people who fear that they might offend. The aim is to organize the network in working groups that will facilitate the exchange of best practices and the work on concrete initiatives to generate tangible output. [262]

Finally, it would be useful if the EU and the Council of Europe improved their communication in the future. Currently, such communication is not optimal. This can be evidenced by two observations. First, a 2018 EU report on Articles 22 and 24 of the Directive failed to refer to the Lanzarote Convention. [263] Second, data on intervention programmes and measures are not consistent. In 2016, the Commission concluded that seven EU Member States had put in place measures to implement Article 22 of the Directive. [264] These were Austria, Bulgaria, Finland, Germany, the Netherlands, Slovakia and the United Kingdom. The information provided by the other Member States was not conclusive. However, the Lanzarote Committee did not refer to the reported progress in Bulgaria and Slovakia in its second implementation report in 2018. [265]

**Conclusion**

Preventive strategies to support people who self-identify as sexually attracted to minors and fear that they might commit a CSO can be useful. While there is currently no evidence of whether pedophilic paraphilia is curable, there is a consensus that PAMs can manage their behaviour. Around 2010, innovative legal obligations were adopted in Europe. Article 22 of Directive 2011/93 EU is almost identical to Article 7 of the Lanzarote Convention. The States Parties to the Lanzarote Convention shall 'ensure', while the EU Member States shall take the 'necessary measures to ensure', that effective intervention programmes or measures designed to evaluate and prevent the risk of such offences being committed are accessible, where appropriate, for *persons* who fear that they might commit sexual offences against children. Such provisions have the potential to prevent considerable trauma and other issues of children, to help persons attracted to minors to lead more productive and fulfilling lives and save substantial resources to society. They need to be supplemented by other preventive strategies that focus on potential victims, survivors, situations, communities and PAMs, as well as effective prosecution and therapy for offenders.

[261] *Ibid.,* p 10
[262] *Ibid.,* p 12.
[263] Di Gioia and Beslay (n 188) 7.
[264] EU (Commission), 'Report Assessing the Extent to Which the Member States have Taken the Necessary Measures in Order to Comply with Directive 2011/93/EU of 13 December 2011 on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography' (2016) COM(2016) 871 final 2.3.3.
[265] Lanzarote Committee (n 189) paras 103-106. In addition to programmes in Austria, Finland, Germany, the Netherlands, and the United Kingdom, the Committee referred to progress in Belgium (Flemish Community), Croatia, Italy, Spain and Turkey.

However, to date, the implementation of Article 7 and Article 22 has been less than optimal in most Council of Europe and EU Member States. The European Commission noted in 2020 that out of all of the state action that needs to be undertaken to implement Directive 2011/93, the least progress has to date been made in relation to prevention programmes for PAMs who fear that they might offend or have offended. There is a need for healthcare professionals who can handle the unique therapist–patient relationship with PAMs. Specific groups of PAMs, such as women or people with disabilities, are most often forgotten in the analysed regimes. Professionals are considerably challenged when there is an imminent risk to children, or when the person seeking help discloses presumed child sexual abuse or exploitation that has not been reported to the authorities. Therefore, tools need to be developed to help professionals when presumed offences become known, especially when there is an acute danger to children. There is also room for improvement in the cooperation between the Council of Europe and the EU. The stigma around 'pedophilia' impedes progress at all levels. The European Commission took a major step in the right direction in 2020 by announcing that it will make use of its enforcement powers and work to set up a prevention network of relevant and reputed practitioners and researchers to support EU Member States in putting in place usable, rigorously evaluated and effective prevention.

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Title: Why Rape Law Revisions should be Consistent with Anderson's Negotiation Model

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Source: *University of St Andrews Law Journal* 3, no.1 (August 2023): 59-68.

Published by: Institute of Legal and Constitutional Research, University of St Andrews

Stable URL: https://doi.org/10.15664/stalj.v3i1.2648

DOI: 10.15664/stalj.v3i1.2648



ISSN 2634-5102

# WHY RAPE LAW REVISIONS SHOULD BE CONSISTENT WITH ANDERSON'S NEGOTIATION MODEL

by Emma Jervis

**(Preamble)**

*This paper examines the failings of the current structures of Rape Law across the world, and offers an insight into the strengths and weaknesses of the proposed revision models. I will argue in favour of Anderson's Negotiation Model as it considers what it means for the law to take the lead in initiatives that protect victims of such crimes.*

In this essay I argue that the current law structure unequivocally fails to protect women against cases of rape and needs reform. I further maintain that Anderson's suggestion of 'negotiation consent' is the most appropriate line of reform, and I will defend her proposal in the face of potential objections. The current rape law in the UK was implemented in 2003[266], which revised previous laws firstly defined in the Sexual Offenses Act of 1953. Despite the ostensibly 'objective' nature of this law, which will be further examined in this essay, many feminist philosophers have noted the biases within the law which favour male interests.

This essay explores the present issues within UK law, as well as our current understandings of what constitutes 'a reasonable belief of consent', that fail to protect women in instances of rape. This foundational attitude towards such matters influences performative revision models, such as the No Model and the Yes model, which I consider within this essay. Yet the inadequacies of such approaches, mirror some of the current issues with rape law in the UK today; the lack of recognition of men's frequent inability to interpret women's nonverbal behaviour and disregard for instances where one person changes their mind.

Furthermore, I advocate for Anderson's proposal of the negotiation model as an alternative reform of the law as well as society's attitude towards sex and how consent can be clearly obtained. This model, when legally applied, will not only legally protect women in cases of rape, but eventually protect them from the present societal norms that perpetuate the imminent risk of rape and sexual exploitation. Through making the act of negotiation a legal requirement, I maintain that there would be a 'ripple effect' throughout society that would encourage a societal shift.

[266] Rape and Sexual Offences - Chapter 7: Key Legislation and Offences | The Crown Prosecution Service," (May 21, 2021) https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-7-key-legislation-and-offences.

True negotiation is a concept founded on respect and equality. Such an initiative, I argue, must be rooted in rape law revision, which would eventually seep into society's wider expectations of individuals when initiating sex, and instigate an educational programme to facilitate the act of negotiation and raise awareness. Societal change will require all these aspects, but can be led by the law.

As of 2003, rape in UK law has been defined in the Sexual Offences Act as a criminal offense when the following criteria has been met: 1a) if a person (A) intentionally penetrates the vagina, anus or mouth of another person (B) with his penis; 1b) B does not consent to the penetration and 1c) A does not reasonably believe that B consents. A second clause within this law states that whether A's belief that B has consented is reasonable is to be determined having regard to all the surrounding circumstances [267]. This supposedly objective legislation immediately presents a potential complication as the subjectivity of the mens rea that the defendant truly had 'reasonable belief' of the victim's consent, is difficult to establish. The controversy surrounding the meaning of such 'reasonable belief' has raised concern for many scholars within the philosophical field of feminist jurisprudence. These feminist philosophers assert that the criteria for this 'reasonable belief', along with the law and many other facets of society, has been both influenced by and continues to perpetuate patriarchal structures that protect male interests over those of women. Catherine MacKinnon further develops this point and holds the radical belief that "so long as power enforced by law reflects and corresponds to power enforced by men over women in society, the objective law… becomes just the way things are"[268].

Although I considered MacKinnon's claims that the law as it is, is intrinsically and unalterably sexist against women to be intuitively too extreme, the statistics for rape in the UK support her statements. According to statistics, 1 in 4 women in the UK have been raped or sexually assaulted, and despite a low reporting rate, studies have shown that 55% of charges, when formally brought to trial, do not lead to conviction[269]. These harrowing findings clearly demonstrate the inconsistencies within the law which are failing to protect women from male perpetrators, who commit 90-98% of all rapes in the UK[270].

In her paper, 'Rape Redefined', MacKinnon attributes such a miscarriage of justice to the misogynistic nature of the societal hierarchy, which has subsequently influenced how men 'reasonably believe' when consent is given, as well as the formal proceedings of court. MacKinnon writes, "in conceiving a cognizable

[267]"Rape and Sexual Offences - Chapter 7: Key Legislation and Offences | The Crown Prosecution Service," (May 21, 2021) https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-7-key-legislation-and-offences.
[268] Catharine MacKinnon. "Rape Redefined" *Harvard Law and Policy Review, (2016)* https://harvardlpr.com/wp-content/uploads/sites/20/2016/06/10.2_6_MacKinnon.pdf 45
[269]*Sexual offences prevalence and victim characteristics, England and Wales - Office for National Statistics. (2021, March 18)* *https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/sexualoffencesprevalenceandvictimcharacteristicsenglandandwales*
[270]*Ibid.*

injury from the viewpoint of the reasonable rapist, the rape law affirmatively rewards men with acquittals for not comprehending women's point of view on sexual encounters"[271].

MacKinnon's view briefly touches on the widely held belief within feminist philosophy that historical male dominance within society is still being perpetuated in today's legal attitude towards female rape victims; as the criteria considered in court for 'reasonable belief' is still held to the 'male standard'. The male standard is what a man would consider 'reasonable' belief, which often overlooks subtle and misread signals that their female counterpart might be giving. The legal term 'stare decisis' also maintains this narrative, as it guides judges to rule in consistency with previous law in legislation and juridical decisions. This encourages the current legal system to refer to misogynistic ideals where the female voice was not considered and perpetuates male-centred ideals; which clearly supports my belief that the current rape law in the UK needs reform.

To demonstrate the context which Anderson challenges, this essay will consider the most widely accepted position of reform in response to the failings of the current law system; referred to as the 'Yes Model'. There are two main models of sexual consent in jurisprudence, both of which emerged towards the end of the twentieth century; the 'Yes Model' and the 'No Model'. Various countries have adopted the respective models differently into law, resulting in unjustifiable discrepancies in cases where the law considers it to have been an act of rape in one country, and not in another. A clear example is Germany, who enacted the 'No Model' in 2016, which states that the partner must communicate their disagreement verbally (in words) or physically, for example by resisting[272]. However, the 'Yes' model states that a sexual act is rape unless consent is affirmatively given, whether that be through verbal or physical means[273]. This ensures that the woman must actively 'give' consent, however they choose to display that, in order for the sexual act to occur; instead of the rulings of other lines of reform such as the 'No Model' whereby sex is only considered rape if the woman physically or verbally conveys her non-consent[274].

The 'Yes Model' is widely regarded as the most plausible of these reform models of performative consent, and has been advocated for by scholars such as Schulhofer to liberate women from the "the gray areas in which coercion and exploitation can be used to elicit a false but legally valid "consent"[275]. In his paper, Schulhofer considers the 'Yes Model' to have solved the problems presented in the current understandings

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[271] Catharine MacKinnon. "Rape Redefined" *Harvard Law and Policy Review, (2016)* https://harvardlpr.com/wp-content/uploads/sites/20/2016/06/10.2_6_MacKinnon.pdf 182
[272] Fünfzigstes Gesetz zur Änderung des Strafgesetzbuches—Verbesserung des Schutzes der sexuellen Selbstbestimmung, Bundesgesetzblatt, Teil I [BGBl I] [Federal Law Gazette], (Nov. 4, 2016) at 246
[273]Whisnant, Rebecca, "Feminist Perspectives on Rape", *The Stanford Encyclopedia of Philosophy* (Fall 2021 Edition), Edward N. Zalta (ed.) https://plato.stanford.edu/archives/fall2021/entries/feminism-rape/
[274] *Ibid.*
[275] Stephen J. Schulhofer, "Unwanted Sex: The Culture of Intimidation and the Failure of Law" (1998) Cambridge, MA: Harvard University Press.

of what 'reasonable belief of consent' means, as he argues the requirement of positive affirmation from the woman "protects each person's right to refuse sexual encounters that are not genuinely desired."[276]. A contemporary, applied example of such a model is Slovenia's current ruling. Under Article 100 of the Criminal Code of the Socialist Republic of Slovenia from 1977, the execution of rape could only be identified as 'immission penis in vaginam'[277]. Yet in later years, controversial cases meant that domestic legislators were put under social pressure to modernise criminal law, which resulted in the Republic of Slovenia assuming the amendments of the Rape and Sexual Assault in the Criminal Code (KZ-1H) in 2021[278]. These amendments are considered to be effective and consistent with the affirmative consent Yes Model. Through this, legislators sought to promote sexual autonomy and self-determination in sexual contexts.

However, I argue that the implications of this line of reform have not been fully recognised, as it does not allow for instances where the woman may engage in romantic or non-penetrative sexual activity, whilst not wanting to consent to penetration. The 'Yes Model' seems to act under the assumption that when a woman, for example, participates in heavy sexual petting, she is indicating her affirmative willingness to have intercourse. This, as Anderson also emphasises in her paper, is a dangerous assumption in the "age of AIDS", where many people are concerned for their sexual health and don't want to engage in penetrative sex, yet are happy to consent to other sexual acts.

Furthermore, I argue that there is an intrinsic problem with the notion that once one has given an indication of consent for one sexual act, the man cannot be penalized for assuming consent has been given for all forms of sexual acts. This does not protect women from the right to change their mind, and seeks only to protect the man from penalisation for not recognising this woman's right. Schulhofer does not account for such instances and therefore seems to implicitly force woman into sexual situations where they can't escape after implying consent.

A further problem of this performative reform model is the lack of recognition of men's frequent inability to interpret women's nonverbal behaviour. A prime example of this would be an instance where a man and woman go on a date, and subsequently go home together; this mere act often leads men to believe that the woman has displayed signs of consent, and this expectation can pressure the woman into doing more sexually, than they truly want. This perpetuates the fundamental problem with the notion of sexual consent

[276] *Ibid.*
[277] Act Amending the Criminal Code (KZ-1H). Official Gazette of Republic of Slovenia (July 4, 2021) 5970.
[278] *Ibid.*

in contemporary society, and within this reform model, which is seen as "a woman's passive acquiescence to male sexual initiative"[279].

In response, Anderson presents her alternative approach of the Negotiation Model to avoid this interpretation of consent, whereby she provides an analytical framework that "requires consultation, reciprocal communication and the exchange of views before a person initiates sexual penetration"[280]. Anderson demands that such a communicative exchange between partners before intercourse should be revised into law, where the emphasis is no longer on the granting of permission for the actions of another; but instead on an active consultation between two people coming to mutual agreements.

In her paper, Anderson carefully details the content of the discussion whereby "partners should have to communicate with one another to discern each other's desires and limitations before sexual penetration occurs"[281]. Ideally, this involves a dialogue about the partner's individual tastes, and an agreement to engage in unitedly desired behaviours. The paper subsequently asserts that in trial cases of rape, the prosecution must prove beyond reasonable doubt that the defendant miniated and engaged in penetration and failed to negotiate and come to an agreement beforehand.

I argue that the greatest strength of this argument is the shift on emphasis from 'what did she let him do' and 'which signals did she give to demonstrate this', to whether they both had an open dialogue where both equals are simply discussing their sexual desires. This model directly addresses the issue of gender norms of male agency initiating sexual acts and female compliance to their advances which is prevalent in alternative lines of reform, such as the aforementioned 'Yes Model'. Anderson explicitly tackles this as the negotiation model is a gender-neutral reform model, whereby either partner, of either gender, is able to initiate the discussion to reach a mutual understanding, in order for sexual penetration to occur. Just as Anderson observes, this approach "expresses an interest in the other person's perspective … [and] a willingness to consider the other person's inclinations and humanity."[282] I argue that this embodies the liberating spirit of Anderson's reform proposal, as the open discussion regards each person involved to have an equal standing, without having to conform to the gender norms of one-sided permission seeking, which is implicitly encouraged in the current legal system and performative models of reform.

Anderson directly responds to some criticisms in her paper, the first being the 'He said/She said' criticism, which states that the negotiation model does not avoid the current issue whereby it is difficult to prove whether the man or the woman is telling the truth; as all the court often has to go on is word-of-mouth. Yet Anderson strongly responds that no rape law can escape this objection, as the alternative of considering

[279] Michelle Anderson "Negotiating Sex", *Southern California Law Review*, (2005b) 78: 1401
[280] *Ibid.*, 1432
[281] *Ibid.,* 1405
[282] *Ibid.,* 1428

physical evidence would fail to protect even more women who have been pressured non-physically into having penetrative sex.

However, one may object to Anderson's negotiation model to argue that it is an unrealistic standard for people, which does not account for the spontaneity of romance and would, ultimately, criminalise all sex. It appears intuitively wrong to illegalise people engaging in sexual acts when 'in the heat of the moment', and furthermore seems irrational to expect that of young people, who the law should be protecting as sexually vulnerable.

Firstly, I would respond to this objection by referring to the case study of the AIDS epidemic in the 1980s[283]. The life-altering STD pandemic rapidly spread throughout the late 20th century, and condoms proved to be the most effective form of contraception that would protect the individuals from the disease. Subsequently, there was a society-wide shift in attitude towards spontaneity during sex whereby both men and women accepted that there would have to be a break before they engaged in penetrative sex so that they could ensure their own and their partner's sexual safety. This demonstrates that it is not only a realistic possibility for there to be a society-wide change to account for a necessary condition added to the act of sex, but it would be an extension of the current standards of sexual spontaneity.

Furthermore, Anderson addresses such criticisms in her paper and demonstrates her recognition that demanding formalised negotiation into sex is unrealistic. Instead, she provides examples whereby the two individuals can negotiate their specific desires in a casual manner, using colloquial language that could be a conversation that many young people are already having. I argue that making such a negotiation a legal requirement is simply guaranteeing the practice, and enforcing this healthy initiation of sex on everyone.

One could also contend that Anderson fails to consider how the current gender roles of women submitting to men's requests could still have a detrimental impact on her negotiation model. This could specifically manifest itself in implicit pressure for the woman to act and say 'provocative' things within Anderson's discussion model to appease the standards of women enforced by society, and indeed the man with her. This demonstrates how Anderson's model, arguably, does not avoid the current issues she criticized in her paper, but could still fall prey to the social pressures put upon men and women to act in a certain way, whether that be acting overly or reservedly sexual. Simply because the social pressures initially take a verbal form does not necessarily mean that men and women are truly able to communicate their wants and desires external from societal standards and pressures.However, I argue that this objection has not considered the societal change that the implementation of the negotiation model would itself create.

[283] Hallie Lieberman, "A Short History of the Condom" (2018)

Through making the act of negotiation a legal requirement, I maintain that there would be a 'ripple effect' throughout society that would, eventually, lead to a change in public expectations of men and women. Reinforced by a government-led programme of education that would flow from a legislation. The government is more likely to act in this way, if it is implementing legislation.

Anderson's emphasis on either party being able to initiate the negotiation establishes a much more open-minded, balanced attitude towards gender roles and expectations of individuals based on their gender. This is the greatest strength of Anderson's argument, as this equality-driven initiative would eventually seep into society's wider expectations of individuals when initiating sex, and create a world where understanding what the other person is anticipating in a sexual situation is the norm. One may respond to this as too idealistic and not considering how deeply current social norms are ingrained into society.

However, in response to criticism, I refer back to how society has developed in recent years to become more accommodating towards condoms as a contraceptive measure after its initial unpopularity. Society's norms have been able to develop when it has become necessary, and making such an equality-driven model legislation would again lead to societal change. Yet, it is important to acknowledge. The current structure veers towards a philosophical exposition, which is insufficient. However, laws alone may not be enough to change deeply ingrained behaviours regarding consent, but they can be a driver a societal shift in education and awareness.

To conclude, I have clearly demonstrated that the current rape law in the UK fails to protect women, and have explored two reform models presented in response to such miscarriages of justice. I have proven the more widely accepted 'Yes Model' to be an inadequate approach to the issue, and have instead endorsed Anderson's negotiation model as the best alternative. The objections to her reform model which I considered in this essay have been rebutted to show that Anderson's model, when legally applied, will not only legally protect women in cases of rape, but eventually protect them from the present societal norms that perpetuate the imminent risk of rape and sexual exploitation.

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ISSN 2634-5102




Title: Post-Brexit Recognition and Enforcement of Judgements: Problems and Solutions

Author(s): Matthew G T Bruce

Source: *University of St Andrews Law Journal* 3, no. 1 (August 2023): 69-84.

Published by: Institute of Legal and Constitutional Research, University of St Andrews

Stable URL: https://doi.org/10.15664/stalj.v3i1.2649

DOI: 10.15664/stalj.v3i1.2649

ISSN 2634-5102

# POST-BREXIT RECOGNITION AND ENFORCEMENT OF JUDGEMENTS: PROBLEMS AND SOLUTIONS

by Matthew G T Bruce

## Part One – The BIRR

Part One will analyse the key legal implications of the repeal of the BIRR. To show the significance and impact of the BIRR, its main provisions on recognition and enforcement of judgments will be compared to the previous Scots law regime. Three main implications will be identified and carried throughout the remainder of the article.

The BIRR was the latest in a succession of conventions, later Regulations, governing the recognition and enforcement of judgments between EU Member States.[284] The BIRR provides for the recognition and enforcement of judgments without any special procedure.[285] The Regulation provides for a very wide range of judgments to be covered by its provisions,[286] with six express areas where the provisions do not apply.[287] Prior to the UK jurisdictions adopting the Brussels regime, recognition and enforcement of European judgements was governed by common law and two Acts of Parliament.[288] After the introduction of the Brussels regime, the common law and statutory law remained for non-EU Commonwealth and other countries; as well as EU countries for matters outside the scope of the Brussels regime.[289] While there is commonality between the BIRR and existing Scots law on recognition and enforcement of judgments, there are notable differences in their operation.

Recognition and enforcement under the BIRR is founded on mutual trust between Member States.[290] The rationale for the BIRR is to speed up and simplify the process of recognition and enforcement.[291] The BIRR impliedly sets no time limit to have a judgment recognised and enforced.[292] The judgment should, however, still be enforceable in the originating Member State.[293] Under the Administration of Justice Act 1920 (AJA 1920), there is a twelve month time limit,[294] although courts are permitted to exercise discretion where

[284] Gerry Maher, 'Enforcing European judgments in Scotland' (2015) 27 Scots Law Times 121.
[285] BIRR, arts 36 and 39.
[286] BIRR, art 1(2).
[287] BIRR, art 2.
[288] Foreign Judgments (Reciprocal Enforcement) Act 1933 (FJA 1933) and Administration of Justice Act 1920 (AJA 1920).
[289] Oliver Browne and Tom Watret, *Enforcement of Foreign Judgments 2021* (Lexology 2021) 109.
[290] BIRR, recital (26).
[291] BIRR, recital (4).
[292] Browne and Watret (n 9), 110.
[293] C-420/07 *Apostolides* v *Orams* [2009] ECR I-3571.
[294] AJA 1920, s 9(1); *Bank of British West Africa Ltd, Petitioners* 1931 SLT 83, 84.

necessary.[295] The limit is six years under the Foreign Judgments (Reciprocal Enforcement) Act 1933 (FJA 1933).[296] Where a judgment is to be enforced under common law it must still be extant.[297] The BIRR has a greater scope that the other methods of enforcement, covering any judgment in civil or commercial matters not expressly excluded.[298] The AJA 1920 extends only to judgments awarding a sum of money.[299] The FJA 1933 can be used for judgments for money in respect of compensation or damages.[300] At common law, judgements will be recognised where they are final, conclusive and for a specific sum of money.[301] Defenders can only use express grounds for refusal under the BIRR, FJA 1933 and AJA 1920.[302] Whereas courts have discretion to allow for the refusal of recognition and enforcement at common law.[303] The BIRR was, therefore, the zenith of a simplified procedure for recognition and enforcement of judgements when compared to the Scots law prior to the introduction of the Brussels regime.

The following are three areas identified by commentators in this area of law as key implications of the repeal of the BIRR for the UK's jurisdictions. First, Scots law no longer forms part of the harmonised private international law across EU Member States.[304] This reduces clarity of applicable rules on cross-border recognition and enforcement.[305] Second, there is no longer reciprocal, automatic procedure for the recognition and enforcement for the majority of judgments between Scottish and EU Member State courts.[306] While Scottish courts could continue to recognise and enforce judgments from EU courts, there is no legal obligation for the latter to do the same.[307] Third, with the removal of the BIRR from Scots law, the scope of judgments that can be recognised and enforced under a single procedure will narrow.[308] These three legal implications will be carried throughout this article to ascertain which potential replacement can satisfactorily rectify their impact. Without any form of replacement for the BIRR, as detailed below, much of the law of recognition and enforcement will default to the common law and statutory provisions.[309]

[295] *Ogelegbanwei* v *Nigeria* [2016] EWHC 8 (QB).
[296] FJA 1933, s 2(1); *New Cap Reinsurance Corp Ltd (In Liquidation)* v *Grant* [2011] EWHC Civ 971, [61].
[297] *Kuwait Oil Tanker Co SAK* v *Al Bader* [2008] EWHC 2432 (Comm).
[298] BIRR, arts 1-2.
[299] AJA 1920, s 12(1); *Strategic Technologies Pte Ltd* v *Procurement Bureau of the Republic of China Ministry of National Defence* [2020] EWCA Civ 1604, [51].
[300] FJA 1933, s 11(1).
[301] *Barclays Bank Plc* v *Shetty* [2022] EWHC 19 (Comm), [75].
[302] BIRR, art 45; FJA 1933, s 4; AJA 1920, s 9(2).
[303] *Adams* v *Cape Industries Plc* (1990) Ch 433, 494; *Geiger* v *D & J Macdonald Ltd* 1932 SLT 70.
[304] Elizabeth B Crawford and Janeen M Carruthers, 'Brexit: The Impact on Judicial Cooperation in Civil Matters Having Cross-border Implications – A British Perspective' (2018) 3(1) European Papers 183, 187.
[305] J M Carruthers, 'Brexit - the implications for civil and commercial jurisdiction and judgment enforcement' (2017) 21 Scots Law Times 105.
[306] *Ibid*.
[307] Jonathan Fitchen, 'The PIL consequences of Brexit' (2017) 3 Nederlands Internationaal Privaatrecht 411, 412.
[308] BIRR, art 45 cf n 15-17.
[309] Carruthers (n 25), 106.

## Part Two – Lugano II

The Lugano II Convention created a parallel set of laws on recognition and enforcement of judgements to the pre-recast Brussels I Regulation (BIR).[310] All EU Member States and four European Free Trade Association (EFTA) Member States are party to Lugano II.[311] In its White Paper published prior to Brexit negotiations, the UK Government identified Lugano II as the preferred option for post-Brexit cooperation.[312] However, the European Commission has not provided its consent to the UK's accession to Lugano II.[313] The UK, therefore, is currently unable to join.[314]

### I

Accession to the Lugano II Convention would provide the same benefits as being party to the BIR,[315] prior to its recasting in 2012.[316] Lugano II was drafted with the accession of third countries in mind,[317] which requires the unanimous consent of the existing parties.[318] The European Commission, exercising its competence in the area of private international law,[319] represents all 27 Member States in this respect.[320] The purpose of the convention is to facilitate the portability of judgments between EU and non-EU countries: albeit the current non-EU countries are all Member States of EFTA.[321] Being party to Lugano II would provide a straightforward and simple solution post-Brexit, due to the previous participation of the UK's jurisdictions in the Lugano II regime.[322] Tang opines that Lugano II would strike a balance between the new UK-EU legal relationship and need for continued participation in judicial cooperation.[323] Accession to Lugano II would not entail significant changes to laws of recognition and enforcement;[324] enabling cooperation in a similar way as was in place under BIRR.[325]

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[310] Carruthers (n 25), 105.
[311] *Ibid.*
[312] HM Government, *The Future Relationship Between the United Kingdom and the European Union* (White Paper Cm 9593, 2018) paras 146-147.
[313] European Commission, Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention (Brussels, 4.5.2021 COM(2021) 222 final).
[314] Lugano II, art 72(2).
[315] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1; Johannes Ungerer, 'Consequences of Brexit for European Private International Law' (2019) 4(1) European Papers 395, 399.
[316] Ungerer (n 35).
[317] Lugano II, art 70; Zheng Sophia Tang, 'UK-EU Civil Judicial Cooperation after Brexit: Five Models' (2018) 43(5) European Law Review 648.
[318] Lugano II, art 72(2).
[319] Consolidated Version of the Treaty on the Functioning of the European Union [2012] C 326/47 (TFEU), arts 67(4) and 81(2)(a).
[320] Opinion 1/03 *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2006] ECR I-01145.
[321] Oriol Espar and Jesús Castell, 'Choice of law and jurisdiction in banking and finance contracts after Brexit: a perspective from Europe' (2020) 14(2) Law and Financial Markets Review 121, 124.
[322] Tang (n 37).
[323] *Ibid.*
[324] Erik Lagerlöf, 'Jurisdiction and Enforcement Post Brexit' (2021) 1 Nordic Journal of European Law 19, 33.
[325] Muriel Renaudin, 'The consequences of Brexit on existing and future commercial contracts' (2017) 112 Amicus Curiae 2.

Like the BIRR, Lugano II is reciprocal in its character.[326] Therefore, it would have satisfactorily ensured the reciprocal recognition and enforcement of judgements between Scottish and EU courts despite being outside of the Brussels regime.[327] Lugano II has been identified as working successfully to harmonise private international laws between EU and non-EU countries in line with the Brussels regime.[328] However, there are a range of concerns about the suitability of Lugano II as a replacement for the BIRR, particularly as regards the scope of its operation and exequatur.

**II**

The primary concern with Lugano II as a replacement regime post-Brexit is that its provisions are out of date when compared with the BIRR. Lugano II, unlike the BIRR,[329] contains an exequatur requirement prior to the enforcement of judgments.[330] There are differences in the mechanisms in place for the recognition and enforcement of EU judgments in the UK and vice versa, this adds additional complexity and time to the process under Lugano II when compared to the BIRR.[331] Therefore, recognition and enforcement under Lugano II would be less streamlined and more costly than the BIRR.[332] Lugano II also has a more limited scope than the most recent regime for recognition and enforcement under the BIRR.[333] There is no provision comparable to Article 54 of the BIRR which requires judgments to be enforced under the most equivalent national law in the receiving Member State where none already exists.[334] Without this express requirement, recognition and enforcement could default to the more complicated procedure of adaptation prior to recasting.[335] While the grounds for refusal of recognition and enforcement are broadly aligned between the two regimes,[336] there is concern over the lack of express reference to the European Convention on Human

[326] Tristan Baumé, 'Competence of the Community to Conclude the New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters: Opinion 1/03 of 7 February 2006' (2006) 7(8) German Law Journal 681.
[327] Andrew Dickinson, 'Back to the future: the UK's EU exit and the conflict of laws' (2016) 12(2) Journal of Private International Law 195, 201.
[328] Anna Nyland and Magne Strandberg, 'Conclusions on Civil Procedure and Harmonisation of Law' in *Civil Procedure and Harmonisation of Law: The Dynamics of EU and International Treaties* (Intersentia 2019), 237; Poomintr Sooksripaisarnkit, 'Harmonisation of Private International Law - Is it Possible At All?' (2012) 1(1) Journal of Civil & Legal Systems 1.
[329] E B Crawford and J M Carruthers, 'Brussels I bis - the Brussels Regulation recast: closure (for the foreseeable future)' (2013) 12 Scots Law Times 89, 94.
[330] Lugano II, art 38(1).
[331] Lugano II, art 38(2); *Drika BVBA v Giles* [2018] CSIH 42, [41]; *Cyprus Popular Bank Public Co Ltd v Vgenopoulos* [2018] EWCA Civ 1, [15].
[332] Maher (n 4); Philippe Hovoguimian, 'The enforcement of foreign judgments under Brussels I *bis*: false alarms and real concerns' (2015) 11(2) Journal of Private International Law 212, 251; Laurens Je Timmer, 'Abolition of *Exequatur* under the Brussels I Regulation: ILL Conceived and Premature?' (2013) 9(1) Journal of Private International Law 129.
[333] Mateusz Pilich, 'Brexit and EU private international law: May the UK stay in?' (2017) 24(3) Maastricht Journal of European and Comparative Law 382, 384.
[334] Hovoguimian (n 52), 218.
[335] Case C-456/11 *Gothaer Allgemeine Versicherung et al v Samskip GmbH* [2013] QB 548; Case 145/86 *Horst Ludwig Martin Hoffmann v Adelheid Krieg* [1988] ECR 645; Felix M Wilke, 'The impact of the Brussels I Recast on important "Brussels" case law' (2015) 11(1) Journal of Private International Law 128, 140.
[336] BIRR, art 45 and Lugano II, art 34.

Rights in Lugano II.[337] Although Article 6 is seldom used as a ground for refusal,[338] and has been viewed as not being a necessary part of the BIRR,[339] it remains an important safeguard of due process.[340] Carruthers concludes that for these reasons Lugano II would not be the best replacement for the BIRR despite it being a parallel regime.[341]

The role of the Court of Justice of the European Union (CJEU) in the Lugano II regime has been identified as another concern post-Brexit. Lugano II requires the courts of its parties to pay due account to jurisprudence of the CJEU and other national courts when interpreting its provisions.[342] Lugano II is closely aligned to the EU institutions and there is an implied adherence to CJEU jurisprudence.[343] Courts in the UK are no longer bound by CJEU rulings delivered after the implementation period and cannot refer any matter to the CJEU for a preliminary ruling.[344] However, for Lugano II to work effectively post-Brexit, Scottish courts would need the flexibility to make refence and align judgments when needed with those of the CJEU.[345] Prior to Brexit negotiations, the House of Lords EU Committee reported that if Lugano II were to be adopted there should be a flexible relationship between domestic courts and the CJEU.[346] With the UK as a third country, Scottish courts would not be able to make preliminary references to the CJEU when interpreting Lugano II.[347] This means that Scottish and other UK courts could not participate in the development of Lugano II jurisprudence.[348]

## Part Two Conclusions

Lugano II provides a well-established regime for recognition and enforcement as an alternative to the BIRR. Like the BIRR, it is reciprocal in its nature and harmonises private international law among its signatory countries. However, when compared to the BIRR it is out of date in key areas such as exequatur which would result in a more complex process for the recognition and enforcement of judgements. Its scope is more limited than the BIRR and contains notable differences which are not desirable. A requirement for some form of

337 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR); BIRR, recital (38); Peter Arnt Nielsen, 'The new Brussels I Regulation' (2013) 50(2) Common Market Law Review 503, 527.
338 ECHR, art 6; *Avotins* v *Latvia* (17502/07) (2017) 64 EHRR 2.
339 Paul Gragl, 'An olive branch from Strasbourg? Interpreting the European Court of Human Rights' resurrection of Bosphorus and reaction to Opinion 2/13 in the Avotins case' (2017) 13(3) European Constitutional Law Review 551.
340 Dominik Düsterhaus, 'The ECtHR, the CJEU and the AFSJ: a matter of mutual trust' (2017) 42(3) European Law Review 388, 400.
341 Carruthers (n 25), 109.
342 Lugano II, protocol 2, art 1(1).
343 Mukarrum Ahmed, 'Brexit and English Jurisdiction Agreements: The Post-Referendum Legal Landscape' (2017) 27(2) European Business Law Review 989; Ungerer (n 35), 402.
344 European Union (Withdrawal) Act 2018 (EUWA 2018), s 6(1).
345 Crawford and Carruthers (n 24).
346 European Union Committee, *Brexit: justice for families, individuals and businesses?* (HL 2016-17, 134), para 127.
347 Ungerer (n 35), 400.
348 *Ibid.*

alignment with the CJEU appears unlikely under the current UK-EU legal relationship. Commentators, including the European Commission, view Hague Conference conventions as a more suitable bridge between the UK and EU post-Brexit.[349]

## Part Three – Hague Conventions

The Hague Conference on International Private Law has adopted two conventions which are mooted as potential replacements for the Brussels regime post-Brexit. Part Three will analyse the efficacy of these conventions compared to the BIRR and conclude with an assessment on the short to medium term period ahead for recognition and enforcement of judgements between Scotland and the EU.

### I

The Convention on Choice of Courts Agreements (2005 Convention) is the first Hague convention considered to be part of the new post-Brexit regime.[350] The 2005 Convention is in force in both the EU and UK,[351] where it was previously part of UK private international law through EU membership.[352] Its provisions ensure reciprocal recognition and enforcement of judgments within its scope and harmonise the rules across contracting states.[353] As an international instrument the 2005 Convention can be entered into more nations than the Brussels regime.[354] Commentators, however, highlight the much more limited scope of the 2005 Convention compared to the BIRR. The 2005 Convention is limited to cross-border cases involving an exclusive choice of court agreement.[355] Where there is a choice of court agreement, there are many more areas of law excluded than are in the BIRR.[356] The legal mechanism for the recognition and enforcement of judgments in such cases also differs. Unlike the BIRR's automatic recognition and enforcement, the 2005 Convention requires this to be done in accordance with the requested state's national law.[357] As such there is no exclusion of the exequatur procedure.[358] Unlike the BIRR, contracting states are afforded the power to limit the recognition and enforcement of judgments within their jurisdictions.[359]

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[349] Ungerer (n 35), 396; Crawford and Carruthers (n 24), 200; European Commission (n 33), 4.
[350] n 3.
[351] Civil Jurisdiction and Judgments Act 1982 (CJJA 1982), s 3D; Department for Foreign and Commonwealth Affairs, *Convention on Choice of Court Agreements* (Cm 9723, 2018).
[352] TFEU, art 216.
[353] Mukarrum Ahmed and Paul Beaumont, 'Exclusive choice of court agreements: some issues on the Hague Convention on choice of court agreements and its relationship with the Brussels I recast especially anti-suit injunctions, concurrent proceedings and the implications of BREXIT' (2017) 13(2) Journal of Private International Law 386, 393.
[354] 'Status Table: Convention of 30 June 2005 on Choice of Court Agreements' (*Hague Conference on Private International Law*) <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> accessed 14 May 2022.
[355] 2005 Convention, art 1(1); *Motacus Constructions Ltd v Paolo Castelli SPA* [2021] EWHC 356 (TCC).
[356] 2005 Convention, art 2 cf BIRR, art 45.
[357] 2005 Convention, arts 8 and 14.
[358] 2005 Convention, art 14; Trevor Hartley and Masato Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements: Explanatory Report* (Permanent Bureau of the Conference 2005), para 216.
[359] 2005 Convention, art 20.

Hague conventions are noted for being much simpler for the UK to enter into post-Brexit as there is no need for unanimous consent of existing parties.[360] The very limited scope of the 2005 Convention means it cannot replace the BIRR by itself. There has been limited legal development and experience of its provisions in practice compared to the BIRR.[361] The legal force of the 2005 Convention is weaker than the BIRR due to the nature of the primacy of EU law and option for countries to limit their participation in the 2005 Convention.[362] Two pre-Brexit parliamentary reports recognised the benefits of the incorporation of the 2005 Convention but opined that it would work best as part of a combination of international instruments including Lugano II.[363] It can be concluded that the 2005 Convention is effective in its niche area of operation and comes with the benefit of already being in force post-Brexit without the need for transitional requirements.[364]

**II**

The second Hague convention under consideration is the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019 Convention).[365] The 2019 Convention was not yet agreed for much of the Brexit negotiations and, therefore, could not be considered by much of the academic commentary and reports above. Nonetheless it now provides another potential option for cross-border recognition and enforcement of judgments post-Brexit.

The 2019 Convention broadly mirrors the Brussels regime in its aims and legal mechanisms.[366] Like the 2005 Convention and BIRR, the 2019 Convention harmonises laws across the contracting states and achieves reciprocal on recognition and enforcement between them.[367] However, unlike the BIRR, exequatur will be required for EU countries where this forms part of their private international law.[368] There is a much larger list of exclusions from the scope of the 2019 Convention than the BIRR and contracting parties can limit the extent of recognition and enforcement within their jurisdictions.[369] The eligibility for recognition and enforcement is more complex than the BIRR.[370] The 2019 Convention is due to come into force in the EU

[360] Giesela Rühl, 'Judicial Cooperation in Civil and Commercial Matters After Brexit: Which Way Forward?' (2018) 67(1) International and Comparative Law Quarterly 99, 127.
[361] *Ibid*., 128.
[362] European Union Committee (n 66), [28].
[363] European Union Committee (n 66), [126]; Justice Committee, *Implications of Brexit for the justice system* (HC 2016-17, 750), 28 and 32.
[364] Crawford and Carruthers (n 24), 202.
[365] n 3.
[366] Reid Mortensen, 'Brexit and private international law in the Commonwealth' (2021) 17(1) Journal of International Private Law 18, 52.
51.
[367] Nielsen (n 57), 207.
[368] 2019 Convention, art 13; Franciso Garcimartín and Geneviève Saumier, *Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (HCCH Permanent Bureau 2020), para 303.
[369] 2019 Convention, arts 2 and 17; Garcimartín and Saumier (n 88), paras 310 – 311; Nielsen (n 57), 237.
[370] 2019 Convention, art 5.

later in 2023, but the UK has yet to sign up.[371] The 2019 Convention must be instituted in both contracting jurisdictions to facilitate cooperation.[372] The 2019 Convention is instituted after a period of one year following notification plus one month.[373] Although the European Commission has ratified the 2019 Convention,[374] there will likely be a period of years before it is operational between the UK and EU.[375]

The 2019 Convention was not originally considered by the UK, with parliamentary research signalling a possible conflict between it and Lugano II had the UK acceded to both.[376] This concern has not manifested. While the mechanisms of the 2019 Convention have been praised for the judgments that can be recognised and enforced within its scope,[377] its much-reduced scope when compared to the BIRR is of concern.[378] However, while the 2019 Convention is not as extensive as the BIRR, it is certainly the most promising available option for continued cooperation between Scottish and EU courts.[379] Due to the flexibility of the 2019 Convention's application, it acts as a minimum standard for harmonisation which can be expanded if ratified by the UK.[380] This may then encourage others to do the same.[381] Due to the greater reach of the 2019 Convention, its provisions could also be used to replace the older, more complex system for recognition and enforcement between Commonwealth nations.[382] Ultimately the success of the 2019 Convention will depend on the willingness for nations to join it.[383] If there is widespread ratification, the 2019 Convention could achieve on an international scale what the Brussels regime has achieved for the EU.[384]

## Part Three Conclusions

Post-Brexit, there is no convention which is directly comparable to the BIRR. Cooperation in recognition and enforcement between the UK and EU will need to be facilitated by multiple conventions, each with their own strength. While the 2005 Convention is an effective solution, it would not suffice on its own. A combination of the 2005 and 2019 Conventions is a promising solution, but it will take some time for the latter convention

371 'Status Table: Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters' (*Hague Conference on Private International Law*) <https://www.hcch.net/en/instruments/conventions/status-table/?cid=137> accessed 15 February 2023.
372 2019 Convention, art 29.
373 2019 Convention, arts 28(1) and 29(2).
374 European Commission, Proposal for a Council Decision on the accession by the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (COM(2021) 388 final).
375 Garcimartín and Saumier (n 88), paras 328 – 330.
376 Joann Dawson, *Private International Law (Implementation of Agreements) Bill 2019- 2021* (Briefing Paper No 8700, House of Commons Library 2020) 8.
377 Nielsen (n 57), 225.
378 Nielsen (n 57), 212 and 245.
379 Paul Beaumont, 'Some reflections on the way ahead for UK private international law after Brexit' (2021) 17(1) Journal of International Private Law 1, 4; Mortensen (n 86), 51.
380 Beaumont (n 99), 5.
381 *Ibid.*
382 Mortensen (n 86), 51.
383 Nielsen (n 57), 246.
384 BIRR, recital (26); David P Stewart, 'The Hague Conference Adopts a Convention on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters' (2019) 113(4) The American Journal of International Law 772, 781-782.

to come to fruition between the UK and EU. Even if Lugano II was successfully adopted, the Hague conventions would still likely be required to fill any gaps left by the BIRR.

## Conclusions

While the removal of the BIRR brings with it a significant change to the UK's private international law, this article has detailed the various options available to replace it. The article has critically analysed the reciprocity, harmonisation, scope and procedures of these potential replacements. Lugano II was the obvious replacement due to it being parallel to the Brussels regime; its provisions adequately cover reciprocity and harmonisation. However, Lugano II would also be a step back from the BIRR as it has not been updated to mirror the former's recasting and requires adherence to CJEU jurisprudence. The two Hague conventions are simpler to accede to and ensure reciprocity and harmonisation between its parties. Their scope is limited when compared to the BIRR, particularly the 2005 Convention. The 2019 Convention would be a key development in cooperation between the UK and EU post-Brexit despite its limitations. The sooner the 2019 Convention is in force in the UK and EU, the sooner it will be able to facilitate recognition and enforcement between courts.

In the meantime, judgments that do not contain an exclusive choice of court agreement will need to be recognised and enforced using the old common law and statutory regimes detailed in Part One. The Scots law regime would also have to be employed to fill in gaps left by the 2005 and 2019 Conventions. Although the common law regime is workable, it is much more costly and time consuming than harmonised private international law.[385] Whatever method is adopted going forward there will be a change in the recognition and enforcement of judgements between Scottish and EU courts. In the longer term, however, commentors believe a bespoke UK-EU recognition and enforcement agreement is the best option.[386] The EU already has a bespoke agreement with Denmark.[387] The Danish government opted out of the BIRR and instead implements the provisions of the BIRR as international law rather than EU law.[388] Such an agreement would require the political will on both sides to negotiate and would not be effective in the short to medium term. That interim period should be covered by the 2019 Convention.[389]

[385] *Barclays* (n 21); *Drika* (n 51), [3]; *Adams* (n 23).
[386] Carruthers (n 25), 108; Rühl (n 80), 121; Crawford and Carruthers (n 24), 197; Tang (n 37), 655.
[387] BIRR, recital (41).
[388] Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2013] OJ L 79/4.
[389] Nielsen (n 57).

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