The Integrating Effect of European Civil Procedure Law

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I. Introduction

The European Community is, according to Art. 1 of the Treaty on European Union, aimed at an 'ever closer union among the peoples of Europe'.[1] This directive of the treaty encompasses the concept of functional integration. Its objectives include the transfer to the Community of broader political capacities and the political competencies that go with them.[2] The integration process transforms the legal systems of the Member States in such a way that the relevant fields of law are initially affected only to a limited extent, then, are gradually superseded by standards promulgated according to Community law. Harmonized national laws remain obligated throughout the process to support the realization of Community goals, and traditional institutions are ultimately supplanted through the creation of a new system.[3] The momentum generated by the integration process results in the replacement of national regulations by Community law, which is directly binding on the Member States of the European Union (the 'Member States'), and by increasingly far-reaching measures designed to harmonize the various national laws.

In the areas of private international and procedural laws, originally only the loose bond of Article 220 of the Treaty Establishing the European Economic Community ('EC Treaty') existed between national civil procedures within the European Community. The harmonization of national procedural laws was achieved in an

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[1] *Müller-Graff*, in: Dauses (Ed.), Hdb. EG-Wirtschaftsrecht A I, No. 72 s., *Zuleeg*, in: v.d. Groeben/Thiesing/Ehlermann, Kommentar zum EU/EG-Vertrag (1997), Art. 1 EGV, No. 7, 43. *Dreier/Pernice*, Art. 23 Grundgesetz (2nd ed. 1998), NO. 33, et seq.

[2] Different conceptions of integration are discussed by *König*, Die Übertragung von Hoheitsrechten im Rahmen des europäischen Integrationsprozesses – Anwendungsbereich und Schranken des Art. 23 GG (2000), p. 34, et seq.

[3] European integration first affected the areas of tax law, than administrative law. Today, private and criminal law are the focus of the community's harmonization as well. *Basedow*, Das BGB im künftigen europäischen Privatrecht, Archiv für die civilistische Praxis 200 (2000), 445, 449, et seq.

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intergovernmental framework, through the familiar means of an international treaty.[4] Against this backdrop appeared the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the 'Brussels' Convention') in the form of an ordinary international convention – comparable to other bi- and multilateral legal instruments dealing with international judicial cooperation, for example, in the context of the Hague Conference.[5] The Brussels' Convention was indeed regarded as more efficient than typical conventions, because the European Court of Justice interprets it uniformly.[6] The parallel Lugano Convention has strengthened this impression, not the least due to the lack of interpretive competence of the European Court of Justice.[7]

The situation has changed since the 1990's[8]: On the one hand the European Court of Justice has strengthened its case-law on the influence of freedoms of the community on international civil procedure. The court declared numerous national procedural provisions discriminating against aliens to be inapplicable to citizens of other Member States.[9] On the other hand, the Community itself was entrusted with new legislative authority: The Maastricht Treaty already declared 'judicial cooperation in civil matters' to be in the 'third pillar' of the European Union.[10] According to the Amsterdam Treaty the implementation of a European Judicial Area is an independent aim of the Community (Arts. 61 and 69 EC Treaty).[11] Within this new political field the EC has efficient law making powers[12] and all of the various forms of secondary Community law at its disposal (see Arts. 67 and 249 EC Treaty). For more than three years the European Commission and the Council of the European Union have been working intensively toward the achievement of a judicial infrastructure for the Internal Market.[13] In light of

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[4] *Grolimund*, Drittstaatenproblematik des Europäischen Zivilverfahrensrechts (2000), p. 124 et seq., stresses quite correctly that the integrative function of procedural law was perceived by the 'founding fathers' of the EC Treaty, see *Hallstein*, Rabels Zeitschrift für ausländisches und internationales Privatrecht 28 (1964), 211, 222s.

[5] Cf. *W. Kennett*, The Enforcement of Judgments in Europe (2000), p. 5, et seq.

[6] *Kropholler*, Europäisches Zivilprozessrecht (6th ed. 1998), Einleitung, No. 17.

[7] For a Swiss perspective cf. *Walter*, Internationales Zivilprozessrecht der Schweiz (2nd ed. 1998), p. 150, et seq., 379, et seq.

[8] *Heß*, Der Binnenmarktprozeß, Juristenzeitung 1998, 1021, et seq.; *Jayme*, Europäisches Kollisionsrecht: Grundlagen – Grundfragen, in: Müller-Graff (ed.) Perspektiven des Rechts der Europäischen Union (1998), p. 1, et seq.

[9] *Heß*, Juristenzeitung 1998, 1021, 1022 s.; *H. Roth*, in: H. Roth/Müller-Graff (ed.), Recht und Rechtswissenschaft (2001), p. 351, 366.

[10] Cf. *Pirrung*, Zeitschrift für europäisches Privatrecht 1999, 834, 835, et seq.

[11] *Heß*, Neue Juristische Wochenschrift 2000, 21 et seq.; *Kotuby*, NILR 2001, 1, 5, et seq.

[12] Art. 67 (5) EC Treaty (of Nice) suspends the necessity of an unanimous decision (with the exception of 'aspects relating to family law'), OJ 2001 C 80, 1, et seq., see *Heß*, Juristenzeitung 2001, 573, 574.

[13] Cf. The conclusion of the Finnish presidency after the Tampere summit (10/15/1999), Neue Juristische Wochenschrift 2000, 1925. The implementation of the conclusion was agreed upon by the ministers of justice and home affairs in an Action Plan of 30 Nov. 2000, 13648/00 JUSTICV 130, OJ 2001 C 12, 1, et seq., Praxis des Internationalen Privat- und Verfahrensrechts 2001, 163, et seq.

the previous 'success' with the harmonization of international procedural law, the Community has indeed developed a key field of activity.[14] By 2004, a European Judicial Area is to be realized as a new step in the integration process.[15] Today, a distinct 'European Transnational Procedural Law' (*'Binnenmarktprozess'*)[16] is increasingly taking form as a new procedural type between national and international civil procedure law.

This background explains the title of the following article: It poses the question, to what extent civil procedure law is part of the European integration process. The central thesis is that the next step in the integration process, grounded upon the new competence of Art. 65 EC Treaty, will bring about a 'paradigm shift'. The goals and needs of the European international civil procedure law will from this point on be formulated from the European perspective of a partially harmonized legal sphere, in which national reservations of sovereignty have only limited justification[17]. From this perspective the first issue concerns the function of procedural law within the European Judicial Area, then the extent of the new Community competence, and finally the relationship of the European Judicial Area to third countries.

II. Procedural Law in the European Judicial Area

1. Access to Justice in the Internal Market

Seen from a Community perspective international civil procedure serves as a means for the realization of the market freedoms of the Community within the Internal Market. This is because cross-border activities, whose exercise guarantees the freedoms of the community, require a well functioning procedural underpinning.[18]

To achieve this goal the Commission and Council have developed the concept

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[14] *Müller-Graff*, in: Hummer (ed.), Rechtsfragen der Anwendung des Amsterdamer Vertrages (2001), p. 53, 65, et seq.; *Kennett*, The Enforcement of Judgments, p. 10, et seq.

[15] Cf. Communication from the Commission to the Council and the European Parliament – Biannual update of the scoreboard to review progress on the creation of an area of 'freedom, security and justice' in the European Union, COM (2000) 782 final of 11/30/2000, http://europa.eu.int/-comm/dgs/justice_home/pdf/com2000_782de.pdf.

[16] A distinct civil procedure for cross-border transaction within the Common Market.

[17] *Heß*, Juristenzeitung 2001, 573, 581.

[18] Green Paper of the Commission, Legal Aid in Civil Matters, COM (2000) 51 final of 2/9/2000, p. 4: 'It is a corollary of the freedoms guaranteed by the EC Treaty that a citizen must be able, in order to resolve disputes arising from his activities while exercising any of those freedoms, to bring or defend actions in the courts of a Member State in the same way as nationals of that Member State. In many circumstances, such a right to access to justice can be effectively exercised only when legal aid is available under given conditions.'

'access to justice'[19]: According to this concept procedural laws of the Member States must effectively protect all citizens of the Community in the case of cross-border transactions. That means in the first instance, that all citizens of the Community must be treated on an equal basis with the citizen of the forum state. Therefore any discriminatory treatment of aliens from other Member States resulting from procedural laws is forbidden.[20] Beyond that, procedural impediments to the cross-boarder exercise of the freedoms guaranteed under the EC Treaty are to be dismantled. In particular, additional financial and procedural-cultural burdens on the foreign party must be reduced and eliminated.[21] From this perspective the Brussels Convention appears as merely a first step in an extensive harmonization of procedural law. Beyond the achievements of the convention in the unification of jurisdictions, *lis pendens* rules and rules on the recognition of judgments, the issue today concerns a 'linking' of the jurisdictional systems of the Member States participating in the European Judicial Area.[22] Art. 65(c) EC Treaty clearly speaks of 'eliminating [all] obstacles to the good functioning of [cross-boarder] civil proceedings'. What is intended is a careful examination of international civil procedure law of the Member States by the Community, with the goal to create an effective procedural law within the European Judicial Area.[23] Accordingly, the current harmonization policy of the Community encompasses cross-border civil procedural law in all its aspects.[24]

2. *Mutual Recognition in Procedural Law*

Another harmonization technique is the concept of 'mutual recognition'. The

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[19] This key-word is to be found in the discussions of the 70's, cf. *Cappelletti/Garth*, Access to Justice, vol. I–VI (1978, et seq.). The concept was transformed to the policy of consumer's protection, cf. *Reich*, Bürgerrechte in der Europäischen Union (1999), p. 366, et seq. Today, it is recognised as a general principle of European procedural integration, see Communication from the Commission from 2/14/1996 'Action plan on consumer access to justice and the settlement of consumer disputes in the internal market' COM (1996) 13 final.

[20] *Grolimund*, Drittstaaten, p. 115, et seq.; *Roth*, Grundfreiheiten des EG-Vertrages und nationales Zivilprozessrecht, in: Roth/Müller-Graff (ed.), Recht und Rechtswissenschaft (2001), p. 351, 353, et seq.

[21] Green Paper of the Commission, Legal aid in civil matters, COM (2000) 51 final, p. 8, et seq.

[22] *Müller-Graff*, Die fortentwickelte Übernahme des Acquis der 'Dritten Säule' in die 'Erste Säule' der Union, in: Hummer (ed.), Anwendung des Amsterdamer Vertrages, p. 53, 67, et seq.

[23] Against this backdrop, the predominant opinion in the German literature, regarding the creation of a European Civil Procedure as premature, seem to be doubtful, cf. *Roth*, in: Roth/Müller-Graff (ed.), Recht und Rechtswissenschaft (2001), p. 351.

[24] *Kennett*, Enforcement of Judgments, p. 12, et seq.; The Action Plan of 30 Nov. 2000 is discussed by *Heß*, Juristenzeitung 2001, 573, 578, et seq.; *Walther*, Zeitschrift des Bernischen Juristenvereins 137 (2001), 120, et seq.

European Council decided to rely on this concept at the special summit conference in Tampere, Finland, in October, 1999.[25] The goal is the complete abolition of the *exequatur* procedure. It shall be replaced by the introduction of a 'country of origin' principle to procedural law.[26] The scope of this concept of harmonization can be illustrated by its general application to the Internal Market.

The principle of mutual recognition was developed together with the free movement of goods within the European Community (Arts. 28 and 30 EC Treaty). This concept initially concerned rules for the admission of goods into the Market – for example, the approval of foodstuffs[27]: Later, it was expanded such that the cross-border delivery of goods and services which were admitted into the stream of commerce by the national authorities of the country of origin had to be on an equal basis with treated comparable goods and services of the country of destination. Therefore, a second administrative admission procedure in the country of destination was forbidden. The principle relies on the presumption that the standards of protection of one Member State are deemed of equal value in all of the Member States. Nevertheless, the importing state may impose protective measures if they comply with the requirements of the so-called 'Cassis de Dijon Formula'.[28] Under this formula, control procedures must serve to enforce recognized fundamental interests (e.g., consumer protection, environmental protection), and the rules of the importing country may not be applied discriminatorily or in a manner disproportionate to the interest sought to be protected.[29]

Within the boundaries of the 'harmonized' Internal Market the concept of 'mutual recognition' takes on a further significance: Here, too, foreign goods and services are to be admitted into the importing state without restriction. Moreover, all secondary controls and procedures are completely precluded. As the requirements for admission of goods and services have been harmonized across the European Community, one control of the compliance of those goods and services with the Community standards is sufficient. This control is exercised by the authorities of the Member State where the product first enters the Internal Market.[30] 'The decision establishing compliance of the product with the Community standards, and therefore allowing its entrance into the Internal Market, has Community-wide binding effect'. Sometimes, it is formally referred to as the 'Europass' ('*passeport*

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[25] Cf. the conclusion of the Finnish European Council Presidency, Neue Juristische Wochenschrift 1999, 1925, No. 34 s.

[26] *Heß*, Juristenzeitung 2001, 573, 578 s.

[27] *Götz*, Der Grundsatz der gegenseitigen Anerkennung im europäischen Binnenmarkt, Liber Amicorum Jaenicke (1998), p. 763, et seq.

[28] ECJ, C-120/78, *Rewe/Bundesmonopolverwaltung* (Cassis de Dijon), 1979 ECR 649.

[29] *Grundmann*, Europäisches Schuldvertragsrecht (1999), p. 82, No. 111, et seq.; *Callies*, Europäisches Wirtschafts- und Steuerrecht 2000, 432, 433 et seq.

[30] *Götz*, Liber Amicorum Jaenicke (1998), p. 763, 778.

judiciaire').[31] It is applied, for example, in the areas of bank supervision[32] or insurance controls,[33] and the area of capital market laws.[34]

The intended advancements in the harmonization of procedural law blend seamlessly with the concept of mutual recognition described above. The exequatur procedure under Art. 31 et seq. of the Brussels Convention, as well as the simplified procedure pursuant to Art. 38 et seq. of Regulation 44/01/EC, correspond to the first step of the concept of mutual recognition: Because the procedural rules of the Member States, have not yet been harmonized, substantive legal and procedural minimum standards will be enforced through the exequatur procedure as a consequence of the recognition impediments of Art. 27 of the Brussels Convention and Art. 34 of Regulation 44/01/EC.[35]

Against the backdrop of the EC Council's concept concerning the harmonization of procedural law, as formulated at the Tampere summit, the current legal *status quo* is merely an intermediary step in the process. The ongoing harmonization of private and procedural laws must necessarily lead to the abolition of secondary controls in the Member States, and the exequatur procedure therefore appears as just such a secondary control. Seen from the European perspective, actual free movement of judgments will only be achieved when all judgments within the European Judicial Area circulate without the necessity of undergoing a prior recognition procedure in the enforcing state.[36] Against this backdrop, the abolition of the exequatur by the European Council is consistent with the logic of the integration process. In a more political sense, it should reflect the status which has been achieved in the meantime by the harmonization process: The civil courts of the Member States increasingly decide cross-border disputes on the basis of harmonized laws, thereby applying European Community law on a decentralized basis.[37]

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[31] The introduction of a 'European Passport' in the field of procedural law was proposed by *de Leval*, Les procédures de transmission et de signification indispensables à la reconaissance mutuelle, Working Paper from 6/20/2000 (not yet published), see also *Heß*, Neue Juristische Wochenschrift 2001, 15, 20 (fn. 84).

[32] *Callies*, Europäisches Wirtschafts- und Steuerrecht 2000, 432, et seq.

[33] Compare Sec. 110a German Versicherungsaufsichtsgesetz, *Hübner*, in Dauses (ed.), Handbuch des EG-Wirtschaftsrechts, E IV R 46, et seq.

[34] *Kurth*, Problematik grenzüberschreitender Wertpapieraufsicht, Wertpapiermitteilungen 2000, 1521, et seq.

[35] Recent example ECJ, C-7/98, *Krombach/Bamberski*, commented by *Bar*, Juristenzeitung 2000, 725 s.; *Geimer*, Zeitschrift für Wirtschaftsrecht 2000, 859, et seq.; *Heß*, Praxis des Internationalen Privat- und Verfahrensrechts 2001, 301; *Muir Watt*, Revue Critique de Droit International Privé 89 (2000), 489, et seq.; *Jayme*, Nationaler ordre public und europäische Integration – Betrachtungen zum Krombach-Urteil des EuGH (Wien 2000), p. 10, et seq.

[36] On the interpretation of the free movements of judgments as the unwritten 'fifth freedom of the Community' see *Heß*, Praxis des Internationalen Privat- und Verfahrensrechts 2001, 301, 302.

[37] ECJ, C-38/98 *Renault Usines/Maxicar*, Praxis des Internationalen Privat- und Verfahrensrechts 2001, 328, see *Heß*, Praxis des Internationalen Privat- und Verfahrensrechts 2001, 301, 304.

However, seen from a conflict of laws perspective, the elimination of the exequatur procedure is questionable: Abolishing the *ordre public* (public policy) reservation[38] depends most decidedly on the prior reconciliation of European procedural law. The current concept of the EC Council and the Action Plan of 30 November 2000 point in this direction, as they combine the automatic recognition of judgments and administrative decisions with a prior harmonization of the affected areas of the law.[39] A joint German-British-Swedish working paper on the 'European Enforcement Order' of 12 January 2001, correctly focuses on the relationship between mutual recognition of judgments and the minimum requisite level of legal harmonization.[40] This close relationship is also stressed by the first proposal of a European Enforcement Order, presented by the Commission in December 2001.[41]

The adoption of the concept of mutual recognition must be accompanied by the following two additional measures: Firstly, the minimal procedural standards of Art. 6 of the European Convention on Human Rights (i.e., fair trial, the conduct of hearings in accordance with the law, impartiality of the court) must be comprehensively implemented in the Member States. That requires implementation in the national procedural laws, not only on the 'constitutional level' of the ECHR.[42] The other key measure consists of the standardization of the claim forms and the legal terms used in the legal instrument itself which comprises the European Enforcement Order. Standardized forms will need neither a prior 'translation nor implementation' by the judge of exequatur, because they are framed in a uniform way. Therefore, every enforcement agent in the European Judicial Area will be able to understand them.[43] The Action Plan for implementation of the principle of decisions in civil and commercial matters of November 30, 2000, agreed by the European Council, adopts a pragmatic approach for such standardization: The concept of mutual recognition shall initially be introduced piece-by-piece,[44] to make

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[38] Art. 34 No. 1 Reg. 44/01/EC, Art. 15 I lit. a, II lit. a Reg. 1347/00/EC.

[39] The (initial) failure of European legislation on visitation orders proposed by the French European Council Presidency in July 2000, was based on the inadequate (parallel) child custody procedure and the absence of legislative standardization, as well as the lack of coordination with national laws on enforcement. *Heß*, Praxis des Internationalen Privat- und Verfahrensrechts 2000, 361, et seq.

[40] Working Paper: 'European Enforcement Order' of 1/12/2001, 5259/01 JUSTCIV 5.

[41] Not yet published, on file with the author.

[42] Precise harmonization measures include *inter alia*: regulations about the methods of service of the document instituting the proceedings, about the summons and the judgment, about service in sufficient time to arrange for defence and about due information of the debtor, *Heß*, Neue Juristische Wochenschrift 2001, 15, 19, et seq.

[43] This implementation is currently achieved through the exequatur procedure. *Heß*, Juristenzeitung 2001, 573, 582 s.

[44] In the field of the so-called small claims, uncontested claims (enforcement orders), visitation rights and maintenance orders, Action plan of the European Council of 11/30/2000, 13648/00 JUSTICV 130, OJ 2001 C 12, 1, et seq., Praxis des Internationalen Privat- und Verfahrensrechts 2001, 163, et seq., detailed *Heß*, Juristenzeitung 2001, 573, 578 s.

possible a parallel harmonization of pre-judgment and enforcement procedures.[45] A general abolishment of exequatur procedure will not be adopted before 2006. This cautious approach in the plan of action appears to be appropriate.[46] As a result, it should be borne in mind that the momentum of legal integration in Europe already encompasses procedural law: The transfer of general harmonization concepts will require further legislative measures designed to harmonize current laws, pending development of a special procedure for resolving cross-border proceedings within the European Judicial Area.

3. New Forms of Judicial Cooperation in the European Judicial Area

In the meantime, European cross-border judicial cooperation represents a departure from conventional models of inter-governmental assistance. In the European Judicial Area, cross-border procedural measures which have legal effect within the sovereign territory of another state are permissible. From this viewpoint, the requirements of a model for judicial cooperation will be reformulated. Certainly, this area of the law does not progress in a straight line:

a) Regulation 2000/1348/EC on International Service of Documents

One example of an attempt at harmonization that was conceived in haste and without due deliberation is the European regulation on the service of documents (1348/2000/EC)[47] (the 'Service of Documents Regulation'), which became effective May 31, 2001. Following the unwieldy model of the Hague Convention on Service of Documents of November 15, 1965[48] (the 'Hague Convention'), it represents little more than an attempt at legislative improvement.[49] It remains to be seen whether the judicial cooperation model provided for in the Service of Documents Regulation (Art. 2 et seq. thereof) will be successful in practice.[50] One reason for this is that Art. 14 of the Service of Process Regulation permits, by way of a supplementary rule, service of process by mail in foreign countries. This provision avoids the expenditure of time and money which is much complained-of in connection with cross-border

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[45] At present, it is unclear whether such a harmonization measure requires a prior harmonization of enforcement proceedings. The working paper 'European Enforcement Order' of 1/12/2001, 5259/01 JUSTCIV 5, proposes the establishment of a questionnaire.

[46] The adopted timetable remains however doubtful, *Heß*, Juristenzeitung 2001, 573, 583.

[47] 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, p. 37, et seq.

[48] Hague Convention on the Service of Documents of 11/15/1965, Bundesgesetzblatt 1977 II, 1453, see *G. Geimer*, Neuordnung des internationalen Zustellungsrechts (1999), p. 129, et seq.

[49] Cf. *Heß*, Über die Zustellung von Schriftstücken im Europäischen Justizraum, Neue Juristische Wochenschrift 2001, 15, et seq.

[50] It is based upon the traditional notions of letters of request and decision-making based on comity, *Kennett*, Enforcement of Judgments, p. 11, et seq.

service, as well as failures in delivery inherent in the current structure of cross-border judicial cooperation. In European criminal procedure, service by mail is currently the rule (see Art. 52 of the Schengen Implementing Agreement).[51] German lawmakers likewise settled on direct service of process: Sec. 2 'EG-Zustellungsdurchführungsgesetz' ('Law on Implementation of EC-Service of Documents') of July 9, 2001, which substantiates the Service of Documents Regulation,[52] permits as a rule service by registered mail with return receipt.[53] It also provides this method of service in the case of foreign requests for the service of documents in Germany.

This example illustrates the current dynamic of European judicial cooperation: Because cross-border procedural actions are permissible in another state without undergoing a prior approval procedure, the judicial assistance mechanism of the Service of Documents Regulation appears too unwieldy, despite the fact that it is effectuated through secondary European Community law. The level of integration that has been achieved in this area obliges German lawmakers to reconcile the EC Service of Documents Regulation with the actual framework prevailing in Europe. The result is a reversal of the rule-and-exception structure of Art. 14 of the Regulation.[54] Whether this reshaping of the law on cross-border service of documents will also be acceptable for other Member States remains to be seen.

b) Regulation 1206/2001/EC on Cooperation in the Taking of Evidence

The regulation on cooperation between the courts of Member States in the taking of evidence in civil or commercial matters represents a true advancement in the integration process.[55] It was adopted by the European Council on 28 May 2001 and will take effect 1 January 2004. First, the regulation improves the scheme of judicial cooperation between courts of the EU Member States (by means of direct communication and under the abolition of the public policy reservation).[56] The main achievement is to be found in Art. 17. This provision allows the direct taking of evidence by a trial court (or a court-appointed expert) acting under its own *lex fori* in another European jurisdiction. Such cross-border taking of evidence only takes place on a voluntary basis and with the

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[51] Cf. *Heß*, 2001, *Neue Juristische Wochenschrift*, 15, 20; *Stadler*, Praxis des Internationalen Privat- und Verfahrensrechts 2001, 514, et seq.

[52] Bundesgesetzblatt 2001 I 1336, Gesetz zur Durchführung gemeinschaftsrechtlicher Vorschriften über die Zustellung gerichtlicher und außergerichtlicher Schriftstücke in Zivil- und Handelssachen in den Mitgliedstaaten.

[53] This legislative approach is based on Art. 14 Reg. 1348/2000/EC, cf. BT-Drucksache 14/5910.

[54] For a different opinion: *Lindacher*, Zeitschrift für Zivilprozessrecht 2001, p. 179, et seq., who does not consider Art. 14 Reg. as an exceptional method for service.

[55] Press release of the Swedish European Council Presidency, Brussels (28-05-2001) – Press: 203 – Document No.: 9118/01, Test: Doc. 8607/01 JUSTCIV 62 of 5/22/2001; cf. *Berger*, Praxis des Internationalen Privat- und Verfahrensrechts 2001, 522, et seq.; *Schulze*, Praxis des Internationalen Privat- und Verfahrensrechts 2001, 527, et seq.

[56] Cf. *Berger*, Praxis des Internationalen Privat- und Verfahrensrechts 2001, 522, 523, et seq.

consent of the central authority in the 'requested' Member State.[57] It may only decline such consent under limited circumstances, especially if 'the direct taking of evidence requested is contrary to fundamental principles of law [in the State in question]' (Art. 17(5)(c)).[58] The regulation clearly departs from previous legal theory. According to the predominant legal theory such a direct taking of evidence was impermissible under international law as 'a sovereign act within a foreign country'.[59] In the European Judicial Area, the duty of the Member States to corporate (Art. 10 EC Treaty), as illustrated by the Evidentiary Regulation, replaces this former legal notion.[60]

What emerges, then, is a new cooperative model within the European Judicial Area, permitting cross-border procedural acts without judicial assistance. The streamlining effect is readily apparent: The former conventional double test performed by the requesting and requested courts (frequently complicated by the involvement of the 'central authorities') is eliminated. In addition, the former accumulation of multiple procedural laws (from the requesting and requested Member States) through implementation of the inter-court cooperation procedure falls by the wayside. Moreover this advancement in the integration process, like others mentioned herein, will remain simply an intermediate step: This is because parties within the European Judicial Area are confronted today with a multiplicity of different applicable procedural laws which, on the basis of new legal developments, have direct cross-border implications.[61] This legal fragmentation places an excessive burden on the parties.[62] The desired goals in this area are a far-reaching harmonization of the technical and procedural requirements and an accompanying standardization of claim forms and other documents.[63] In the short

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[57] Cf. *Schulze*, Praxis des Internationalen Privat- und Verfahrensrechts 2001, 527, 530, et seq.

[58] This provision provides a limited public policy clause. Its application and its limits will be controlled by the ECJ under Art. 68, 234 EC Treaty; cf. *Heß*, Aktuelle Probleme des Vorabentscheidungsverfahrens, Rabels Zeitschrift für ausländisches und internationales Privatrecht 2002 (in print).

[59] Cf. *Bertele*, Souveränität und Verfahrensrecht (1998), p. 82, et seq.; *Walther*, in: Walter/Jametti/Greiner/Schwander (ed.), IPR und IZVR (1999), 61bE, No. 12, et seq.; further *Daoudi*, Extraterritoriale Beweisbeschaffung (2000), p. 108, et seq. (about official experts); Zöller/*Geimer*, Zivilprozessordnung, § 363 ZPO, No. 4.

[60] The duty to cooperate, based on Art. 10 EC Treaty, modifies the former framework which was derived from the prevalence of state sovereignity, cf. *Heß*, Juristenzeitung 1998, 1021, 1027 s.; *Heß*, Neue Juristische Wochenschrift 2001, 15, 20; differing *Stadler*, Praxis des Internationalen Privat- und Verfahrensrechts 201, 514, 521, fn. 81. From this perspective the remaining requirement for approval in Art. 17 (6) and (5) of the Regulation seems unnecessary, *Heß*, Juristenzeitung 2001, 573, 581.

[61] This is the consequence of the applicability of the foreign lex fori according to Art. 17 Reg. 1206/2001/EC.

[62] Therefore, a legal notification about the available remedies is to be prescribed, see *Heß*, Juristenzeitung 2001, 573, 581.

[63] *Heß*, Juristenzeitung 2001, 573, 581; *Kerameus*, Die Angleichung des Zivilverfahrensrechts der Europäischen Union vor dem Hintergrund der Schaffung eines europäischen Zivilgesetzbuchs, in: Europaparlament, Generaldirektion Wissenschaft, Arbeitsdokument Juri 103 DE (10/1999), p. 85, 89.

term, a distinct European law on service of process will emerge, as well as a European law on evidence.

III. The Scope of the New Community Competence

The far-reaching legislative activities in European civil procedural law lead to the closely-related question of whether the measures discussed before can in any event be grounded upon the enabling rule of Art. 65 EC Treaty. This discussion is influenced by the latest decision of the European Court, which declared the directive on tobacco advertising based on Article 95 EC Treaty void for lack of competence on the part of the European Community.[64] The exercise of competence within the Internal Market requires, according to the European Court, that the Community's action improve the conditions for the establishment and the functioning of the Internal Market. An indirect relationship to the Internal Market or the existence of different regulations in the Member States is not, by itself, sufficient[65]. Article 65 also refers to the 'proper functioning of the internal market'. Accordingly, doubts are raised in the literature, for example, as to whether 'free movement of divorce judgments' or 'custody decisions' are really necessary for the functioning of the internal market, and correspond to the competence criteria of the recent European Court's tobacco directive decision.[66]

Such an approach clearly does not differentiate sufficiently between reactive and active legal harmonization.[67] Whereas the 'competence of the internal market' of Article 95 EC Treaty reacts primarily to distortions of competition and similar restraints on market freedoms (therefore, the term 'reactive legal harmonization'), Article 65 EC Treaty is formulated differently.[68] The rule provides a subject-matter oriented competence to the Community. Similar to the policies on consumer protection and the environment, Article 65 EC Treaty empowers the Community to create positive standards for the creation of a specific procedural law enabling and facilitating cross-border disputes within the European Judicial Area. Article 65 EC Treaty therefore permits active legislative harmonization by the Community.[69] In addition, harmonization measures in international family law and the law of

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[64] ECJ C-376/98, 'Bundesrepublik Deutschland/Parlament und Rat, (2001) *Juristenzeitung*, 32, et seq.

[65] Ibid. et 84 et seq.

[66] *Jayme Kohler*, (2000) Praxis des Internationalen Privat- und Verfahrensrechts 454, at 458; *Callies/Brechmann*, Art. 65 EG, No. 2.

[67] Generally *Franzen*, Privatrechtsangleichung in der Europäischen Union (1999), p. 105, et seq.

[68] *Basedow*, CMLR 2000, 687, et seq.; *Heß*, Juristenzeitung 2001, 573, et seq.; *Leible/Staudinger*, European Legal Forum 2000/01, 225, 231, et seq.

[69] *Leible/Staudinger*, European Legal Forum 2000/01, 225, 228 s.

succession serve to establish and to facilitate freedom of movement, which is the declared goal of the 'area of freedom, security and justice' (Art. 61 EC Treaty).[70]

IV. The European Judicial Area and Third Countries

In the process of 'communitization', European civil procedure law is disengaging itself from other conventions on international private and procedural law, especially from those elaborated by the Hague Conference of Private International Law. Considered from a 'universal perspective', European conflict of laws is presently experiencing a sustained 'regionalization and disconnection'.[71] This development places third countries and 'competing' international institutions (the Hague Conference on Private International Law, Unidroit, Commission Internationale de l'Etat Civil, and also the Council of Europe) under pressure: Not only is the traditional role of the core European states as groundbreakers in the elaboration of international rules brought into question, but also the financing of proven institutions by these states. In the field of the unification of private international law, a new division of labor is emerging: The primary task of the international institutions remains the elaboration of model laws with a claim of worldwide adoption. On the other hand, the Community lays claim to the (exclusive) lawmaking competence for the European Judicial Area. Moreover, the new competences of Articles 61 and 65 EC Treaty also include the legal relationship to third countries. The current efforts of the Hague Conference on Private International Law towards a global convention on jurisdiction and the recognition of judgments,[72] as well as the Unidroit project on a model law for international civil law disputes,[73] show that these institutions recognize the 'European challenge'. In the short term, the question of whether the Community (instead of the Member States) should hold membership in these institutions presents itself.[74]

The disconnection of Community legislation from the international legal framework extends to the legislative process as well as the contents of rules and regulations: The law-making procedure found in Articles 65 and 67 EC Treaty is much more efficient than the ratification procedure provided by the traditional approach based on Article

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[70] Recently, ECJ, C-85/99, Zeitschrift für das gesamte Familienrecht 2001, 683; *Kennett*, Enforcement of Judgments, p. 12.

[71] *Jayme/Kohler*, Praxis des Internationalen Privat- und Verfahrensrechts 2000, 454; *Walter/Walther*, International Litigation, Swiss Papers on European Integration 23 (2000), p. 35, et seq.

[72] *van Mehren*, Rev. Crit. 2001, 85, et seq.; *Kotuby*, NJLR 2001, 1, 21: 'the most important convention on rules of private international law ever undertaken by that organization'. *Wagner*, Praxis des Internationalen Privat- und Verfahrensrechts 2001, 533, et seq.

[73] *Walter/Walther*, Swiss Papers on European Integration 23 (2000), p. 43, et seq.

[74] The issue was discussed by the European Council in 2001, see *Jayme/Kohler*, Praxis des Internationalen Privat und Verfahrensrechts 2001, p. 501, 505 s.

293 EC Treaty and public international law.[75] European Regulations in the field of procedural law enter into force directly in all Member States in accordance with Article 249 EC Treaty; the competence of the European Court to interpret no longer needs to be grounded on (separately ratified) supplementary protocols.[76] For this reason, suggestions in the literature[77] – often based on the 'subsidiary principle' (Art. 5 EC Treaty) – that the Community should prompt the Member States to adopt existing conventions before promulgating their own legislation are not convincing. The Community would be obligated to see to the adoption of existing conventions by the Member States instead of promulgating its own legislation.[78] The experience of the past 30 years indicates that the Member States do not carry out the ratification procedure.[79]

The efficient legislative process inside the Community also affects its relationship with the Lugano Convention: The importance of the latter will be reduced. It appears unlikely that future Community legislation in procedural matters will be prepared by a common group of experts from States which are signatories to the Brussels and Lugano Conventions.[80] To do so would result in the Community's renewed involvement in the ponderous international law legislative process. One might greet such a – cautious – approach for legal-political, that is qualitative, reasons.[81] On the other hand, among the arguments to the contrary is the fact that the European Judicial Area is set upon the path of a step-by-step integration. Since 'Amsterdam' the participating states have decided upon an accelerated procedure and a swift realization of the goal of integration. Third countries (and according to Art. 69 EC Treaty, Denmark is included among them) can in this situation only work towards negotiations to achieve, completely or partially, the *acquis* which has thus far been attained through international law treaties.[82]

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[75] The Community's negotiation framework is described in depth by *Kennett*, Enforcement of Judgments, pp. 14–19.

[76] Unfortunately, the jurisdiction of the European Court under Art. 68 EC Treaty is limited: a preliminary reference is only admissible if it is made by a court of final appeal. This restriction is largely criticized by legal literature, cf. *Basedow*, CLMR 2000, 687, et seq.; *Heß*, Rabels Zeitschrift für ausländisches und internationales Privatrecht 2002 (in print).

[77] *Pirrung*, Übereinkommen zur justitiellen Zusammenarbeit, in: Schulte-Nölke/Schulze (ed.), Europäische Privatrechtsangleichung (1999), p. 341, 342 (commenting intergovernmental cooperation under the 'Third Pillar' of the Maastricht Treaty).

[78] *See* Green Paper from the Commission, Legal Aid in Civil Matters: The problems confronting the cross-border litigant, COM (2000) 51 final, p. 15, et seq., <http://europa.eu.int/eur-lex/en/-com/gpr/2000/com2000_0051en01.pdf>

[79] This reason explains the rapid implementation of several 'procedural regulations' by the Community after the entry into force of Arts. 65, 67 EC Treaty; *Heß*, Neue Juristische Wochenschrift 2000, 23, 27 s.

[80] Zu den Vorschlägen der Reflexionsgruppe zur Revision des EuGVÜ und LugÜ, vgl. *Hausmann*, European Legal Forum 2000, 40 et seq.; *Kohler*, in: Gottwald (Ed.), Die Revision des EuGVÜ (2000), p. 2, et seq.; *Bruneau*, Semaine Juridique 2001, 533, et seq.

[81] *Schack*, Zeitschrift für europäisches Privatrecht 1999, 803, et seq.; *Stadler*, Praxis des Internationalen Privat- und Verfahrensrechts 2001, 514, et seq.

[82] In November 2001, the Danish government proposed to the Commission the extension of the new Community instruments to Denmark by a bilateral treaty.

Finally, a 'disconnection' in terms of content leads to a procedural disengagement: The European Judicial Area is grounded on premises other than the general harmonization and unification at the global level. Because the sovereignty reservation on the part of the Member States no longer exists, a completely different integration of the national judicial systems in the Community framework may be achieved. Moreover, the procedural laws of the Member States are interlocked through Article 6 of the European Convention on Human Rights and the appellate-like preliminary ruling procedure before the European Court (Arts. 68 and 234 EC Treaty). The development of cross-border judicial cooperation,[83] as well as the achievement of free movement of judgments through the concept of mutual recognition[84] illustrate that the international conventions negotiated and concluded among sovereign nations are no longer suitable as a model for the European Judicial Area. They are aimed at global applicability and must take major cultural differences of the contracting states into account. The confidence of the contracting states in the equal weight of their judicial systems is missing. Such far-reaching public policy reservations are necessary to protect citizens. The situation in the European Judicial Area which is based upon 'mutual confidence among the Member States in the proper functioning' of their civil proceedings is different.

Naturally, the achievement of the European domestic and foreign fields coinciding with one another as closely as possible is desirable. Examples are Articles 4, 8 and 16 European Regulation 1347/00/EC, which meld European legislation with the Hague Child Abduction Convention and the Hague Convention on Child Protection.[85] However, tendencies toward separation from the international law rule-making model – which are illustrated by the discussion of a European law on visitation – are also apparent in this regard.[86] The working paper of the Commission of 27 March 2001, therefore makes the ratification by the European Community of the Hague Child Kidnapping Convention and the Hague Convention on Child Protection dependent on a re-negotiation of the 'disconnection clause' (Art. 52), to keep the enactment of further legislation in this field (also as regards third states) possible.[87]

V. Concluding Comments

The breathtaking speed of the harmonization of European procedural law can only

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[83] Compare supra footnotes 48, et seq.

[84] Supra at footnote 25, et seq.

[85] Uncertainties as regards the 'disconnection clauses' are rightly criticized by *Jayme/Kohler*, Praxis des Internationalen Privat- und Verfahrensrechts 2000, 454 s.

[86] *See Heß*, Praxis des Internationalen Privat- und Verfahrensrechts 2000, 361, et seq.

[87] Commission working document, Mutual Recognition of Decisions on Parental Responsibility, COM (2001) 166 final, p. 10–12.

be explained as resulting from the integrating effect of the new Community policies under Article 65 EC Treaty. These policies result in a real paradigm shift of European Civil Procedural Law. A different issue which was not addressed here is the legal political desirability of the measures passed by the European Council and the tempo of legal harmonization in this field. Above all there exist – as the author has discussed elsewhere – doubt as to the latter, especially the speed of the ongoing 'communitization' and harmonization of procedural law.[88] Against the background of the advancements which have been initiated in harmonization, public opinion – in particular, as developed by scholars of procedural law – will be called upon to open the discussion with the Community and the Member States.

[88] *Heß*, Juristenzeitung 2001, 373, 383.