
MICHAEL HELLNER

# The limits to judicial cooperation in civil matters: taking legality seriously

RGSL WORKING PAPERS No. 9

RIGA 2002

Riga Graduate School of Law (RGSL) is a not-for-profit, limited liability company founded by the Governments of Sweden and Latvia, and the Soros Foundation Latvia. The activities of the School are currently regulated by the Agreement on the Foundation of the Riga Graduate School of Law entered into by the two governments and ratified on 20 November 1997 by the Latvian *Saeima* (Parliament). According to the Agreement, *"RGSL shall offer its students academic education based on the rule of law, respect for human rights and principles of political democracy. The academic program shall include international public law and international treaties, international private law, international trade law and international commercial transactions, European Union law and substantive trade law" (Section 1.5)*

This series of papers aims at contributing to that program by documenting studies undertaken by academic staff, students and guest speakers.

## About the author:

**Michael Hellner** has been associate professor in EU Law at Riga Graduate School of Law since 2001. He received his LL.D. at the University of Uppsala in 2000 with a thesis on international competition law. He then worked with the Swedish Ministry of Justice in 2000/2001 on judicial cooperation in civil matters in the EU. Prior to that, he had written the textbook *Introduktion till EU och EG-rätten* together with Göran Lysén.

The author wishes to thank Ms. Åsa Persson at the Swedish Ministry of Justice for fruitful discussions on this topic and Mr. Christopher Goddard for useful comments on the English.



ISSN 1407-8732

# Contents

# 1 Judicial Cooperation in Civil Matters

## 1.1 Background

Cooperation between the Member States in the field of private international law, if the meaning of "judicial cooperation in civil law matters" is restricted in such a manner (and we will return to this question), originally took place on the basis of Article 220 (now 293) of the EC Treaty. According to this article Member States should enter into negotiations with each other with a view to simplifying formalities governing the reciprocal recognition and enforcement of judgements of courts or tribunals and of arbitration awards. Various conventions have been concluded directly or indirectly on the basis of Article 220. The major achievement was the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.[1]

Article 220 EC of the Treaty was given an extensive interpretation which enabled cooperation beyond the original mandate. Thus, the Brussels Convention deals not only with the recognition and enforcement of judgments but also with jurisdiction. Strictly speaking Member States did of course not need Article 220 to conclude treaties of public international law – but it did provide for a framework. The latest result of this public international law working method under Article 220 is the 1995 Convention on insolvency proceedings, which then, due to protests against the handling of the BSE crisis, never was signed by the United Kingdom.[2] The Article is still in place and it

[1] Private international law rules have also been included in acts of secondary EC law adopted under other legal bases, e.g. Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, OJ L 11, 14.1.1994, p. 1 (based on Art. 235 (now 308 EC)); Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6.1997, p. 19 (based on Art. 100a (now 95 EC)); Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, p. 1 (based on Arts. 57 and 66 (now 47 and 55 EC)). For the relationship between private international law rules in secondary EC law and the Brussels and Rome conventions see, Erik Jayme & Christian Kohler, "L'interaction des règles de conflits contenues dans le droit derivé de la Communauté Européenne et des conventions de Bruxelles et de Rome", (1995) 84 *Revue Critique de Droit International Privé*, pp. 1–40.

[2] For an analysis of the draft convention see Michael Bogdan, *Sveriges och EU:s internationella insolvensrätt* (Stockholm, 1997).

remains to be seen what role it may still have to play.

The Treaty of Maastricht (a.k.a. the EU Treaty), which came into force on 1 November 1993, established in Article K.1 that judicial cooperation in civil law matters was an area of common interest for the purposes of achieving the objectives of the Union and in particular the free movement of persons.[3] Article K.1 formed part of the so called third pillar of the EU, which was then cooperation in the fields of justice and home affairs. In comparison to Article 220 of the EC Treaty it was a widening of cooperation in several aspects. Firstly, the area covered by EU competence was wider and secondly the forms of cooperation were taken one step in the direction of "traditional" EC law in that the Commission was given the right of initiative parallel to that of the Member States. The method for cooperation was still that of public international law conventions.[4] Article K.9 of the EU Treaty gave Member States the possibility to transfer cooperation to the "first pillar" EC Treaty but this was never used.

Under third pillar cooperation two conventions were adopted: the 1997 Service Convention[5] and the 1998 "Brussels II" Convention on the recognition and enforcement of judgments in matrimonial matters.[6] However, they never came into force before the Treaty of Amsterdam, which moved judicial cooperation in civil matters from the third pillar to the first. It was therefore decided to convert these conventions into regulations (it would probably not

---

[3] For the purposes of establishing the present boundaries to Community competence in this area, this original connection may be important and is a question to which we will return.

[4] See Art. K.3 EU Treaty.

[5] Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters, OJ C 261, 27.08.1997, p. 2. See Fernando Rui Paulino Pereira, "La Convention relative à la signification et à la notification dans les Etats membres de l'Union Européenne des actes judiciaires et extrajudiciaires en matière civile et commerciale" (1998) 40 *Revue du Marché Commun et de l'Union Européenne*, pp. 111–115.

[6] Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on jurisdiction and the recognition and enforcement of judgments in matrimonial matters, OJ C 221, 16.7.1998, p. 1. An ambitious explanatory report to the convention was written by professor Alegría Borrás and published in OJ C 222, 16.7.1998, pp. 27–64. See also Maarit Jänterä-Jareborg, "Marriage Dissolution in an Integrated Europe": The 1998 European Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (Brussels II Convention)", (1999) 1 *Yearbook of Private International Law*, pp. 1–36.

have been in conformity with the principle of loyalty as expressed in Article 10 EC to conclude conventions between Member States in an area in which the Community had competence).

## 1.2 The Treaty of Amsterdam

On 1 May 1999 the Treaty of Amsterdam came into force. In the area of private international law its importance lies in the "communitarisation" of private international law through the introduction of "judicial cooperation in civil matters" into the EC Treaty, to which the area was moved from the EU Treaty. The relevant treaty provisions can be found in the new EC Treaty Title IV on "Visas, asylum, immigration and other policies related to free movement of persons", which consists of Articles 61–69 EC. Article 61 provides a list of areas in which measures may be adopted for the purpose of establishing "an area of freedom, security and justice". Of interest to us here is lit. c), which confers the power to adopt measures in the field of judicial cooperation in civil matters to the Community:

> *Article 61*
> *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*

The conditions for the exercise of this legislative power are specified in Article 65:

> *Article 65*
> *Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar 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.*

Finally, the procedure is laid down in Article 67, according to which until 30 April 2004 the Member States and the Commission share the right of initiative, the Council acts unanimously and the European Parliament has only the right to be consulted, according to the "consultation procedure"[7]. Starting 1 May 2004 Member States lose their right of initiative[8] and the normal procedure where the Commission has exclusive right of initiative will apply. Furthermore, the Council may, according to Article 67(2) second indent, decide to abandon unanimity and the consultation procedure in favour of the "co-decision procedure"[9] contained in Article 251 EC.

If and when the Treaty of Nice comes into force, judicial cooperation in civil matters, with the exception of "aspects relating to family law", will be decided under the co-decision procedure. The possibility for the Council also to unanimously transfer the area related to family law to this decision making procedure remains in Article 67(2) second indent.

---

[7] See i.a. Trevor Hartley, *The Foundations of European Community Law,* 4th ed. (Oxford, 1998), p. 38 f.

[8] But according to Art. 67(2) first indent the Commission "shall examine any request made by a Member State that it submit a proposal to the Council". The difference between this and the Council's right to request a Commission proposal already guaranteed in Article 208 EC is a fine one indeed.

[9] For this procedure see Trevor Hartley, *supra* note 7, pp. 40–44.

The transfer of judicial cooperation in civil matters to the first pillar meant a vitamin injection to this area of the law. Even before the coming into force of the Treaty of Amsterdam, the Justice and Home Affairs Council on 3 December 1998 adopted an action plan on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice – the "Vienna Action Plan".[10] Furthermore, and more importantly, a special meeting of the European Council, which was devoted to the creation of "an area of freedom, security and justice in the European Union", was held in Tampere on 15–16 October 1999. The presidency conclusions[11] contained plans for the creation of a "genuine European area of justice", in which *inter alia* mutual recognition of judicial decisions in civil matters and greater convergence in civil law were recognised as means to this end.

In the period since the coming into force of the Treaty of Amsterdam, the following legal acts have been adopted:

- The Insolvency Regulation (a transformation of the convention into a regulation),[12]
- The Brussels II Regulation (a transformation of the convention into a regulation),[13]
- The Service Regulation,[14]
- The Brussels I Regulation (a transformation of the convention into a regulation),[15]

[10] Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, OJ C 19, 23.1.1999, p. 1.
[11] Presidency conclusions from 1994 can be found on the European Union's web site http://europa.eu.int by clicking on "Institutions", "Council", "European Council" and "Presidency Conclusions" in that order. Exact location of the Tampere conclusions is http://ue.eu.int/en/Info/eurocouncil/index.htm (last visited 20 November 2002).
[12] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160, 30.6.2000, p. 1.
[13] Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160, 30.6.2000, p. 19.
[14] Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, OJ L 160, 30.6.2000, p. 37.
[15] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1.

- The Taking of Evidence Regulation,[16]
- The Civil Law Network (based on Articles 61 (c) and (d) and 66 EC – not Article 65),[17]

The French presidency initiated an action programme on mutual recognition, which was adopted in December 2000.[18] The programme aims at lending impetus to judicial cooperation in civil matters and to set precise guidelines for it. According to the Tampere conclusions mutual recognition is a "cornerstone of judicial co-operation".[19] The programme foresees action in four different areas: (1) the area covered by the Brussels I Regulation; (2) the area covered by the Brussels II Regulation and family situations arising through relationships other than marriage; (3) rights in property arising out of a matrimonial relationship and the property consequences of the separation of an unmarried couple; and (4) wills and succession.

Furthermore, the action programme anticipates work to progress in three different stages towards the final stage, which means full abolition of the often cumbersome exequatur procedure in the state in which the foreign judgment is to be enforced. The first stage involves *inter alia* the establishing of mutual recognition in areas where this is not yet in effect (property regimes for married and unmarried couples and wills and succession) and to abolish exequatur in trial areas such as uncontested and small claims. The second stage aims at the abolition of the exequatur procedure in even more areas as well as its simplification in others. The final aim to be reached after the third stage of the programme is a true free movement of judgments, so that a foreign judgment will be enforced just as easily and readily as a domestic one.

---

[16] Council Regulation (EC) No 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, OJ L 174, 27.6.2001, p. 1.

[17] Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, OJ L 174, 27.6.2001, p. 25.

[18] Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, OJ C 12, 15.1.2001, p. 1. The word "draft", which has also crept into some other language versions – cf. Swedish "*utkast*" and Dutch "*ontwerp*" – is misleading. The French original speaks of "*projet*", which means "proposal" or "plan". "Draft" is "*avant-projet*".

[19] Presidency Conclusions Tampere European Council 15 and 16 October 1999, para. 33.

The question is to what extent such mutual recognition can be made to happen without far reaching harmonisation of procedural law, conflict of laws, and substantial civil (including family) and commercial law rules of the Member States. There is also the question of whether or not there is legal competence for the EC to do this and if so whether Article 65 is the correct legal basis. In the following pages I will begin an analysis of the principle of legality in general and in connexion with judicial cooperation in civil matters.

# 2 The Principle of Legality

The EC can only act when the power to do so has been transferred to it from the Member States. According to the principle of conferred powers (*principe de compétence d'attribution/Prinzip der enumerierten Einzelzuständigkeiten*), it is a substantial requirement for the legality of all Community legislation that it is properly based on some particular Treaty Article.[20] This follows from Article 5 EC, according to which "[t]he Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein".[21] If Community legislation should be based on the wrong Treaty Article or if there should be no legal basis at all, the consequence is that the legislation in question is a nullity and if an infringement action is brought the Court of Justice will declare the legislative act void (Article 231 EC). To state the legal basis of a measure forms part of the duty to state reasons prescribed by Article 253 EC.[22]

The importance of this principle is somewhat diminished by the long standing practice of the Court of Justice to give the relevant Treaty Article a flexible and extensive interpretation. It is further reduced by the Court's adherence to the principle of implied powers (*effet utile*),[23] according to which the existence of a power means that the Community also has any other power which is reasonably necessary to exercise the former.[24]

Finally, Article 308 EC gives the Community a residual legislative power of "*Vertragsausfüllung*". It can and has been used to legitimate legislation when the Community could not have acted otherwise. Originally Article 220 of the EC Treaty (now Art. 308 EC) was used to compensate *within areas of activity explicitly covered by the Treaty* but where explicit legal power to act

---

[20] See Hartley, *supra* note 7, p. 110.
[21] This provision was inserted by the Maastricht Treaty. However it can also be inferred from in particular Article 7, but also Articles 202, 211 and 249 EC.
[22] It may be dispensed with if it is clear from other parts of the act what the legal basis is, see Case 45/86 *Commission v. Council* [1987] ECR 1493 para. 9.
[23] See *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations* [1949] ICJ 174 for its origins in public international law.
[24] See cases 281, 283–285, 287/85 *Germany v. Commission* [1987] ECR 3203.

was not granted. However, after the Paris Summit of 1972, where Member States declared that they would make full use of Article 220, the Community made use of Article 220 in a way that went beyond the understanding of the Article as a mere codification of the implied powers doctrine. It has been said about this Article that, due to the wide interpretation given to it, it would be virtually impossible to find an activity for which it could not act as legal basis.[25]

Even if these factors taken together indicate that there are very wide limits to the Community's legislative powers, they do not mean that the principle of legality is without importance. The question of the choice of the correct legal basis but also considerations as to whether a particular proposal lies within Community competence at all both play great practical importance when drafting Community legislation.[26] Also in a recent case concerning the legality of the Tobacco Advertising Directive,[27] the Court of Justice has indicated a will to take legality seriously.[28]

In the context of judicial cooperation in civil matters the choice of Article 65 EC instead of Articles 94, 95, 293 or 308 EC (which could all arguably be used as legal bases for judicial cooperation in civil matters[29]) has some very important consequences:

(1) Article 65 is not applicable to all Member States. The United Kingdom and Ireland both have the right to opt in within three months after a legislative initiative has been presented and thus take part in the adoption procedure and the application of the legal act[30] and Denmark is altogether excluded from its

---

[25] Joseph Weiler, "The Transformation of Europe", (1991) 100 *Yale Law Journal*, p. 2403–2483 at p. 2445 f. However, in its Opinion 2/94 *Re the Accession of the Community to the European Human Rights Convention* [1996] ECR I-1759, the Court made clear that Article 308 does not provide the Community with limitless competence.

[26] See the testimony of professor, former director at the legal service of the Council, Alan Dashwood, "The Limits of European Community Powers", (1996) 21 *European Law Review*, p. 113–128 at p. 113.

[27] Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ L 213, 30.7.1998, p. 9.

[28] Case C-376/98 *Germany v. European Parliament and Council* [2000] ECR I-8419.

[29] See *supra* note 1 for examples of measures containing private international law rules based on other Treaty provisions.

[30] See Articles 1 and 3 of the 1997 Protocol on the position of the United Kingdom and Ireland.

application.[31]

(2) At present Article 65 (in conjunction with Article 67) means unanimity in the Council and the consultation procedure vis-à-vis the European Parliament. The same is the case for Articles 94 and 308, whereas Article 95 means qualified majority voting in the Council and the co-decision procedure vis-à-vis the European Parliament. Article 293 uses a traditional public international law decision-making procedure and does not formally require that the European Parliament even be consulted.

(3) At present Article 65 (and, it would appear, Article 293) gives a right of initiative to the Member States. Articles 94, 95 and 308 follow the normal procedure with the Commission as sole initiator.

(4) For legislative acts adopted on the basis of Article 65, a different procedure for preliminary rulings applies than the normal procedure prescribed in Article 234 (see Article 68). Only national courts of final instance may refer questions in cases pending before them. In addition, the Council, the Commission or a Member State may ask for a preliminary ruling, which has been described as a system of "cassation in the interest of the law" similar to that in French and Dutch law.[32] Under this system the Court of Justice is forced to give rulings on questions of interpretation in the abstract, without necessary connexion to a real case.[33] This is not the case for acts adopted on the basis of Articles 94, 95 and 308. Any convention based on Article 293 would require

---

[31] However, Denmark has the right to opt in to all of Title IV if it wishes to. See Article 7 of the 1997 Protocol on the Position of Denmark. Denmark was not opposed to the cooperation as such – only its communitarisation. Therefore preparations for parallel conventions between Denmark and the EC concerning the application of legislative acts adopted under Article 65 are being carried out. However, there are great technical difficulties which have caused some delay.

[32] Jürgen Basedow, "The Communitarization of the Conflict of Laws under the Treaty of Amsterdam", (2000) 37 *Common Market Law Review*, pp. 687–708 at 695; id., "European Conflict of Laws under the Treaty of Amsterdam", in Patrick J. Borchers & Joachim Zekoll (eds.), *International Conflict of Laws for the Third Millenium: Essays in Honor of Friedrich K. Juenger* (Ardsley, 2001), pp. 175–192 at p. 181 f.; Gerrit Betlem & Ewoud Hondius, "European Private Law after the Treaty of Amsterdam", (2001) 9 *European Review of Private Law*, pp. 3–20 at p. 16.

[33] Paul Beaumont, "European Court of Justice and Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters", (1999) 48 *International and Comparative Law Quarterly*, pp. 223–229 at p. 226 recalls of the similarity to Article 4 of the 1971 Protocol to the Brussels Convention.

specific provisions or an additional protocol giving the Court of Justice jurisdiction at all.[34]

(5) Finally, Articles 65, 95 and 308 can all act as bases for the adoption of any kind of EC legal act: regulations, directives, decisions etc. Article 94 can only result in directives. The result of Article 293 being used is a convention, which will have to be ratified in each of the Member States according to its constitutional provisions.

It is not difficult to imagine different actors in the legislative process preferring one legal basis over another depending on the situation. For instance, the choice of Article 95 rather than Article 65 as legal basis would allow Denmark to participate. The choice of Article 65 would allow a Member State the right of initiative where Articles 95 and 308 would not. Articles 65 and 308 would allow a unanimous Council to ignore the views of the European Parliament whereas Article 95 would not.

In the light of what has been said about legality in general and its importance, we should then proceed to look at the limits to Article 65.

[34] Such as the above mentioned Protocol concerning the interpretation by the Court of Justice of the convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters – signed in Luxembourg on 3 June 1971, consolidated version in OJ C 27, 26.1.1998, p. 28.

# 3 Limits to Cooperation in Civil Law Matters

## 3.1 Limits to Article 65 EC

We have now come to the question of what kind of measures can be adopted with Article 65 EC as their legal basis.[35] An analysis of Article 65 (see *supra* p. 7) shows that it contains three prerequisites:

1) the measure must lie in the field of judicial cooperation in civil matters;
2) the cooperation must have cross-border implications;
3) the measure must be necessary for the proper functioning of the internal market.

The three prerequisites are cumulative, i.e. they must all be fulfilled. The latter two were allegedly proposed by British Prime Minister Tony Blair during the negotiations between Heads of Governments in Amsterdam on 2 October 1997 to curtail the effects of Article 65.[36] This means that there are restraints to judicial cooperation in civil matters that were not there within the previous third pillar framework. It remains to be seen what effect these additional two prerequisites might have.

### 3.1.1 Judicial Cooperation in Civil Matters

Article 65 contains a list of areas which are to be considered as falling within the field of judicial cooperation in civil matters in lit. (a) – (c). The list speaks of: (a) cross-border service, taking of evidence and recognition and enforcement, (b) rules on jurisdiction of courts and applicable law, (c) civil procedure. The question is whether that list is exclusive or only exemplifying. If the former is the case, it would indicate that harmonisation of the

[35] Strictly speaking the legal basis would be Article 61 (c). But since that provision is given its content in Article 65 we will speak of that Article for the sake of simplicity.
[36] Gerrit Betlem & Ewoud Hondius, *supra* note 32, p. 10.

substantive civil law rules of the Member States would have to be undertaken on another legal basis.

The first method of interpretation would be a straightforward text analysis. As always when dealing with EU law, such an analysis is complicated by the fact that the Treaties come in 11 different language versions, all of which have equal standing. The different language versions give different answers to our question.[37] Clearest of all for exemplifying interpretation is the French version, which says that judicial cooperation in civil matters: "*visent entre autres à*" followed by the matters mentioned in lit. a) – c). The Spanish, Italian, English and German versions: "*incluirán*", "*includono*", "shall include" and "*shließen ein*" lean towards the exemplifying although less clear than the French version. The Danish, Dutch, Greek and Swedish versions: "*omfatter*", "*omvatten*", "*perilamvanoun*"[38] and "*skall omfatta*"[39] lean toward an exhaustive list but are also not clear. Quite clearly in favour of an exhaustive list are Portuguese and Finnish: "*terão por objectivo, nomeadamente*"[40] and "*ovat*"[41]. The result of comparative language analysis is thus a clear split and not very fruitful.

As in our case, a literal interpretation of EC law is often of limited use. Many provisions have an open-textured nature, in part because they are often the result of late political compromises between Member States. The European Court of Justice has in cases of disparities between the different language versions, rather than following the meaning indicated by the majority of texts, shown itself willing to proceed to other methods of interpretation.[42] Even if the Court eventually will deliver an interpretation it is of course a problem pertaining to the democratic legitimacy of EC law if the various language

---

[37] I would like to thank my wife Ann Hellner who helped me with the Spanish, Italian and Portuguese versions, Associate Professor Athanasia Spilopolou-Åkermark who helped me with Greek and Professor Maarit Jänterä-Jareborg who helped me with Finnish.
[38] In Greek letters: "περιλαμβάνουν".
[39] The Swedish government seems to have been of the opinion that the list was exhaustive. See prop. 1997/98:58, p. 66.
[40] Translates into "shall have as their objective the following".
[41] Third person plural of the verb to be "olla".
[42] See cases 29/69 *Stauder v. Ulm* [1969] ECR 419 and 150/80 *Elefanten Schuh v. Jacqmain* [1981] ECR 1671.

versions differ to the extent that fundamental questions of interpretation are left open to the courts.

If we go back to the drafting history of the provision we find that earlier drafts, which indicated an exhaustive character of the list, were rejected in favour of the present version.[43] This, in conjunction with the doctrine of implied powers, would support the interpretation that the list is exemplifying. One practical consequence is that measures mainly dealing with jurisdiction, recognition and enforcement or conflict of laws may contain elements of harmonising substantial civil law without the Community legislator having to resort to another legal basis. This also follows from a reading of Article 67(5) second indent as it will read after the coming into force of the Treaty of Nice.[44] It provides for a shift to the co-decision procedure in the case of "measures provided for in Article 65 with the exception of aspects relating to family law" where unanimity in the Council and the consultation procedure vis-à-vis the European Parliament will prevail. The French version is even clearer and speaks of "*des aspects touchant le droit de la famille*". No widening of the scope of Article 65 was intended and we see that certain elements of harmonisation "touching" upon substantial civil law are foreseen.[45]

An example of debate of the scope of Article 65 is in connexion with the French proposal of 3 July 2000 for a "Brussels II bis" Regulation on the mutual enforcement of judgments on rights of access to children.[46] The proposed rules on the right to refuse enforcement of a judgment on right of access from another Member State (risk to the child's health etc.), were by some believed to form part of the substantial family law of the Member States and thus

---

[43] See Christian Kohler, "Interrogations sur les sources du droit international privé européen après le traité d'Amsterdam", (1999) 88 *Revue Critique de Droit International Privé*, pp. 1–30 at pp. 9–14 for the genesis of Article 65.

[44] Amendment made by Article 2(4) of the Treaty of Nice.

[45] This is a case where the Swedish negotiators in Nice may have scored an own goal. The provision was proposed by the Swedish delegation in order to preserve unanimity for sensitive areas such as that covered by the Brussels II regulation and other future instruments on international family law. However, the wording that came out is not reduced to private international law but appears to cover substantial family law as well.

[46] Initiative of the French Republic with a view to adopting a Council Regulation on the mutual enforcement of judgments on rights of access to children, OJ C 234, 15.8.2000, p. 7.

outside the scope of Article 65. Furthermore, decisions on the return of the child were held not to be dealing with the enforcement of judgments on access or parental responsibility but rather to be independent judgments to put an end to the wrongful retention of a child. Therefore they would not fall under lit. (a) third indent (recognition and enforcement of decisions). However, because of the close link to the provisions on the enforceability of judgments on rights of access, they were held to fall within the scope of Article 65.[47]

It is submitted that the fact that judicial cooperation in civil matters might go beyond areas of cooperation stated in Article 65 and e.g. entail some harmonisation of substantive civil law, does not mean that the provision can be used for a full scale harmonisation of large areas of the substantive civil law of the Member States or even go far beyond the objectives stated in the Article. There must be a close link to the objectives described in (a) – (c) or the wording of the law would be bereft of any value, which is certainly not what was intended. However, it must be admitted that in the area of civil procedure, given the wide wording of lit. (c), the potential for harmonisation could be quite substantial.[48]

### 3.1.2 Cross-border Implications

In relation to the objectives described in lit. (a) and (b), the prerequisite that the measure to be taken must be concerned with civil matters having cross-border implications probably has no independent value. The areas described are by their very nature of a cross-border character. However, the limitation could have a significant impact on the harmonisation of rules of civil procedure in the Member States.[49]

---

[47] Opinion of the Council Legal Service 1 December 2000, 13772/00, JUR 393/JUSTCIV 132.

[48] The conclusion of Messrs. Betlem & Hondius, *supra* note 32, at p. 20 is that "[f]or specific legal fields such as private international law and the law of civil procedure, possibly supplemented by some items of substantive [private] law, the Treaty of Amsterdam is an excellent operating base".

[49] See *supra* note 39, p. 66. Jürgen Basedow (2000), *supra* note 32, p. 188; id. (2001), *supra* note 32, 702 draws the conclusion that Article 65 because of the cross-border limitation could not serve as a basis for harmonisation of substantive private law applicable to both international and internal fact situations.

### 3.1.3 Necessity for the Proper Functioning of the Internal Market

Several Treaty Articles concerned with the harmonisation or approximation of laws other than Article 65 have prerequisites pertaining to the necessity of the measure and/or its effect on the common or internal market. If we restrict the discussion to other Treaty Articles that are most likely to serve as a basis for harmonisation of civil law, private international law or the law of international civil procedure, we find that:

- Article 94 speaks of "directives for the approximation of such laws […] of the Member States as directly affects the establishment or functioning of the common market",
- Article 95 regulates the adoption of "measures for the approximation […] which have as their object the establishment and functioning of the internal market", and
- Article 308 requires that "action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community".

We find that Article 65 is related to the internal market whereas Articles 94 and 308 relate to the common market and we will discuss this difference later. Suffice it to say at this stage that the internal market is a narrower concept than that of the common market. It could be said that the prerequisite in Article 65 "necessary for the proper functioning of the internal market" sets the hurdle higher than any of the other provisions. E.g. Article 95 does not speak of a "proper" functioning of the internal market only of the "establishment and functioning". Articles 94 and 308 only require that the measure in question in some way works toward establishing or strengthening the common market.

Certainly, the Council has a wide level of discretion in ascertaining

whether a measure is necessary for the proper functioning of the internal market. E.g. in the case of the Brussels II Regulation[50] the justification for Community competence was that recognition of divorces and decisions on parental responsibility were necessary for the free movement of persons. I.e. a person might be reluctant to move to another Member State and benefit from the free movement of persons if his or her divorce or right to custody of a child is not recognised in the new state of residence.[51]

Against this background we arrive at an alternative understanding of "proper". The Brussels II regulation probably has a role to play for the achievement of the free movement of persons but it is undoubtedly a minor one compared with cornerstone legislation such as Regulation 1612/68 on the freedom of movement for workers.[52] It could be said that the internal market is already functioning when it comes to the free movement of workers and that the role of judicial cooperation in civil matters is that of "laying the final touch" to achieve a "proper functioning". This understanding is probably best expressed by the German version of Article 65, which speaks of "das *reibungslose* [my italics] Funktionieren des Binnenmarkts". It is submitted that this interpretation goes best with what the role of judicial cooperation in civil matters can realistically be expected to be in the creation of an internal market. The practical importance of the difference should at any rate not be exaggerated. E.g. in the Danish version it is entirely lost.

However, the test of the necessity of a measure as such (irrespective of how "proper" should be interpreted) cannot be reduced to a formality without any real meaning. Even if the hurdle is not to be set too high, considerations of whether the Community should act must be taken seriously. In the words of the Court itself[53]:

---

[50] *Supra* note 13.
[51] Cf. recital 4 of the regulation.
[52] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257, 19.10.1968, p. 2.
[53] Case C-376/98, *supra* note 28, para. 84.

*[A] measure adopted on the basis of Article 100a of the Treaty [now Article 95 EC] must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article 100a as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory.*

Another important question in the context of this prerequisite is the meaning of the "internal market".[54] The internal market forms part of the wider concept of the common market and is quite distinct from it.[55] The internal market is defined in Article 14 EC as "an area in which the free movement of goods, persons, services and capital is ensured", i.e. the so called four freedoms.[56] The question is whether a measure to be taken by the Community on the basis of Article 65 must always be linked to one of these four freedoms or whether the scope of the internal market has been expanded beyond the four traditional freedoms.

Recital 2 of the Brussels II Regulation states that "[t]he proper functioning of the internal market entails the need to improve and simplify the free movement of judgments". This would imply that the concept of the internal market is widening so as also to encompass a fifth freedom, i.e. that of judgments. However, it is submitted that the free movement of judgments in itself does not constitute a legitimate reason for a Community measure. A

---

[54] According to some commentators, because of this limitation, private international law rules on family law would fall outside the scope of Article 65. See Paul Beaumont, *supra* note 33, at p. 227 and Haimo Schack, "Die EG-Kommission auf den Holzweg von Amsterdam", (1999) 7 *Zeitschrift für europäisches Privatrecht* , pp. 805–808 at p. 807. Subsequent legislative practice and the fact that the Treaty of Nice amends Article 67(5) EC to explicitly mention family law has now proven them wrong.

[55] See Paul Joan George Kapteyn & Pieter VerLoren van Themaat, *Introduction to the Law of the European Communities*, 3rd ed. translated from Dutch, edited and revised by Laurence W. Gormley (London, 1998), p. 575.

[56] See also Article 3(1)(c) according to which the internal market is "characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital".

measure can only be justified if the free movement of judgments can be justified as a means toward the end of facilitating one of the four freedoms.

It has also been submitted that judicial cooperation in civil matters, due to its systematic position in the EC Treaty in Title IV on "Visas, asylum, immigration and other policies related to free movement of persons", should be limited to measures with the purpose of facilitating the free movement of persons.[57] We will return to this question later when we discuss the relation between Article 65 and other possible legal bases.

## 3.2 Relation to Certain other Legal Bases

### 3.2.1 Double Legal Basis

In certain cases it is necessary for a measure to have more than one legal basis in the EC Treaty. This is the case if the measure in question has a dual purpose and both purposes are (more or less) equally important.[58] In the *Erasmus* case[59] the Commission challenged the Erasmus scheme for the mobility of students adopted by the Council.[60] The ground for the Commission's challenge was that the Council had chosen to base the decision on both Articles 235 (now Art. 308 EC) and 128 (now deleted) of the EEC Treaty whereas the Commission's proposal was based on Article 128 alone. The Court ruled in favour of the Council since the Erasmus programme also covered aspects of research, which fell outside the scope of Article 128 (vocational training), for which at the time before the coming into force of the Single European Act there was no other legal basis than Article 235.

One example of discussion of a double legal basis in connexion with Title IV is the Commission's proposal for a Directive on the posting of third country

[57] Jürgen Basedow (2000), *supra* note 32, p. 697 f.; id. (2001), *supra* note 32, p. 184
[58] See e.g. case C-360/93 *European Parliament v. Council* [1996] ECR I-1195.
[59] Case 242/87 *Commission v. Council* [1989] ECR 1425.
[60] Council Decision 87/327/EEC of 15 June 1987 adopting the European Community Action Scheme for the Mobility of University Students (Erasmus), OJ 1987 L 166, 25.6.1987, p. 20.

national workers.[61] There was discussion of the possibility to base the Directive on Articles 62 and 63 as well as Articles 47 and 55 EC. However, due to the special status of Denmark on the one hand and the United Kingdom and Ireland on the other, this was deemed impossible because of the differences in the territorial fields of application of the Articles.

### 3.2.2 Relation to Article 95 EC

Judicial cooperation in civil matters is rather the odd bird in relation to the name given to Title IV – the connexion between civil law matters and the free movement of persons is not immediately obvious and the formula constantly reiterated with minor variations in recitals to regulations adopted on the basis of Article 65[62] is that "the European Union has set itself the objective of maintaining and developing the European Union as an area of freedom, security and justice in which the free movement of persons is ensured. To establish such an area the Community is to adopt [insert regulation in question]".[63]

This latter denotation would probably have been a more accurate, but admittedly vaguer, description of the content of the Title than the present one. It can be found in the first paragraph of Article 61, according to which the Community shall establish an "area of freedom, security and justice". It is presently the title of choice and is used instead of the "real" title in the *Directory of Community Legislation in Force* in its analytical structure, the

[61] COM(1999) 3 final: Proposal for a Directive of the European Parliament and the Council on the posting of workers who are third-country nationals for the provision of cross-border services, OJ C 67, 10.3.1999, p. 12.
[62] Formally the legal basis is considered to be Articles 61 (c) and 67(1) – the latter regulating the decision making procedure.
[63] Cfr. recital 1 of *inter alia* Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, pp. 23 (the "Brussels I" Regulation); Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160, 30.6.2000, pp. 19–36 and Council Regulation (EC) No 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, OJ L 174, 27.6.2001, pp. 1–4.

Tampere Conclusions and the Vienna Action Plan.[64]

The historical explanation for the connexion to the free movement of persons is to be found in the origins of Title IV. Before the coming into force of the Amsterdam Treaty in 1999, the rules on cooperation in civil law matters were to be found in the EU Treaty under the third pillar (then Title VI) on cooperation in the field of justice and home affairs, which at that time was considered somewhat in terms of "flanking measures" in order to achieve the free movement of persons.[65]

The fact that the connexion to the free movement of persons was carried over into the EC Treaty has led some commentators to argue that Article 65 would be the proper legal basis for private international law rules connected to the free movement of persons, such as family law, company law and the law of succession whereas Article 95 would be the proper legal basis for measures with greater impact on the free movement of goods and services, such as private international law rules for contracts and torts etc.[66]

Contrary to this view, it is submitted that the connexion to the free movement of persons should not be exaggerated. Firstly, it would be contrary to the general trend in Community law to equalize the four freedoms and, where possible, to apply the same standards irrespective of which freedom is applicable. Secondly, it would run contrary to legislative practice, under which i.e. the Brussels I Regulation was adopted on the basis of Article 65.[67] Thirdly, the connexion to the free movement of persons is only in the Title and is nowhere to be found in the text itself. The title also speaks of "policies *related* [my italics] to the free movement of persons", an expression wide enough to allow for measures chiefly aiming at ensuring i.e. the free movement of goods.

It is submitted that Article 65 should be considered as *lex specialis* for

---

[64] See *supra* notes 10 and 11.
[65] Ex Article K.1 of the EU Treaty read: "For the purposes of achieving the objectives of the Union, in particular the free movement of persons, […], Member States shall regard the following areas as matters of common interest: [---] 6. judicial cooperation in civil matters".
[66] Miguel Asenso, "La evolución del derecho internacional privado comunitario en el Tratado de Amsterdam", (1998) 50 *Revista Española de Derecho Internacional*, pp. 373–376 at p. 374; Jürgen Basedow (2000), *supra* note 32 at p. 184; id. (2001), *supra* note 32 at p. 697 f.
[67] *Supra* note 15.

the adoption of measures concerned with private international law and international civil procedure. There will unquestionably be borderline cases, in which there are strong elements of harmonisation of substantive civil law. Since a double legal basis is impossible when it comes to Article 65, it could be argued that such borderline cases should be avoided and that measures containing strong elements of private international law and/or international civil procedure should be divided into two separate instruments each covering the two different aspects and each adopted on its own legal basis. Another possible procedure is to give precedence to Article 95 as the more "democratic" Article, since it provides for a more effective participation of the European Parliament.[68]

### 3.2.3 Relation to Article 293 EC

In the process of negotiating the Treaty of Amsterdam, both the Commission and the Dutch presidency proposed that the fourth indent of Article 293 EC (then Art. 220) be deleted.[69] That indent, which calls upon the Member States to enter into agreements with each other for the purpose of simplifying the "recognition and enforcement of judgments of courts or tribunals and of arbitration awards", was perceived to be redundant after the coming into force of Article 65 EC.

However, the field of application for Article 293 EC is not restricted to judicial cooperation in civil law matters. The fourth indent of that Article could still have a role to play in enacting conventions on the mutual recognition of judgments in tax and administrative matters.[70] The role of Article 293 EC in the

---

[68] See case C-300/89 *Commission v. Council* [1991] ECR I-2867. Advocated by Jürgen Basedow (2000), *supra* note 32, p. 184 f.; id. (2001), *supra* note 32, p. 698.

[69] See Christian Kohler, *supra* note 43, with document references on pp. 11 and 14. There was also a Finnish proposal to insert judicial cooperation in civil matters as an Article 220a, directly after Article 220.

[70] Jürgen Basedow (2000), *supra* note 32, p. 186; id. (2001), *supra* note 32, p. 700 also thinks that the provision could have a role to play in the mutual recognition of judgments in criminal matters. However, it would appear that work in that direction is being undertaken on the basis of Article 31 EU rather than Article 293 EC. See Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12, 15.1.2001, p. 10.

area of judicial cooperation in civil matters would only be a theoretical one. One could say that proposed measures that do not meet the onus under Article 65 of proving the necessity for the proper functioning of the internal market, could instead be adopted on the basis of Article 293. However, in practice, if not in theory, in the field of judicial cooperation in civil matters Article 293 has become obsolete.[71]

[71] Jürgen Basedow (2000), *supra* note 32, p. 188; id. (2001), *supra* note 32, p. 701 does not even recognize the theoretical opening for an application of Article 293.