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Article 81 [Judicial Cooperation in Civil Matters]
(ex-Article 65 EC)

1. The Union shall develop judicial cooperation in civil matters having cross-border implications,[1-9] based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases.[10-19] Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.[20-27]

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure,[28-29] shall adopt measures, particularly when necessary for the proper functioning of the internal market,[30-31] aimed at ensuring:

(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;[32]
(b) the cross-border service of judicial and extrajudicial documents;[33]
(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;[34]
(d) cooperation in the taking of evidence;[35]
(e) effective access to justice;[36]
(f) the 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;[37]
(g) the development of alternative methods of dispute settlement;[38]
(h) support for the training of the judiciary and judicial staff.[39]

3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.[40]

The Council, on a proposal from the Commission, may adopt a 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. The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision.[41]

Contents

1 Overview

1 The Preamble of the TEU declares that the establishment of an Area of Freedom, Security and Justice (AFSJ) will facilitate the free movement of persons while ensuring the safety and security of people in the Union. Such a solemn statement is to be achieved in accordance with the provisions of the TFEU. Article 67 TFEU clearly identifies a three-prong area where distinct policies regarding border checks, asylum and immigration, criminal matters and civil matters might be at stake. In contrast to the other two, judicial cooperation in civil matters is dealt with in one and only provision, Article 81 TFEU, that crystallises five decades of collaboration among Member States. Throughout these years the legal basis for cooperation in civil matters has evolved, the legislative procedure to adopt these texts has been modified and the role given to the ECJ/CJEU has also shifted according to the policies pursued. In other terms, Article 81 TFEU may not be wholly understood unless we explain the timeline that led to its present wording.

2 In this vein, the deepest roots of Article 81 TFEU may be traced back to **Article 220 EEC**, according to which Member States might secure for the benefit of their nationals the simplification of the formalities governing the reciprocal recognition and enforcement of judgments of courts or arbitration awards. As a result, the Brussels Convention on jurisdiction and recognition of decisions in civil and commercial matters saw the light in 1968.[1] The Preamble of the Convention declared that introducing common rules on jurisdiction, recognition and enforcement of judgments and other documents was *necessary to the purpose of strengthening the legal protection of the persons established in the Community* (emphasis added). It soon became clear that the free movement of judgments could amount to a fifth 'freedom',[2]

[1] 1968 Brussels Convention *on jurisdiction and the enforcement of judgments in civil and commercial matters*, O.J. L 299/32 (1972); *Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, O.J. C 59 (1979).
[2] Kerameus 2007, para 7.

central to the building process of the internal market. Although this Convention was not an EEC piece of legislation but an international agreement signed by Member States, a Protocol conferred the ECJ powers to interpret its provisions in 1971.[3] The ECJ issued more than a hundred judgments on the interpretation of the Brussels Convention, that soon became part and parcel of the *acquis communautaire* that new Member States should accept while joining the Community.[4] So successful was the convention that in order to achieve similar results within the EFTA, the EC Member States signed the so-called parallel Lugano Convention with the States belonging to the EFTA in 1988.[5] The international co-operation in civil matters among Member States resulted in another international agreement, namely the Rome Convention 1980 on the applicable law to civil matters, a sort of spin-off of the Brussels Convention, which aimed at continuing 'in the field of private international law the work of unification of law which has already been done within the Community'.[6] The ECJ was also conferred powers to interpret its provisions by a specific Protocol.[7]

3 International co-operation was partially 'communitarised' with the entry into force of the 1992 TEU-Maastricht. While Article 220 EEC remained in force (and was the legal basis in 1995 for a new convention on insolvency proceedings),[8] the new **Title VI of the TEU-Maastricht** introduced a '**third pillar**' on cooperation in matters of justice and home affairs. This was an intergovernmental pillar in nature; therefore the European Parliament had a limited consultation role and measures adopted within it required the unanimity of the Council of Ministers. According to Article K.1(6) TEU-Maastricht, "*For the purposes of achieving the objectives of the Union, in particular the free movement of persons*, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest: […] (6) judicial cooperation in civil matters; […]" (emphasis added). In light of this provision, and without prejudice of Article 220 EEC, Article K.3(2c) TEU-Maastricht empowered the Council to negotiate international agreements upon the initiative of a Member State or the Commission. This Article also foresaw the possibility that Member States might confer the Court of Justice powers to interpret those texts. On this legal basis two further conventions were adopted, although they never entered into force: the 1997 Convention on the service of documents and the 1998 Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters.[9]

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[3] Protocol of 3 June 1971 *on 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*, O.J. C 189/25 (1990).

[4] Denmark, the United Kingdom and Ireland acceded the Convention on 9 October 1978 (Report: O.J. C 59 (1979)), Greece on 25 October 1982 (Report: O.J. C 298 (1986)), Spain and Portugal on 26 May 1989 (Report: O.J. C 189 (1990)) and finally, Austria, Finland and Sweden on 29 November 1996.

[5] Lugano Convention of 16 September 1988 *on jurisdiction and the enforcement of judgments in civil and commercial matters*, O.J. L 319/9 (1988).

[6] Preamble of the 1980 Rome Convention *on the law applicable to contractual obligations*, O.J. C 27/34 (1998), consolidated version; Report *on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I*, O.J. C 282/1 (1980).

[7] First Protocol *on the interpretation of the 1980 Convention by the Court of Justice* (O.J. C 27/47 (1998), consolidated version) and Second Protocol *conferring on the Court of Justice powers to interpret the 1980 Convention* (O.J. C 27/52 (1998) consolidated version).

[8] The Convention on insolvency proceedings of 23 November 1995 never entered into force.

[9] Convention *on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters of 26 May 1997 –and its Protocol on the interpretation of the Convention by the ECJ* (O.J. C 261/2 (1997)); *Convention on jurisdiction and the enforcement of*

4 The final turn of this process of 'communitarisation' was achieved in 1997 with the **Treaty of Amsterdam**, where cooperation in civil matters was definitely assumed by the European Community. The third pillar was abandoned and the competence was transferred to the EU under the terms of Articles 61(c) and 65 EC-Amsterdam. These provisions set forth the competence of the Council to adopt "measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 EC-Amsterdam and *in so far as necessary for the proper functioning of the internal market*" (emphasis added). These measures would 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 conflict of laws and jurisdiction; (c) eliminating obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules of civil procedure applicable in the Member States.

5 A second and relevant shift deals with the competence of the ECJ to interpret the texts resulting from Articles 65 et seqq. EC-Amsterdam. As these texts were Community pieces of legislation, there was no need to endow the ECJ with the power to interpret them. However, according to Article 68 EC-Amsterdam, a request for a preliminary ruling could be raised before the ECJ where "a question on the interpretation of this Title or on the validity or interpretation of acts of the institutions of the Community based on this Title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law." Therefore, only a restricted number of courts had the option to raise a preliminary question to the ECJ and the possibility of the ECJ to remain an active actor in this integration process was somewhat curtailed.

6 The introduction of this new legal basis resulted in two main outcomes: on the one hand, the former conventions were all 'communitarised' and several EC Regulations saw the light in matters of insolvency proceedings;[10] on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility for children of both spouses;[11] on the service of documents;[12] and on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[13] On the other hand, and in order to achieve the aims set forth in Article 65 EC-Amsterdam, new texts were put into the pipeline following the landmarks which were pointed out by the action plans in civil cooperation resulting from the **Tampere European Council** of 1999[14] and the **Hague Programme 2004**.[15]

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judgments in matrimonial matters of 28 May 1998 –and its corresponding Protocol on the interpretation of the Convention by the ECJ (O.J. C 221/2 (1998)).

[10] Council Regulation (EC) No 1346/2000 *on insolvency proceedings*, O.J. L 160/1 (2000).

[11] Council Regulation (EC) No 1347/2000 *on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility for children of both spouses*, O.J. L 160/19 (2000).

[12] Council Regulation (EC) No 1348/2000 *on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters*, O.J. L 160/37 (2000).

[13] Council Regulation (EC) No 44/2001 *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, O.J. L 12/1 (2001).

[14] Tampere European Council of 15 and 16 October 1999, Presidency conclusions. Available at http://www.europarl.europa.eu/summits/tam_en.htm.

[15] European Council, *The Hague Programme: Strengthening freedom, security and justice in the European Union*, (2005/C 53/01) O.J. C 53/1 (2005). This programme was followed some months later by the "Action plan implementing the Hague Programme on Strengthening freedom, security and

All this resulted in Regulations on a European small claims procedure;[16] on the law applicable to non-contractual obligations[17] and on the law applicable to contractual obligations.[18]

7 The two following benchmarks in the process of establishing European cooperation in civil matters did not provide significant changes to the framework that the Treaty of Amsterdam had set forth regarding European private international law. The **Treaty of Nice 2001** had a minor impact in the construction of the AFSJ although it opened the mechanisms of co-decision (in accordance to the procedure set forth in Article 251 EC-Nice (→Article 294 TFEU) to this AFSJ. However, measures related to family law still required unanimity and consultation. As for the (failed) **2004 Constitution for Europe**, Section 3 of Chapter IV of Title III of Part III introduced Article III-269, which is almost identical to Article 65 EC-Amsterdam. No changes were made in relation to the competence of the ECJ to interpret the texts resulting from Articles 65 et seqq. EC-Amsterdam, although it should be noted that the introduction in 2008 of the **urgent proceedings** (PPU) before the ECJ –as set forth in the Hague Programme in relation to preliminary rulings concerning the AFSJ- was particularly fruitful for the interpretation of certain civil matters (such as parental responsibility and child abduction) covered by Title IV of the TEC.

8 The **Treaty of Lisbon 2007** has not significantly altered this frame of judicial cooperation in civil matters, as co-decision remains the ordinary legislative procedure, although it has widened its scope of application. Most interestingly, the Treaty retrieves a well-known principle in Community law (in relation to the free movement of goods), namely the **principle of mutual recognition** –and certainly parallelisms and differences could be found-[19] and explicitly endorses it as a characteristic and specific feature of the process of integration within the AFSJ. The specific design of this cooperation is drafted in the Stockholm Programme 2009.[20] Furthermore, it should be noted that under the Treaty of Lisbon, all matters related to the AFSJ fall under the jurisdiction of the Court of Justice. Hence, preliminary references will be available to any national court, thus restoring the possibility for the CJEU of having a greater say in these matters and facilitating better access to justice for individuals.

2 Scope of the EU Competence in Civil Law Matters

9 Article 81.1 TFEU sets out the key features that frame the scope of the EU competence in civil law matters: The Union must be dealing with **judicial cooperation in civil matters that have cross-border implications**. There is no doubt that the precedents of Article 81 TFEU have a say on the reference to judicial cooperation. Article 220 EEC and the Brussels Convention 1968 were mainly focused on this kind of cooperation. However, the broadening scope of matters covered by subsequent Articles has raised questions as to the centrality of legal proceedings in this definition. This concern was already present during the works of Working Group X on freedom, security and justice in the European convention prior to the TCE[21], but

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justice in the European Union" where the specific measures to be adopted were listed. Available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52005XG0812%2801%29 .

[16] Regulation (EC) No 861/2007 *establishing a European small claims procedure*, O.J. L 199/1 (2007).

[17] Regulation (EC) No 864/2007 *on the law applicable to non-contractual obligations (Rome II)*, O.J. L 199/40 (2007).

[18] Regulation (EC) No 593/2008 *on the law applicable to contractual obligations (Rome I)*, O.J. L 177/6 (2008).

[19] Lenaerts 2015, p. 3-4; Storskrubb 2016, p. 19; Brouwer 2016, p. 60.

[20] Available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52010DC0171.

[21] Rapport Borrás du Groupe de Travail X: *"Liberté, securité et justice"*, point II.

nonetheless the reference to judicial cooperation has survived throughout these years. The ECJ in the *Roda Golf* judgment clarified that the judicial cooperation in Article 65 EC-Amsterdam cannot be limited to legal proceedings alone. Said cooperation may manifest itself both in the context of and in the absence of legal proceedings, if that cooperation has cross-border implications and is necessary for the proper functioning of the internal market.[22] One may wonder whether once the link to the internal market is softened in Article 81 TFEU, there might be even a less relevant link to legal proceedings. Although it has been asserted that in order to take due account of the legal basis of the Treaty, **some sort of judicial involvement in the relevant proceedings might still be a requirement**,[23] this involvement might be rather weak in some of the EU's most recent Regulations. The same inconsistency may be noted as well in relation to the 'cross-border' implications of the cooperation. In strict terms, this would demand that **cooperation measures are set where disputes have elements linked to more than one Member State**. Although the Commission sometimes focuses more on the instrumental character of the legislation issued under Article 65 EC-Amsterdam/81 TFEU for the functioning of the internal market (→ para 30) –and this would mean that the cross-border element may not be necessarily present, in particular when focusing on that element would bring about discriminatory effects-[24], Member States seem to endorse a more restrictive approach and adhere to the cross-border limitation.[25]

3 The Principle of Mutual Recognition

3.1 The Constitutional Nature of the Principle

10 The construction of the AFSJ relies on cooperation rather than integration. In this context, other tools are needed in order to achieve those cooperation goals.[26] This is accomplished by the principle of mutual recognition, which is the cornerstone of the entire European system of recognition of decisions in civil matters as well. This has been so since the **Tampere European Council** in 1999 (→ para 6), where it has been enshrined as the basic principle in civil and criminal cooperation (conclusion 33). One year later the Council issued its 'Programme of measures for implementation of the principle of mutual recognition of decisions in civil and criminal matters'.[27] In 2004, Article III-269 TCE acknowledged the **constitutional nature of the principle of mutual recognition**. Soon thereafter, the European Council at its Hague meeting issued 'The Hague Programme: Strengthening freedom, security and justice in the European Union'[28] which reflected the goals as expressed in the latter Treaty. In light of said benchmarks, we can say that although the principle of mutual recognition has only been officially enshrined by Article 81 TFEU, its constitutional nature can be traced back to 2004.

11 As The Hague Programme put it, **mutual recognition relies on mutual trust**, mutual understanding and confidence building.[29] The ECJ has also acknowledged the straight link between mutual recognition and mutual trust in the area of cooperation in civil

[22] C-14/08, *Roda Golf & Beach Resort* (ECJ 25 June 2009) para 56.
[23] Peers 2016, p. 348.
[24] Peers 2016, p. 349.
[25] Storskrubb 2011, p. 304.
[26] Monar 2010, pp. 573-574.
[27] Available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32001Y0115(01).
[28] European Council, *The Hague Programme: Strengthening freedom, security and justice in the European Union*, (2005/C 53/01) O.J. C 53/1 (2005).
[29] European Council, *The Hague Programme: Strengthening freedom, security and justice in the European Union*, (2005/C 53/01) O.J. C 53/1 (2005), point 3.

matters.[30] This connection demands further reflection on the meaning of mutual trust, which is not defined in the Treaties but is certainly and closely related to the protection of fundamental rights. In the words of the Hague Programme, mutual recognition of decisions is an effective means of protecting *citizens*' rights –it is interesting to note the evolution from conclusion 33 of the Tampere Council, which underlines the impact of mutual recognition in the protection of *individual* rights- and securing the enforcement of such rights across European borders.[31] The **close link between mutual trust and protection of fundamental rights** was underlined by the ECJ in case *N.S.*[32] and thereafter in Opinion 2/13. As the Opinion noted "the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the AFSJ, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law."[33] This led the Court to infer two negative obligations for Member States: on the one hand, they may not demand a higher level of national protection of fundamental rights from another Member State than the level provided by EU law. On the other hand, Member States –save in exceptional cases- are precluded from checking whether other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.[34] This last safeguard puts the spot precisely on the limits to mutual trust, since its constitutional nature and the deference it demands from Member States cannot lead to a situation which is detrimental to procedural rights. This concern refers directly to Article 67.1 TFEU (→Article 67.1 TFEU), which requires the implementation of the AFSJ in relation to fundamental rights and the different legal systems and traditions of the Member States. In other terms, mutual trust could represent the EU's recognition of its own diversity and complexity, and that results in pursuing cooperation rather than sheer integration.[35] Accordingly, mutual trust should not be confused with blind trust, and the principle of mutual recognition should be applied in compliance with the principles of proportionality and subsidiarity, while respecting the margin of discretion left by the EU legislator to national authorities, and taking into account national and European public-policy considerations.[36]

3.2 Giving Shape to the Principle of Mutual Recognition

12 The question that arises is the extent of mutual recognition pursuant to Article 81 TFEU. The principle of mutual recognition appears as the final step in a process of increasing trust among Member States. Thus, mutual recognition could be an alternative to the harmonisation of (conflict) rules, a path that has not been trodden by the EU legislature.[37] On the contrary, emphasis has been put on mutual recognition of

[30] In Cases C-256/09, *Bianca Purrucker v Guillermo Vallés Pérez* (ECJ 17 July 2010) para 70-74; C-403/09 PPU, *Jasna Detiček v Maurizio Sgueglia* (ECJ 23 December 2009) para 45; C-4/14, *Christophe Bohez v Ingrid Wiertz* (ECJ 9 September 2015) para 43-44; or C-428/15, *Child and Family Agency v J. D.* (ECJ 27 October 2016) para 57.
[31] European Council, *The Hague Programme: Strengthening freedom, security and justice in the European Union*, (2005/C 53/01) O.J. C 53/1 (2005), point 3.4.2.
[32] Joined Cases C-411/10 and C-493/10, *N.S.* (ECJ 21 December 2011) para 83.
[33] Opinion 2/13, *accession to the ECHR* (ECJ 18 December 2014) para 191.
[34] Opinion 2/13, *accession to the ECHR* (ECJ 18 December 2014) para 192.
[35] Gerard 2016, p. 77.
[36] Lenaerts 2015, p. 29
[37] Meeusen, 2019, pp. 662-662.

decisions. Accordingly, its ultimate result would be to erase any objection to the decisions of other Member States having effects in another Member State, so that those decisions would be directly enforceable without any intermediate procedure in the latter State. This is a long process, which has been developing since its first stages where a decision issued by a court of a Member State could be enforced in another Member State after the latter had agreed to recognise its effects by means of an increasingly simplified and facilitated *exequatur*. However, it may also entail further consequences, as identified by the CJEU. Thus, mutual recognition would demand an autonomous interpretation of the concepts enshrined in Regulation (EC) No 2201/2003.[38] Specifically, that the court granting the decision indicates the basis of its jurisdiction –in a way which is clear to the court where recognition of the decision is sought- and that the requested State does not review the correctness of such basis.[39] Furthermore, that no substantive control of the decision is available in the State where recognition is sought,[40] or that no control of the substantive consequences that a transfer of the case to a better placed court –in terms of Article 15 Regulation (EC) No 2201/2003- would have in order to accept this *forum conveniens* request.[41] As said, the above is premised on the high degree of trust reached among Member States. Therefore, **further controls do not need to be established because it is trusted that the court granting the decision has respected the procedural safeguards that might be required elsewhere in the EU**. This has also been explicitly endorsed by the CJEU when referring to mutual trust in order to consolidate the aims pursued in Regulation (EC) No 44/2001, which expressly incorporates it into recitals 16 and 17 as a basic premise for the automatic recognition and facilitated enforcement of Member States' judgments.[42] Mutual trust relies on the existence of guarantees provided by the Member State of origin of the judgment, whereby internal mechanisms to ensure judicial fairness and compliance with EU law are provided.

13 However, **this latter point has been challenged through the entire process of Europeanization of judicial cooperation in civil matters**, particularly so when it comes to the safeguarding of fundamental (procedural) rights as protected in the requested Member State. In other terms, Member States may consider that the procedural guarantees in origin were not adequate and challenge the direct enforcement of –or even oppose to- the decision issued. This tension was clearly present during the drafting of the Regulation on the European enforcement order[43] and again, it is palpable in the application of the 'mechanism of last resort' set forth in Regulation (EC) No 2201/2003, whereby the judge of a Member State where the child had her habitual residence before being illicitly removed, may issue a decision replacing the decision of the requested Member State that orders that the child should

[38] C-435/06, *C.* (ECJ 27 November 2007) para 45.
[39] C-256/09, *Bianca Purrucker v Guillermo Vallés Pérez* (ECJ 17 July 2010) para 70-74.
[40] C-4/14, *Christophe Bohez v Ingrid Wiertz* (ECJ 9 September 2015) para 43-44.
[41] C-428/15, *Child and Family Agency* (ECJ 27 October 2016) para 57.
[42] See namely, Cases C-456/11, *Gothaer Versicherung AG and others v Samskip GmbH* (ECJ 15 November 2012) para 28-29; C-619/10, *Trade Agency Ltd v Seramico Investments Ltd* (ECJ 6 September 2012) para 40; C-157/12, *Salzgitter* (ECJ 26 September 2013) para 36; C-452/12, *Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport BV* (ECJ 19 December 2013) para 37-38; C-302/13, *FlyLAL Lithuanian Airlines AS v Starptautiska Iidosta Riga VAS and Air Baltic Corporation* (ECJ 23 October 2014) para 45; C-536/13, *Gazprom* (ECJ 13 May 2015) para 39; C-681/13, *Diageo Brands BV v Simiramida-04-EOOD* (ECJ 16 July 2015) para 63; C-559/14, *Rudolfs Meroni v Recoletos Limited* (ECJ 25 May 2016) para 47.
[43] Garcimartín 2006, p. 186-198.

stay. Several judgments of the CJEU such as *Aguirre Zarraga* or *Povse*[44] clearly illustrate this tension. Hence, the doubt whether Member States could resort to national safeguards when access to justice with high standards of quality –as promoted by the Hague Programme- is not granted.

3.3 Compliance with the ECHR Standards on Fundamental Rights Protection

14 Building on the previous remarks, there is no doubt that mutual trust –as the basis of mutual recognition- entails to accept that the protection of fundamental rights is duly ensured by the granting Member State (*i. e.* where the protection should be demanded). However, if the Member State where enforcement is sought follows a different solution in relation to conflicting rights or establishes higher standards of protecting fundamental rights according to its own legislation, or to the international treaties it has ratified –such as the European Convention on Human Rights (ECHR)-, the obligation of **mutual recognition may be perceived as a water-down mechanism hampering the level of protection of fundamental rights** guaranteed in the latter Member State.

15 The tension between the fulfilment of the obligations that belonging to the EU imposes on Member States and the respect of fundamental rights in those Member States –as protected by the ECHR- has been articulated in several cases litigated before the European Court of Human Rights (ECtHR). In its seminal *Bosphorus* decision of 2005[45], the ECtHR stated that Member States of an international organization are liable under the ECHR for "all acts and omissions of its organs regardless of whether the act or omission in question was a consequence […] of the necessity to comply with international legal organisations."[46] Since the EU is not a party to said convention, the question was whether such protection could be awarded, nonetheless, by the Union. The ECtHR solved this dilemma by establishing the '**presumption of equivalent protection**'. According to the Court, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides […]. By "equivalent" the Court means "comparable"; any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued […]. However, any such finding of equivalence could not be final and would be susceptible to review in light of any relevant change in fundamental rights protection. Where such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than to implement legal obligations flowing from its membership in the organisation. However, any such presumption can be rebutted if, under the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.[47]

16 The reach of the *Bosphorus* doctrine as applied to the principle of mutual recognition in civil matters was tested in 2013 in the ***Povse* decision**, which is the sequel of the

[44] Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v Simone Pelz* (ECJ 22 December 2010); Case C-211/10 PPU, *Doris Povse v Mauro Alpago* (ECJ 1 July 2010).

[45] Appl. No. 45036/98, *Bosphorus v Ireland*, (ECtHR Grand chamber 30 June 2005). This judgment was greeted with relieve since it was expected that after Opinion 2/13 of the ECJ, the ECtHR could have adopted a more confrontational approach to the European Union.

[46] Appl. No. 45036/98, *Bosphorus* (ECtHR 30 June 2005) para 153.

[47] Appl. No. 45036/98, *Bosphorus* (ECtHR 30 June 2005) para 155 and 156.

Povse case litigated before the European Court of Justice.[48] In this case, the specific proceedings of Articles 11.8 and 42.2 of Regulation (EC) No 2201/2003 were at stake. Italian courts had ordered – as the State of the residence of the child before its illicit removal to Austria- that the child should be returned despite the decision of the Austrian courts –issued pursuant to the 1980 Hague Convention on child abduction- that the child should remain in Austria. By ordering the immediate return of the child, Austrian authorities had complied with the obligations set forth in Articles 11.8 and 42.2 Regulation (EC) No 2201/2003, but both mother and child complained that this blind application of the rules had violated their right to family life as provided in Article 8 ECHR since the return would entail a permanent separation of mother and child. Building on the *Bosphorus* presumption, the ECtHR concluded that the immediate enforcement of a decision of another Member State, which imposes the return of the child, did not violate Article 8 ECHR. Firstly because the EU –as an international organisation- respects fundamental rights in a way that is equivalent to the terms of the ECHR; secondly, because the obligation imposed by the EU Regulation to Member States is respectful of the fundamental rights' standard set forth by the ECHR (in the sense that the court of the Member State of origin necessarily has to assess the impact of the return order on the child);[49] lastly, because Member States' courts have no margin of discretion in applying these rules, should that margin have been used in a way detrimental to the respect of the fundamental right. In this vein, the ECtHR seemed to endorse that all Member States comply with fundamental rights protection while applying the principle of mutual trust in the area of cooperation in civil matters.[50]

17 However, a more nuanced approach seems to have been followed in 2016 in a later **case, *Avotins***.[51] The ECtHR was asked to decide whether the application of Article 34.2 Regulation (EC) No 44/2001 (now Article 45.1 Regulation (EU) No 1215/2012) had violated Article 6.1 ECHR. This provision provides a ground for refusing the recognition and/or enforcement of another Member State's decision when the proceedings at the Member State of origin were not duly notified to the defendant 'unless the defendant failed to commence proceedings to challenge the judgment when it was possible to do so'. And this was precisely the case: the defendant had been sued in Cyprus but had not appeared before the court. A favourable judgment was granted to the claimant who asked for its enforcement in Latvia, where the defendant's domicile was. Allegedly, this second proceeding was neither notified to the defendant who was aware of these two proceedings only once the Latvian court had granted the *exequatur*. The defendant argued that the Latvian court had infringed Article 34.2 of Regulation (EC) No 44/2001 and, by not considering the lack of due service of proceedings, had also infringed Article 6.1 ECHR. The ECtHR applied again the *Bosphorus* presumption but with some interesting nuances.

18 Firstly the Court signalled that the presumption could be rebutted if the protection of the rights laid down in the ECHR was "manifestly deficient" in the case.[52] Secondly, it stated that in order to create an AFSJ, based on the principle of mutual trust, the fundamental rights of the persons must not be infringed. Therefore, limiting to exceptional cases the power of the State in which recognition is sought to review

[48] Appl. No. 3890/11, *Povse v Austria*, (ECtHR 18 June 2013); Case C-211/10 PPU, *Doris Povse v Mauro Alpago* (ECJ 1 July 2010).
[49] Appl. No. 3890/11, *Povse v Austria*, (ECtHR 18 June 2013) para 86.
[50] Sceptical on this point, Hazelhorst 2014, p. 33.
[51] Appl. No. 17502/07, *Avotins v Latvia* (ECtHR Grand Chamber 23 May 2016).
[52] Appl. No. 17502/07, *Avotins v Latvia* (ECtHR Grand Chamber 23 May 2016) para 112.

the observance of fundamental rights by the State of origin of the judgment could, in practice, run counter to the requirement imposed by the ECHR according to which the court in the State addressed must, at least, be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient.[53] Thirdly, based on the principle of mutual trust, domestic courts are deprived of discretion while presuming the observance of fundamental rights by other Member States. The *Bosphorus* presumption should, hence, apply. However, the ECHR would require Member States' courts to ensure that the mutual recognition mechanisms do not leave any gap or particular situations, which would render the protection of the human rights guaranteed by the Convention manifestly deficient. Therefore, it must **verify that the principle of mutual recognition is not applied automatically and mechanically to the detriment of fundamental rights** which must be observed in this context. Where the courts of a Member State are called upon to apply a mutual recognition mechanism established by EU law, they must give full effect to it if the protection of Convention rights cannot be considered manifestly deficient. If a substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and this situation cannot be remedied by EU law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law.[54]

19 As a result the ECtHR found that the application of (the exceptions to mutual recognition of) Regulation (EC) No 44/2001 by the Latvian court had been too literal and automatic and *could in theory* lead to a finding that the protection afforded was manifestly deficient, and as a result, the presumption of equivalent protection of the rights of the defense guaranteed by Article 6.1 ECHR is rebutted. However, this manifest deficiency was not present in the case at stake since the defendant –who was a skilled businessman- had the means and knowledge about how the Cypriot courts worked, and could have appealed the judgment.[55] It may be concluded that the ECtHR has not significantly changed its position as to the EU's compliance with the protection of fundamental rights while establishing the principle of mutual trust and recognition. It could be observed, though, a progressive **leaning of the ECtHR towards setting forth more stringent requirements** that ultimately might question the equal footing among Member States and the equal protection of fundamental rights upon which mutual trust is premised in the EU.[56]

4 A Complex Area of Cooperation

20 The AFSJ in civil matters is meant to be the result of increasing cooperation among Member States and its authorities. The EU has abandoned the integration approach in favour of cooperation based on the principle of mutual recognition (→ para 10). However, the foregoing does not mean that a certain degree of harmonisation should not be pursued where it is instrumental to the development of (judicial) cooperation in civil matters. In this vein, Article 81.1 TFEU considers the need to adopt 'measures for the approximation of the laws and regulations of the Member States'. This provision needs to be read both in relation to the rest of Article 81 TFEU, in particular Articles 81.2 (c) (→ para 34) and 81.2 (f) (→ para 37), but also in relation to the cross-border scope that measures adopted according to its first sentence need to

[53] Appl. No. 17502/07, *Avotins v Latvia* (ECtHR 23 May 2016) para 114.
[54] Appl. No. 17502/07, *Avotins v Latvia* (ECtHR 23 May 2016) para 116.
[55] Appl. No. 17502/07, *Avotins v Latvia* (ECtHR 23 May 2016) para 121-122.
[56] Weller 2017, p. 17.

respect. Accordingly, the construction of the AFSJ would not only aim at **granting free circulation of judgments within the EU**, but also at setting a common legal framework in civil matters with cross-border implications upon which individuals may rely. This would ensure that individuals may rely on the **recognition of rights acquired in another Member State**. Otherwise, the enjoyment of EU citizen's free movement rights might be likely to be jeopardized. However, such a premise may be seriously challenged when the procedures articulated to build the AFSJ are analysed as a whole. **Inasmuch the EU might strive for such an approximation in terms of Article 81.1 TFEU, it also allows for significant exceptions to this premise**, both as regards the (non) participation of certain Member States within this area (→ paras 21-22) and allowing particular areas of enhanced cooperation among Member States (→ para 23). Although cooperation measures are not directly aimed at the individuals, the latter are the main beneficiaries of these measures. Hence, establishing different levels of participation in the AFSJ may impinge on the exercise of citizen's rights (→ para 27). Finally yet importantly, the reach of such cooperation also questions the competence of Member States in civil matters having cross-border effects outside the EU territory (→ paras 24-25).

4.1 An Area of Freedom, Security and Justice *à la Carte*

21 It seems that further judicial cooperation in cross-border civil matters needs for all Member States to take part in the construction of this AFSJ. However, it was clear from the very beginning that achieving such goal would not be an easy task and the Treaty of Amsterdam could not help to acknowledge that further cooperation would cause a rift between Member States. In fact, three of them were allowed to have a particular status in relation to the AFSJ and this situation has been maintained under the Treaty of Lisbon. According to **Protocol No 21** (→ Protocol No 21) on the position of the UK and Ireland in respect of the AFSJ, the UK and Ireland shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the TFEU. However, within three months after a proposal or initiative has been presented to the Council, the UK or Ireland may decide to take part in the adoption and application of the said measure. Therefore, the UK and Ireland have followed an **opt-in** scheme that allows them to participate strategically in the negotiation and to be bound by certain measures adopted under Title V of Part Three of the TFEU. This choice had left the UK and Ireland in a very advantageous position, as it gave them a bargaining power which is not at the disposal of other Member States. This particular status of the UK is recognized in the **Withdrawal Agreement** of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. According to its Article 127(1)(a), the existing opt-outs and opt-ins before Brexit date are to be kept during the transition period. However, pursuant to Article 127(5) of the Withdrawal Agreement, the UK will not have the right to opt into entirely new measures adopted under Article 4a of Protocol No 21. [*i.e.* acts amending existing measures to which the UK is bound] although it may be invited to cooperate in these under the conditions set out for cooperation in relation to third countries.

22 Moreover, **Protocol No 22** (→ Protocol No 22) set up the position of Denmark, which shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the TFEU. This is a full **opt-out** scheme that responds to a deep questioning of the policies addressed and the legal procedures incorporated in the EC/EU *acquis* with the Schengen system. Nevertheless, it should be noted that according to Article 3 of the Annex to Protocol No 22, Denmark may reconsider its

position and opt-in by mere notification of participation. This has led to a complex situation where the **variable geometry** that Denmark had introduced into the AFSJ needed to be solved by means of a specific agreement that allowed securing the achievements of Regulation (EC) No 44/2001 and its spin-offs.[57]

4.2 Enhanced Cooperation

23 The achievement of certain aims within the EU has proven complex in some areas. The voting system may frustrate initiatives that intend to foster cooperation, particularly in the AFSJ. Accordingly, the Treaty of Lisbon, following the path initiated by the Treaty of Amsterdam, has incorporated a way of escape for those Member States that, despite the opposition of one or more Member States, still wish to strive for greater cooperation at the private international law level. In this sense, **enhanced cooperation** is another –but more constructive- method of pursuing separate interests within the AFSJ.[58] Enhanced cooperation existed, both in the EC-Amsterdam and the TEU-Amsterdam, and it is now regulated in Articles 20 TEU and 326ff TFEU (→ Article 326 TFEU). Article 20.2 TEU makes it clear that this is a mechanism of last resort that can only be triggered once the cooperation objectives are not likely to be attained within reasonable time by the Union. A minimum of nine Member States may then engage in this cooperation after having secured the authorisation of the Council. For the time being, this legislative technique has been used in three occasions where unanimity was impossible to achieve, namely because these were sensitive matters of family law: Regulation (EU) No 1259/2010 on the law applicable to divorce and legal separation,[59] Regulation (EU) No 2016/1103 on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes[60] and Regulation (EU) No 2016/1104 on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.[61] Inasmuch as enhanced cooperation may be a step forward in the achievement of the AFSJ, it also has relevant constitutional side effects (→ para 26).

4.3 External Relations

24 One of the main implications of the assumption of powers by the EU in cooperation in civil matters having cross-border implications is that Member States have mostly lost their capacity to legislate in private international law matters in relation to third States. This does not directly stem from Article 81 TFEU, but it is the natural consequence of the implied (external) powers of the EU as enshrined in Articles 3.2 and 216.1 TFEU (→ Article 216.1 TFEU). The latter directly results from two

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[57] Agreement of 19 October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereafter the Agreement), concluded by Council Decision 2006/325/EC and subsequent amendments of this text on 12 June 2009 (OJ L149/80) as a result of the adoption of Regulation 4/2009 and on 21 March 2013 (OJ L79/4) as a result of the recast of Regulation 44/2001 into Regulation 1215/2012.

[58] Monar 2010, p. 572.

[59] Council Regulation (EU) No 1259/2010 *implementing enhanced cooperation in the area of the law applicable to divorce and legal separation*, O.J. L 343/10 (2010).

[60] Council Regulation (EU) No 2016/1103 *implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes*, OJ L 183/1 (2016).

[61] Council Regulation (EU) No 2016/1104 *implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships,* O.J. L 183/30 (2016).

seminal opinions of the ECJ: Opinion 1/2003 on the competence of the Community to conclude the new Lugano convention,[62] and Opinion 1/2013 on the competence to accept the accessions to the Hague convention 1980 on international child abduction.[63] These two opinions are built on the **doctrine of implied external powers** set forth by the Court of Justice in case *ERTA*[64] and developed thereafter in Opinion 1/94[65] and in case *Open Skies*.[66]

25 Some key elements about the EU external powers in relation to the AFSJ in civil matters were identified in **Opinion 1/2003.** This Opinion concludes that the EC should have the exclusive competence to sign international conventions where there has been a complete assumption of the internal competence by the EC.[67] No alternative interpretation is possible when the rules of the convention are likely to affect the functioning and coherence of Regulation (EC) No 44/2001.[68] This has brought about two main consequences. On the one hand, the EU has gained power to act not on behalf of its Member States but on its own, assuming the status of 'member' in international organisations that deal with cross-border cooperation in civil matters such as the Hague Conference.[69] This gives the EU an unparalleled bargaining power in relation to other members of the Conference. As a result of this new status, the EU has negotiated –and eventually signed- conventions such as the Hague Convention on choice of court agreements 2005, or the Protocol on the Law applicable to maintenance obligations 2007.[70] On the other hand, it has become clear that such an implied competence lies only when it has been assumed at the internal level. Therefore, there must be areas where it is still possible for Member States to retain competence and negotiate on their own behalf and interest. This has been acknowledged by two EC Regulations, which allow Member States to conclude bilateral agreements on specific matters under the strict conditions set forth therein, namely Regulation (EC) No 662/2009[71] and Regulation (EC) No 664/2009.[72] In this same vein, the CJEU points out in **Opinion 1/2013** the risk that, by making different declarations in relation to third States, Member States may affect the scope and effectiveness of Regulation (EC) No 2201/2003.[73] Accordingly, the CJEU asserts the power of the EU to accept ratifications to the Convention. This conclusion reinforces the external competence of the EU inasmuch as it places an unexpected burden upon

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[62] Opinion 1/03, *Lugano convention* (ECJ Grand Chamber 7 February 2006).
[63] Opinion 1/2013 *Hague convention 1980 on international child abduction* (ECJ Grand Chamber 14 October 2014).
[64] Case 22/70, *ERTA* (ECJ 31 March 1971).
[65] Opinion 1/94, *WTO agreement* (ECJ 15 November 1994).
[66] Case C-476/98, *Commission v Germany* (ECJ 5 November 2002).
[67] Opinion 1/03, *Lugano convention* (ECJ Grand Chamber 7 February 2006) para 116-117.
[68] Opinion 1/03, *Lugano convention* (ECJ Grand Chamber 7 February 2006) para 160-161 and 172.
[69] European Council, *The Hague Programme: Strengthening freedom, security and justice in the European Union*, (2005/C 53/01) O.J. C 53/1 (2005), point 3.4.5.
[70] The EC became member of the Hague Conference on 3 April 2007: Available at https://www.hcch.net/es/news-archive/details/?varevent=129".
[71] Regulation (EC) No 662/2009 *establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations*, O.J. L 200/25 (2009).
[72] Council Regulation (EC) No 664/2009 *establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations,* O.J. L 200/46 (2009).
[73] Opinion 1/2013, *Hague convention 1980 on international child abduction* (ECJ Grand Chamber 14 October 2014) para 88.

EU citizens since in last instance, they will be the ones who will bear the cost of the delay that the acceptance of the ratification by the EU might entail. This approach is clearly inconsistent with the aim of facilitating access to justice that the AFSJ is trying to fulfill.

4.4 Constitutional Consequences

26 Previous paragraphs draw a rather complex picture of the AFSJ. One may seriously question whether there is a constitutional consensus on the scope and purpose of this area, when it is accepted from the very beginning that some States may opt-out the system while others may, at the same time, pursue further integration by means of enhanced cooperation. These choices have prompted a **variable geometry scheme** –or a Europe at different speeds- in the AFSJ, which may challenge the existence of a coherent constitutional framework that is equally applicable to all Member States. In constitutional terms, it should be noted that making a choice for enhanced cooperation or leaving some States outside the area results in lesser space for consensus and a way to bypass debate. Moreover, the differentiation among Member States also creates technical problems such as how to articulate the participation of Member States that did not accept **enhanced cooperation** once, when the adoption of a new related measure is at stake. Finally, yet importantly, once enhanced cooperation has been adopted, one may question how this affects the external competence of the EU on this point. It could be suggested that the reach of the competence of the EU –exercising its external powers- would only affect those Member States having participated in the enhanced cooperation measure. Similar doubts may arise in relation to **opt-in/opt-out** schemes and the external competence of the EU.[74] The picture is by no means a clear one and shows the absence of a constitutional consensus on the scope and purpose of the AFSJ.[75]

27 Moreover, this variable geometry has another unexpected constitutional side effect, since the escape-ways to the common project also result in **lack of uniform treatment of citizens of different Member States within the EU**.[76] In fact, these choices result in a patchwork of legal rights and obligations, far from the intended purpose of the EU of protecting individuals' rights and securing the enforcement of such rights across European borders, which should be ultimately the purpose of judicial cooperation in civil matters.[77]

5 Results Achieved and to be Accomplished

5.1 Measures Adopted in Accordance with the Ordinary Legislative Procedure

28 The ordinary legislative procedure may be triggered in order to adopt measures for the purpose of Article 81.1 TFEU. This provision of Article 81.2 TFEU is to be read ultimately in relation to Article 67.1 TFEU (→Article 67.1 TFEU), where the constitution of the AFSJ is directly related to the protection of fundamental rights. As the Tampere Programme stated, individuals must not be discouraged or prevented

[74] Guzmán Zapater 2014, p. 254-255.
[75] Monar 2010, p. 569.
[76] Monar 2010, p. 569 and 572.
[77] On a more positive note, in the context of the Brexit withdrawal, one should at least acknowledge the efforts to ensure the position of individuals who relied on the application of EU rules after the transition period. Under Articles 66 to 69 of the Withdrawal Agreement, ongoing proceedings initiated before the end of the transition period will still benefit from continued cooperation between the UK and the EU.

from exercising their rights by the differences between national systems of justice.[78] This entails both a better access to justice in cross-border legal proceedings and ensuring that decisions rendered in one Member State are valid in other Member States through mutual recognition. In other words, civil justice –which is administered by Member States- should not be obstructed by borders. As a result, the construction of an AFSJ implies that the **EU becomes a provider of public goods: access to justice and protection of fundamental rights are so fundamental to the EU as the internal market is**. Once the EU assumes the provision of cooperation in civil matters, this has an effect on the way individuals have access to justice and the protection of their rights is granted. These two goods are no longer exclusively granted by Member States, and this affects the way in which individuals are subject to the power by the competent authorities of the Member States. Therefore, this has an implication for the rights of individuals, but it also raises the question of the legitimacy of the EU to take action on these matters and the division of power between the EU and its Member States.[79]

29 According to **Article 81.2 TFEU**, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, *particularly* when necessary for the proper functioning of the internal market, aimed at ensuring certain objectives (→ para 31). Since no unanimity voting is required (but just a qualified majority and co-decision with the European Parliament), this legislative procedure facilitates achieving results –in contrast to what happens in relation to family law matters (→ para 39). While **co-decision** may result in slowing down procedures, the presence of the European Parliament counter-balances the power of the Council while it ensures the representation of European citizens (at least from a formal point of view, since informal practices such as *trilogues* (→ para 289 TFEU) may call into question this last statement). This may allegedly provide a greater focus on the rights and the interests of citizens and residents of the EU. On the other hand, the **opt-in/opt-out** choice available to Denmark and Ireland as well as the particular situation of the United Kingdom after the Brexit necessarily challenges the uniformity of the protection granted (→ paras 21-22).

5.2 Cooperation in Civil Matters and the Achievement of the Internal Market

30 The constitutional principles in the AFSJ are intimately connected to the values that the EU seeks to protect. Therefore the **relationship between the EU's objectives and the normative values pertaining to the AFSJ must be acknowledged**.[80] In light of this, a proper evaluation of the place that the achievement of the internal market has in cooperation in civil matters should be performed. Previous paragraphs have shown the evolution of the founding reasons for each step in this cooperation. Article 220 EEC aimed at the simplification of the formalities governing the reciprocal recognition and enforcement of judgments *for the benefit of their nationals*. No precise integration aim was at stake at this moment. Thereafter, Article K.1 (6) TEU-Maastricht justified taking action in the field of cooperation in civil matters for the purposes of achieving the objectives of the Union, in particular the *free movement of persons*. It is only in Article 65 EC-Amsterdam that reference is made to the internal market, since measures in the field of judicial cooperation in civil matters having cross-border implications were to be taken *in so far as necessary for the proper functioning of the*

[78] Tampere European Council of 15 and 16 October 1999, Presidency conclusions. Available at http://www.europarl.europa.eu/summits/tam_en.htm, para 28.
[79] Monar 2010, p. 552.
[80] Herlin-Karnell 2014, p. 39.

internal market. Finally, Article 81 TFEU –following Article III-269 TCE- endorsed the need to establish measures, *particularly when necessary for the proper functioning of the internal market*, aimed at ensuring cooperation in civil matters.

31 The difference between adopting a measure *in so far as necessary* or *particularly when necessary* is a subtle but not a negligible one. It could be understood that the measures on cooperation in civil matters were ancillary to the achievement of the internal market in 1997, whereas in 2007 the main focus was elsewhere –although it is not explicitly acknowledged. In other words, **cooperation in civil matters contributes to the fulfilment of the internal market, but it should also aim at achieving other 'constitutional' aims of the Union**, such as access to justice and protection of fundamental rights. As the Hague Programme puts it, cooperation in civil matters should be closely related to the enhancement of the EU citizenship. In fact, many of the most recent legal texts based on Article 81 TFEU seem to balance the achievement of both aims. However, and in light of the precedent remarks, one may doubt whether market integration and efficiency have not taken more stance for the time being, to the detriment of individual's rights.[81] To put in different words, the fact that the heading of Article 81.2 TFEU explicitly relies on the notion of 'internal market' and does not refer to justice, may be signalling that the system this provision intends to build still lacks a vision of justice. It could even be discussed whether the objectives of European integration are clearly identified when the AFSJ is promoted to the same level as the internal market while keeping the former as a key element to the fulfilment of the latter. This raises doubts as to the existence of a substantive policy decision, and raises a suspicion whether this may have been the way to incorporate conflict of laws in the Treaties.[82] This might be even more evident once the different measures to be adopted within this general framework are analysed.

5.2.1 Mutual Recognition and Enforcement of Judgments and of Decisions in Extrajudicial Cases (lit. a)

32 This first measure directly relates to Article 81.1 TFEU and the progressive steps undertaken to eliminate the exequatur proceedings in the EU. Why the texts resulting from this provision –or its immediate precedents, Articles 61 and 65 EC-Amsterdam- are ancillary to the achievement of the internal market has been the subject of dispute.[83] However, many relevant Regulations were grounded on Article 61 EC-Amsterdam (Regulation (EC) No 44/2001, Regulation (EC) No 805/2004,[84] Regulation (EC) No 2201/2003, Regulation (EC) No 4/2009) or directly result from Article 81.1 (a) TFEU (*v. gr.* Regulation (EU) No 1215/2012, Regulation (EU) No 655/2014,[85] Regulation (EU) No 2015/848[86] or Regulation (EU) No 606/2013[87]).

5.2.2 Cross-Border Service of Judicial and Extrajudicial Documents (lit. b)

33 Article 61 (c) EC-Amsterdam already envisaged said measure, which since then has been incorporated as the perfect complement to facilitate the recognition and

[81] Storskrubb 2011, p. 320.
[82] Meeusen, 2019, pp. 674-675.
[83] Rapport Borrás du Groupe de Travail X: "*Liberté, securité et justice"*, point II.
[84] Regulation (EC) No 805/2004 *creating a European Enforcement Order for uncontested claims*, O.J. L 143/15 (2004).
[85] Regulation (EU) No 655/2014 *establishing a European account preservation order procedure to facilitate cross-border debt recovery in civil and commercial matters*, O.J. L 159/89 (2014).
[86] Regulation (EU) No 2015/848 *on insolvency proceedings (recast)*, O.J. L 141/19 (2015).
[87] Regulation (EU) No 606/2013 *on mutual recognition of protection measures in civil matters*, O.J. L 181/4 (2013).

enforcement of decisions. In this vein, to what extent this measure is needed for the proper functioning of the internal market is directly related to its ancillary nature to measures under Article 81.2 (a) TFEU. On the other hand, the cross-border nature of these measures is self-evident. Regulation (EC) No 1393/2007 (based on Article 61 (c) EC-Amsterdam) is the most relevant outcome of this provision.[88]

5.2.3 Compatibility of the Rules Concerning Conflict of Laws and Jurisdiction (lit. c)

34 Article 65 (b) EC-Amsterdam already enshrined a similar provision but with an interesting nuance since the latter Article did not refer to 'ensuring the compatibility' but 'promoting the compatibility' of rules. The scope of the EU's intervention seems less ambitious and more respectful of the general frame set forth by Article 67.1 TFEU (→ Article 67.1 TFEU). Concrete outcomes of this provision in relation to conflict of laws are Regulation (EC) No 593/2008, *Rome I*, Regulation (EC) No 864/2007, *Rome II* (both based on Article 65 (b) EC-Amsterdam) and Regulation (EU) No 650/2012. The Brussels I Recast, Regulation (EU) No 1215/2012 refers Article 81.2 (c) TFEU as its legal basis. It should be noted that, notwithstanding this provision, Article 81.3 TFEU may provide for an alternative legislative procedure when these measures affect family law with a cross-border element (→ para 40).

5.2.4 Cooperation in the Taking of Evidence (lit. d)

35 As it happens with due service of documents, cooperation in the taking of evidence appears as a necessary tool in cross-border litigation. Less evident, on the contrary, is how this measure in itself fosters the proper functioning of the internal market. Article 61(c) EC-Amsterdam already envisaged this measure and was the legal basis for Regulation (EC) No 1206/2001, the most relevant outcome of this provision.[89]

5.2.5 Effective Access to Justice (lit. e)

36 The TEU-Amsterdam made no reference to access to justice but a precedent to this section was introduced in Article III-269 (e) TCE. Put on an equal footing with other measures, it is not surprising that some of the Regulations based in Article 81.2 (a) TFEU also refer to Article 81.2 (e) TFEU (*e.g.* Regulation (EU) No 1215/2012 and Regulation (EU) No 655/2014). However, one should not forget that access to justice was already recognised as a fundamental right in Member States, and is closely related to Article 47 EUCFR. We could question then whether access to justice should appear as a complementary measure to mutual recognition or should, on the contrary, be the paramount aim in the AFSJ.[90] However, this might not actually be the case considering how the EU approach seems to put the stress on the *effective*[91] rather than the access to justice by means of ensuring an adequate level of legal aid in cross-border cases throughout the Union (*e.g.* Directive 2002/8/EC, on the basis of Article

[88] Article 81.2 subparagraphs (b) and (d) will be the legal basis for the revised Regulation, following the Proposal of 31st May 2018 for a Regulation of the European Parliament and of the Council *amending Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)* (COM/2018/379 final).

[89] Article 81.2(d) TFEU will be the legal basis for the revised Regulation, following the Proposal of 31st May 2018 for a Regulation of the European Parliament and of the Council *amending 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* (COM/2018/378 final).

[90] Aguilar Grieder 2010, p. 325.

[91] Storskrubb 2011, p. 314.

61 (c) and Article 67 EC-Amsterdam)[92], the publication of 'user guides' on judicial cooperation,[93] common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims, as well as maintenance claims, and on uncontested claims, extra-judicial procedures and multilingual forms or documents.[94]

5.2.6 Elimination of Obstacles to the Proper Functioning of Civil Proceedings (lit. f)

37 This provision mirrors Article 65 (c) EC-Amsterdam as well as Article III-269.2 (f) TCE. The power conferred by Article 81.2 (f) TFEU cannot be divorced from the general limitations set out by Article 81.1 TFEU.[95] Accordingly, this provision does not give an indiscriminate power to harmonise civil procedure, to the contrary, it gives powers that can only be exercised when such measures are ancillary to others which facilitate proceedings with a cross-border element. This is confirmed by Regulations such as Regulation (EC) No 1896/2006 on a European order for payment procedure and Regulation (EC) No 861/2007 on a European small claims procedure (both on the basis of Article 65(c) EC-Amsterdam and, after their amendment in 2015, on the generic basis of Article 81 TFEU[96]) or Regulation (EU) No 606/2013 and Regulation (EU) No 655/2014 (on the basis of Article 81.2 (f) TFEU). It should also be noted that even though these measures aim at creating European procedures, they are closely related to enforcement measures (under Article 81.2 (a) TFEU) since the decisions resulting from these European procedures are directly enforceable in other Member States.

5.2.7 **Development of Alternative Methods of Dispute Settlement (lit. g)**

38 This indent introduces a measure which was absent in Article 65 EC-Amsterdam but had been included in Article III-269.2 (g) TCE. It was then backed by both the Hague[97] and the Stockholm programmes. It was based on Articles 61 (c) and 67(5) EC-Amsterdam that Directive 2008/52/EC on mediation in civil and commercial matters was adopted.[98]

5.2.8 Support for the Training of the Judiciary and Judicial Staff (lit. h)

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[92] Council Directive 2002/8/EC *to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes*, O.J. L 26/41 (2003), and the complementary Commission Decision No 2005/630/EC *establishing a form for the transmission of legal aid applications under Council Directive 2003/8/EC*, O.J. L 225/23 (2005) and Commission Decision No 2004/844/EC *establishing a form for legal aid applications under Council Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes*, O.J. L 365/27 (2004).

[93] Available at http://ec.europa.eu/justice/civil/document/index_en.htm.

[94] Tampere European Council of 15 and 16 October 1999, Presidency conclusions. Available at http://www.europarl.europa.eu/summits/tam_en.htm, para 29 and 30.

[95] Peers 2016, p. 351.

[96] The Regulations have been revised by Regulation (EU) 2015/2421 of the European Parliament and of the Council *amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure*, O.J. L 341/1 (2015) is in force.

[97] European Council, *The Hague Programme: Strengthening freedom, security and justice in the European Union*, (2005/C 53/01) O.J. C 53/1 (2005), point 3.4.2.

[98] Directive 2008/52/EC of the European Parliament and the Council *on certain aspects of mediation in civil and commercial matters*, O.J. L 136/3 (2008).

39 The Hague programme already foresaw the need to strengthen mutual recognition through mutual confidence, and this was to be accomplished by means of improving mutual understanding among authorities and legal systems.[99] Consequently, specific support from the EU for implementing a European judicial network and a European judicial training system was to be implemented. Concrete results of this action are the European judicial network[100] -which aims at building closer ties between the judiciaries of the Member States and a growing feeling of sharing a common purpose-, the European judicial training network[101] and the European e-Justice portal –which allegedly favours an easier access to justice.[102]

5.3 Measures Adopted in Accordance with a Special Legislative Procedure

40 Article 81.3 TFEU envisages the adoption of EU measures concerning family law with cross-border implications. Its most recent outcome is Regulation (EU) No 2019/1111, recasting Regulation (EC) No 2201/2003.[103] In contrast to Article 81.2 TFEU, the Council, acting in accordance with a **special legislative procedure**, shall establish these measures. The Council shall act unanimously after consulting the European Parliament. The rationale for such a different regime lies directly on the nature of these measures. **Family law** is not only a very idiosyncratic area in the legal systems of Member States, but it is a fundamental one where different kinds of perceptions other than the legal ones may take the lead and frustrate any agreement: religious, moral, social and economic elements shape the understanding of this area of law. This has been very clearly evidenced during the adoption of the Regulations on the law applicable to divorce or on the patrimonial effects of married couples or registered partnerships, which have found stern opposition from several Member States that have only been overcome by means of **enhanced cooperation** (→ para 23). It is interesting to note that Article 81.3 TFEU refers to family law without specifying whether this would refer to substantive issues or whether procedural questions should also be envisaged –in contrast to the wording of Article 81.2 (c) TFEU. Bearing in mind the requirements of the special legislative procedure, and in order to avoid clashes with the later provision, it would be advisable to follow a restrictive interpretation.[104]

41 However, the last sentence of Article 81.3 TFEU provides for an additional *passerelle* (→ Article 48.7 TEU) that would allow the Council to decide that certain aspects of family law may be adopted under the **ordinary legislative procedure**. In order to do so, prior consultation to the European Parliament is needed and approval of all national parliaments required within six months of notification of the proposal to them. Therefore, a single national Parliament may block the decision to move to qualified majority voting. Article 81.3 TFEU –which was firstly introduced in Article III-269 (3) TCE- shows clear differences with the latter, where no room was left to

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[99] European Council, *The Hague Programme: Strengthening freedom, security and justice in the European Union*, (2005/C 53/01) O.J. C 53/1 (2005), point 3.2.

[100] Council Decision No 2001/470/EC *establishing a European Judicial Network in civil and commercial matters*, O.J. L 174 (2001).

[101] Available at http://www.ejtn.eu.

[102] Available at https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/tools-judicial-cooperation/european-e-justice-portal_en.

[103] Council Regulation (EU) 2019/1111of 25 June 2019 *on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)*, O.J. L 178/1 (2019).

[104] Rapport Borrás du Groupe de Travail X: "Liberté, securité et justice", point IV.

national parliaments. Whereas the participation of the European Parliament in Article 81.2 TFEU could be seen as a means of balancing powers within the EU, Article 81.3 TFEU balances powers between the EU and its Member States by allowing national parliaments to have a say on sensitive matters relating to its citizens and residents. Although the parliamentary veto permits to safeguard the specificity of family law decision-making, it does not absolutely block any initiative in these matters at the European level thanks to the device of enhanced cooperation. Article 81.3 TFEU provides, once again, an out of focus picture of the AFSJ where different interests are considered but **no clear constitutional design** is put forward concerning the aims pursued.

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