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A SYSTEMATIC STUDY OF THE EUROPEAN JUDICIAL AREA IN CIVIL AND COMMERCIAL MATTERS:COMPETENCE, RECOGNITION AND ENFORCEMENT OF JUDICIAL DECISIONS
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MODULE I

SUBJECT 1

CIVIL JUDICIAL COOPERATION BETWEEN UE MEMBER STATES

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Con el apoyo de la Unión Europea
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1. Civil judicial cooperation amongst European Union Member States

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By way of introduction to training for judges on civil judicial cooperation, first some background (I) is given, followed by the European judicial area after the Treaty of Amsterdam (II), and the prospects opened up by the Constitutional treaty signed in Rome on 29 October 2004 and the five-year programme signed in The Hague on 5 November 2004 (III).

I. BACKGROUND.

We shall first look at the initial situation (A), then move on to the European Union Treaty signed in Maastricht (B).

A. The initial situation

The Paris Treaty of 18 April 1951 (ECSC) and the two Rome Treaties of 25 March 1957 (EEC and EAEC/Euratom) created three distinct European communities based on economic aspects. The Court of Justice, however, is a single body for the European Communities and the merger of the other Community institutions took place as from 1965.

It should be remembered that, from the start, the free movement of people was included as one of the four freedoms laid down by the Treaty establishing the European Economic Community.

The provisions of this treaty included **article 220** (later to become article 293) which states that “Member States shall enter into negotiations with each other with a view to securing for the benefit of their nationals :
« ...- the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.”

The rules of article 220 depart from those of the treaty. On the one hand, it is the Member States and not the Community institutions which negotiate. On the other, the result is not a Community instrument (regulation or directive) but a convention subject to compulsory ratification in each Member State.

It was on this legal basis that the Brussels Convention of 27 September 1968 was signed on *jurisdiction and the enforcement of judgments in civil and commercial matters* by which the high contracting parties “anxious to strengthen in the Community the legal protection of persons therein established” undertake to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals on civil and commercial matters.

[1] The opinions expressed in this article are the author’s own personal opinions and in no way commit the institution to which he belongs.

This convention was completed on 3 June 1971 by the Luxembourg Protocol regarding (its) *interpretation by the Court of Justice of the European Communities*.

These two texts establish initial civil judicial cooperation which benefits from a regime of preliminary rulings before the Court. However, this regime is different to that resulting from enforcement of article 177 (later 234) of the treaty:

- First instance jurisdictions are not entitled to question the Court;
- Questions may only refer to interpretation and not the validity of the convention;
- The competent authorities of a Member State may question the Court if decisions which have become res judicata are in contradiction with an interpretation of the Court or other decisions issued in other Member States; in this case, the interpretations of the Court in response to such questions shall have no effect on the decisions on the occasion of which they were passed.

The field of application of the Brussels Convention of 1968 continues, however, to be economic matters because it is limited to property cases and excludes, for example, matrimonial litigation. Geographically, it concerns all the Member States of the European Communities and extends to the Member States of the European Free Trade Association (EFTA) under the terms of the Lugano Convention of 16 September 1988.

The **European Single Act**, signed in Luxembourg and in force as from 1 July 1987, does not directly cover civil judicial cooperation but does strengthen European political cooperation opening the way to the Maastricht Treaty. Moreover, it marks an important stage for the internal market by extending the vote to the qualified majority and by creating the Court of First Instance attached to the Court of Justice.

B. The Maastricht Treaty

This Treaty, signed on 7 February 1992 and in force as from 1 November 1993, marks an essential stage in the construction of the European judicial area. It could be said to invent a new European architecture, making considerable progress towards the Europe of citizens and the emergence of a political dimension in the construction of Europe.

It created the European Union and established the division into pillars, showing the place occupied by Justice and Home Affairs (JHA), which made up the third pillar (also known as “Title VI”, as provisions governing Justice and Home Affairs are given under Title VI of the European Union Treaty) alongside the first pillar (for the existing community, that is, the initial communities) and the second pillar (Common Foreign and Security Policy – CFSP). In parallel, the European Economic Community, created by the Treaty of Rome, became the European Community, which amounted to an extension of its scope going beyond strictly economic concerns.

The same community institutions were covered by the third pillar but they functioned differently. **The intergovernmental method,** particularly, was

characterised by the initiative of Member States, which from now on was to be shared with the Commission in connection with civil judicial cooperation, and the requirement for unanimity within the Council.

The role of the Court of Justice of the European Communities was not defined and had to be negotiated at the same time as the conventions themselves which became the basic legal instruments of the third pillar. Article K.3 only states that they "may stipulate that the Court of Justice shall have jurisdiction to interpret their provisions and to rule on any disputes regarding their application, in accordance with such arrangements as they may lay down". This entails negotiation of both the principle of jurisdiction of the Court and its arrangements.

The role of the European Parliament was limited and, obviously, there was no question of co-decision.

Since the Treaty of Maastricht, several conventions have been signed regarding procedures for insolvency (JHA Council, 23 November 1995), the service in Member States of judicial and extra-judicial civil and commercial acts (26 May 1997), competition, recognition and implementation of decisions on matrimonial matters and on parental responsibility for children of both spouses (29 May 1998). However, on the entry into force of the Treaty of Amsterdam, none of these had been ratified by all the Member States. None of them, therefore, was applicable and this was pointed out by Madame Nicole Fontaine, then President of the European Parliament, during the opening session of the European Council in Tampere (cf. *infra*).

II. THE EUROPEAN JUDICIAL AREA SINCE THE TREATY OF AMSTERDAM.

The following should be studied : the Treaty of Amsterdam (A), the Vienna Plan of Action (B), the conclusions of the European Council at Tampere (C), the programme of measures for implementation of the principle of mutual recognition of civil and commercial judicial decisions (D), the Nice Treaty (E), and the main legislative changes (F).

A. The Treaty of Amsterdam

The Treaty of Amsterdam was signed on 2 October 1997 and came into force on 1 May 1999. It was considered by some people as of minor importance in comparison with the Maastricht Treaty. It is true that it did not change the structure set in place several years before. However, it did confirm the importance of the European judicial area and provided it with more efficient legal instruments.

From a technical point of view, it introduced amendments into the Treaty on the European Union (hereafter the EU Treaty), signed in Maastricht, and the Treaty establishing the European Community (hereafter the EC Treaty).

The aim was to give a clearer definition of the objectives. The specific nature of Justice and Home Affairs was confirmed but expressed differently.

The third pillar was to be limited from then on to cooperation on criminal matters between the police and the judiciary. Under the terms of article 34 of the EU Treaty, new instruments were created for these matters based on the community method (framework decisions and decisions). These very quickly replaced the conventions in spite of the new rule whereby the latter came into force in the Member States that adopted them as soon as they were adopted by at least half the Member States.

Civil judicial cooperation was included within 'communitarised' matters and constituted, together with visas, asylum and immigration, the new Title IV of the EC Treaty under the heading "*Visas, asylum, immigration and other policies related to free movement of persons".* From then on, the legal instruments were to be the community regulations and directives laid down in article 249 of the EC Treaty, which led to the 'reformation' of the previously signed conventions, that is, to their transformation into regulations that are directly enforceable in Member States.

Justice and Home Affairs as a whole became subject to greater jurisdictional and democratic control. Articles 35 of the EU Treaty and 68 of the EC Treaty established the precise powers of the Court of Justice in sharp contrast with the previous situation.

With the new numbering applied also to the Treaty of Amsterdam, four articles in Title IV of the EC Treaty cover civil judicial cooperation.

Article 61 states that "in order to establish progressively *an area of freedom, security and justice, the Council shall adopt:*
... c) measures in the field of judicial cooperation in civil matters as provided for in article 65 (...)".

Article 65 states that "measures in the field of judicial cooperation in civil matters **having cross-border implications**, to be taken in accordance with Article 67 and **in so far as necessary for the proper functioning of the internal market**, shall include:

(a) improving and simplifying:

- the system for cross-border service of judicial and extrajudicial documents,

- cooperation in the taking of evidence,

- the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;

(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;

(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States".

The conditions established by cross-border implications and the need for proper functioning of the internal market are essential matters and are often the subject of debate in connection with the legal basis of draft instruments within the Council. The Council's legal department has had to state that the field of application of a text based on article 65 of the EC Treaty should be limited to cross-country matters or litigation.

Article 67 provides for a succession of two regimes for decision-making:

- during a transitional period of five years, following the entry into force of the Treaty of Amsterdam, that is, from 1 May 1999, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State[2] and after consulting the European Parliament;

- at the end of this period, the Commission recovers the monopoly for initiative but must examine any application from a Member State wishing to submit a proposal. Also, the Council, acting unanimously after consulting the European Parliament, shall be able to take a decision with a view to making the co-decision procedure applicable to all areas of Title IV or to some of them.

Article 68 of the EC Treaty establishes special conditions for the application of article 234 regarding questions to the Court of Justice on a case pending before a court or tribunal. Only a national jurisdiction "against whose decisions there is no judicial remedy under national law" may request the Court to give a ruling on a matter "if it considers that a decision on the point is necessary to enable it to give judgment". The question may refer only to the interpretation of Title IV but may refer to both the interpretation or the validity of an act based on this title.

This solution is different to that laid down by the Luxembourg Protocol of 3 June 1971 concerning the interpretation of the Brussels Convention of 1968. However, the fact that first instance jurisdictions cannot question the Court is reminiscent of this Protocol. The same can be said for the procedure established by paragraph 3 of article 68 whereby "the Council, the Commission or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this title or of acts of the institutions of the Community based on this title. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become res judicata".

This introduction to the Treaty of Amsterdam would not be complete without mention of an unexpected effect of communitarisation with regard to geographical scope. On the one hand Denmark and, on the other, the United Kingdom and Ireland have actually negotiated individual procotols.

Denmark does not participate in the adoption of measures under Title IV and is not bound by them. It may, however, at any time "in compliance with its constitutional requirements, inform the other Member States that it no longer wishes

[2] The initiative of a Member State continues with the intergovernmental method of the third pillar but revokes the community rule whereby the Commission has the monopoly for the initiative.

to benefit from all or a part" of the protocol. So far, Denmark has not made use of this possibility and is not bound by any act taken in application of Title IV.

In addition, no measure of Title IV is applicable from the point of view of the United Kingdom and Ireland unless written notification is received from the President of the Council within a period of three months after presentation to the Council of a proposal or an initiative (...) requesting adoption and application of the measure proposed. In practice, the United Kingdom and Ireland have chosen to participate in several instruments for civil judicial cooperation presented as from 1 May 1999.

B. The Vienna Plan of Action

The Council's and Commission's plan of action regarding the optimum methods for implementing the provisions of the Treaty of Amsterdam concerning the establishment of an area of freedom, security and justice[3], adopted on 3 December 1998 was approved by the European Council in Vienna.

Some months before the entry into force of the Treaty of Amsterdam and subsequent to the resolution taken in Cardiff as from 15 and 16 June 1998, the Heads of State and Prime Ministers approved the opening up of a new field of action for justice and home affairs and the definition of a specific framework for future activities, and requested that special attention be paid to the creation of a European judicial area[4].

This plan of action concerns the different aspects of the area of freedom, security and justice and, in particular, states that it aims "to guarantee European citizens equal access to justice and to promote cooperation between the judicial authorities". The fundamental importance of judicial cooperation in civil matters is stated and certain guidelines are laid down: simplification of the environment for European citizens, adaptation of rules for conflicts of law and jurisdiction "particularly as regards contractual and non-contractual obligations, divorce, matrimonial regimes and inheritance and mediation should be developed, particularly for family conflicts".

Mention is also made of the possibility of creating a civil judicial network "to increase Europe-wide contacts between professionals in the field".

The concern is also expressed that the Council's working structures in the field of justice and home affairs should be adapted (cf. Point 6 of the plan of action). These structures are simpler than those of the Maastricht Treaty[5] and are similar to the decision-making structure of community law[6]. However, note should be taken of the unusual "Civil Law Committee – General Affairs" which, as a reflection of the previous K4 Committee of the Maastricht Treaty, is still at a higher level than the working groups without being a necessary intermediate stage between them and the

[3] OJEC C. 19, 23 January 1999

[4] Cf. points 83 and 84 of the conclusions of the Presidency of the European Council at Vienna on 11 and 12 December 1998.

[5] Five decision-making levels existed within the JHA Council : Council, COREPER, K4 Committee, steering groups, working groups.

[6] The community decision-making structure within the Council has three levels : Council, COREPER and working groups.

COREPER (Committee of Permanent Representatives), unlike the Article 36 Committee[7] for police and judicial cooperation on criminal matters.

On the other hand, the Civil Law Committee – General Affairs was granted by the COREPER during its meeting of 10 March 1999 the mission of guaranteeing coherence in community actions on matters of civil law, especially those covered by articles 65 and 293 of the EC Treaty. It may also give its opinion on matters relating to civil judicial cooperation regarding other parts of the EC treaty, such as matters of jurisdiction and applicable law raised by community instruments.

C. The conclusions of the European Council at Tampere.

The European Council met on 16 and 16 October 1999 in Tampere. For the first time, Heads of State and Prime Ministers devoted the whole of their meeting to matters of justice and home affairs. They expressed their determination to "make the Union an area of freedom, security and justice by taking full advantage of the possibilities created by the Treaty of Amsterdam".

A new method, which takes its inspiration from the plan for the internal market, was set up. The Commission was to draw up a list of markers to facilitate verification of the completion of goals set by the Treaty of Amsterdam, the Vienna Plan and the Tampere conclusions. In parallel, the European Parliament was encouraged by the European Council to provide regular information.

Above all, ambitious objectives were set "to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all" (point 2) and so that "people can approach courts and authorities in any Member State as easily as in their own" (point 5).

The European Council states that "in a genuine European Area of Justice, individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States" (point 28), and invites the Council to establish minimum standards of legal aid in cross-border cases as well as special, common procedural rules for simplified and accelerated cross-border litigation on small claims (point 30). It also refers to maintenance claims and the protection of victims of crime (point 32).

But what is most important in the conclusions of the European Council at Tampere is the statement of the *principle of mutual recognition* which "should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union" and should be applied "both to judgements and to other decisions of judicial authorities" (point 33).

With regard to civil matters, the aim is to reduce the intermediate procedures required to allow recognition or implementation of a decision in a different Member State and even to eliminate them for minor claims and in certain family litigation (maintenance claims, visiting rights) so that decisions can be recognised automatically (point 34).

[7] This Committee takes its name from article 36 of the EU Treaty which created it.

The European Council asks the Council and the Commission to adopt as from December 2000 a programme of measures to implement this principle (point 37), also to prepare new procedural legislation for cross-border cases in order to facilitate judicial cooperation and enhance law, especially provisional measures, the taking of evidence, orders for money payment and time limits (point 38).

D. The programme to implement the principle of mutual recognition in civil and commercial matters adopted on 30 November 2000

This programme was adopted in implementation of the Tampere conclusions and gives indications on the main priorities. A debate on this subject had been organised among the Ministers of Justice during an informal meeting held in Marseilles on 28 and 29 July 2000. The programme refers to both the conclusions of the European Council and the Community acquis, especially the Brussels Convention of 27 September 1968, the "Brussels II" regulation regarding judicial jurisdiction, the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for children of both spouses[8], and the regulation on insolvency proceedings[9]. It also states that the principle of mutual recognition of civil and commercial judgments is not new amongst Member States. However, enforcement has been limited both because of exclusion by instruments in force in many areas (family situations in ad hoc relationships, matrimonial regimes, inheritance) and because of the maintenance of very limiting "intermediate procedures" for enforcing in one Member State a judgment passed in another Member State.

The process was a practical one comprising three sections covering the areas in which progress was needed, the type of progress that was possible and the stages of the progress to be achieved:

1. Areas of mutual recognition in which progress should be made.

These are the areas not covered by the future "Brussels I" regulation (which covers the field of application of the 1968 Brussels Convention) and the "Brussels II" and "Insolvency" regulations of 29 May 2000.

Two types of proposal were made:

- The first type relates to areas not yet covered by community instruments: progress to be made in family law regarding international jurisdiction, the recognition and enforcement of judgments, on the one hand for the dissolution of matrimonial regimes, the property consequences of the separation of unmarried couples and inheritance[10] and, on the other, with regard to parental responsibility and other non-property aspects involved in the separation of couples. In the latter case, the objective is to complete the "Brussels II" regulation in order to include a sociological reality, namely, the increasing number of couples and births "outside marriage";

[8] Council Regulation (EC) no.1347/2000 of 29 May 2000 (OJEC L. 160 of 30 June 2000)
[9] Council Regulation (EC) no.1346/2000 of 29 May 2000 (OJEC L. 160 of 30 June 2000)
[10] Matrimonial regimes and inheritance were among the priorities of the Vienna plan of action.

- The second type relates to improvements in existing systems: priority areas the elimination of intermediate procedures, that is, in family law, visiting rights and maintenance claims as well as uncontested claims and minor litigation.

2. The objective of achieving higher degrees of mutual recognition.

The programme identifies in the existing instruments two different degrees whereby the result of the instrument is only a less complex *exequatur* procedure than that which usually results from enforcement of national law[11] (Brussels Convention of 1968 and the "Brussels II" regulation) or a considerably simplified *exequatur*[12] (the future "Brussels I" regulation and the insolvency regulation).

In the areas not covered, the aim is to move towards the method of the "Brussels II" regulation then towards that of the "Brussels I" regulation but a change to the higher degree without an intermediate stage is not excluded.

In the areas already covered, the aim is to reduce intermediate measures by limiting the reasons for non-recognition or non-enforcement, strengthening the effects in the questioned State of judgments made in the State of origin (establishing enforcement by provision and protective measures), even eliminating control by the judge in the questioned State in order to allow free movement of a national title, now considered as a decision made in the questioned State (resulting in the invented term "European enforcement title" now in use).

Moreover, *measures to support mutual recognition* are presented: minimum procedural regulations aiming to reinforce mutual trust between the judicial systems of Member States to prepare the ground for progress, strengthening the effectiveness of measures to enforce judgments in a different Member State by identifying the property of the debtor, improving judicial cooperation as a whole (civil judicial network, taking of evidence, access to justice, standardisation of rules in conflicts of law).

3. Stages.

A real timetable was not considered desirable but a Commission report on implementation of the programme is planned, five years after its adoption. The eventual aim of acceptance of the principle of mutual recognition is to achieve widespread elimination of the exequatur. This will be the third stage in each area.

E. <u>The Treaty of Nice</u>

[11] There is fully recognition without dispute ; the exequatur is obtained on request but must be rejected for one of the reasons listed by the instrument applicable.

[12] The *exequatur* is obtained after certain formalities have been complied with. It is only in the second stage that it can be contested by the other party (the « inverted dispute » system).

This Treaty, which was signed on 25 February 2001 and entered into force on 1 February 2003, achieved a marked change in the system of the qualified majority while expanding the field.

With regarding to civil judicial cooperation, it marked the end of the transition period which began with the Treaty of Amsterdam and instituted the qualified majority and co-decision in the European Parliament and the Council. However, family law is still subject to the rule of unanimity.

Moreover, the Member States no longer have the right to initiative which they used to share with the Commission.

Two specific features of Title IV of the EC Treaty, however, were retained:

- Article 68 on the jurisdiction of the Court of Justice of the European Communities was not changed;

- In the Council, texts are negotiated within the limits of JAI.

F. Overview of results of civil judicial cooperation

A fairly large number of legal instruments have been adopted in the framework of the mutual recognition programme.

1. In family law.

Mention should be made of EC Regulation 1347/2000 of 29 May 2000 on jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses[13] known as “Brussels II” and EC regulation no.2201/2003 of 27 November 2003 on jurisdiction, recognition and enforcement of decisions in matrimonial matters and in matters of parental responsibility rescinding regulation EC no.1347/2000[14], which entered into force on 1 March 2005 and brings together provisions on divorce and parental responsibility.

2. In other areas.

The most emblematic text is obviously EC Regulation no. 44/2001 of 22 December 2000 regarding judicial jurisdiction, recognition and enforcement of judgments in civil and commercial matters[15], known as « Brussels I » which followed on from the “Brussels Convention” concluded on 27 September 1968 and replaces it amongst the Title IV Member States. The Brussels Convention is still the text applicable for Denmark.

Mention should also be made of EC Regulation no. 1348/2000 of 29 May 2000 regarding the service in Member States of judicial and extrajudicial acts in civil and

[13] OJEC of 30 June 2000, no. L. 160/19s
[14] OJEC of 23 December 2003, no. L.338/1s.
[15] OJEC of 16 January 2001, n° L.12/1s.

commercial matters[16], EC Regulation no. 1346/2000 of 29 May 2000 regarding insolvency procedures[17], EC Regulation no. 1206/2001 of 28 May 2001 regarding the taking of evidence in civil and commercial matters[18] and EC Regulation no.805/2004 of the European Parliament and Council of 21 April 2004 on the creation of a European enforcement order for uncontested claims[19]. These different community regulations are directly applicable in the Member States and can be found in the Official Journal of the European Communities (OJEC) or of the European Union (OJEU).

Also adopted were Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border matters by establishing minimum common rules for legal aid in such matters[20] and Council Directive of 29 April 2004 on compensation for victims of crime[21]. Since these are Directives, they have to be transposed in each Member State. The Directive of 29 April 2004 presents the unusual feature of being based on article 308 of the EC Treaty and not article 65 and therefore of being imposed in all Member States.

3. The European judicial network.

Council decision 2001/470/EC of 28 May 2001 on the creation of a European judicial network for civil and commercial matters[22] has been fully applicable since 1 December 2002. This network, which comprises contact points designated by the Member States, aims above all to facilitate judicial cooperation amongst Member States and to draw up, implement and keep updated an information system for the network members as well as to provide information to the public.

III- THE FUTURE OF THE EUROPEAN JUDICIAL AREA IN CIVIL AND COMMERCIAL MATTERS

A. The Constitutional Treaty

This Treaty, signed in Rome on 29 October 2004, is being ratified by the Member States. Assuming it will eventually enter into force, an overview should be given of the main elements related, directly or indirectly, to judicial cooperation in civil matters.

The disappearance of the division into pillars, and the use of new legal instruments (European law, European framework law, European regulation, European decision, recommendations and opinions) and the definition of an “ordinary adoption procedure” (joint adoption by the European Parliament and the Council on a proposal from the Commission) have simplified matters. Article I-42, however, lays down special provisions for the area of freedom, security and justice. Of special interest among these are the concern to promote “mutual trust amongst the competent authorities of the Member States, particularly on the basis of mutual

[16] OJEC of 30 June 2000, n° L.160/37s.
[17] OJEC of 30 June 2000, n° L.160/1s.
[18] OJEC of 27 June 2001, n° L.174/1s.
[19] OJEC of 30 April 2004, n° L.143/15s.
[20] OJEC of 31 January 2003, no. L.25/41s.
[21] OJEC of 6 August 2004.
[22] OJEC of 27 June 2001, n° L.174/25s.

recognition of judicial and extrajudicial judgments" and the possibility for national parliaments of participating in the evaluation mechanisms described in article III-260.

Chapter IV of Part 3 of the Constitutional Treaty specifically refers to the area of freedom, security and justice and contains five sections. The first on general provisions states, in article III-257 (4) that "the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters" and facilitates the creation of a mutual evaluation mechanism aiming to promote full application of this principle (article III-260). The following sections cover, respectively, the different types of cooperation currently stemming from Title VI of the EU Treaty or Title IV of the EC Treaty: policies relating to border control, asylum and immigration (section 2), judicial cooperation in civil cases (section 3) and penal cases (section 4) and police cooperation (section 5).

Section 3 on civil judicial cooperation contains a single article which states as follows:

"**Article III-269**

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

2. For the purposes of paragraph 1, European laws or framework laws shall establish measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

   a) mutual recognition and enforcement between Member States of judgments and decisions in extrajudicial cases;
   b) cross-border service of judicial and extrajudicial documents;
   c) compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
   d) cooperation in the taking of evidence;
   e) effective access to justice;
   f) elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States ;
   g) development of alternative methods of dispute settlement;
   h) support for the training of the judiciary and judicial staff.

3. Notwithstanding paragraph 2, a European law or framework law of the Council shall establish measures concerning family law with cross-border implications. The Council shall act unanimously after consulting the European Parliament.

   The Council, on a proposal from the Commission, may adopt a European decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted

by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament."

This provision is on the same lines as the current article 65 in the EC Treaty with its reference to the proper functioning of the internal market, and of the Treaty of Nice in that it excepts the principle of adoption of legislative measures for the qualified majority and for co-decision with the European Parliament on matters of family law. However, the "passage" created by the last paragraph allows the Council to decide unanimously to make the ordinary procedure applicable to certain aspects of family law, without reviewing the Constitutional Treaty.

Note the inclusion in this article of the principle of mutual recognition of judicial and extrajudicial decisions as stated in Tampere.

B. The five-year Hague programme

This new five-year programme was adopted in Brussels on 5 November 2004 by the European Council[23], five years after the Tampere meeting. It confirms the Tampere conclusions while cautiously anticipating the entry into force of the Constitutional Treaty. It should be followed by the adoption of a plan of action during 2005.

In the introduction, which covers the advances made since the European Council in Tampere, it states the objective of promoting mutual recognition of judicial decisions and certificates in both civil and criminal matters and of "eliminating legal and judicial obstacles in litigation in civil or family matters with cross-border implications".

General orientations are given with a view to responding to the expectations of Union citizens and they stress evaluation of the implementation of measures adopted in the field of freedom, security and justice as well as follow-up of the plan, with a view to the entry into force of the constitutional treaty.

This is followed by particular guidelines on the strengthening of freedom, security and justice and, finally, external relations. The section on justice underlines the increasing importance of the jurisdiction of the Court of Justice of the European Communities in this field and the importance of giving it the means, including the procedural means, "for speedy and appropriate handling of requests for preliminary rulings concerning the area of freedom, security and justice".

In parallel, strengthening of mutual trust and the progressive development of a European judicial culture are encouraged in order to facilitate full application of the principle of mutual recognition in judicial cooperation. The accompanying measures to be implemented include objective, impartial evaluation, respecting the independence of the judiciary, support from the existing judicial organisations and institutions and the organisation of exchange programmes for the judicial authorities. The commission is particularly invited to prepare a proposal aimed at creating, from

[23] The Hague programme is annex I of the conclusions of the Presidency, at the European Council in Brussels on 4 and 5 November 2005.

the existing structures, “an efficient European training network for both civil and criminal matters”.

Important developments can be expected in civil judicial cooperation:

1. The European Council stresses the importance, for the everyday life of citizens, of full implementation of the programme for mutual recognition adopted in 2000, so that “borders between countries in Europe should no longer constitute an obstacle to the settlement of civil law matters or to the bringing of court proceedings and the enforcement of decisions in civil matters”.

2. Mutual recognition of decisions, considered “an effective means of protecting citizens’ rights and securing enforcement of such rights across European borders”, is a top priority. Work must therefore be done firstly, from now until 2011, on the conflict of laws regarding non-contractual obligations (“Rome II”) and contractual obligations (“Rome I”), a European payment order and instruments concerning alternative dispute resolution and small claims. Secondly, the programme includes increasing the effectiveness of existing instruments, standardising procedures and documents and defining minimum standards for aspects of procedural law, such as the service of judicial and extrajudicial acts, the commencement of procedures, enforcement of judgments and transparency of costs.

   Several proposals or green papers are expected in 2005 and 2006 from the Commission regarding family law and inheritance, such as the recognition and enforcement of decisions on maintenance or the resolution of inheritance disputes, matrimonial regimes or divorces (in the latter case, the instrument has been named “Rome III”). With regard to inheritance and matrimonial regimes, the judicial jurisdiction, mutual recognition and the enforcement of decisions will have to be studied. The programme also includes a European inheritance certificate and a mechanism to show precisely whether a resident of the European Union has left a will or testament.

   Harmonisation of concepts has been excluded in these areas and rules of uniform substantive law would only be introduced when necessary to improve judicial cooperation.

3. Cooperation should also be improved by the designation of liaison judges and cooperation amongst members of the legal professions with a view to defining best practices.

4. Another objective is to improve the quality of community legislation and the coherence of legal instruments.

5. The overall aim should be to achieve coherence between European law and the international legal order (especially the Hague Conference on international private law and the Council of Europe).

Having reached the end of this introduction to the rules in force and the prospects offered by the constitutional treaty and the five-year Hague programme, the following is a brief conclusion:

More than ever, civil judicial cooperation is a priority for the construction of Europe. There can be no doubt that European citizens are keenly awaiting it.

Important legislative progress is on the way to completion and should to fully implement the principle of mutual recognition, including its application to family law. European law-makers should show that the rule of unanimity in this area of civil judicial cooperation does not prevent progress.

But the challenge for coming years is not only for the legislators. Great expectations have been placed on the capacity of legal practitioners and especially the judiciary for the implementation of these new rules based on the principle of mutual recognition and therefore on the mutual trust that must continue to be developed amongst judges in all the Member States of the European Union.

This represents a challenge for judges but also an unprecedented opportunity for them to develop a common culture of respect for the diversity of legal traditions. Judges have a special right and duty to train others in order to secure full freedom of movement for persons in a considerably enlarged European Union

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