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Presentation

In the context of the European Union, the recent term « codification » receives two meanings. The codification method applied to European Union law implies merely that several different texts are gathered in a single body of rules. It may also incorporate case-law into European Union law. In the field of Private International Law, the codification method may involve different type of work. As in National law, the method ranges from compiling pre-existing texts to the drafting of a genuine Code including common provisions and specific ones.

In any case, the work of codification must be able to cope with the difficult issue of interactions between the instruments of European Union Private International Law, the International Conventions and European Union law. According to the authors, such interactions in the European context implies distinguishing on the one hand, the fate of International Conventions as an external source of European Union law, and, on the other hand, the fate of European Union law as internal sources.

The Place of International agreements and European Law in the European Code of Private International Law

By Pedro A. de Miguel Asensio¹ and Jean-Sylvestre Bergé²

Content

¹ Professor at the Law Faculty of the Universidad Complutense de Madrid.

² Professor at the Law Faculty of the University of Jean Moulin – Lyon 3 (EDIEC), member of the European University Network “European Law of the Area of Freedom, Security and Justice” (GDR – CNRS (National Center For Scientific Research), number 4352).

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In the context of the European Union, the recent term « codification » receives two meanings. The codification method applied to European Union law implies merely that several different texts are gathered in a single body of rules⁵. It may also incorporate case-law into European Union law⁶. In the field of Private International Law, the codification method may involve different type of work. As in National law⁷,

³ Translated from French by Guillemine Taupiac-Nouvel.

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⁵ For instance, see the Community Customs Code, Community Code on Visas, Community Code relating to veterinary medicine products, the Schengen Borders Code, etc.

⁶ See, Directive 2007/65/EC of the Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, § 32 : « In order to deal with situations where a broadcaster under the jurisdiction of one Member state provides a television broadcast which is wholly or mostly directed towards the territory of another Member state, a requirement for Member state to cooperate with one another and, in cases of circumvention, the codification of the case-law of the Court of Justice (Case C-212/97 Centros v. Erhvervs- og Selskabsstyrelsen; Case C-33/74, Van Binsbergen v. Bestuur van de Bedrijfsvereniging; case C-23/93, TV 10 SA v. Commissariaat voor de MEDIA, § 21], combined with a more efficient procedure, would be an appropriate solution that takes account of Member state concerns without calling into question the proper application of the country of origin principle”. See also, concerning the interpretation of Rome I, the opinion of Advocate General TRSTENJAK in the case C-29/10 : “The wording of Article 8(2) of Rome I, it is true, is very different from that of Article 6(2)(a) of the Rome Convention and also from that of article 5(1) of the Brussels Convention, but in fact it is no more than a clearer formulation or even codification of the existing case-law on Article 5(1) of Brussels Convention” (...). “The objective in codifying the conflict rules in Rome I was to replace the Rome Convention and at the same time to ensure continuity fundamentally with it. It is therefore appropriate to interpret the provisions of the Rome Convention in such a way as to ensure continuity and to enable Rome I to begin to be applied without significant modifications of interpretation”. (§ 76 et 80).

⁷ Following the purposive objective of the unification of National law in civil and criminal matters, the codification method has been spreading at a International and European level (for example in Private International law, or in Contract law). However, the flow from the National order to the supranational has changed the meaning of the term “codification”. See D. Bureau et S. Poillot Peruzzetto in B. Beignier (dir.), *La codification*, Dalloz, 1996. Dispute arises when National law vocabulary is used at European level without fittings. It occurs in France, for instance, as regard to the European Civil Code. See the opposition of Y. Lequette, *Vers un code civil européen ?*, in *Le Code civil*, Pouvoirs n° 107, 2003, p. 97, and for a moderate point of view see B. Fauvarque-Cosson, *Codification et droit privé européen*, in *Mélanges B. Oppetit*, Litec 2009, p. 179.

the method ranges from compiling pre-existing texts to the drafting of a genuine Code including common provisions and specific ones⁸.

In any case, the work of codification must be able to cope with the difficult issue of interactions between the instruments of European Union Private International Law, the International Conventions and European Union law. According to the authors, such interactions in the European context implies distinguishing on the one hand, the fate of International Conventions as an external source of European Union law, and, on the other hand, the fate of European Union law as internal sources.

I - International conventions and European instruments of international private law : interrelation and codification

The respective roles of the EU and its Member States as actors in the negotiation and conclusion of international conventions in the field of private international law has been deeply affected by the instruments adopted in the framework of the European area of freedom, security and justice since the Treaty of Amsterdam. These instruments have significant implications on the external exclusive competence of the UE to negotiate and conclude international conventions. Because of the expansion of the EU external competence in the field of judicial cooperation in civil and commercial matters, international agreements concluded by the EU have become a new component of EU Private International Law of increasing importance. These developments also influence the future role of international conventions concluded by Member States with third parties since Member States are not allowed to conclude agreements in more and more areas. Due to the level of international cooperation in the field of Private International Law the significance of international conventions and the relations between EU provisions and such conventions are elements of exceptional importance in the drafting a EU regime.

A. Interaction between international conventions and unification of private international law in the EU

⁸ See the presentation of S. Corneloup et C. Nourissat, *Quelle structure pour un code européen de droit international privé ?*, p. xxx.

1. Scope and nature of the EU external competences

The development of judicial cooperation in civil matters having cross-border implications and, in particular the progressive unification within the EU of the rules concerning conflict of laws and of jurisdiction as well as the mutual recognition and enforcement of judgments has decisively influenced the scope of the external competence of the EU and the Member States in this area

At the early 1970s the ECJ¹⁰ had already established that the competence of the Community to conclude international agreements may flow implicitly from Treaty provisions and from measures adopted by the Community institutions. The ECJ held that the Community was competent to conclude international agreements even when it was not specifically authorized to do so in the primary law, in particular because to the extent to which Community rules are adopted, member States can not by their own assume obligations which may affect those rules or alter their scope. Under the *ERTA* doctrine, where the Community exercises the internal competence to regulate a field it has implied powers to act in relation to third-party countries excluding the possibility of concurrent powers by Member States, since Community competence is deemed exclusive where the conclusion of an agreement by the Member States is incompatible with the uniform application of Community law. The ECJ has later confirmed that when common rules come into being, the Member States no longer have the right to conclude international agreements affecting those rules¹¹. Hence the content of the EU instruments concerning private international law adopted so far is of the outmost importance in this regard.

With respect to the areas covered by the instruments adopted to develop judicial cooperation in civil matters, the ECJ Opinion 1/03 rendered in 2006¹² was especially significant in the process of expansion of EU exclusive competence. Opinion 1/03 established that the Community had exclusive competence to conclude the revised version of the Lugano Convention given that this Convention affects the rules on jurisdiction and recognition and enforcement of judgments contained in Regulation (EC) 44/2001. According to the ECJ Opinion 1/03, because of the unified and coherent system of rules on jurisdiction and recognition provided for in the Brussels I Regulation, any other international agreement also establishing a unified system of rules on conflict of jurisdiction or recognition and enforcement of judgments is capable of affecting the uniform application of the rules of the Brussels I Regulation or the proper functioning of the system that they establish and hence falls within the exclusive competence of the EU.

¹⁰ ECJ Judgment of 31 March 1971, C-22/70, *ERTA*, paras. 16-31.

¹¹ ECJ judgment of 5 November 2002, C-467/98, *Commission v Denmark (Open Skies)*, para. 77.

¹² ECJ Opinion 1/03 of 7 February 2006.

However, the criterion that the EU has exclusive external competence to the extent to which an international convention affects internal EU rules or alters their scope seems to raise a number of practical difficulties with respect to judicial cooperation in civil matters. Some uncertainties or distortions may appear when determining if internal EU rules are affected with a view to establish the exclusive competence of the EU and hence that it is only for the EU to conclude agreements between the Union and third countries or international organisations. As noted in paragraph 8 of the Declaration of competence made by the EC at the time of the accession to the Hague Conference, the extent of competences which the Member States have transferred to the Union is, by its nature, liable to continuous development¹³. At any rate, after the ECJ Opinion 1/03 an expansive view of the scope of the external exclusive competence prevails in the practice of the EU institutions with respect to international conventions concerning jurisdiction, recognition and enforcement of judgments and applicable law in areas which have been the subject matter of EU instruments, as illustrated by Regulation (EC) No 664/2009¹⁴. Such an expansive view may lead to some distortions in particular to the extent that it tends to cover issues which have not been regulated by EU provisions, and in which Member States have traditionally been active in concluding international conventions with third-party States. Bilateral conventions with third countries on recognition and enforcement of judgments may be a good example, since the EU instruments adopted so far lack common rules on the effect of third State judgments.

Additionally, complexity increases as a result of the fact that given the scope of the exclusive external competence of the EU many international agreements can fall not entirely but only partially within the exclusive competence of the EU. To the extent that only certain articles of an international convention affect EU legislation, the Member States retain their competence in the areas covered by the convention which do not affect EU law¹⁵. In these situations, the EU and the Member States share competence to conclude the relevant convention, as established, for instance, in the Preamble of the

¹³ See Annex II to Council Decision 2006/719/EC, previously cited.

¹⁴ Council Regulation (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations (OJ L 200 of 31.7.2009, p. 46).

¹⁵ See S. Bariatti, *Cases and Materials on EU Private International Law*, Oxford, 2011, p. 39.

Council Decisions 2003/93/CE and 2008/431/EC concerning the 1996 Hague Convention on the Protection of Children¹⁶. Declaration No. 36 annexed to the Final Act of the International Conference which adopted the Treaty of Lisbon, refers to Article 218 TFUE concerning the procedure of negotiation and conclusion of international agreements by the Union. The Declaration expressly acknowledges that Member States may negotiate and conclude international agreements with third countries or international organisations “in so far as such agreements comply with Union law”.

2. The EU in the international scene

The expansion in recent years of the EU external competence in the field of private international law is connected to the increasing role of the Union as an actor in the negotiation and conclusion of international conventions concerning that field. This trend has become a critical element in the future development of EU Private International Law. For instance, the Action Plan Implementing the Stockholm Programme detailed in the Commission Communication of 20 April 2010¹⁷ includes as ongoing actions: continue to support the Hague Conference on Private International Law; and cooperate with the Council of Europe based on the Memorandum of Understanding signed in 2006 and continue to support the implementation of its important conventions including an express reference to the ones on data protection and protection of children. Additionally, the 2010 Action Plan envisages, among other initiatives, a Proposal on the conclusion by the EU of the 2005 Hague Choice of Court Convention in 2012; and a Proposal for the accession of the EU to UNIDROIT in 2014. Furthermore, the European Parliament has recently urged the Commission to use its best

¹⁶ See Council Decision 2003/93/CE of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (OJ L 48 of 21.2.2003, p. 1); and Council Decision 2008/431/EC of 5 June 2008 authorising certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law - Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (OJ L 151 of 11.06.2008, p. 36).

¹⁷ “Delivering an area of freedom, security and justice for Europe’s citizens”, COM(2010) 171 final.

endeavours at the Hague Conference to revive the project for an international judgments convention¹⁸.

A fundamental development in this context was the accession of the EC to the Hague Conference on Private International Law¹⁹ without prejudice to the possible role of the EU in the framework of other international organisations, such as WTO, UNCITRAL, UNIDROIT and IMO, to the extent that they may create private international law rules²⁰. Accession to the Hague conference was a necessary step to enable the Community to exercise its external competence regarding international cooperation in civil matters, since the new status granted to the Community gives it the means to participate as a full member in the negotiations of conventions by the Hague Conference in areas of its competence. Moreover, the practice of the Hague Conference has evolved in order to overcome the difficulties that result from the lack in the conventions of clauses on the position of an organisation such as the EU. In the absence of special provisions, only sovereign States may usually be party to a convention and hence the EU can not sign, ratify or accede to the relevant convention even though it falls entirely or partially within the exclusive external competence of the EU. In these situations, the EU needs to have recourse to a Decision authorising its Member States, by way of exception, to sign, ratify or accede the relevant convention in the interest of the Union²¹.

In the recent practice of the Hague Conference it has become common that international conventions include among their final clauses specific provisions on Regional Economic Integration Organisations that make possible for the EU to become a party to those conventions²². Such clauses refer typically to organisations which are constituted solely by sovereign States and have competence over some or all of the matters governed by the relevant convention. Under this type of provisions Regional

¹⁸ Resolution of 23 November 2010 on civil law, commercial law, family law and private international law aspects of the Action Plan Implementing the Stockholm Programme (2010/2080(INI)).

¹⁹ For a comparison with the previous situation, see N. Hatzimihail, “General Report – Transnational Civil Litigation Between European Integration and Global Aspirations”, A. Nuyts and N. Watté (eds.), *International Civil Litigation in Europe and Relations with Third States*, Brussels, 2005, p. 595 at pp. 615-617.

²⁰ S. Marinari, *I valori comuni nel diritto internazionale private e processuale comunitario*, Turín, 2007, pp. 310-320.

²¹ See in this regard the Council Decisions authorising EU Member States to sign, ratify or accede to the 1996 Hague Convention on the Protection of Children, already cited.

²² See, for instance, articles 29 and 30 of the Hague Convention on Choice of Court Agreements of 30 June 2005.

Economic Integration Organisations are equated with States to the extent that those organisations may similarly sign, accept, approve or accede to the conventions; organisations have the rights and obligations of a contracting State; and any reference to a “State” in the convention applies equally, where appropriate, to an organisation that is a party to the convention. However, consideration of organisations as contracting States is only possible to the extent that the relevant organisation has competence over matters governed by the convention. Therefore, such organisations are required to notify the matters governed by the convention in respect of which competence has been transferred to them by their member States. Given that international conventions in this field may fall entirely within the exclusive competence of the EU, the recent Hague conventions provide also for the possibility that regional organisations access the conventions without their Member States to the extent that the organisations exercise competence over all the matters governed by the convention and hence their Member States do not become parties to it but are bound by virtue of the accession of the organisation.

Developments in the field of maintenance obligations offer significant examples of conventions that the EU has decided to sign or conclude alone because it exercises competence over all the matters governed by the convention but also illustrate how due to the complexity of the Area of Freedom, Security and Justice even in these situations fragmentation may remain within the EU Member States. Indeed, even in the case of conventions falling completely within the scope of the external exclusive competence of the Union fragmentation may persist. In particular, because of the peculiar position of the UK, Ireland and Denmark in respect of the Area of Freedom, Security and Justice, it may happen that these countries are not bound by a EU Decision concerning the signing or access to a Convention regardless of the exclusive external competence of the EU. Under Article 3 of the 2009 Decision on the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations²³, since the EU exercises competence over all the matters governed by the Protocol its Member States are bound by the Protocol by virtue of its conclusion by the EU. However, for the purposes of this Decision and in regard to the Protocol, the EU does not include Denmark and the United Kingdom. The 2011 Council Decision on the signing of the 2007 Hague Convention on the

²³ Council Decision (2009/941/EC) of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (OJ L 331 of 16.12.2009, p. 17).

International Recovery of Family Maintenance²⁴ offers a similar example. Although it is an international Convention that the Union decided to sign alone declaring that it exercises competence over all the matters governed by it since such matters are also dealt with in Regulation (EC) No 4/2009 on maintenance obligations²⁵, Denmark is not bound by the Decision nor subject to its application.

3. The position of EU Member States

Although traditionally EU Member States have concluded international conventions with third countries in some areas of Private International Law, now they only remain competent to conclude such agreements to the extent that the relevant convention does not fall within the exclusive external competence of the EU. In particular, Member States must abstain from entering into international agreements which may affect or alter the scope of EU legislation. Additionally, according to Article 351 TFEU Member States are required to take all appropriate steps to eliminate the incompatibilities between the agreements they have concluded with third countries and EU law. Therefore, although previous agreements between Member States and third countries are in principle not affected by EU law, such criterion applies only to the extent that agreements are compatible with EU law; moreover, as noted earlier, the possibility by Member States to conclude such agreements is limited by the scope of the exclusive competence of the EU.

This evolution poses significant challenges when considering that traditionally bilateral and other agreements have been established with third countries in situations in which special ties exist and with a view to meet particular needs of the Member State involved. In sharp contrast with the role played by such conventions in the Private International Law systems of some Member States, special ties or particular needs of a given country may not be significant from the perspective of the EU and in fact the EU has not been active in the negotiation of bilateral agreements. Hence, the progressive

²⁴ Council Decision (2011/220/EU) of 31 March 2011 on the signing, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (OJ L 93 of 7.4.2011, p. 9).

²⁵ Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ L 7 of 10.1.2009, p. 1).

development of judicial cooperation in civil matters within the EU and the expansion of the external exclusive competence of the EU in this area decisively influence the position of Member States in the international scene. Two specific instruments have been adopted with a view to make possible the coordination between the special needs of Member States and the exclusive external competence of the Union: Regulation (EC) No 662/2009 of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non- contractual obligations²⁶; and Regulation (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations²⁷.

These two Regulations establish a procedure to authorise a Member State to amend an existing agreement or to negotiate and conclude a new agreement with third countries on certain specific civil justice issues falling within the exclusive competence of the EU. Under the procedure established in these two Regulations, the authorisation is subject to the control by the Commission that the envisaged convention does not undermine EU law or the EU external relations policy and that there is no sufficient interest by the EU itself in concluding a bilateral agreement with the third country concerned.

Both Regulations envisage the possibility to authorise agreements between Members States and third countries as an exceptional measure that is only available in specific matters and which also is limited in time. The agreements that may benefit from such an authorisation are restricted to those dealing with the specific subject matters of some of the EU instruments adopted in the area of judicial cooperation in civil matters. Regulation (EC) No 662/2009 (art. 1.2) refers only to agreements on the particular matters covered by the Rome I and Rome II Regulations (the law applicable to contractual and non- contractual obligations); Regulation (EC) No 664/2009 applies only (art. 1.2) to agreements concerning matters falling within the scope of Regulation

²⁶ (OJ L 200 of 31.7.2009, p. 25).

²⁷ (OJ L 200 of 31.7.2009, p. 46).

(EC) No 2201/2003 (jurisdiction and recognition of judgments in matrimonial matters and the matters of parental responsibility) and Regulation (EC) No 4/2009 (jurisdiction, applicable law, recognition of decisions and cooperation in matters relating to maintenance obligations)²⁸.

The introduction of the authorisation procedures established in these two Regulations seems a positive development inasmuch as it makes possible the conclusion of international agreements by Member States with third countries in matters falling within the exclusive external competence of the EU in situations in which such a possibility seems appropriate. Notwithstanding this, the scope and rationale of these Regulations raise also some uncertainties in connection with the delimitation of the external competence of the EU and the practice of Member States regarding international judicial cooperation in civil matters. Regulations (EC) 664/2009 and 662/2009 are based on a broad understanding of the exclusive external competence of the EU, that extends to areas where common rules do not exist within the EU, in particular with regard to the recognition and enforcement of third country judgments in the EU Member States. Such an interpretation can be founded on the idea that under the EU common provisions a judgment given in a Member State is not to be recognised if it is irreconcilable with an earlier judgment given in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought²⁹. Hence, it can be argued that the rules applicable to the recognition of third-country judgments in a Member State may affect the application of EU common rules on the recognition and enforcement of judgments given in other Member States. Although this approach can find support in the ECJ Opinion 1/03³⁰, it is also true that the reasoning of the Court was made with regard to two parallel instruments such as the Lugano Convention and Regulation 44/2001 (“Brussels I”).

There is a remarkable contrast between the broad understanding of the EU exclusive external competence concerning international judicial cooperation in civil

²⁸ See A. Borrás, “La celebración de convenios internacionales de Derecho internacional privado entre Estados miembros de la Unión Europea y terceros Estados”, *AEDIPr*, t. IX, 2009, pp. 83-96.

²⁹ See, for instance, Article 22(d) Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II bis Regulation) (OJ L 338 of 23.12.2003, p. 1) and Article 34(4) Regulation 44/2001 (Brussels I).

³⁰ ECJ Opinion 1/03 of 7 February 2006, at para. 165 et seq.

matters that prevails in the EU institutions and the restrictive scope of Regulations 662/2009 and 664/2009. These two instruments only envisage the possibility of Member States being authorised with respect to agreements on very specific matters. In this context, a number of questions arise with respect to the fact that in some Member States international agreements of a general scope with third States play a significant role in areas such as recognition and enforcement of judgments.

Firstly, some Member States have concluded such agreements with third States even after the adoption by the EU of common rules on the reciprocal recognition and enforcement of judgments. Among the most prominent examples are some bilateral conventions concluded by Member States with third countries. For instance, in the Italian practice reference can be made to the Convention between Italy and Algeria regarding Legal Aid in Civil and Commercial Matters, signed at Algiers on 22 July 2003 (in force since 13 December 2006) that includes in Title III (arts. 15-20) provisions on the recognition and enforcement of judgments³¹ or to the Convention between Italy and Kuwait regarding Judicial Cooperation and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Kuwait on 11 December 2002 (in force since 21 December 2004)³². Furthermore, in the Spanish practice reference can be made to the Convention between Spain and Algeria regarding Judicial Aid in Civil and Commercial Matters, signed at Madrid on 24 February 2005 (in force since 24 April 2006)³³, and to the Convention between Spain and Mauritania regarding Judicial Aid in Civil and Commercial Matters, signed at Madrid on 12 September 2006; both of them include in Title III (arts. 16-21) provisions on the recognition and enforcement of judgments³⁴.

Secondly, the restrictive position adopted with regard to the scope of Regulations 662/2009 and 664/2009 and the exceptional nature of the authorisation mechanisms produce the result that bilateral agreements as those previously referred to with regard to the recent practice of Italy and Spain can not be authorised. This is the result of the criterion laid down by the Commission at the time of the drafting of these two Regulations. Although it was acknowledged that Member States would have preferred a horizontal instrument which would take into account both bilateral

³¹ *Riv.dir.int.pr.proc.*, vol. XLIII, 2007, pp. 819-823.

³² *Riv.dir.int.pr.proc.*, vol. XLI, 2005, pp. 846-850.

³³ *AEDIPr*, vol. VI, 2006, pp. 776-780.

³⁴ *AEDIPr*, vol. VI, 2006, pp. 780-783.

agreements on specific matters and agreements concerning jurisdiction, recognition and enforcement of decisions in civil and commercial matters in general, and even broader agreements on legal cooperation, the Commission considered that this approach would be likely to undermine the Community legal framework in the area of judicial cooperation in civil and commercial matters, and excessively affect the existing *acquis*³⁵. Hence, the scope of Regulations 662/2009 and 664/2009 and the procedure to authorise agreements is limited to a minimum in tune with the specific subject matters they cover.

Thirdly, the current situation does not seem optimal when considering all interests at stake. The limits of the exclusive external competence of the EU remain uncertain with regard to issues which have not been subject to common rules. In particular, it may be unclear the determination of when the existing rules on recognition and enforcement of decisions between Member States can be affected by a bilateral convention including provisions on the reciprocal recognition and enforcement of judgments between a EU Member State and a third State. However, Regulations 662/2009 and 664/2009 seem to have been drafted on the assumption that when such bilateral conventions deal with the recognition and enforcement of judgments in a matter that is regulated in a EU instrument, the exclusive external competence of the EU has to be affirmed even though the EU instrument does not apply to third State judgments. This approach in practice excludes the possibility by Member States to conclude such agreements and no authorisation is possible under Regulations 662/2009 and 664/2009 because of the limited subject-matter of these two Regulations. Furthermore, such an approach raises doubts about the possible incompatibilities between the agreements previously concluded by Member States and EU law. However, a more flexible approach seems to be preferable and in fact no action has been taken against the Member States that have concluded such bilateral agreements in the past and in more recent times, even after the adoption of Regulation 44/2001 or Regulation

³⁵ See Proposal for a Regulation establishing a procedure for the negotiation and conclusion of bilateral agreements between Member States and third countries concerning sectoral matters and covering applicable law in contractual and non-contractual obligations, COM(2008) 893 final of 23.12.2008, pp. 4-5; and Proposal for a Regulation establishing a procedure for the negotiation and conclusion of bilateral agreements between Member States and third countries concerning sectoral matters and covering jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, parental responsibility and maintenance obligations, and applicable law in matters relating to maintenance obligations, COM(2008) 894 final of 19.12.2008, pp. 4-5.

2201/2003. Additionally, when considering the practice and the future plans of the Commission it seems clear that currently does not exist a sufficient EU interest to replace the bilateral agreements between Member States and third countries concerning the recognition and enforcement of judgments in general and that the EU does not seem ready to negotiate and conclude this kind of agreements. Moreover, the EU instruments have not been reviewed to include common rules on the recognition and enforcement of third country judgments. Under these circumstances doubts may be raised as to the extent in which Member States have been deprived of the possibility to conclude bilateral agreements with third countries concerning the reciprocal recognition and enforcement of judgments in general or at least as to the need to supplement the existing authorisation mechanisms to enable the conclusion of agreements that deal with matters others than those addressed by Regulations 662/2009 and 664/2009.

B. International conventions in the drafting of an EU regime

1. Agreements concluded by the EU

As laid down in Article 216(2) TFEU, agreements concluded by the European Union are binding upon the institutions of the Union and on its Member States. International treaties concluded by the EU with third-party countries take precedence over secondary EU law and are applicable in all Member States³⁶. The text of such conventions is typically provided for in the annex of an EU decision³⁷. Given that the EU has acquired exclusive competence for the negotiation and conclusion of international agreements with third countries governing most areas of judicial cooperation in civil and commercial matters, the criterion that the EU provisions apply without prejudice of the international conventions to which the EU is a party becomes

³⁶ Although some flexibility concerning the notion of Member State may be needed given the peculiar position of the United Kingdom, Ireland and Denmark in the framework of the of the European area of freedom, security and justice. For instance, according to Article 5 of the Agreement between the EC and Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 299 of 16.11.2005, p. 62), international agreements entered into by the Community based on the rules of the Brussels I Regulation are not binding upon and are not applicable in Denmark.

³⁷ See, e.g., Decision (2009/941/EC) of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (OJ L 331 of 16.12.2009, p. 17).

of great importance in this field to ensure that international conventions concluded by the EU prevail over EU legislation. Therefore, it seems advisable that EU legislation on Private International Law include a reference to the priority of international conventions.

In practice, the prevalence of the international conventions concluded by the Union over EU law may find significant exceptions and not affect the relations between EU Member States that may continue to be governed by EU legislation regardless of the convention in tune with the special nature of EU Private International Law provisions as the product of an integration process. Such a result is typically attained by the inclusion in the international agreement of a so-called “disconnection clause” enabling EU Member States to apply *inter se* EU legislation and not the international convention including such a clause. Hence, under such circumstances conclusion by the EU of an international convention is compatible with the applicability of EU rules to certain relations covered by the convention concerned to the extent that such relations are “disconnected” from the convention. Examples of this type of clauses may be found in a significant number of international agreements concluded by the EU in this area. For instance, article 64 of the 2007 Lugano Convention³⁸ establishes that the Convention does not prejudice the application by the EU Member States of the Brussels I Regulation.

The evolution in the EU has very much influenced the recent practice of the Hague Conference in this respect. In such practice examples may be found of specific clauses providing that the application of the rules of a Regional Economic Integration Organisation (such as the EU) remain unaffected when the organisation becomes a party to the convention concerned. The scope of such clauses determines the applicability of the EU rules after the EU becomes a party to the Convention. For instance, under Article 26(6) of the 2005 Hague Convention on Choice of Court Agreements the jurisdictional provisions of the Brussels I Regulation remain unaffected where none of the parties is resident in a Contracting State to the Convention that is not a Member State of the EU and the EU legislation remains also unaffected with regard to the

³⁸ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, done at Lugano on 30.10.2007 (OJ L 147 of 10.6.2009, p. 5).

recognition or enforcement of judgments as between Member States³⁹. In the application of these provisions difficulties may appear. In this connection, it has been noted that provisions of the 2005 Hague Convention and of the Brussels I Regulation could conflict in certain situations in which their rules differ, in particular Article 6 of the Convention provides for a different solution than Article 27 Brussels I Regulation regarding *lis pendens* and the obligations of a court not chosen, since the Hague Convention gives preference to the chosen court and not to the court first seized⁴⁰.

Due to the level of international cooperation existing in some areas, the adoption of special rules concerning the relations between international conventions and EU legislation could be appropriate in the framework of an eventual codification of Private International Law in Europe⁴¹. Indeed, provisions of this kind can already be found in the existing EU Regulations in order to coordinate their content with the existing international conventions. This sort of special provisions have been inserted to take account of the existence of agreements on special matters between some Member States that may contain a more favourable system than the one established at EU level. In this regard, Article 59(2) Regulation 2201/2003 left open the possibility to apply to the mutual relations between Finland and Sweden a Convention between Nordic countries comprising international private law provisions on marriage, adoption and guardianship. Also Regulation 4/2009 allows Member States which are party to the 1962 Convention between Nordic countries on the recovery of maintenance to continue applying that Convention in their mutual relations since it contains more favourable rules on recognition and enforcement than those in the Regulation.

Even more significant are special provisions that regulate the relations between EU legislation and multilateral conventions adopted at the Hague Conference or other international fora and that may be crucial to determine the limits of the application of the instruments involved. Such provisions in EU legislation have to be respectful with the provisions of the conventions concerned. For example, Article 61 Regulation 2201/2003 deals with the relation between the Regulation and the 1996 Hague

³⁹ See A. Borrás, “La relation des textes de référence avec les textes internationaux”, M. Fallon, P. Lagarde and S. Poillot-Peruzzetto, *La matière civile et commerciale, socle d'un code européen de droit international privé?*, Paris, 2009, p. 141, at p. 144.

⁴⁰ See “Report on the Application of Regulation Brussels I in the Member States” presented by B. Hess, T. Pfeiffer and P. Schlosser, Study JLS/C4/2005/03, Final Version September 2007, paras. 391-397.

⁴¹ See P. Lagarde, “Rapport de synthèse”, *La matière...*, *op. cit.*, p. 194.

Convention on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children. According to Article 61, the Regulation applies: a) where the child concerned has his or her habitual residence on the territory of a Member State; and b) when the judgment whose recognition is sought in a Member State has been rendered in another Member State regardless of the habitual residence of the child. In this connection, Article 52 of the 1996 Hague Convention establishes that the Convention does not affect the possibility for Contracting States to conclude agreements which contain, in respect of children habitually resident in any of the States, Parties to such agreements, provisions on matters governed by the Convention. Article 52(4) acknowledges that such possibility applies to uniform laws adopted by organisations of regional integration.

From the perspective of a possible future codification, it is noteworthy that the conclusion by the EU of an international convention may under some circumstances render unnecessary the establishment of an EU regime, in particular in situations in which the agreement has universal application and hence the provisions of the international agreement are applicable with respect to all situations concerning the relevant subject-matter⁴². In these circumstances the inclusion in the EU legislation of a provision referring to the relevant international convention may be appropriate. Provisions incorporating by reference into EU legislation an international convention as the set of rules on conflict of laws to be applied in the EU are rare since it is unusual that international conventions adopted by the EU make redundant EU legislation. The most prominent example in this regard may currently be found in the provision on the determination of the applicable law in Regulation 4/2009⁴³ relating to maintenance obligations. Article 15 of Regulation 4/2009 provides that, for Member States bound by the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations, the rules on conflict of laws in respect of maintenance obligations will be those set out in that Protocol. This case provides also an example of some drawbacks and risks of this approach. First, some degree of fragmentation within the EU may remain to the extent that given the special position of some Member States not all of

⁴² See K. Kreuzer, "Gemeinschaftskollisionsrecht und universales Kollisionsrecht (Selbstopolation, Koordination oder Integration?)", *Die richtige Ordnung (FS J. Kropholler)*, Tübingen, 2008, p. 129, at pp. 147-148.

⁴³ Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations

them are bound after the conclusion by the EU of the 2007 Hague Protocol⁴⁴. Second, from the broader international or global perspective this approach does not attain harmony and uniformity with third States if the relevant convention has not achieved significant international acceptance and hence doubts may be raised about the convenience of replacing in such cases EU legislation by an international convention⁴⁵.

2. Conventions to which Member States are parties

With regard to international conventions to which not the EU but its Member States are parties, article 351 TFEU is founded on the criterion that international commitments must be respected without prejudice of the obligation by Member States to act to eliminate incompatibilities between such conventions and EU law. In line with this approach, EU instruments concerning private international law usually establish that they do not affect any conventions between Member States and third countries provided that the external competences of the EU have been respected. In this regard, by contrast with the wording of Article 57(1) of the Brussels Convention, Article 71(1) Brussels I Regulation excludes that Member States introduce, by concluding new specialised conventions, rules which would prevail over those of the Regulation. Only conventions to which one or more Member States are parties at the time of the adoption of the regulation concerned prevail over those of the regulation, as established also, for example, in Article 28 Rome II Regulation, Article 25 Rome I Regulation, Article 59(1) Regulation 2201/2003 and Article 69(1) Regulation 4/2009. On the contrary, as between Member States EU instruments take precedence over conventions concluded exclusively between two or more Member States which are superseded by EU rules in so far as such conventions concern matters governed by the relevant EU instrument (e.g., Articles 69 Brussels I; 59.1 Brussels II bis; 28 Rome II; 25 Rome I; and 19 Reg. 1259/2010).

⁴⁴ According to Article 3 of 2009 Decision on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (OJ L 331 of 16.12.2009, p. 17), the declaration that the Member States of the EC would be bound by the Protocol by virtue of its conclusion by the EC included a statement that for the purpose of such declaration the term “European Community” does not include Denmark and the United Kingdom.

⁴⁵ That conclusion seems especially appropriate with regard to the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations.

Although these solutions should also be accepted in principle in any future codification of Private International Law in the EU, some additional considerations may be relevant in this context. The specialised conventions prevail over the EU instruments only insofar as a Member State became a party before the adoption of the EU regulation and the conventions provide for specific provisions. In line with the wording of Article 71 Brussels I Regulation, the ECJ has held that the rules laid down in specialised conventions –such as the Convention on the Contract for the Carriage of International Goods by Road (CMR)⁴⁶ or the Warsaw Convention and of the Convention on Arrest in Seaships⁴⁷- have the effect of precluding the application of the provisions of the Brussels I Regulation relating to the same question and that “the purpose of that exception is to ensure compliance with the rules of jurisdiction laid down by specialised conventions, since when those rules were enacted account was taken of the specific features of the matters to which they relate”⁴⁸. Difficulties may arise in practice because the conventions on particular matters, such as those referred to in Article 71 Brussels I Regulation, only partly address the scope of the EU instrument concerned and delimitation between the scope of the particular convention and the subsidiary application of the Regulation may be a source of uncertainty, as pointed out in the 2007 Report on the Application of Regulation Brussels I in the Member States⁴⁹.

It is noteworthy that the case-law of the ECJ has established some additional restrictions to the prevalence of international conventions concluded by Member States with non-member countries. In *TNT Express Nederland*, when interpreting Article 71 Brussels I Regulation in connection with certain provisions of the CMR, the ECJ held that the application of the specialised conventions in the matters they cover “cannot compromise the principles which underlie judicial cooperation in civil and commercial matters in the European Union, such as the principles [...] of free movement of judgments in civil and commercial matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the

⁴⁶ See ECJ Judgment of 28 October 2004, C-148/03, *Nürnberger Allgemeine Versicherung*, stating that Article 57 Brussels Convention introduced an exception to the general rule that the Brussels Convention takes precedence over other conventions signed by the Contracting States on jurisdiction and the recognition of judgments (para. 14).

⁴⁷ ECJ Judgment of 6 December 1994, C-406/92, *The Tatry*, para. 24.

⁴⁸ See ECJ Judgment of 6 December 1994, C-406/92, *The Tatry*, para 23; and ECJ Judgment of 28 October 2004, C-148/03, *Nürnberger Allgemeine Versicherung*, para 14.

⁴⁹ See “Report...”, *cit.*, paras. 139.

administration of justice in the European Union”⁵⁰. The result of the approach adopted in *TNT Express Nederland* is that in practice the criterion that jurisdiction and recognition rules of specialised conventions prevail over the rules of the Brussels I Regulation is to be applied with significant limitations to ensure that it does not conflict with the principles underlying the Regulation. These limitations are based on the view that conventions concluded by Member States with non-member countries cannot, in relations between the Member States, be applied to the detriment of the objectives of European Union law and cannot lead to results which may undermine the sound operation of the internal market⁵¹. Regarding the jurisdiction provisions –including rules on *lis pendens*- the ECJ established in *TNT Express Nederland* that the rules of the specialised conventions can only be applied to the extent that “they are highly predictable, facilitate the sound administration of justice and enable the risk of concurrent proceedings to be minimised” (para. 53). Moreover, in the area of the recognition and enforcement of judgments, the *favor executionis* principle and mutual trust in the administration of justice between Member States must be ensured and hence the rules of the specialised conventions cannot be applied if they require less favourable conditions for the recognition and enforcement than those provided for by the Brussels I Regulation (paras. 54-56).

The trend to limit the situations in which international conventions concluded by Member States with third States take precedence over EU law has also been reflected in the text of the recent EU instruments in this field. Provisions can be found that establish that such criterion does not apply to relations between Member States because with regard to such relations the relevant EU instrument prevail over the conventions concluded between Member States and third countries in so far as they concern matters governed by the instrument. Article 60 Regulation 2201/2003 and Article 69(2) Regulation 4/2009 on maintenance obligations are examples of this trend. The criterion that, in relations between Member States, EU instruments take precedence over the conventions which concern matters governed by the relevant instrument and to which Member States are party should also be adopted in principle in a future codification of Private International Law in the EU.

⁵⁰ ECJ Judgment of 4 May 2010, C-533/08, *TNT Express Nederland*, para. 49.

⁵¹ See ECJ Judgment of 22 October 2009, C-301/08, *Bogiatzi*, para. 19; and ECJ Judgment of 4 May 2010, C-533/08, *TNT Express Nederland*, paras. 49-56.

From the perspective of the unification of Private International Law within the EU it is remarkable that the current situation concerning international conventions concluded by Member States has made possible that significant fragmentation continues to exist even in some of the core areas governed by the EU regulations. Particularly noteworthy is the situation in the field of the law applicable to non-contractual obligations where the EU rules have universal application (Article 3 Rome II). The prevalence of the international conventions to which one or more Member States were parties at the time of the adoption of the Regulation -Article 28(1)- produces the result that (only) in some Member States central issues covered by the Regulation, such as the law applicable to product liability, or situations which fall entirely within the scope of the Regulation –such as non-contractual liability arising out of car accidents- are not governed by the Regulation. In particular, that is the situation in the Member States that are parties to the Hague Convention of 4 May 1971 on the law applicable to traffic accidents and the Hague Convention of 2 October 1973 on the law applicable to product liability. In the context of a possible future codification of Private International Law such a level of fragmentation within the EU seems unacceptable and hence additional steps should be envisaged to safeguard uniformity between EU Member States, including an eventual denunciation of the Conventions by the Member States that are parties to them.

II - European law and European instruments of

The question then arises of how to build the relations between the European Code of Private International Law system and the European Union judicial system. The main difficulties of determining such relations must be presented before going through the solutions proposed.

A. Problems

1. The scope of the Code

The first difficulty to cope with is to identify the scope of the Code. Even if this issue has already been dealt with in that conference, I would like to emphasise some relevant points.

The exercise of defining the scope of a European Code in the field of Private International Law implies the following question : what exactly does Private International Law mean ? Where does Private International Law start and finish ? These are broad questions highlighted by the current debate on the role of the recognition mechanism in the field of traditional conflicts of laws and jurisdictions methods⁵³. The outstanding mechanism in European Union law (recognition of judgements, acts and

Panthéon Sorbonne, 2000 ; D. Cohen, La Convention européenne des droits de l'homme et le droit international privé français, RCDIP 1989, 451 ; P. Mayer, La convention européenne des droits de l'homme et l'application des normes étrangères, RCDIP 1991, 651 ; F. Marchadier, Les objectifs généraux du droit international privé à l'épreuve de la Convention européenne des droits de l'homme, Thèse Limoges 2005, éd. Bruylant 2007 ; E. Guinchard, Procès équitable (article 6 CESDH) et droit international privé, in A. Huyts et N. Watté, International Civil Litigation in Europe and Relations with the Third States, Bruylant 2005, 199 ; P. Kinsch, Droits de l'homme, droits fondamentaux et droit international privé, RCADI 2005, t. 318, 11. Voir plus récemment, P. Kinsch, Le droit international privé au risque de la hiérarchie des normes : l'exemple de la jurisprudence de la CEDH en matière de reconnaissance des jugements, Annuaire de droit européen, Volume 2007, Bruylant 2010, 957 ; F. Marchadier, Charte des droits fondamentaux et droit international privé – aspects procéduraires, in B. Favreau (dir.), La Charte des droits fondamentaux de l'Union européenne après le Traité de Lisbonne, Bruylant 2010, 81 ; L. d'Avout, Droits fondamentaux et coordination des ordres juridiques en droit privé, in E. Dubout et S. Touzé (dir.), Les droits fondamentaux : charnières entre les ordres et systèmes juridiques, Pedone, 2010, 165 ; J.-S. Bergé, Le droit à un procès équitable au sens de la coopération judiciaire en matière civile et pénale : l'hypothèse d'un rapport de mise en œuvre, in F. Sudre et C. Picheral (dir.), Le droit à un procès équitable au sens du droit de l'union européenne, Bruylant-Némésis (collection Droit et Justice), à paraître.

⁵³ See P. Lagarde, Développements futurs du droit international privé dans une Europe en voie d'unification : quelques conjectures, *RabelsZ* 2004, 225 ; P. Mayer, La méthode de la reconnaissance en droit international privé, *Mélanges en l'honneur de Paul Lagarde*, Dalloz, 2005, 547 ; P. Lagarde, La reconnaissance mode d'emploi, *Mélanges en l'honneur d'Hélène Gaudemet-Tallon*, éd. Dalloz 2008, 481 ; C. Pamboukis, La reconnaissance-métamorphose de la méthode de reconnaissance, RCDIP 2008, 513.

judicial situations) is not naturally integrated into a body of rules on conflicts of laws and conflicts of jurisdictions⁵⁴.

As a consequence, the question of the shape of the European Code in Private International Law still stands. In the European context, it appears very important to decide whether or not a European Code aims to gather all the European instruments of judicial cooperation in civil matters within the Freedom, security and Justice area⁵⁵.

A more selective way has already been proposed concerning European cooperation at the stage of service and evidences, enforcement of judgements (European enforcement order for uncontested claims and Small claims procedure)⁵⁶, and enhanced cooperation (divorce and legal separation)⁵⁷. Most of the participants in the Conference would rather insert all of the new European regulations in the framework of the European Private International Law Code.

2. Specific provisions

The second difficulty emerging from the birth of a Code of Private International Law in the European judicial order has not been yet referred to by the other participants

⁵⁴ See the analysis of H. Muir Watt, *La nécessité du trio : conflit de lois, de juridiction, règles de reconnaissance et d'exécution*, p. xxx.

⁵⁵ Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, 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, Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (Brussels I), Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the Courts of the Member States in the taking of evidence in civil or commercial matters, Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation No 1347/2000 (Brussels II), Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, Regulation (EC) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III).

⁵⁶ See B. Vila Costa et M. Atal « La place de la procédure et de la coopération entre juges et acteurs nationaux », p. xxx ; M.-L. Niboyet et M. Vilderspin, « Les règles de procédure, les règles de compétence et les effets des jugements : l'acquis et les propositions », p. xxx.

⁵⁷ See C. Nourissat, *op. cit.*, p. xxx.

in the Conference. It is possible to ask if specific provision may lay out solutions about interactions between the European Code and the other European methods. On the one hand, specific provisions are necessary if it appears that problems in the integration process occur because of the European Private International Law Code. On the other hand, the European judicial order is sufficient and has the capacity to integrate properly the European Code as a part of it.

B. The solutions

1. Established solutions

The experience of the European Private International Law legislation in force⁵⁸ drives the insertion mode of the new European Code in the European order. Then, three interesting outcomes are relevant.

Firstly, it seems that references to European law have to be made in the frame of a European Private International Law Code. With regard to the judicial basis, the European Code, or before that, the European Private International Law legislation, are not self-sufficient. In other words, the European Code must rely on the European Treaties. Regardless of Article 21 TFEU (concerning European citizenship)⁵⁹, it is the Article 81 TFEU (concerning judicial cooperation in civil matters *lato sensu*) that has to be laid down. This text has set out a general judicial basis (§2) and also a specific one for International family law (§3). Thereby, the Article 81 TFEU would be more appropriate to ground the European Code of Private International Law.

Secondly, some usual references in European Private International Law remain. Despite the fact that each conflict of law or conflict of jurisdictions rules are based upon a specific European Regulation, cross references have to be made. For instance, the

⁵⁸ See n° 50, p. .

⁵⁹ We do not agree with the proposition to adopt that judicial basis in order to pass round the unanimity vote set out in Article 81 TFEU in Family law matters. Firstly, the ECJ, ruling on a request for a preliminary ruling or on action for annulment, is unlikely to accept such a judicial basis since the primary law lays down a specific ground for Private International law issues. Specifically, Article 21 TFEU sets out that it does apply except when the Treaties have provided the necessary powers. Secondly, we do not agree with a complicated theory that is based upon a will to “pass round” primary law provisions.

cross references exist in the Regulations in force, concerning financial products⁶⁰, Legal Aid⁶¹ or in the fields of protection of personal data⁶². Consequently, a consistent system explains that European Private International Law issues not included in the European Code, as consumer welfare policy⁶³, European patents⁶⁴, or the posting of workers in the framework of the provision of services⁶⁵, should also comply with the cross references method. The purpose is to avoid divergences that may occur⁶⁶ between external provisions and the European Code on common issues.

Thirdly, a current European legislative practise that applies to relations between the instruments of Private International Law should be avoided with the European Code as a unique body of rules. Specifically, numerous cross references in the Private International law instruments aiming to modify each other⁶⁷ or to facilitate their interrelation⁶⁸ are no longer relevant in a codification context.

2. Solutions still in debate

A broad question arises concerning the interaction between Private International law methods and solutions, and the rules of European Union law which do interfere with the classical logic of traditional Private International law. More precisely, some European rules, such as the proper functioning of the internal market, European citizenship, or the right to a fair trial, undoubtedly modify the settlement of Private International law dispute. Therefore, it must be decided if specific provisions relating to

⁶⁰ See Regulation Rome I, *cit.*

⁶¹ See Regulation relating to maintenance obligations, *cit.*

⁶² See Regulation relating to maintenance obligations, *cit.*

⁶³ The Directives adopted in this matter may interfere with the Regulation Rome I.

⁶⁴ The Regulations adopted in this matter may interfere with the Regulation Bruxelles I.

⁶⁵ The Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services may interfere with Rome I.

⁶⁶ Incoherence are important in the field of consumers protection. See M.-N. Jobard-Bachelier, L'acquis communautaire du droit international privé des conflits de lois, in J.-S. Bergé et M.-L. Niboyet (dir.), *La réception du droit communautaire en droit privé des Etats membres*, éd. Bruylant 2003, 185. However, this incoherence are about to disappear throughout the review of secondary legislation in that matters.

⁶⁷ See Regulation on maintenance obligations modifying Regulation Brussels I.

⁶⁸ See the interaction between the Regulation Brussels IIbis, the Regulation on maintenance obligations, and the Regulation Rome III, *cit.*

interaction between those European rules provided mostly by the Treaties or the European Charter and the European Code have to be set out in the European Private International law Code.

It seems easier for the European legislator to handle such relations in a prospective way providing a framework throughout specific provisions. This legislative phenomenon appeared in the field of the internal market⁶⁹ and is now in debate concerning the right to a fair trial⁷⁰. Moreover, the establishment of a European Code in Private International law matters entails a debate on the role, for instance, of the European citizenship in the European judicial area⁷¹.

Nevertheless, the absence of consensus on this prospective approach cannot be denied. Two of the main instruments in force of European Private International law do not foresee the terms of the relation between the rule of conflict of law and the material imperative of the Internal market whose purpose is to facilitate free movement⁷².

Personally, I do approve of this approach since I consider the European Union system self-sufficient and it may be able to give options to resolve the existing problem without a transcription in a Code. Several issues, such as the relations between a

⁶⁹ Concerning Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, see Regulation Rome I, *spe.*, § 40 : « A situation where conflicts of law are dispersed among several instruments and where there are differences between those rules should be avoided. This regulation, however, should not exclude the possibility of inclusion of conflict of law rules relating to contractual obligations in provisions of Community law with regard to particular matters. This Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designed by the rules of this Regulation. The application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market”.

⁷⁰ In the perspective of the revision of the Regulation Brussels I, please note the increase of references to the right to a fair trial. See, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (COM/2010/0748 final), § 46-1.

⁷¹ See the prospective analysis of E. Pataut, « Citoyenneté communautaire et libre circulation des personnes – de la construction d’un marché à l’élaboration d’un statut » in : S. Bollée, Y.-M. Laithier et C. Pérès (dir.), *L’efficacité économique en droit*, Economica, 2010, 147.

⁷² The two Regulations Rome I and Rome II set out that « the present Regulation shall not prejudice the application or adoption of acts of the institutions of the European Communities which lay down rules to promote the smooth operation of the internal market, where such rules cannot apply at the same time as the law designated by the rules of Private International law » (Art. 22 c) in fine). In the line of criticism of that provision, see our analysis, “Le droit du marché intérieur et le droit international privé communautaire : de l’incomplétude à la cohérence » in *Le droit, les institutions et les politiques de l’Union européenne face à l’impératif de cohérence*, V. Michel (dir.), Presses universitaires de Strasbourg, 2009, 339.

European Code of Private International law and the Treaties, the European Charter, the construction of the Internal market and the FSJ area, the method of harmonization, the national procedural autonomy, are based upon the European Union system bringing down the necessity of specific provisions in the European Code.

Notwithstanding its originality, this position finds its roots in the specificity of the matters at stake. Although Private International law knows how to handle the distinction « national/foreigner», it has become more difficult to integrate a European judicial level in the reasoning. The scope of the European Union law, the assertion of an independent European public order, and the questioning on European policy law⁷³ are not easily included in the dynamic of conflict of law and conflict of jurisdictions.

But this European dimension does exist on its own remaining outside of Private International law issues. Consequently, a European Code in Private International law has no legitimacy in intending to solve, through specific provisions, the relationship between rules and the imperative rules binding the whole European Union system. The question of the protection of fundamental rights included in the shape of the new instruments of European Private International law⁷⁴ is a relevant illustration of the lack of legitimacy of those texts. The protection of fundamental rights is a European imperative and such provision in secondary legislation in the field of Private International law will not prevent Europe from respecting it⁷⁵.

Although a European Code in Private International law is a system, it is a part of a wider integrative system – the European Union judicial system -. It appears unreasonable to argue that the European Union judicial system would rather be submitted to the imperatives of a European Private International law system than the contrary. To do so infers that the European context of the European Private International law Code is wrongly denied.

In conclusion, I would like to emphasise that including all the imperatives of the European Union judicial system in the shape of the Code is not necessary. It relies on

⁷³ Concerning that issue, see the debate with E. Pataut au Cejec, Nanterre University : « La distinction « national – étranger – européen » et le droit international privé : question de vocabulaire ou problème arithmétique ? », LPA 2008, n° 221, pp. 5-12.

⁷⁴ For instance, the Regulation on the European Enforcement Order, *cit.* See, the criticism of L. d'Avout *in* Droits fondamentaux et coordination des ordres juridiques en droit privé, *op. cit.*

⁷⁵ See our analysis on the right to a fair trial, Le droit à un procès équitable au sens de la coopération judiciaire en matière civile et pénale : l'hypothèse d'un rapport de mise en œuvre, *cit.*

the European Union system and its lawyers to implement solutions dealing with the interactions between the new European Code and other European Union rules. And the doctrinal School from Toulouse, with my colleague and friend S. Poillot-Peruzzetto, is amply participating in that work.