



CONSEJO GENERAL DEL PODER JUDICIAL
ESCUELA JUDICIAL



Red Europea de Formación Judicial (REFJ)
European Judicial Training Network (EJTN)
Réseau Européen de Formation Judiciaire (REFJ)

MODULE I

UNIT II

The Judge in the Construction of the Judicial Area. Instruments to Improve Legal Assistance in the EU

**DISTANCE-LEARNING COURSE
The Judicial Area in Civil and
Commercial Matters
2011 EDITION**

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1.- LEGAL ASSISTANCE IN THE EU

Traditionally, international society has based around the idea of juxtaposition: the States were conceived as isolated compartments which exercised powers inherent in their sovereignty, and which only occasionally required exterior action to carry out their objectives. International Law was born which was concerned with eliminating, as far as possible, any clashes between the application of the legal systems of the different States: it is restricted to establishing limits to the jurisdiction of the States (Jurisdictionalist International Law).

The development of technology and communication, however, determined the emergence of a need for collaboration between the different States, with a relaxation of the concept of sovereignty. International Law became obligationist, i.e., capable of establishing the rights and obligations of the different States in the regulation of the essential cooperation between them; but this regulation could not be imposed on any sovereign State, a State was only bound to it if it consented to its application by signing and ratifying the corresponding international agreement.

In this field, international judicial cooperation revolves around the following principles:

- A court in a State cannot enforce its jurisdiction in another State's territory.
- A State, by exercising its sovereignty, can cooperate with another by conducting proceedings requested by a court in the other State in its own territory and by its own bodies.
- If there is an applicable international agreement between both States (bilateral or multilateral), the legal obligation of carrying out the proceedings requested by the other State is born with complete submission to the conditions of the Treaty.
- In the absence of a Treaty, there is no legal obligation to carry out the requested proceedings, instead the requested State can do so in the hope that the requesting State returns the favour (principle of reciprocity).

The free movement of capital, goods, services and people in the EU, as well as the extensive development to the media, has resulted in both an increase in the exchanges between people and companies in the different States, and greater ease in carrying out transnational crime that seeks impunity by taking advantage of freedom of movement. Thus, legal assistance between the EU Member States has undergone a considerable increase, which has demonstrated the limitations of a system which had become obsolete.

The legal systems of States within the EU can no longer be understood as being isolated legal phenomena, instead they have come to complement each other due to the following reasons: the reciprocal influence between the legal systems, the realignment of public power in Europe, and the defence of political and social values shared by the whole of the European Union.



Due to the above-mentioned, the necessary breeding ground has emerged in the EU to produce a huge development in cooperation or legal assistance between the different States, both from a regulatory perspective as well as through the creation of institutional mechanisms to favour it. There has therefore been, and it continues today, an accelerated process of transcending the instruments of classic international law in the face of the limitations which these instruments have shown in order to tackle the new challenges. This new system has been built granting huge protagonism to the Courts in the European Union Member States.

2.- INSTRUMENTS TO IMPROVE THE COOPERATION BETWEEN THE LEGAL AUTHORITIES IN DIFFERENT STATES

2.1.- REGULATORY INSTRUMENTS

The community institutions have drawn up a series of Regulations which seek to improve cooperation or legal assistance between EU Member States: Regulation EC no. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)¹; and Regulation 1206/2001 of 28 May 2001, on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

2.2.- INSTITUTIONAL INSTRUMENTS

Institutional instruments are those institutions and technical mechanisms which, by applying the current regulatory framework, seek to improve judicial cooperation between Authorities in different EU States (instrumental function) making the different existing resources more operational².

2.2.1.- Institutions

Firstly the Liaison Magistrates were created (Joint Action of 22 April 1996). They are public officials³ which a State appoints and posts another State's territory in order to increase the speed and efficiency of judicial cooperation, as well as at the same time contributing to the exchange of information on legal systems and judicial systems of the Member States and their functioning.

¹ Repeals Regulation EC no. 1348/2000 of the Council

² Javier PARRA GARCÍA, "Instituciones de mejora de la cooperación judicial civil", Module in the 2nd edition of the Distance-Learning Course on "Brussels Regulations I and II", organised by the General Council of the Judiciary.

³ As Luis RODRÍGUEZ SOL states, despite their name, these Liaison Magistrates do not form part of the General Council of the Judiciary strictu sensu, but work for the Ministry of Justice attached to a diplomatic mission; in Spain they are judges, senior judges or public prosecutors which have an administrative status as special services (Act 66/97); in "Los Magistrados de Enlace", Revista Jurídica Española La Ley, Volume 2000-4, D-136, p 1590.



The European Judicial Network in Civil and Commercial Matters⁴ was then created (Council Decision of 28 May 2001), comprised of authorities from each of the countries (points of contact), whose objective also extends to the improvement of access to justice in cross-border disputes. It has a dual mission⁵: in connection with the courts it should facilitate effective judicial cooperation between the States in civil and commercial matters; and for citizens, facilitate the effective access to justice through information campaigns, and establish and maintain updated an information system aimed at the public. In this field the Decision of the Parliament and of the Council of 18 June 2009 should be highlighted which modifies Decision of the Council of 28 May 2001 establishing a European Judicial Network in Civil and Commercial Matters.

We must not forget the internal Networks in each country. Of note is the Spanish Judicial Network for International Judicial Cooperation (REJUE), fully operational since 2003. It is formed by 62 Senior Judges specialised in the field, distributed throughout Spain, and grouped into two Divisions, one for civil matters and the other for criminal matters. Its regulation is established in articles 81 *et seq* of General Council of the Judiciary Regulation 1/2005, of 15 September, on additional aspects of judicial proceedings, and its duty is to lend the necessary assistance to the courts for the correct referral and effective compliance with the applications for jurisdictional cooperation, as well as the support required by the points of contact of the European Judicial Network and of other institutions of a similar nature (article 81.2)⁶.

2.2.2.- Technical Instruments Supporting Judicial Cooperation

Particular mention should be made of the "European Judicial Atlas in Civil Matters"⁷. This allows a large volume of information relevant to this subject to be accessed simply, as well as identifying Courts and other authorities with jurisdiction in each country, also enabling the existing forms to be completed, as well as their translation and their transmission. The Action Plan implementing the Hague Programme outlines the updating and continuous improvement to the European Judicial Atlas.

One of the purposes of the European Judicial Network in civil and commercial matters is the creation and maintenance of an information system aimed at the public on judicial cooperation in civil and commercial matters in the European Union, relevant community and international instruments and internal law of the Member States, in particular regarding access to justice (Decision of the Council, of 28 May 2001, establishing a European Judicial Network in Civil and Commercial Matters). At a Spanish domestic level, reference should be made to the "Vademecum of International Judicial Assistance", drawn up by the General Council of the Judiciary, the Ministry of Justice and the Office of the Public Prosecutor, and which contains a compendium of all the regulations of international mutual assistance applicable in Spain⁸.

⁴ The website is <<http://ec.europa.eu/civiljustice>>

⁵ Javier PARRA GARCÍA, "Instituciones de mejora...", above-mentioned module.

⁶ Francisco Javier FORCADA MIRANDA, "La Red Judicial Española de Cooperación Judicial Internacional", Ministry of Justice Newsletter, numbers 1995-1996, pp 3263 *et seq*.

⁷ The webpage is <http://ec.europa.eu/justice_home/judicialatlascivil>

⁸ This vademecum has its own website: <www.prontuario.org>



3.- DIRECT TRANSMISSION IN MUTUAL ASSISTANCE BETWEEN EU MEMBER STATES

Within the European Union the idea of direct transmission of requests for international mutual assistance between judicial authorities has been generalised over time, without the intervention of the central Authority. This new design has been reflected not just in civil and commercial matters⁹, but also in different regulatory instruments in the criminal field among which the following can be highlighted: Convention of 29 May 2000 on mutual assistance in criminal matters between the Member States of the EU; and Framework Decision of the Council of 13 June 2002, on the European arrest warrant and the surrender procedures between Member States.

It must be taken into account that, while the direct transmission of requests generates a greater processing speed, it is also true that it determines that the Judge sending or receiving a request for mutual assistance finds himself in a situation of greater complexity. On the one hand, international mutual assistance activities entail a high level of technical difficulty which requires the Judge to know not just domestic Spanish law, but also the specific applicable international convention and its declarations or reservations, as well as the other State's internal law. This problem becomes particularly important if the possibility of complying with the request for assistance is taken into account in accordance with the legislation of origin considered in article 4.1 of the Convention in Mutual Assistance on criminal matters of 29 May 2000 (*forum regit actum* rule). With regards to languages, the direct transmission between judicial authorities requires appropriate instruments of translation and linguistic training. Lastly, Judges and Magistrates need to quickly be able to find the current details (address, telephone number, email address, etc.) of the judicial bodies of the other EU Member States.

4.- THE JUDGE IN THE CONSTRUCTION OF THE EUROPEAN JUDICIAL AREA: Towards a New Judicial Culture

Bearing in mind the main focuses of development studied in Unit 1, it can be stated that the Judges in the different Member States of the EU assume an important role in the construction process of the European Judicial Area.

Therefore, the Judicial Authorities become involved in and the protagonists of a new judicial culture which has significant effects on the protection of European citizens' rights. As the Hague Programme stated (approved by the European Council of Brussels of 4 and 5 November 2004), "judicial cooperation both in criminal and civil matters could be further enhanced by strengthening mutual trust and by progressive development of a European judicial culture based on diversity of the legal systems of the Member States and unity through European law."

To this regard, and as GÓMEZ MARTÍNEZ states, "European integration at a European judicial level, the creation of the European judicial area, commands new approaches, the assumption of new concepts on the function of judges which no longer act solely at a national level but in a European dimension."¹⁰

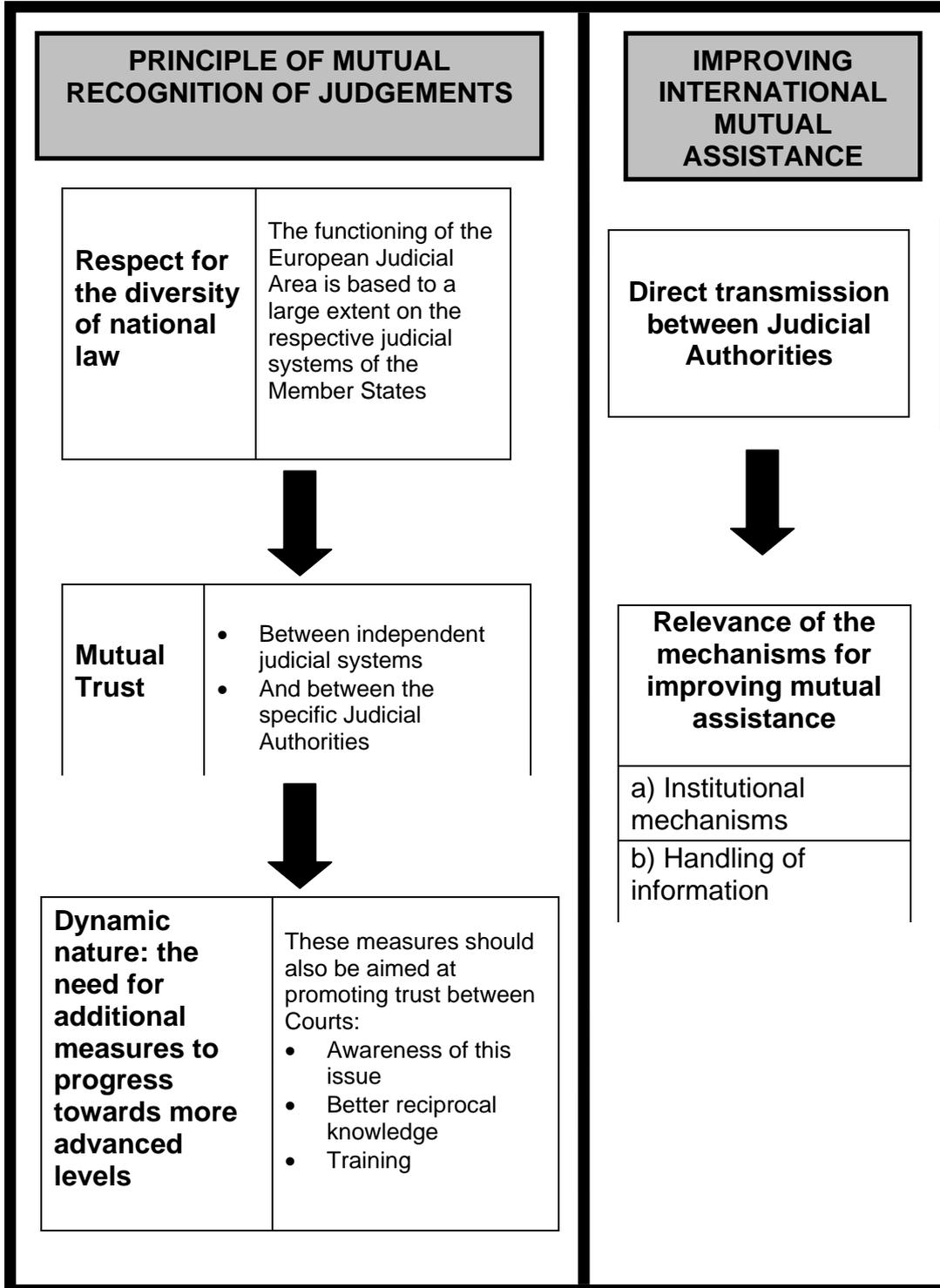
⁹ This idea of direct transmission is outlined in the Regulations stated in the previous section 3.3.1 on regulatory instruments.

¹⁰ Carlos GÓMEZ MARTÍNEZ, "La dimensión europea en la formación judicial del Juez. La Red Europea de formación judicial", Libro Homenaje a Eduardo Font, p 457.





See the summary table below:



5. - MEASURES TO PROMOTE MUTUAL TRUST BETWEEN JUDICIAL AUTHORITIES IN THE STOCKHOLM PROGRAMME

The Stockholm Programme (approved by the European Council and published in the OJEU of 4 May 2010) grants mutual trust a central role among those called upon to apply the legal system, among which the Judicial Authorities should be highlighted. As stated in this Programme, “mutual trust between authorities and services in the different Member States and decision-makers is the basis for efficient cooperation in this area. Ensuring trust and finding new ways to increase reliance on, and mutual understanding between, the different legal systems in the Member States will thus be one of the main challenges for the future.”

Aware of this need, the Stockholm Programme contains measures which, essentially, branch off into two directions: on the one hand, training, and, on the other, the creation and functioning of networks.

5.1.- TRAINING

As stated in the founding charter of the European Judicial Training Network¹¹, “the effectiveness of the European Area of Justice requires a good understanding by members of the judiciary of legal and judicial systems in other Member States, as well as national, European and international instruments concerning co-operation.”

The Stockholm Programme states that “in order to foster a genuine European judicial and law enforcement culture, it is essential to step up training on Union-related issues and make it systematically accessible for all professions involved in the implementation of the area of freedom, security and justice. This will include judges, public prosecutors, judicial staff, police and customs officers and border guards. The objective of systematic European training programmed offered to all persons involved should be pursued. The ambition for the Union and its Member States should be that a substantive number of professionals by 2015 will have participated in a European Training Scheme or in an exchange programme with another Member State, which might be part of training schemes that are already in place. For this purpose existing training institutions should in particular be used.”

The EU understands that the Member States will have the primary responsibility in the training of Judicial Authorities, however, the EU itself also has a significant role in this field: it should give their efforts support and provide financial backing and also be able to have its own mechanisms to supplement national efforts in particular in two key aspects, according to the Communication from the Commission to the European Parliament and the Council of 29 June 2006 on judicial training in the European Union:

- Firstly, **the proper application of Community law**, which depends largely on how it is applied by the legal practitioners, and especially by judges;

¹¹ Charter adopted in Copenhagen by the General Assembly of the European Judicial Training Network on 6 December 2002.



- And, secondly, the **development of the mutual recognition principle**, which rests primarily on mutual confidence and cooperation between judicial authorities.

The activities of the European Judicial Training Network are of note in this area (<http://www.ejtn.net/>), created in 2000 to promote the development of training and exchange of knowledge and experience between EU courts. It is governed by a founding charter adopted in Bordeaux on 13 October 2000, revised in Copenhagen on 6 December 2002 and in Ljubljana on 23 and 24 June 2008. The objectives of this Network are part of the Communication of the European Commission on judicial training of 29 June 2006, Resolution of the European Parliament of 9 July 2008 on the role of the national judge in the European judicial system and Resolution of the European Union Council of 24 October 2008 on the training of legal practitioners to set as European Union objectives the creation of a genuine area of freedom, security and justice, the promotion of the knowledge of European judicial systems and strengthen understanding and cooperation between the judges and public prosecutors in the EU Member States.

Another organisation that cannot go unmentioned is the so-called "Lisbon Network", a body dependant on the Council of Europe that was created in 1995 as part of the legal cooperation programmes and exchange of information on matters of mutual interest. The network brings together European judicial schools (with a wider territorial scope than the EU) whose purpose is to train European judges, lawyers and public prosecutors (<http://www.coe.int/t/dghl/cooperation/lisbonnetwork>).

5.2.- NETWORK DEVELOPMENT

According to the Stockholm Programme itself, "the European Council considers that contacts between senior officials of the Member States in areas covered by Justice and Home Affairs are valuable and should be promoted by the Union in so far as possible." It subsequently adds that "such networks should primarily meet using existing structures such as Europol, Eurojust and Frontex or at the invitation of the Presidency as host country. Other Networks of professionals existing in this area should also continue to receive Union support. Among those are the European Network of Councils for the Judiciary and the Network of the Presidents of the Supreme Judicial Courts of the European Union."

According to the Dictionary of the Royal Academy of Spanish Language, a "network" is a "group of people working together for a common goal, generally secret, illegal or criminal in nature", using smugglers or spies as examples. However, the more appropriate meaning for the purposes of this unit is that which defines it as "a group of things or set of connections which work in favour or against a purpose or attempt." In the field that concerns us, the Network is a group of people working together towards a common goal, in this case serving Judges and specialists in judicial cooperation, who are distributed throughout the European territory with the aim of improving international judicial cooperation.



The EU has been using the instrument of networks on a very frequent basis and for very different fields. In Unit 1 the principal characteristic features of the European Judicial Network in Civil and Commercial matters are analysed, as well as the Spanish Judicial Network for International Judicial Cooperation (REJUE). It is necessary here to briefly refer to the European Network of Councils for the Judiciary (ENCJ), which was formally established at the General Assembly in Rome, May 2004, and whose purpose is the promotion of cooperation between its members in the following fields:

- Analysis of the structures and spheres of competence of the members, as well as the exchange of information on these structures and spheres of competence.
- Exchange of experiences with regards to the organisation and functioning of the judiciary.
- Matters related to the independence of the judiciary and other matters of mutual interest.
- Contribution of technical knowledge, experience, and proposals for European Union institutions and other national and international organisations.

A “Joint Work Committee Involving The Ibero-American Judicial Summit, The European Network of Councils Of Justice And The Network of Presidents of High Courts of The European Union” has been created, whose rules of creation and operation were approved by the XIV Ibero-American Judicial Summit (Brasilia, March 2008). See: http://www.cumbrejudicial.org/c/document_library/get_file?uuid=f94976b4-f8e5-4fe7-b350-9f69d9744289&groupId=10124

6.- EPILOGUE

But are Judges really aware of this phenomenon? Their awareness is probably still limited, which is why the implementation of actions aimed at increasing awareness and training on this subject is advisable¹². The implementation of activities which support contact and exchange between the Judicial Authorities in the different Member States is also important.

In short, better reciprocal knowledge increases the trust necessary for the effective functioning of the principle of mutual recognition. The Stockholm Programme is fully aware of this reality¹³, stating that “in order to foster a genuine European judicial and law enforcement culture, it is essential to step up training on Union-related issues and make it systematically accessible for all professions involved in the implementation of the area of freedom, security and justice. This will include judges, public prosecutors, judicial staff, police and customs officers and border guards.” To this regard, the Stockholm Programme understands that “the Member States have the primary

¹² See Javier PARRA GARCÍA, “El nuevo régimen de las solicitudes de asistencia judicial en materia penal”, Cuadernos de Derecho Judicial, Volume on “Derecho Penal Supranacional y Cooperación Jurídica Internacional”, edited by the General Council of the Judiciary, Madrid, 2004, p 157.

¹³ The Hague Programme was also aware, according to which: “strengthening mutual confidence requires an explicit effort to improve mutual understanding among judicial authorities and different legal systems”; adding that “the constitution of networks of judicial organisations and institutions, such as the network of the Councils for the Judiciary, the European Network of Supreme Courts and the European Judicial Training Network, should be supported the Union”.





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responsibility in this respect, but the Union must give their efforts support and financial backing and also be able to have its own mechanisms to supplement national efforts”.



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WEBSITE LINKS

1.- Stockholm Programme

[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010XG0504\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010XG0504(01):EN:NOT)

2.- European Judicial Network in Civil and Commercial Matters

<http://ec.europa.eu/civiljustice>

3.- European Network of Councils for the Judiciary (ENCJ)

<http://www.encj.eu/>

4.- European Judicial Training Network

<http://www.ejtn.net/>

5.- European e-Justice Portal

<https://e-justice.europa.eu/>

6.- Lisbon Network of Judicial Training (Council of Europe)

<http://www.coe.int/t/dghl/cooperation/lisbonnetwork>

Please see the links in the document "**A Virtual Journey Through the European Judicial Area in Civil and Commercial Matters,**" which are included as one of the additional materials in this Course.

