

The European research network project*

– challenges, chances, perspectives –

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1. Developing the “European legal discipline” of the law of judicial cooperation in civil matters

At the Tampere European Council on 15 and 16 October 1999, the Council formulated the aim of the creation of a “genuine European area of justice”. When the EC decided to develop the European Union with the Treaties of Maastricht and Amsterdam, it accepted the challenge of developing this genuine European area of justice, for which the Tampere Council established three priorities for action:

- the mutual recognition of judicial decisions
- better access to justice throughout all of Europe
- an increased convergence in the field of civil law (and the law of civil procedure)

Where the Amsterdam Treaty’s focus still lay on the creation of the European Union’s own legislative competence in the field of “judicial cooperation in civil matters”, the Tampere Council shifted the focus to the legal practice when it formulated the request of the “genuine European area of justice”.

The more complex the practice of the law is, the more important is the role of legal research. Legal research, the academic and non-academic discussion and legal reasoning, monitors the development of the law, deciphers the legal principles, approves or criticizes the practice of the law and develops suggestions for the intervention of the legislative power. When the Tampere Council, with the postulate of the “genuine European area of justice”, turned the attention to the European legal practice, it therefore simultaneously emphasized the functioning of “European legal research” in the field.

If looked at more closely, there is, however, nothing much of a “European legal research” in the field of civil law, at least if “European legal research” is understood as something which develops the European dimension and thus goes beyond the sphere of research at the “national” level of each European legal system. It is true that Europe can be seen at the centre of the wide field of international uniform law which has, through the years, developed through international conventions or State treaties. Some of these, such as for e.g. the CISG, have become an important focus of cooperation and discussion between legal researchers from different jurisdictions. However, it would be far from realistic if one would daresay that there is something like a “European legal think-

ing” or, even more venturesome, that something like a “European discipline of civil law” exists.

This is, however, what the Tampere Council’s postulate of the “genuine European area of justice” – if taken seriously – aims at. If the European jurisdictions are to grow together into one “genuine European area of justice”, it is essential that the European legal research in the field be consolidated into one “genuine European legal discipline”.

Of course, the perspective of the development of one common European civil law throughout the EU is still far away, although the discussion has been underway since quite some time, following the path of the dynamic harmonisation of the European legal systems through the ever closer network of EU directives. However, civil law harmonisation so far does not seriously challenge the national identity of each individual European civil law system.

That is what makes the difference. The law of judicial cooperation in civil matters is by no means any more national. Since the Amsterdam Treaty, it is truly primary European law in all respects. It does not just consist of common European standards as under the European civil law harmonisation, but is a full legal discipline, with the EU holding the competences of *European legislator*, with a *European legislation* directly applying in all EU Member States, and it would be only logical if it was accompanied by one “genuine European legal discipline”.

As is easy to see, the reality of European legal research and of the European legal discussion is far from reaching that aim.

– In order for a legal discipline to exist, the concept of the legal public is fundamental. However, if we look at the reality of the European legal discussion in the field of the law of judicial cooperation in civil matters, and more precisely of private international law and the law of international civil procedure, we find that it is made up of 25 “national” legal discussions in each of the European jurisdictions, which are conducted alongside each other, and with little or no exchange between them.

– If with regard to the application of the Brussels I Regulation, reference is made to a judgment of the appeals court in Hamburg before a court of first instance somewhere in Bavaria, this precedent will, in a most natural way, be taken into consideration. Reference to a judgment rendered by the French, Belgian or Italian court of cassation or by the British House of Lords is instead likely to be considered only with great hesitation, if at all. There is still that strong “national” view, with its specific limitations, anchored in the minds and which demonstrates how far from our grasp the concept of the “European legal discipline” still is.

This is of course not always necessarily so everywhere in

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Europe. However, an open-minded attitude towards the European dimension of the law of judicial cooperation in civil matters must still be considered as the exception to the general rule. At a more general level, the “European legal discipline” in the field of private international law still represents a great aim to be achieved.

2. The feasibility study

This is where the feasibility study on the creation of a European research network enters on stage. It is one of several initiatives which the European Commission is taking under the specific assignments received through the Amsterdam Treaty and the Tampere European Council.

In very general terms, the objective of the feasibility study is two-fold. It shall prepare an inventory of the research in European civil law as it presently exists throughout all of the EU Member States. Furthermore, based on the findings of the inventory, and in a very general understanding, the study shall develop proposals on

- how to promote the further development of the European dimension in legal research in the field of judicial cooperation in civil matters and of the harmonization of civil law in the EU; and

- how to improve and intensify the fertilisation of the European legal practice by the European legislation, and vice versa, the fertilisation of the European legislation by the European legal practice.

In other words, at a most general level, the study shall investigate how the development of the “European legal discipline” of judicial cooperation in civil matters can be best promoted.

3. The conditions under which the “European legal discipline” of private international law must develop

Before further concretization of this general task of the study, the framework of the conditions shall be briefly outlined, out of which the European research network will have to be developed.

(1) Obstacles

There are many obstacles or conditions which strengthen the “national” ties of research and hinder the free development of the European legal discipline of private international law. Just some examples shall be called upon, which could be easily further extended:

- In legal practice as well as in academic teaching, private international law and the law of international civil procedure, which today is basically European, is frequently combined with general civil law, which instead continues to be “national”.

- Most legal literature is “national”, i.e. bound to one specific jurisdiction. High de facto boundaries exist between the various European jurisdictions, with regard both to the publi-

cation of legal texts and to the availability of legal texts published in other jurisdictions.

- With legal thought and reasoning being closely bound to legal language, the plurality of European languages sets important obstacles to a more frequent and a more extensive exchange of legal opinion.

- Judges are used to thinking in terms of their “national” legal systems and lawyers are used to disputing their cases in a form which adequately corresponds to the judges’ expectations.

- Academic chairs are granted in accordance with specific rules which not only vary among different Member states / jurisdictions but which on average clearly privilege competitors that originate from the jurisdiction in which a chair is to be granted.

Altogether, these conditions describe the close and intense “national” inclination of legal research in the field of private international law today.

(2) Encouragements

On the contrary, there are a number of considerations, which are more adequate in order to enhance the “European legal discipline of private international law”.

- The most important development is that which takes place in “the minds”. Already at the start of the study it can be said that the European dimension of the law of judicial cooperation in civil matters is being noted and taken into due consideration by those doing research in the field of private international law.

- There is the very practical role of the European Union in its function as the legislator in the field and of the DG Justice, Freedom and Security as the European Commission’s, so to say, “Ministry of Justice”.

- In particular, in the field of private international law, there is the long tradition of intensive cross-national encounter, discussion and exchange, which has laid, and continues to lay, the foundations for more extensive exchange.

(3) The “European lighthouse” functions

The generally “national” orientation of the legal practice is only one side of the present legal reality. Especially in the field of judicial cooperation in civil matters, the role of the case-law produced by the ECJ is particularly important. The ECJ’s authentic interpretation has led to a set of rules which has been, with little or no resistance at all, accepted throughout all of the 25 Member States. *Luxemburg locuta* is today a generally accepted principle in European civil law. Especially in the field of the Brussels Convention / Brussels I Regulation, there are so far approx. 130 ECJ judgments which are closely followed in all jurisdictions of the EU. It can be said that the principles laid down in these judgments are at the core of a most general common European understanding and are good grounds for the further development of the European legal discipline of civil law.

4. The objective of the Feasibility study

With a better idea of what the conditions are, under which a European research network would have to be established, one can more closely examine what is at the core of the feasibility study, i.e. the development of proposals for structures and objectives which could be functional to the creation of the network. The study shall work on two levels.

(1) It shall design the structure and the peculiarities of a European framework, which shall serve different objectives:

– It shall develop a long-term perspective of European encounter and cooperation of the research in the field of judicial cooperation in civil matters.

– It shall have the capability to follow the development of the law in the field and to intervene on current issues, both in terms of critical discussion and of providing input to the legislative process.

– It shall offer a point of reference and promotion to those who are prepared to direct research from a European perspective in the field of private international law and the law of international civil procedure.

(2) In order to achieve these goals the study shall establish concrete aims which are functional for the promotion of the development of the European legal discipline of the law of judicial cooperation in civil matters and for developing instruments for its realisation. Such aims could be:

– to create awareness among the relevant legal public, i.e. both academics and practitioners who are active in the field;

– to establish a European focus for the discussion of the contents and issues of judicial cooperation in civil matters, and to help free this discussion from the narrow “national” ties and establish it at the European level;

– to develop criteria for the measurement and appraisal of European excellence in the field;

– to promote means and instruments of European discussion and European information exchange;

– to develop instruments for promoting flexibility in language and thus help to extend the European information flow;

– to increase European cross-border research cooperation;

– to establish standards and references of European research in the field.

The study’s task is to produce the most concrete results possible. The Commission expects so-called “turnkey-projects” and would like to receive concrete and detailed indications which it can accept and put into practice without being forced to request further studies.

5. The role of those engaging in private international law research in Europe

The European research network will strive on the persons who will engage in it. Any network project and structure will therefore have to be developed in close contact with those who shall pervade these structures with their European re-

search work and who will make use of the network as the forum of a European discipline of private international law. One of the primary tasks of the project will therefore consist in calling for the opinions of who is engaged in academic research and in legal practice in the subject field and for their cooperation on the development of structures and contents, which fit their needs and that of the European private international law community.