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Article 65 of the EC Treaty in the EC System of Competencies

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I. Introduction

On the basis of the Treaty of Amsterdam, with Article 61 of the EC Treaty for the first time a competency demarcation has been created that *expressly* empowers the Community to take measures in the field of judicial cooperation in civil law cases. What this refers to and under what conditions such measures can be taken, is then regulated in Article 65 of the EC Treaty. The Community has already made use of this competency norm by issuing four legal instruments, more precisely the Process Service Regulation,[1] the Insolvency Regulation (EuInsR)[2] as well as the regulations Brussels I[3] and Brussels II.[4] Nonetheless, the scope of Community jurisdiction derived from Article 61, lit. c and Article 65 of the EC Treaty and its relation to legislative authority resulting from other provisions of the EC Treaty is still the subject of lively disputes. In view of the further measures envisaged by the Council and the Commission in the field of judicial cooperation in civil law cases,[5] there is an urgent need for clarification.

II. General remarks

1. Genesis and purpose norms

Article 65 of the EC Treaty developed out of Article K.1, No. 6 of the Treaty of the EU in the Maastricht Treaty version which listed judicial cooperation in civil law cases as a component of European cooperation in the fields of justice and internal affairs, in other words, the Treaty of the EU's third pillar.[6] By anchoring it in the EC Treaty, what previously had been a purely intergovernmental coordination in civil law matters was turned into Community policy and in this way one of the main demands of both the Maastricht Treaty of Union as well as academic expertise was met.[7] The

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1 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 2000 L 160/37. Hereon *Hess*, Die Zustellung von Schriftstücken im europäischen Justizraum, NJW 2001, at 15.

2 Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, OJ 2000 L 160/1. Hereon *Eidenmüller*, Europäische Verordnung über Insolvenzverfahren und zukünftiges deutsches internationales Insolvenzrecht, IPRax 2001, at 2; *Leible/Staudinger*, Die europäische Verordnung über Insolvenzverfahren, KTS 2000, at 533.

3 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 2001 L 12/1; on the revision of the Brussels Convention see most recently: *Hausmann*, The Revision of the Brussels Convention of 1968, EuLF 2000/01 (E), at 40 et seq.

4 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 2000 L 160/19. Hereon *Gruber*, Die neue „europäische Rechtshängigkeit" bei Scheidungsverfahren, FamRZ 2000, at 1129; *Hau*, Das System der internationalen Entscheidungszuständigkeit im europäischen Eheverfahrensrecht, FamRZ 2000, at 1333; *Kohler*, Internationales Verfahrensrecht für Ehesachen in der Europäischen Union: Die Verordnung „Brüssel II", NJW 2001, at 10. See also as a supplement to this legal instrument the proposed regulation of the French Council Presidency of 26 June 2000 on a "European Visitation Title"; hereon *Hess*, Der Verordnungsvorschlag der französischen Ratspräsidentschaft vom 26. 6. 2000 über einen „Europäischen Besuchstitel", IPRax 2000, at 361.

5 Cf. the plan of action of the Council and the Commission on the best possible implementation of the provisions of the Treaty of Amsterdam on the establishment of an area of freedom, security and justice, OJ 1999 C 19, at 1, 10 et seq., paras. 39 et seq.

6 On Article K.1, No. 6 EU Treaty in the version of the Maastricht Treaty cf. *Degen*, in: *von der Groeben/Thiesing/Ehlermann* (eds.), Kommentar zum EU-/EG-Vertrag, 5th ed., Baden-Baden (D), 1997, paras. 1 et seq. to Article K.6 EU Treaty; *Dittrich*, in: *Müller-Graff* (ed.), Europäische Zusammenarbeit in den Bereichen Justiz und Inneres, Baden-Baden (D), 1996, at 105 et seq.

7 Cf. the Resolution of the European Parliament on the functioning of the Treaty of the European Union with regard to the 1996 Intergovernmental Conference, EP 190. 441 of 17 May 1995; *Lepoivre*, Le domaine de la Justice et des affaires intérieurs dans la perspective de la conférence intergouvernementale, CDE 1995, at 332, 341; *Lipsius*, The 1996 Intergovernmental Conference, ELR 20 (1995), at 249; *O'Keeffe*,

regulation's goal is, *inter alia*, promoting the compatibility of Member State conflict-of-laws norms where such is required for the Internal Market's proper functioning (Article 65, lit. b of the EC Treaty).

2. Peculiarities of the legislative process

Article 65 of the EC Treaty is a component of Title IV of the Treaty which bears the heading: "Visas, asylum, immigration and other policies related to freedom of movement of persons." Community legal measures based on Article 61, lit. c and Article 65 of the EC Treaty are therefore subject to the decision making procedures regulated under Article 67 of the EC Treaty. According to the latter, the Council during an interim period of five years after the Treaty of Amsterdam takes effect acts unanimously upon the recommendation of the Commission or on the initiative of a Member State. After the end of those five years, the Commission has the sole right of initiative. However it is obligated to study corresponding proposals made by Member States. In contrast to legislative acts, which are based on Article 95 of the EC Treaty, the European Parliament is not entitled to share in decision making in the terms of Article 251 of the EC Treaty but is only entitled to a hearing.

The significance of this new source of competencies is mitigated by the fact that both Denmark as well as Great Britain and Ireland have lodged their reservations against legislative acts based on Article 61 of the EC Treaty in accordance with corresponding protocols (cf. Article 69 of the EC Treaty). They do not have any effect in those States. Nonetheless, on the basis of Article 3 of Protocol 4 to the Treaty of Amsterdam, Britain and Ireland can still inform the President of the Council in writing within three months after submission of a proposal or an initiative that they wish to participate in adoption and implementation of the measure in question (so-called "opting-in"). A measure adopted after such a notification is then binding for all Member States participating in its adoption. Great Britain and Ireland have thus far availed themselves on their opting-in possibilities in all Community measures thus far based on Article 61, lit. c and Article 65 of the EC Treaty and will certainly do so in the future as well. This is because both of those States announced at the Council's Justice and Internal Affairs meeting held on 12 March 1999 that they wished to participate fully in judicial cooperation in civil law matters.[8] By contrast, Denmark remains exempted from harmonisation acts under Article 61, lit. c and Article 65 of the EC Treaty since the Danish protocol to Article 68 of the EC Treaty does not allow for any participation in legislative procedures in civil matters. However, under Article 7 of the protocol, Denmark can at any time declare in regard to its position that it wishes to forego use of its reservations under Article 69 of the EC Treaty in full or in part.[9] However, where this does not occur, as with the last four regulations, the only remaining alternative is to conclude corresponding international law treaties with Denmark.[10] That this could therefore entail a relatively opaque mixture of Community law measures and international law treaties is admittedly to be regretted but must probably be accepted as a consequence of the option of graduated integration introduced by the Treaty of Amsterdam.

In case of future amendments to the Treaty, consideration should certainly be given to separating the field of judicial cooperation in civil law cases from the politically much more heavily charged issues of asylum, immigration, etc. and to create a separate heading for this or, in view of its obvious proximity to the Internal Market, to allocate it outright to the competency heading of Article 95 of the EC Treaty. In any case, however, the treaty revision options provided for in Article 67(2) of the EC Treaty should be used when the five-year period after the Treaty of Amsterdam went into effect is over to extend the procedure for sharing in decision-making (Article 251 of the EC Treaty) to decisions taken on legislative acts dealing with judicial cooperation. That would admittedly not solve the problem of British, Irish and Danish participation, but in any case legal instruments enacted in this field, which are quite likely to interfere significantly with the rights of private persons, would have greater democratic legitimacy due to the involvement of the European Parliament. A uniform legislative procedure would additionally remove the aura of controversy surrounding the issue of delineating between the competency range in Article 95 of the EC Treaty, on the one hand, and Article 61, lit. c and Article 65 of the EC Treaty on the other hand. The Treaty of Nice (OJ 2001 C 80/14) takes this matter at least partly into account. The following paragraph shall be added into Article 67: "5. By derogation from paragraph 1, the Council shall adopt, in accordance with the procedure referred to in Article 251 (...) the measures provided for in Article 65 with the exception of aspects relating to family law."

3. The ECJ's competence to interpret

Legal instruments based on Article 61, lit. c and Article 65 of the EC Treaty, like other secondary law harmonisation measures, are subject to the ECJ's competency to interpret them. However, the right to refer cases, granted to all Member State courts under Article 234 of the EC Treaty is limited by Article 68 of the EC Treaty to courts of last resort. This provision, which lags far behind the Brussels Convention's interpretation protocol,[11] to cite an example, is particularly regret-

Recasting the third Pillar, CMLR 22 (1995), at 893. Further references regarding the expectations of Intergovernmental Conference with respect to the cooperation in the areas of Justice and Internal Affairs in *Besse*, Die justitielle Zusammenarbeit in Zivilsachen nach dem Vertrag von Amsterdam und das EuGVÜ, ZEuP 1999, at 107 (see n. 3).

8 Cf. for example No. 2.2. of the proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 1999 C 376/1.

9 In more detail *Basedow*, The Communitarisation of the Conflict of Laws under the Treaty of Amsterdam, CMLR 2000, at 687 et seq. (696); *Hailbronner/Thiery*, Amsterdam – Vergemeinschaftung der Sachbereiche Freier Pertsonenverkehr, Asylrecht und Einwanderung sowie Überführung des Schengen-Besitzstands auf EU-Ebene, EuR 1998, at 583 et seq. (601 et seq.).

10 For an accordant view see *Besse* (*supra* note 7), at 107 et seq. (121 et seq.); *Hess*, Die „Europäisierung" des internationalen Zivilprozessrechts durch den Amsterdamer Vertrag – Chancen und Gefahren, NJW 2000, at 23 et seq. (28); *Kohler*, Interrogations sur les sources du droit international privé européen après le traité d'Amsterdam, Rev. crit. dr. internat. Priv. 88 (1999), at 1 et seq. (8 et seq.).

11 Cf. Article 2 of the Luxembourg Protocol regarding the interpretation of the European Convention of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters through the Court of Justice of 3 June 1971, BGBl. 1972 II, at 846. Current version

table for civil law proceedings. It entails unnecessary litigation delay, for example if the jurisdiction of the court seised is in dispute and it then turns out from an ECJ decision that the court called upon to rule in Member State A does not have jurisdiction but that a court in another Member State does have jurisdiction. The regulation is explainable due to the fact that Member States fear that the court could be overburdened with numerous referrals in asylum cases.[12] In the field of international civil process law and private international law, however, no "deluge of referrals" can be expected since experience with the ECJ has shown that Member State courts behave responsibly with their right to refer cases. Therefore, the possibility provided for in Article 67(2) of the EC Treaty of adapting the provisions on court jurisdiction after the five-year transition period is up should in any case be used for legal instruments based on Article 61, lit. c and Article 65 of the EC Treaty.[13]

To be sure, one cannot totally exclude the possibility of the ECJ becoming clogged by judicial cooperation cases in the field of civil law. But it would not be caused by any exorbitant preference for referral by national courts but by the progressing communitarisation of process law and conflict-of-laws rules. Until now, the ECJ was only called upon to interpret the Brussels Convention. In the future, and should the plan of action of the Council and the Commission be fully realised, it will be confronted with a large number of legal instruments in the field of judicial cooperation in civil cases. But this problem should not be solved, in the interests of effective legal protection, by reducing the authority to refer but rather by corresponding modifications to the structure of the European Community. Feasible would be a shift of jurisdiction to the European Court of First Instance, the creation of special court divisions, or an increase in the number of judges to keep pace with the rising amount of work, etc.[14]

It is another question whether the national courts of last resort are merely authorised to refer cases where the interpretation issue is crucial to the decision or whether those courts are not actually obliged to do so.[15] What is striking is the difference in the German wording between Article 234(3) and Article 68(1) of the EC Treaty. According to the former provision, "that court is obliged to call upon the Court."[16] According to Article 68(1) of the EC Treaty, on the other hand, "that court shall refer to the Court for a ruling if it considers this necessary to issue its own judgment." Where there are differences in wording, one would rather have to suppose, different things were intended.[17] It can admittedly not be denied that even the wording "shall refer" has a mandatory character. A pure referral authorisation, of the type which Article 234(2) of the EC Treaty provides for regular courts, can therefore hardly be intended. Yet the gradual difference in wording would not appear to exclude the possibility that Article 68(1) of the EC Treaty assumes a lesser duty to refer when compared with Article 234(3) of the EC Treaty and is therefore moving away from the ECJ's very strict CILFIT doctrine.[18] One could therefore imagine that an obligation to refer could only be assumed under Article 68(1) of the EC Treaty if the issue referred is of sufficient importance in Community law and if its clarification in the view of the national court leaves room for "reasonable doubt." Such "reasonable doubt" would have to be assumed if the same question has already been decided in the opposite direction by courts in another Member State. This would not only adequately do justice to the proposals of the working group on consideration of the "Future of the European Union's Court System,"[19] set up by the Commission but in particular would also do justice to the special requirements of the issues encompassed by legal instruments under Article 61, lit. c and Article 65 of the EC Treaty. Thus in the case of transborder insolvency, there is a danger of a further reduction in value of available assets occurring caused by a protracted referral for interpretation of the "EuInsR", something which might take up to three years.[20] With regard to the matrimonial and custody law matters regulated by the Brussels II Regulation as well, the delay of national court cases through referral to the ECJ should give rise to concern.[21]

The adoption of a reduced referral obligation under Article 68(1) of the EC Treaty would at least go some way to recognising this circumstance without endangering the unity of Community law which the Court is bound to protect.[22] Greater abuse could be prevented by introducing accelerated proceedings under Article 104a of the ECJ's constitutional statutes. In addition, there is still the possibility of initiating proceedings under Article 68(3) of the EC Treaty. Whether

reprinted in *Jayme/Hausmann*, Internationales Privat- und Verfahrensrecht, 10th ed., Munich (D), 2000, No. 151, at 322 et seq.

12 *Girerd*, L'article 68 CE: un renvoi préjudiciel d'interprétation et d'application incertaines, RTDE 1999, at 239 et seq. (244 et seq.); *Bardenhewer*, in: Lenz (ed.), EG-Vertrag, 2nd ed., Cologne (D), 1999, para. 4 on Article 68 EC Treaty.

13 For an accordant view see *Hess* (*supra* note 10), at 23 et seq. (29); *Müller-Graff*, in: Integration 1997, at 271 et seq. (280); *Müller-Graff/Kainer*, Die justizielle Zusammenarbeit in Zivilsachen in der Europäischen Union, DRiZ 2000, at 350 et seq. (352); *Staudinger*, Rom, Brüssel, Berlin und Amsterdam, ZfRV 2000, at 93 et seq. (104).

14 Cf. hereon also *Streinz/Leible*, Die Zukunft des Gerichtssystems der Europäischen Gemeinschaft. Reflexionen über Reflexionspapiere, EWS 2001, at 1.

15 For a strict duty to bring the matter before the Court of Justice in accordance with Article 234(3) EC Treaty see for example *Dörr/Mager*, Rechtswahrung und Rechtsschutz nach Amsterdam – Zu den neuen Zuständigkeiten des EuGH, AöR 125 (2000), at 386 (389 et seq.); *Röben*, in: *Grabitz/Hilf* (eds.), Das Recht der Europäischen Union (loose-leaf edition, Munich (D), as of July 2000), para. 6 on Article 68 EC Treaty; *Eidenmüller* (*supra* note 2), at 2 (7 et seq.); *Pechstein/Koenig*, Die Europäische Union, 2nd ed., Tübingen (D), 1998, para. 383; for a concurrent view see *Lenz-Bardenhewer* (*supra* note 12) para. 3 on Article 68 EC Treaty; *Brechmann*, in: *Calliess/Ruffert*, Kommentar zum EU-Vertrag und EG-Vertrag, Neuwied (D), 1999, para. 2 on Article 68 EC Treaty; more cautious *Kohler* (*supra* note 4), at 10 et seq. (14): „wohl auch verpflichtet"; *Chavrier*, La Cour de Justice après le traité d'Amsterdam: Palingénésie ou palinodies?, RMC 2000, at 542 et seq. (545): "La sémantique laisse encore subsister le doute (...)".

16 In accordance Article 3(1) of the Luxembourg Protocol regarding the interpretation of the European Convention of 27 September 1968 on the on jurisdiction and enforcement of judgments in civil and commercial matters through the Court of Justice; current version reprinted in *Jayme/Hausmann* (*supra* note 11), No. 151, at 323.

17 For a similar view see *Chavrier* (*supra* note 15), at 542 et seq. (545).

18 Cf. ECJ 6 October 1982 – 283/81 – *C.I.L.F.I.T.*

19 Cf. the special supplement to NJW and EuZW 2000, at 1, 7, and hereon also *Hakenberg*, Vorschläge zur Reform des europäischen Gerichtssystems, ZEuP 2000, at 860; *Rabe*, Zur Reform des Gerichtssystems der Europäischen Gemeinschaften, EuR 2000, at 811; *Rösler*, Zur Zukunft des Gerichtssystems der EU, ZRP 2000, at 52; *Streinz/Leible* (*supra* note 14), at 1.

20 *Leible/Staudinger* (*supra* note 2), at 533 et seq. (572).

21 In this vein *Kohler* (*supra* note 4), at 10 et seq. (14).

22 *Leible/Staudinger* (*supra* note 2), at 533 et seq. (573).

the differences in wording between Article 68(1) of the EC Treaty and Article 234(3) of the EC Treaty actually does yield such a differentiated interpretation of the two norms, is something that the ECJ must ultimately clarify. For the future, it must be seriously considered whether a clarification amendment to Article 68(1) of the EC Treaty is not called for,[23] where the principle of an obligation to refer on the part of courts of last resort may not be tampered with; since without it, there is no way to prevent the danger of divergent interpretation by national courts inherent in any measure to harmonise law.

III. The various fields of competency in Article 65 of the EC Treaty

Article 65 of the EC Treaty does not exhaustively list all of the fields of competency.[24] Its purpose is to create a "European legal region entailing tangible advantages to the Union's citizens."[25] With that, all of the Community's citizens are to be given simplified access to the courts of other Member States and all in all improved legal protection is to be ensured. "The confidence-building consequences potentially inherent therein indicate beyond the Internal Market's objectives of greater commercial freedom the constitutive social component of the concept of European integration."[26] This concept is reflected, as will be shown later on, in the conditions for exercising the Community competency formulated in Article 65 of the EC Treaty.[27]

Article 65 of the EC Treaty moreover explicitly stresses that private international and civil law procedures just like certain provisions of general procedural law are not national domains completely untouched by Community law: rather, even in these sectors there is power for the Community to act. This development began to emerge earlier in the ECJ's case law decisions on fundamental freedoms[28] as well as in various secondary law acts mostly based on Article 95 of the EC Treaty.[29] However, academic scholarship in particular long ignored it and the existence of any competencies was occasionally even negated altogether.[30] But it should be pointed out that even under Article 65 of the EC Treaty no wall-to-wall standardisation of substantive civil process law systems is allowed but that it in particular serves to ensure Union citizens simplified access to decision making courts in neighbouring countries in transborder disputes. In particular, the intention was to provide regulations on posting process cost bonds or guaranteeing legal litigation assistance.[31]

By contrast, harmonisation of substantive civil law[32] cannot be based on Article 65 of the EC Treaty. True enough, Council and Commission have announced that they would investigate the "possibility of legal approximation in certain fields of civil law such as the introduction of internationally uniform private law regulation for bona fides acquisition of tangible movable goods."[33] This envisaged integration step, however, meets up with reservations, if one goes by the wording of Article 65 of the EC Treaty, where throughout the article there is only mention of regulations on civil procedure law and conflict-of-laws rules. That the catalogue in literae a through c only lists rule exemplifications and that judicial cooperation in civil law cases "includes" the fields listed there, in other words, is still very much open in relation to other subjects, is hardy able to change anything. This is because the direction and scope of this opening can only be determined from the provision's global context which clearly only aims at eliminating obstructions from transborder cases resulting from procedural law and conflict-of-laws norms.[34]

IV. Prerequisites for exercising competencies

1. Internal Market link

A prerequisite for the Community to initiate action under Article 61, lit. c and Article 65 of the EC Treaty is that such measures "are required for *proper* functioning of the Internal Market." Article 95 of the EC Treaty, however, merely makes reference to the necessity of a legal instrument for the "functioning of the internal market." The mandate to act in Article 65 of the EC Treaty thus goes beyond what Article 95 of the EC Treaty does: the Internal Market should not just function, but function properly.[35] This coincides with the intention expressed in Article 61 of the EC Treaty of establishing progressively an "area of freedom, security and justice". Such a goal is hardly compatible with a strict reference to the Inter-

23 In agreement *Eidenmüller* (*supra* note 2), at 2 et seq. (8).

24 *Basedow* (*supra* note 9), at 687 et seq. (700 et seq.).

25 Plan of action of the Council and the Commission on the best possible implementation of the provisions of the Treaty of Amsterdam in order to establish progressively an area of freedom, security and justice, OJ 1999 C 19, at 1, 4, para. 16.

26 *Müller-Graff/Kainer* (*supra* note 13), at 350 et seq. (351).

27 Cf. in this article under section IV.

28 For example, here is to be reminded of ECJ case-law regarding the basis of the writ of attachment in foreign execution (ECJ 10 February 1994 – C- 398/92 – *Mund & Fester* v *Hatrex*) or on the admissibility of legal aid for foreigners (ECJ 1 July 1993 – C-20/92 – *Hubbard* v *Hamburger*; ECJ 26 September 1996 – C-43/95 – *Data Delecta* v *MSL Dynamics;* ECJ 20 March 1997 – C-323/95 – *Hayes* v *Kronenberger*; ECJ 2 October 1997 – C-122/96 – *Saldanha and MTS*).

29 Cf. for example the Directive 98/27/EC based on Article 95 EC Treaty on Injunctions for the Protection of Consumers' Interests (OJ 1998 L 166/51) or Article 5 of the Directive 2000/35/EC on Combating Late Payment in Commercial Transactions (OJ 2000 L 200/35).

30 Lastly again for the law of procedure *Borges*, Die europäische Klauselrichtlinie und der deutsche Zivilprozess, RIW 2000, at 933 (935). Similar – however mainly with subsidiarity considerations – *H. Roth*, Die Vorschläge der Kommission für ein europäisches Zivilprozessgesetzbuch - das Erkenntnisverfahren, ZZP 109 (1996), at 271 et seq. (310 et seq.).

31 Plan of action of the Council and the Commission on the best possible implementation of the provisions of the Treaty of Amsterdam in order to establish progressively an area of freedom, security and justice, OJ 1999 C 19, at 1, 10 et seq. para. 41 lit. d.

32 Hereon *Basedow*, Das BGB im künftigen europäischen Privatrecht: Der hybride Kodex, AcP 200 (2000), at 445 et seq. (476 et seq.).

33 Plan of action of the Council and the Commission on the best possible implementation of the provisions of the Treaty of Amsterdam in order to establish progressively an area of freedom, security and justice, OJ 1999 C 19, at 1, 11 para. 41 lit. f. The English language version is as follows: "uniform private international law" and refers to a standardisation of conflict-of-laws rules: *Basedow*, op. cit., at 445, 477.

34 Similar – however only in regard to the creation of a uniform European law of obligations and property – *Tilmann/van Gerven*, in: Europäisches Parlament (ed.), Untersuchung der Privatrechtsordnungen der EU im Hinblick auf Diskriminierungen und die Schaffung eines Europäischen Zivilgesetzbuchs, Luxembourg 1999 (PE 168.511), at 183, 192 et seq.

35 *Leible*, in: *Schulte-Nölke/Schulze* (ed.), Europäische Rechtsangleichung und nationale Privatrechte, Baden-Baden (D), 1999, at 353 et seq. (388).

nal Market as Article 95 of the EC Treaty requires but also demands legal implementation by the Community where there is neither a threat of any immediate jeopardy to fundamental freedoms nor a distortion of competition,[36] at least one that can be discerned.[37] This in particular affects family law procedures such as recognition of judgments on personal status, etc. but goes far beyond it. Here a parallel can very well be drawn to the ECJ's case law practice on fundamental freedoms: the ECJ has, particularly in the recent period, repeatedly ruled that restriction of market freedom is out of the question if the effects emanating from a norm are too uncertain or of too indirect significance to be able to obstruct intra-Community commerce in goods and services or the free movement of persons.[38] One may agree with the ECJ that, for example, a regulation barring summary debt recovery proceedings where service would have to be made on a debtor in another Member State does not violate freedom of export under Article 30 of the EC Treaty because it has only indirect effects on trade flows.[39] Then too, the issue of simplified transborder enforcement of claims is certainly one of several decisive factors in concluding international treaties even if it is not the crucial one. And one cannot contest the fact that a properly functioning Internal Market undoubtedly includes the possibility of being able to initiate national summary debt recovery procedures against debtors residing in other Member States. Approximation or even standardisation of such regulations are now being opened up by Article 65 of the EC Treaty with its more flexible reference to the Internal Market in that regulation.

ECJ jurisprudence on process cost bonds constitutes another example. The Court has several times ruled that national legal regulations on posting of process cost bonds, which fall within the remit of the EC Treaty because of their effects on inter-Community trade in goods and services, by their very nature are subject to the general prohibition on discrimination set forth in Article 12 of the EC Treaty.[40] The applicability of Article 12 of the EC Treaty was affirmed by the ECJ in such cases precisely because fundamental freedoms are indeed affected but were not relevant in regard to concrete criteria;[41] since the possibility that citizens of one Member State would hesitate to conclude contracts with customers in other Member States due to the fact that they would have to post process cost bonds in an action for payment is too uncertain and indirect as to allow one to see it as a restriction on fundamental freedoms.[42] Notwithstanding this, it cannot be disputed in these cases either that such difficulties in taking court action on such a claim is amongst the risks which could very well deter smaller enterprises, in particular, from entering into foreign business. It was therefore not without justification that a "study of the regulations on deposit of security for process costs and expenses of defendants in civil proceedings" has been included in the Council and the Commission's plan of action.[43]

It can therefore be said in summary that Article 61, lit. c and Article 65 of the EC Treaty also allow for approximation or harmonisation of such Member State norms on process law and conflict-of-laws rules as are not exactly constitutive for the Internal Market to which in any case a supportive function, albeit an indirect one, is attributed for the exercise of fundamental freedoms and thus for functioning of the Internal Market as a whole.

2. Regulation of third-state cases

Whether a secondary law act encompasses a case with transborder references to different Member States as well as third States or even between a Member State and a third State, cannot be determined for all cases but only through interpretation of the concrete legislative measures in question. More important than that is, however, the issue of whether Article 65 of the EC Treaty is the source of competency restricted a priori only to the web of relationships within the Internal Market and thus limited to purely intra-Community cases. For the field of private international law in Article 65, lit. b of the EC Treaty, no explicit territorial limitations can be read out of the wording. If need be, the concept of the "Internal Market" implies that only civil cases[44] with a link to different Member States fall under the provisions of its empowerment foundation.

a) Private international law

Rules pertaining to conflict-of-laws have thus far primarily included the younger generation of consumer protection directives.[45] Their explicit regulatory prescriptions relate to cases having an intimate connection with the Internal Market and subject to third-state law on the basis of a subjective link. To this are added secondary law acts with unwritten rules on

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36 In this direction also *Müller-Graff/Kainer* (*supra* note 13), at 350 et seq. (351).

37 Cf. the judgment on the Tobacco Advertising Prohibition Directive: ECJ 5 October 2000 – C-376/98 – *Deutschland* v *Kommission*, EuLF 2000/01 (E), at 160 with essay *Obergfell*, On Division of Competence in the EU – The Tobacco Advertising Prohibition Directive Test Case, EuLF 2000/01 (E), at 153 = JZ 2001, at 32 with comment by *Götz* = EuZW 2000, at 694 with comment by *Wägenbaur* = EWS 2001, at 27 with essay by *Stein*, Keine Europäische „Verbots"-Gemeinschaft – das Urteil des EuGH über die Tabakwerbeverbot-Richtlinie, EWS 2001, at 12.

38 Cf. for example ECJ 7 March 1990 – C-69/88 – *Krantz*, para. 11; ECJ 13 October 1993 – C-93/92 – *CMC Motorradcenter*, para. 12. Further references in *Grabitz/Hilf-Leible* (*supra* note 15), para. 15 to Article 28 EC Treaty.

39 Cf. ECJ 22 June 1999 – C-412/97 – *ED*, para. 11.

40 ECJ 26 September 1996 – C-43/95 – *Data Delecta* v *MSL Dynamics*, para. 14M; ECJ 20 March 1997 – C-323/95 – *Hayes* v *Kronenberger*, para. 16; ECJ 2 October 1997 – C-122/96 – *Saldanha and MTS*, para. 20.

41 *Streinz/Leible*, Prozesskostensicherheit und gemeinschaftliches Diskriminierungsverbot, IPRax 1998, at 162 et seq. (165 et seq.); *Streinz*, Europarecht, 4th ed., Heidelberg (D), 1999, para. 668.

42 *Grabitz/Hilf-Leible* (*supra* note 15), para. 50 on Article 28 EC Treaty.

43 Cf. the plan of action of the Council and Commission concerning the best possible implementation of the provisions of the Treaty of Amsterdam in order to establish progressively an area of freedom, security and justice, OJ 1999 C 19, at 1, 11 para. 41 lit. d.

44 Given the fact that transborder aspects are inherent in both international private law and the law of international civil procedure, this element of the rule incorporated in Article 65 EC Treaty does not in any case preclude the issuing of secondary legal instruments: *Basedow* (*supra* note 9), at 687 et seq. (701); *Remien*, European Private International Law, the European Community and its Emerging Area of Freedom, Security and Justice, CMLR 2001, at 53 et seq. (74).

45 Cf. hereon *Leible*, in: *Schulte-Nölke/Schulze* (ed.), Europäische Rechtsangleichung und nationale Privatrechte, Baden-Baden (D), 1999, at 353 (360 et seq.); *Staudinger* (*supra* note 13), at 93 (94 et seq.).

conflict-of-laws situations. Thus in the legal case of *Ingmar,*[46] the ECJ ruled that the standard of protection of the Sales Representative Directive is internationally mandatory and may not be evaded by opting for the law of a third State as long as the matter has a strong connection with the Community. Globally speaking, there are now a number of directives at European level which include (unwritten) conflict-of-laws regulations, even if only as an appendix, and thus primarily regulate third-state cases. Such legal instruments are mainly based on Articles 94 and 95 of the EC Treaty which in their wording likewise refer back to the "Internal Market" or the "Common Market". But it can hardly be established why, for instance, Article 65, lit. b of the EC Treaty allows for the issuance of directive whose conflict-of-laws requirements also extend to third-state constellations while Article 65, lit. b of the EC Treaty, by contrast, is only supposed to be restricted to Internal Market cases. This applies all the more as this new source of competency is aimed precisely at promoting compatibility of conflict-of-laws norms applying in the Member States, thus primarily intended to eliminate frictions produced by implementation of the regulatory requirements cited above. As a first step it can therefore be stated: no territorial restriction emerges from the concept of "Internal Market" in Article 65 of the EC Treaty such as to allow one to base on that provision only harmonisation of rules on conflict-of-laws for pure Internal Market cases. It is rather so that Article 65, lit. b of the EC Treaty makes it possible to standardise those regulatory requirements explicitly included in consumer protection directives or covertly found in other secondary law acts.

But this only constitutes a segment of the field of private international law. The crucial question is therefore: does Article 65, lit. b of the EC Treaty allow for issuing a regulation with linkage rules open in all directions[47] which point to the applicability of third-state law and also comprise cases having no intimate or strong connection with the Community's territory? Expressed in a different way: does Article 65, lit. b of the EC Treaty contain a source of authority for communitarisation of the Rome Convention (Rome I Regulation) or even codification of an international law of torts (Rome II Regulation)? The Rome Convention does not distinguish between a Member State and a third State. Thus under Article 2 of the Rome Convention, law is even applicable if it is included in the legal system of a non-treaty State, in other words a third State. The Rome I Regulation can then only be supported by Article 65, lit. b of the EC Treaty if the compatibility of such multilateral linkage rules in the Member States is "necessary for the proper functioning of the internal market". It should first of all be noted that the strict requirements developed by the ECJ in its Tobacco Ruling[48] in regard to Article 95 of the EC Treaty cannot be undifferentiatedly applied to Article 65 of the EC Treaty. The intervention threshold for action by the Community legislator has rather been lowered. If a case now indicates a connection with a third State as well as with two different Member States with divergent linkage rules, then the importance of standard a universal conflict-of-laws system for the Internal Market clearly emerges from the following consideration: if there is no "compatibility" of the conflict-of-laws norms applicable in the Member States, then the requirement of legal security is first of all violated[49] and an incentive for forum shopping has been created.[50] If the third-state petitioner decides, where process law allows, to sue the respondent in Member State A, where conflict-of-laws norms favour him, then only the jurisdictional provisions of the Brussels Convention or of the Brussels I Regulation generally intervene as well. The decision handed down in Member State A must accordingly be recognised and declared enforceable in all other Member States. Different linkage rules calling for the application of a specific specialised law in this way attain Internal Market relevance ultimately due to the principle of the free movement of judgments.

Discrepant conflict-of-laws norms can moreover give rise to obstructions of competition from the vantage point of an EU supplier where he is put at a disadvantage in relation to his competitors from another Member State. It is furthermore not to be excluded that linkage rules enter into the decision process on whether a Union citizen avails himself of his fundamental freedoms. This can in certain ways be illustrated on the basis of international tort law: An entrepreneur with a commercial focus on third-state business will answer the question whether and in what way he exercises his freedom of establishment in the Internal Market completely without reference to how damage claims are linked in a Member State and whether he might ultimately be threatened with unlimited punitive damages if he supplies products to the United States.

In summary it can be shown both from the vantage point of fundamental freedoms as well as in view of impending distortions of competition that the Internal Market can only function "properly" if in third-state cases the multilateral conflict-of-laws norms in the Member States are the same. Article 65, lit. b of the EC Treaty accordingly offers the supranational legislator something of a possibility of transferring the Lugano Convention to the regulation. This approach avoids not only mixing up conflict-of-laws norms derived from national, European and international law sources but also achieves compatibility with the Brussels Convention which has already been communitarised.

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[46] ECJ 9 November 2000 – 381/98 – *Ingmar GB Ltd.* v *Eaton Leonard Technologies Inc.* in: EuLF 2000/01 (E), at 177 et seq. with comment by *Font i Segura* = BB 2001, at 10 with comment by *Kindler* = EuZW 2001, at 50 with comment by *Reich*; cf. hereon also *Freitag/Leible*, Der internationale Anwendungsbereich der Handelsvertreterrichtlinie – Europäisches Handelsvertreterrecht weltweit?, RIW 2001, Issue 4 (in print); *Michaels/Kamann*, Handelsvertreterausgleich und Rechtswahlfreiheit, EWS 2001 (in print); *Staudinger*, Die ungeschriebenen kollisionsrechtlichen Regelungsgebote der Handelsvertreter-, Haustürwiderrufs- und Produkthaftungsrichtlinie, NJW 2001 (in print).

[47] Sceptical: *von Hoffmann*, in: *idem* (ed.), European Private International Law, Nijmegen (NL), 1998, at 19, 32 paras. 28, 34, 35; *Remien* (*supra* note 44), at 53 et seq. (74 et seq.); *Basedow* goes further (*supra* note 9), at 687 et seq. (701 et seq.); previously critical of the competence for issuing general conflict of laws rules: *Lurger*, in: *Terlitza/Schwarzenegger/Boric´* (eds.), Festschrift Posch, Vienna (A), 1996, at 179, 200 et seq.

[48] Cf. hereon the information in note 36.

[49] Cf. *Basedow* (*supra* note 9), at 687 (703).

[50] Ibid.

b) International civil process law

As already mentioned, no strict geographic limitation for future legal instruments follows from the concept "Internal Market" in Article 65 of the EC Treaty. Here below, the question will be pursued whether and to what extent the framers of secondary law have in the past included third-state cases under the remit of the various regulations in measures taken on international civil process and insolvency law (see section c below).

In order to determine the territorial scope of the Brussels I Regulation, its predecessor, the Brussels Convention, must first be studied. This convention in its Title III extends only to the recognition and enforcement of decisions from Member States (Article 25 of the Brussels Convention). The jurisdictional rules in Title II however cover not only cases with a connection with the treaty States but go beyond the Internal Market in the geographic sense. This is in particular underscored with the ECJ's decision[51] in the *Group Josi* case.[52] Thus Article 2(1) of the Brussels Convention automatically applies if the proximity to the Internal Market connection exhausts itself simply in the domicile of the respondent and the petitioner is domiciled in a third State. In regard to Articles 17 and 18 of the Brussels Convention as well, the Court rejects the assumption of an unwritten limitation on applicability and likewise extends both regulations to third-state cases. The Brussels I Regulation converts the Brussels Convention into an instrument of Community law and, more precisely, in the characterisation that the Court gave it up until its enactment in December of last year. Consequently, third-state cases such as where the respondent's domicile is sufficiently closely connected with the Internal Market fall under the remit of the Brussels I Regulation.

c) International insolvency law

The territorial scope of the European Insolvency Regulation comprises transborder insolvency cases within the Internal Market.[53] As can be gathered from the reasons advanced for its adoption, this legal instrument applies to those bankruptcy proceedings "where the center of the debtor's main interests is located in the Community."[54] The European Insolvency Regulation's scope of regulation is consequently not opened up where such a focus lies in a third State. If the debtor, on the other hand, does operate a branch outside of the Internal Market while the focus of his interests lies in a Member State, then the European Insolvency Regulation continues to apply.[55] Even in such a case, however, the regulation does not govern the effects of the main insolvency proceedings in relation to third States.[56]

V. Delineation in relation to other EC Treaty competency provisions

The required reference to the Internal Market required in Article 65 of the EC Treaty raises the question concerning the delineation in relation to other EC Treaty competency provisions. To date, it has remained largely unanswered. What is particularly the subject of dispute, is what significance should be granted to the position of Article 65 of the EC Treaty as a component of Title IV of the EC Treaty, the heading of which explicitly refers to "policies related to free movement of persons".

1. Article 65 of the EC Treaty as competency norm having merely a supplemental function

From this point of reference, the conclusion has at times been derived that Article 65 of the EC Treaty could only support such measures as *only* affect the freedom to establish, the free movement of employees and the freedom of services.[57] According to this, the regulation would only have a supplemental function. If this were correct, its scope of application would be quite restricted. This applies in particular in relation to Article 95 of the EC Treaty. As is well known, the council issues legal instruments under Article 95 of the EC Treaty for approximation of legal and administrative regulations of Member States that deal with the establishment and functioning of the Internal Market. Such measures can also extend to regulations of international civil process law and private international law. The Community has several times made use of this competency. Mention need only be made of the regulation requirements on conflict-of-laws contained in numerous EC directives[58] and likewise on the different legal instruments that can be found with civil process implications, in particular the guidelines on transborder consumer lawsuits.[59] If one then assumes that Article 65 of the EC Treaty is only supposed to

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51 ECJ 13 July 2000 – 412/98 – *Group Josi* v *UGIC*, in: EuLF (E) 2000/01, at 49 = IPRax 2000, at 520.

52 Hereon see *Staudinger*, Vertragsstaatenbezug und Rückversicherungsverträge im EuGVÜ, IPRax 2000, at 483. In accordance the assessment of *Geimer*, in: EuLF 2000/01 (E), at 54 et seq. (56 et seq.) in the comment to ECJ 13 July 2000 – 412/98 – *Group Josi* v *UGIC*, *idem*, in Zöller, ZPO, 22nd ed., Cologne (D), 2001, Annex I to Article 2 Brussels Convention, para. 1, para. 5 on Article 17 Brussels Convention; *Hausmann* (*supra* note 3), at 40 et seq. (44 n. 31); however, more cautious: *Jayme/Kohler*, Europäisches Kollissionsrecht 2000: Interlokales Privatrecht oder universelles Gemeinschaftsrecht, IPRax 2000, at 454 et seq. (459).

53 *Eidenmüller* (*supra* note 2), at 2 et seq. (5); *Leible/Staudinger* (*supra* note 2), at 533 et seq. (538).

54 Consideration No. 14.

55 The ruling on secondary insolvency proceedings according to Article 3(2) of the European Insolvency Regulation does not apply, as the elements of this rule require the setting up of a branch in the area of "another Member State".

56 Cf. the explanatory report compiled by *Miguel Virgós Soriano* and *Etienne Schmit* on the Insolvency Convention of 8 July 1996, 6500/1/96 REV 1, DRS 8 (CFC), No. 11; *Balz*, Das neue Europäische Insolvenzübereinkommen, ZIP 1996, at 948.

57 *Basedow*, Die Harmonisierung des Kollisionsrechts nach dem Vertrag von Amsterdam, EuZW 1997, at 609; *idem* (*supra* note 9), at 687 et seq. (697 et seq.); *Israel*, Conflicts of Law and the EC after Amsterdam. A Change for the Worse?, MJ 7 (2000), at 81 et seq. (92). *Wiedmann*, in: *Schwarze* (ed.), EU-Kommentar, Baden-Baden (D), 2000, para. 9 to Article 65 EC Treaty; *Kohler* (*supra* note 10), at 1 et seq. (15 et seq.). In agreement, see *Leible* (*supra* note 45), at 353 et seq. (388). This opinion has expressly been abandoned.

58 Cf. in the text under section IV. 2. a).

59 Directive 98/27/EC of 19 May 1998 on Injunctions for the Protection of Consumers' Interests (OJ 1998 L 166/51). Cf. hereon *Baetge*, Das Recht der Verbandsklage auf neuen Wegen, ZZP 112 (1999), at 329; *Hoffmann*, Directive "Actions en cessation en matière de protection des intérêts des consommateurs" (Dir. 98/27/CE du 19/5/98), ERPL 2000, at 147.

fill in the remaining competency gaps, then the norm's scope of application is limited to harmonisation of the provisions on free movement explicitly excluded from Article 95 of the EC Treaty as well as the rights and interests of employees (Article 95(2) of the EC Treaty). Due to the different decision making procedures, in one case participation in decision making, in another one only the European Parliament's right to be heard, in view of the ECJ's "Titanium oxide" decision[60] a legal instrument could only be supported by Article 65 of the EC Treaty if it did not affect any regulatory subjects for which Article 95 of the EC Treaty also could be held to be a basis for competency. Expressed in other terms: with multifunctional legal instruments, i.e. those serving several different freedoms, Article 95 EC Treaty would always have to be used as the legal basis for a measure and not Article 65 of the EC Treaty.[61]

Ultimately the conclusion is drawn, based on the purely supplemental function of Article 65 of the EC Treaty in its relation to Article 94 of the EC Treaty that the regulation, for one thing, can only be used if it is a not a question of issuing a directive but only a regulation, something that would be the preferred form anyway in private international law or international process law. For another, it should be noted that Article 94 of the EC Treaty demands that the legal instrument have a direct effect of the functioning of the Common Market while Article 65 of the EC Treaty contents itself with requiring that the Internal Market function properly.[62]

2. Article 65 of the EC Treaty as "lex specialis" for certain Internal Market-related norms

According to another view, specific reference to the Internal Market rather suggests an interpretation according to which Article 65 of the EC Treaty justifies enacting all kinds of harmonisation measures which either "serve the functional adequacy of the internal market or the free movement of persons."[63] The use of the dichotomous "either/or" is admittedly somewhat less precise since measures serving the free movement of persons inevitably strengthen the functional adequacy of the Internal Market as well; after all, the free movement of persons, as emerges from Article 14(2) of the EC Treaty, is precisely one of the integral components of the Internal Market. If one assumes that for opening up the application scope of Article 65 of the EC Treaty an indirect effect promoting the Internal Market is enough for a legal instrument,[64] then the regulation involves nothing other than a "lex specialis" for the fields of private international law, internal procedural law as well as other areas of civil process law. The following considerations additionally speak for the "lex specialis" theory and against the supplemental function of Article 65 of the EC Treaty.

a) Legislative will and the practice of Community bodies

If the theory of a merely supplemental character of Article 65 of the EC Treaty were correct, then the recently enacted European Insolvency Regulation would be based on the wrong empowerment basis since the recognition and settlement of international insolvencies affect not only the free movement of persons but also have implications for free movement of goods, services and capital. The proper source of competency would then be Article 95 and not Article 65 of the EC Treaty.[65] Simply on the basis of which legal basis Community bodies have chosen does not, it is true, provide much insight into the interpretation of competency norms. Supranational legislators can also make mistakes, as the ECJ decision in the Tobacco Directive[66] case demonstrates. But the same arguments that can be mobilised against an Article 65-based competency for enacting the European Insolvency Regulation can also be used to reject the Community's competence to communitarise the Brussels Convention and convert it into a regulation. Ultimately, the application scope of such a legal instrument is not limited to subjects attributable solely to the free movement of persons but extends to all civil and commercial law matters. It is precisely recognition and enforcement of judgments on purchase price claims that more properly relates to the free movement of goods. It has therefore been argued in doctrine that Article 65 of the EC Treaty is an inadequate competency source for the Brussels I Regulation and that Article 95 of the EC Treaty should have been used.[67] This is at first surprising since Article 101a of the EC Treaty (old version) according to a practically unanimous opinion[68] was rejected as a legal basis for standardisation of international procedural law in the terms of the Brussels Convention.[69] The Treaty of Amsterdam would therefore have had to entail a competency increment under Article 95 of the EC Treaty. However, this cannot be read out of the available materials.

The rejection of Community jurisdiction for enactment of the Brussels I Regulation furthermore collides with the wording of Article 65, lit. a of the EC Treaty according to which the measures to be based thereon serve "the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases". Now, one could perhaps object here that rulings in civil cases could also include family law decisions. However, even the concept of "commercial" itself projects far beyond the narrowly defined field of the free movement of persons. Moreover, the almost word-for-word adoption of the Brussels Convention's title strongly suggests that the Member States as lords of the treaties actually wanted to create a competency basis with Article 65 of the EC Treaty, one which as a legal basis would *also* allow for enactment of a redesigned Brussels Convention in the form of a Community instrument.

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60 ECJ 11 June 1991 – C-300/89 – *Commission* v *Council*.

61 In this vein expressly *Basedow* (*supra* note 9), at 687 et seq. (698); *Israel* (*supra* note 57), at 81 et seq. (92).

62 *Israel* (*supra* note 57), at 81 et seq. (92 et seq.).

63 *Hess* (*supra* note 10), at 23 et seq. (27); *Staudinger* (*supra* note 13), at 93 et seq. (104).

64 Cf. in this article under section IV. 1.

65 In this vein see *Israel* (*supra* note 57), at 81 et seq. (98).

66 See the information in note 36.

67 *Basedow* (*supra* note 9), at 687 et seq. (699); for a similar view see *Israel* (*supra* note 57), at 81 et seq. (98).

68 *Basedow* (*supra* note 9), at 687 et seq. (699).

69 *Remien* also makes reference to this: (*supra* note 47), at 53 et seq. (72).

b) Retransfer of competencies

The position taken here that Article 65 of the EC Treaty is a more special competency norm for the field of private international law and process law finally runs up against the objection that this would amount to retransfer of competencies to the Member States;[70] tasks incumbent upon the Community could not be re-delegated to the Member States without an explicit provision of the Treaty to that effect.[71] But this argument is not too convincing either. It is first of all worth emphasising that there has been no complete retransfer. The Community continues to be in charge of matters that previously were subject to Article 95 of the EC Treaty; only the majority conditions have changed.[72] Article 65 of the EC Treaty thus does not entail any loss of competencies but at most a limitation on them. Furthermore, delegation or ex post facto limitation of competencies is nothing unusual in Community law, as Article 152(5), sentence 2 of the EC Treaty makes clear.[73] Nor is the change in majority conditions accompanying Article 65 of the EC Treaty without its own internal logic, since Article 65 of the EC Treaty actually does entail incremental competency of the Community due to the less stringent link to the Internal Market, one which is to be compensated for with the aid of the unanimity principle. The Community's room to manoeuvre has been widened, but its activities have at the same time been made dependent upon the consent of all the participating Member States. Whether in the framework of a later treaty conference this is again abandoned and there is to be a transition to the majority principle, is another question and primarily one of legal policy.

3. Article 293 of the EC Treaty

Article 293, bracket 4 and Article 65, lit. a, bracket 3 of the EC Treaty all relate to the same comparable regulation object. However they do not have the same coverage as far as their criterial scope is concerned. Both regulations rather form two concentric circles that to a large extent overlap. Thus Article 65, lit. a, bracket 3 of the EC Treaty is limited solely to decisions in civil and commercial matters, but not those in the field of tax law.[74] Where there are overlaps, Article 293 of the EC Treaty is by no means capable of limiting Community competencies deriving from other EC Treaty norms. Nor does the norm create any grounds for Member State reservations on international treaties. It only opens up an additional option to take action to achieve results which could not be achieved with the aid of other competency provisions of the EC Treaty.[75] Article 293, bracket 4 of the EC Treaty therefore retains its significance to the extent that it constitutes the basis for concluding agreements with Denmark and the other Member States.[76]

VI. The form of the legal instrument

It is questionable which action instruments are feasible in the framework of Article 65 of the EC Treaty. With reference to the wording about "promoting the compatibility" in Article 65, lit. b of the EC Treaty,[77] that implies less than legal approximation or standardisation, some voices in academic literature would exclude a regulation as such a legal instrument. Feasible however would still be a directive. However, this approach must be rejected.[78] For lack of divergent special regulation in Articles 61 et seq. of the EC Treaty, all of the forms of action listed are available to the Community: regulations, directives, decisions, recommendations or simple statements.[79] Moreover, a text comparison with other competency regulations shows that the EC Treaty explicitly establishes if a purely non-binding measure is to be taken or if harmonisation of legal regulations must be forgone.[80] Alongside of such a systematic argument, the reliability of regulation enactment is also based on the idea of "effet utile" and thus on the principle of teleological interpretation. In the field of private international law, the current lack of harmony between the linkage rules in the Internal Market is due precisely to the use of directives as legal instruments. A large number of consumer protection directives in the past contained requirements to regulate conflict-of-laws situations which required implementation in the national legal systems. This transformation process by itself led to a large number of conflict norms at the national level.[81] This applied all the more since Member States misunderstood these conflict-of-laws instructions as being merely minimum standards and ultimately created a veritable overgrowth of intervention norms. But if the measures based on Article 65, lit. b of the EC Treaty are there precisely for the purpose of ensuring the "compatibility" of applicable Internal Market norms relating to conflicts of law and thus to that sector's proper functioning, then more effective legislative instruments like regulations are needed.[82]

The overwhelming importance of the regulation as a legal instrument can best be illustrated precisely by the impending

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70 *Israel* (*supra* note 57), at 81 et seq. (90).

71 Cf. ECJ 14 December 1971 – 7/71 – *Commission* v *France*, paras. 18/20.

72 Unanimity instead of a qualified majority.

73 This exclusion was made in order not to leave the organs and substances of human origin over to the economical logic of the Internal Market, i.e. to leave them over to a harmonisation of legislation based upon Article 95 EC Treaty, cf. *Calliess/Ruffert-Wichard* (*supra* note 15), para. 14 to Article 152 EC Treaty.

74 *Basedow* (*supra* note 9), at 687 et seq. (700).

75 *Calliess/Ruffert-Bröhmer* (*supra* note 15), para. 4 on Article 293 EC Treaty.

76 *Schwarze-Wiedmann* (*supra* note 57), para. 22 on Article 65 EGV.

77 Cf. also Article 65 lit. c EC Treaty.

78 Cf. in detail *Staudinger* (*supra* note 13), at 93 et seq. (104).

79 In principle, the Commission bound itself within the scope of Article 100a EC Treaty for the benefit of the Directive, cf. the Declaration on the Single European Act of 28 February 1986 (OJ 1987 L 168/1, at 24): "The Commission will give precedence to its proposals in accordance with Article 100a(1), when the approximation in one or more Member States requires an amendment to the legal provisions." However it is questionable, whether this self limitation will remain in existence at all according to the Treaty of Amsterdam.

80 *Schwarze-Wiedmann* (*supra* note 57), para. 7 on Article 65 EC Treaty.

81 See also *Remien* (*supra* note 44), at 53 et seq. (76). *Remien* refers to the faulty development in international insurance law, which was triggered by the mere "harmonisation" on the basis of Directives.

82 *Kreuzer*, in: *Müller-Graff* (ed.), Gemeinsames Privatrecht in der Europäischen Gemeinschaft, 2nd ed., Baden-Baden (D), 1999, at 457, 502 et seq., also holds the legal instrument of the Regulation to be the ideal legislative form for the standardisation of conflict-of-laws provisions.

eastward expansion of the EU. Until now, there have been four different accession agreements to the Brussels Convention in the field of international civil process law which make its legal application more difficult in the Internal Market. At present, the Brussels I Regulation has supplanted international law treaties and the requirement of their ratification and will under Article 249(2) of the EC Treaty be directly and uniformly applicable as of 1 March 2002 in all Member States with the exception of Denmark.[83] Consequently, when accepting new members into the Community, harmonised international civil procedure law can in the future be made applicable as part of the acquis communautaire not just in a short period of time but uniformly throughout the Internal Market as well.

VII. Subsidiarity and proportionality

Article 65 of the EC Treaty does not provide the mandate for complete communitarisation of international civil procedure law and private international law, but simply establishes a competing Community jurisdiction.[84] A legislative measure is according to that only in conformity with primary law if the barriers set forth in Article 5(2) and (3) of the EC Treaty are observed. The European legislator goes into these two aspects of the matter in the preliminary considerations on regulations based on Article 65 of the EC Treaty.[85]

VIII. Ramifications for the EC's external competency

If the Community exercises jurisdiction by enacting legislative instruments, then according to the ECJ's case-law[86] this automatically brings about the increment of an implied[87] supplementary external competency. The Court[88] has based this parallelism of internal and external competency on primary law (Article 10(1) of the EC Treaty).[89] This development of law by the Court and thus the recognition of so-called "implied powers" of the Community have been the object of endorsement as well as criticism in doctrine.[90] Whether and to what extent the EU is invested with exclusive or only competing authority to conclude international law treaties with third States and whether the Member States still retain independent competencies must be determined at the level of secondary law on the basis of each concrete legal instrument. Decisive are the latter's substantive, personal and geographic scope of application as well as the fact of whether only minimum harmonisation is being attempted in the form of a directive or whether legal standardisation is being sought by way of a regulation.[91] If one looks at Article 8[92] of the Brussels II Regulation, then Member States do retain "legal jurisdictions" under certain conditions. They can fall back on their autonomous competency law if no forum can be derived from Articles 2 through 6 of the Brussels II Regulation. Within this segment of possible third-state cases, the Member States are therefore at liberty to retain or enact autonomous regulations or even to conclude international law treaties with third States.[93] In regard to recognition and enforcement of decisions, Article 16 of the Brussels II Regulation mentions conventions with third States. In the application scope of Article 8 of the Brussels II Regulation, agreements can accordingly be reached with third States which bar recognition of decisions from other Member States. Just what Article 16 of the Brussels II Regulation really says is the subject of lively dispute in academic literature.[94] This applies in particular to the question of who is authorised to conclude such agreements with third States. A statement by the Council[95] on this question, which apparently takes a position diverging from that of the commission, likewise says very little on the subject. A comparable dispute is going on about the regulatory content of Article 44(3), lit. a of the European Insolvency Regulation.[96] Even there it is unclear whether and to what extent in future only the Community is to be empowered to negotiate international law treaties with third States. Difficulties have ensued with this legal instrument primarily from the fact that international insolvency law involves cross-sectional matters and the regulation includes regulations on conflict-of-laws situations, jurisdiction of panels as well as recognition and enforcement of decisions.

Apart from the previously mentioned examples, the issue of the Community's external competency achieves considerable relevance precisely in the field of jurisdiction, recognition and enforcement of civil and commercial law rulings since the Hague Conference is currently working on a worldwide

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83 Cf. Article 76 of the Brussels I Regulation.

84 *Jayme/Kohler* (*supra* note 52), at 454 et seq. (455); *Schwarze-Wiedmann* (*supra* note 57), para. 37 on Article 62 EC Treaty.

85 Cf. Considerations Nos. 4 et seq. of the Brussels I Regulation.

86 Regular case-law since: ECJ 31 March 1971 – 22/70 – *AETR*; see also Report 1/94 of 15 November 1994, "Zuständigkeit der Gemeinschaft für den Abschluß völkerrechtlicher Abkommen auf dem Gebiet der Dienstleistungen und des Schutzes des geistigen Eigentums", ECR 1994-I, at 5267; critical thereof *Mittmann*, Die Rechtsfortbildung durch den Gerichtshof der Europäischen Gemeinschaften und die Rechtsstellung der Mitgliedstaaten der Europäischen Union, Frankfurt a/M (D), 2000, at 13 et seq. The acceptance of this case-law in all Member States can be explained on the basis of their Declaration No. 10 to the Maastricht Treaty, which expressly makes reference to the judgment of the ECJ in the case *AETR*.

87 This must be differentiated from the competencies ascribed expressly to the Community in the EC Treaty on the conclusion of agreements with third states; on the competence for the conclusion of contracts in general, see: *Streinz*, (*supra* note 41), paras. 593 et seq.

88 See hereon *Nakanishi*, Die Entwicklung der Außenkompetenzen der Europäischen Gemeinschaft, Frankfurt a/M (D), 1998.

89 *Callies/Ruffert-Schmalenbach* (*supra* note 15), para. 5 on Article 300 EC Treaty.

90 See for example the information given in: ibid., paras. 16 et seq. to Article 300 EC Treaty

91 Ibid., para. 10 on Article 300 EC Treaty.

92 Hereon *Hau* (*supra* note 4), at 1333 (1340 et seq.); *Kohler* (*supra* note 4), at 10 (11).

93 In this vein, see also *Jayme/Kohler* (*supra* note 52), at 454.

94 See hereon *Jayme/Kohler* (*supra* note 52), at 454; *Kohler* (*supra* note 4), at 10 et seq. (14).

95 Declaration 2000/C 183/02; OJ C 183 of 30 June 2000, at 1: According to this, "Regulation (EC) No. 1346/2000" does not prevent a Member State from concluding agreements with third countries which apply to the same area as this Regulation, as long as the agreement in question does not affect this Regulation; but see also *Jayme/Kohler* (*supra* note 52), at 454 n.6: According to this view, the Council Declaration refers, pursuant to its wording, to the European Insolvency Regulation; instead, the Brussel II Regulation was allegedly meant; in this vein see also *Kohler* (*supra* note 4), at 10 et seq. (14; n. 32).

96 *Eidenmüller* (*supra* note 2), at 2 et seq. (10); *Leible/Staudinger* (*supra* note 2), at 533 et seq. (539).

agreement,[97] albeit without great success thus far. If one recalls once again the territorial scope of application[98] of the Brussels I Regulation, then the jurisdictional provisions of Title II then apply even in regard to third States. Decisive under Article 3(1) of the Brussels I Regulation is solely the domicile of the respondent on the territory of a Member State. The Member States retain only "residual jurisdiction" in the narrow range of Article 4(1) and (2) of the Brussels I Regulation. Limited to this, the Member States are at liberty to maintain or enact autonomous jurisdiction regulations or to reach agreements with third States. Otherwise, the right to conclude agreements is restricted to the Community since with the enactment of the legal instrument in December it had availed itself of its internal competency under Article 65, lit. a, bracket 3 of the EC Treaty. It is of no import that the regulation under its Article 76 only takes effect on 1 March 2002. Its enactment alone establishes a blocking effect in external relations.[99]

In regard to recognition and enforcement of decisions, the following applies: Article 72 of the Brussels I Regulation allows under stringent preconditions agreements with third States that inhibit recognition. It should be noted that Article 72 of the Brussels I Regulation only leaves such agreements untouched as were reached with third States "prior to" the regulation going into effect. *E contrario*, it follows that Member States are to enjoy no further competency to conclude external agreements thereafter according to the intention of the secondary law legislator. It must instead be assumed that the Community alone is authorised to negotiate such conventions with third States. This is justified since such agreements have broken with the principle of free movement of titles which is set forth in Article 33(1) of the Brussels I Regulation.

What remains unclear, finally, is the division of competencies between Member States and the EU in regard to recognition and enforcement of decisions originating in third States. The Brussels I Regulation restricts itself according to its Article 32 only to decisions from Member States. But even from this point of view, the Community's parallel jurisdiction must at least be affirmed against the background of its having availed itself of its internal competency under Article 65, lit. a, bracket 3 of the EC Treaty. An international law agreement like the universal convention which the Hague Conference is striving for can therefore no longer be negotiated between Member States and third States alone. Instead cooperation on the national and supranational level will be required.

IX. Outlook for the future

Article 65 of the EC Treaty opens up for the supranational legislator the possibility of communitarising the broad reach of private international law and international civil process law. This regulation has led to a significant increment in the competency of the Community since, unlike Article 95 of the EC Treaty, it does not require any stringent Internal Market connection for the Community to become active since even promotion of the Internal Market in a legal instrument suffices. This trend has been compensated for by the principle of unanimity. Whether the Member States' confidence will be sufficient to introduce the majority principle in the framework of a treaty revision is something only the future can decide.

Since the Treaty of Amsterdam went into effect, the Community has already in several cases used Article 61, lit. c and Article 65 of the EC Treaty as the basis of its authority. Here one must note that the enactment of the Brussels I or Brussels II Regulations has been accompanied by an increment in the Community's competency in external relations. This has to some extent entailed controversial debates in academic literature.[100] They are largely based on the fear that private international law and international process law will now be exposed to the dangers of a "un-pragmatic bureaucratisation and unprofessional politicisation."[101] In view of the opaqueness of Brussels's legislative practice (package solutions, etc), such reservations are not without some justification. But they can ultimately change very little in the Community's competency. The goal should more properly be to ensure that the action instruments lie in competent and experienced hands at the European level. In view of the current personnel structure of the Commission, doubts about this are quite appropriate. What is therefore needed is an involvement of the professional expertise available in the Member States in the legislative process. A possibility might be the creation of a scientific auxiliary advisory body equivalent to the German Council for Private International Law for legal instruments based on Article 61, lit. c and Article 65 of the EC Treaty.[102] Equally imaginable might be the creation of a "European Scientific Committee for Private Law",[103] to which advisory tasks in the fields of private international law and international civil procedure law could then be transferred. Worthy of attention are likewise proposals made by private institutions like the European Group for Private International Law.[104] The European legislator would in any case be well advised to enter into dialogue with professional constituencies in the Member States.

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97 See hereon *Hess* (*supra* note 4), at 342; *Juenger*, Eine Haager Konvention über die Urteilsanerkennung?, in: Gedächtnisschrift Lüderitz, München (D), 2000, at 329; *von Mehren*, The Hague Jurisdiction and Enforcement Convention Project Faces an Impasse – A Diagnosis and Guidelines for a Cure, IPRax 2000, at 465.

98 Moreover, one should note that the substantive scope of application is limited according to Article 1(1) and (2) Brussels I Regulation.

99 A parallel can insofar be drawn to the "frustration prohibition" in the issuing of directives: ECJ 18 December 1997 – C 129/96 – *Inter-Environnement Wallonie ASBL*, EuZW 1998, at 167 et seq. (170 para. 50).

100 Cf. for instance *Schack*, Die EG-Kommission auf dem Holzweg von Amsterdam, ZEuP 1999, at 805.

101 *Schack*, op. cit., at 805 et seq. (808).

102 Cf. *Sonnenberger/Grosserichter*, Konfliktlinien zwischen internationalem Gesellschaftsrecht und Niederlassungsfreiheit, RIW 1999, at 721 *Sonnenberger*, Die erste Seite, RIW 4/1999; for a similar view see *Remien* (*supra* note 44), at 53 et seq. (79); see already *Zweigert*, Einige Auswirkungen des Gemeinsamen Marktes auf das Internationale Privatrecht der Mitgliedstaaten, in: Festschrift Hallstein, Frankfurt a/M (D), 1966, at 555 et seq. (562, 566).

103 Hereon *Kieninger/Leible*, Plädoyer für einen „Europäischen wissenschaftlichen Ausschuß für Privatrecht", EuZW 1999, at 37; for a similar view see *Schmid*, in: *Ackermann et al.* (eds.), Tradition und Fortschritt im Recht, Jahrbuch Junger Zivilrechtswissenschaftler 1999, Stuttgart (D), 2000, at 33 et seq.

104 See most recently the proposal for a revision of the Rome Convention, which was published in IPRax 2001, at 64 et seq.; hereon also *Jayme*, Europäische Gruppe für Internationales Privatrecht – Vorschläge für eine Reform des Schuldvertragsübereinkommens (EVÜ) (Rom/Castelgandolfo 15. - 17. 9. 2000), IPRax 2001, at 65 et seq.