Chapter 12

# The Present and Possible Future of Judicial Cooperation in Civil Matters

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**ABSTRACT**

*Judicial cooperation in civil matters is based on the principle of mutual recognition, which in turn is based on the principle of mutual trust. The study shows how the EU has been given the power to regulate this policy through the amendments to the founding treaties, what the current results of this policy are, and how the principle of mutual trust is reflected in the various EU legal sources and the relevant case law of the CJEU. It gives an overview of the most recent relevant legislation on digitization and finally suggests how to make the practical implementation of this policy in the relationship between national courts and the CJEU more effective.*

**KEYWORDS**

principle of mutual trust, rule of law, recognition and enforcement of foreign judgments, jurisdiction, foreign service of documents, digitization, court of competent jurisdiction

## 1. Introduction

'Mutual trust is a prerequisite for cooperation and the struggle for a common goal, and working together strengthens it even more....The starting point is, above all, mutual trust. This develops naturally when people approach the problem to be solved in a similar way. If they look at a task in the same way, and if everyone has the same interest in solving it, then conflicts and suspicions disappear, and friendship often replaces previous bad feelings. But how can people be made to approach a problem in the same way, and how can they be made to see that they have the same interests, when people and nations are very much divided?'[1]

1 Monnet, 1976, p. 145.

Osztovits, A. (2022) 'The Present and Possible Future of Judicial Cooperation in Civil Matters' in Osztovits, A., Bóka, J. (eds.) *The Policies of the European Union from a Central European Perspective.* Miskolc–Budapest: Central European Academic Publishing. pp. 239–258. https://doi.org/10.54171/2022.aojb.poeucep_12

Jean Monnet, one of the founding fathers of the European Union, formulated one of the most important questions of European integration in his *Memoirs*: how to make Member States trust each other and the new European institutions. It is precisely because of this mutual trust that judicial cooperation in civil matters, as one of the EU's policies, has developed. It is safe to say that this area of law can only develop as long as the Member States do not begin to doubt the independence and professionalism of each other's judicial systems. In this chapter, we will show where this policy started, what the relevant primary EU legal framework is, and what secondary EU legal norms currently give it substance. We will also look at the impact of digitization, the key challenge of the ever-closer future, on this policy. We will then examine how the principle of mutual trust is reflected in the various EU legal sources and how they have been interpreted by the CJEU. We also look at the organizational weaknesses that hamper the effectiveness of judicial cooperation in civil matters. Finally, proposals are made to ensure that mutual trust between Member States is maintained in the future.

## 2. The Development of Judicial Cooperation in Civil Matters

It reflects the caution and political reality of the countries that founded the European Economic Community that, to create an internal market based on the four basic economic freedoms (free movement of capital, labor, services and goods in the Community), Member States did not give up their full sovereignty in favor of an integration organization with an uncertain future. Thus, for example, a single judicial organization has not been created in the EC, which would adjudicate civil disputes involving cross-border elements in the same way in each Member State. There was not even legislation to unify the problems arising from these situations.

But the need was there when the EEC was founded. Art. 220 of the ECSC Treaty stated that the Member States undertook to ensure the simplification of formalities for the mutual recognition and enforcement of judgments and arbitral awards. As a result of the amendment of the Maastricht Treaty, judicial cooperation in civil matters was added to the intergovernmental third pillar. One of the most important achievements of the Amsterdam Treaty was the transfer of this area to the first pillar, also known as the Community pillar, which gave the EC institutions legislative powers in this area under Arts. 61(c) and 65 TEC.

The Lisbon Treaty also brought substantial changes: the relevant Arts. 65 to 69 of the EC Treaty, in the area of judicial cooperation in civil matters, were consolidated into a single Art. 81, thus removing the restriction in Art. 68 of the EC Treaty on the jurisdiction of the CJEU to refer questions for a preliminary ruling on the interpretation of Community law in this policy area to national courts against whose decisions there is no judicial remedy under national law.

Art. 65 TEC set two important limits on the measures to be adopted in the field of judicial cooperation in civil matters: on the one hand, the scope of such Community

legislation should only cover civil matters with cross-border implications and, on the other hand, it should serve the proper functioning of the internal market. Art. 81 TFEU contains only the first restriction and, in para. 2, merely refers to the need to adopt Union rules to achieve the objectives set out therein, in particular where this is necessary for the proper functioning of the internal market. This is a clear extension of the EU's pre-existing powers, but it will only become clear in the coming years how the EU institutions can make use of them.

Art. 81(1) still does not give the Union the power to regulate civil procedural law as a whole and to establish a uniform code of civil procedure for all Member States. Nor was it given the power to unify the organization of the courts in the Member States, which remained the exclusive competence of the Member States.

The United Kingdom, Ireland and Denmark have annexed an additional protocol to the Treaty of Amsterdam, excluding themselves from the measures to be taken under Arts. 61(c) and 65 TEC. The United Kingdom and Ireland have refined this negative position insofar as they wish to participate in judicial cooperation between Member States, which means that the rules of civil procedure issued by Community bodies are also applicable there. Denmark has concluded an international treaty with the EU, as a result of which Regulation (EC) 44/2001 and Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which repealed it on 21 January 2015, are also in force on its territory.

Notwithstanding the positive case law experience of the secondary Community legislation adopted, these three Member States have also added a protocol to the TFEU: in No. 21, the United Kingdom and Ireland reserve the right to participate in the adoption by the Council of proposed measures under Title V TFEU only if they consider it appropriate to do so. If they do not take part, the rule so adopted shall not have effect in their territories.[2] Denmark has declared in Art. 2 of Protocol (No. 22) that it will not apply Title V of Pt. 3 of the TFEU.[3]

## 3. Legislation in the Field of Judicial Cooperation in Civil Matters

Art. 81(2) TFEU broke with the system of legislative rules governing judicial cooperation in civil matters previously established in Art. 67 TEC. The current rules are simpler and thus allow for more effective legislation. The ordinary legislative procedure is the general rule for all measures. The exception to this is measures on family law matters with cross-border implications under Art. 81(3) TFEU, which can only be adopted under the special legislative procedure. Although this para. does not define precisely what is meant by such family law matters, it does, for the sake of clarity,

2 In Declaration 56 to the TFEU, Ireland stated that it wished to participate to the fullest extent possible in the adoption of measures under Title V. of Pt. 3 of the TFEU.

3 Brexit has created new challenges for judicial cooperation in civil matters between EU Member States and the UK. For more details, see Molnár, 2022, pp.80–107; Ungerer, 2019, pp.397–405.

empower the Council, acting unanimously on a proposal from the Commission, to list the areas of family law matters with cross-border implications which are exempted from the special legislative procedure and may be adopted by ordinary legislative procedure.

Even today, there are still significant differences in national family law rules between Member States, due to different cultural and legal traditions. Even when the Lisbon Treaty was adopted, the Member States did not want to leave this entirely to the EU, which is why the third subpara. of Art. 81(3) TFEU gives the national parliaments of the Member States a 'right of veto' over the Council's decision. If the latter institution adopts a 'list' of family law issues to be subject to the ordinary legislative procedure, it must notify the national parliaments, which may object to the proposal within six months. It only takes one objection for the Council not to adopt the decision.

## 4. Secondary EU Legislation Adopted to Date

### *4.1. Background*

At the Commission's initiative, a committee of experts composed of representatives of the Member States and experts in observer status began work in 1960, with the task of drafting the text of an international legal convention.[4] As a result of the careful work of the commissioned body, a convention was signed by the Member States in Brussels on September 27, 1968, entitled the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as the Brussels Convention), which entered into force on February 1, 1973, following ratification.

The practical effectiveness of the rules of the Brussels Convention was ensured by the fact that it directly regulates the question of jurisdiction in civil and commercial matters. Where the defendant in a civil dispute is domiciled in one of the contracting states, the rules of the Convention apply. Last but not least, it has simplified and sped up the recognition and enforcement of judgments of the contracting states.

The amendments to the Brussels Convention were made at the time of the enlargement of the EEC, given that this legislation is not formally part of Community law, but is an international legal norm, with the specificity that only the Member States of the EEC—later the EU—can accede to it.[5] The Convention has faced its greatest challenges in the context of the accession of the new Member States, namely the United Kingdom and Ireland. It was questionable to what extent the Convention's provisions, based on

4 The committee was chaired by the German Arthur Bülow, while the rapporteur for the proposal was the Belgian P. Jenard, whose report is still one of the most important starting points for the interpretation of the Brussels Convention. Kengyel, 2012, p. 450.

5 Thus, Accession Convention I—for Denmark, Ireland, and the United Kingdom—was signed on 9 October 1978, Accession Convention II—for Greece—on 25 October 1982, Accession Convention III—for Spain and Portugal—on 25 and 26 May 1989, and finally Accession Convention IV. —for Austria, Finland and Sweden—on 29 November 1996.

continental concepts, were compatible with common law concepts. Although this led to a thorough reworking, the basic principles that governed the Convention stood the test and did not need to be changed.

The beneficial effect of the provisions of the Convention on the case law of the courts of the Member States has also been noticed outside the EEC. In 1982, on the initiative first of Sweden and then of Switzerland, a committee of experts was set up among the Member States of the European Free Trade Association (EFTA) to draw up an international legal convention, modelled on the Brussels Convention, to which both the EEC and EFTA Member States could accede. The document prepared by the panel was signed by the Member States in Lugano on September 16, 1988, and was also entitled the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter, the Lugano Convention), and entered into force, after ratifications, at different times in the various Member States, between 1 January 1992 and 1 September 1996.

The importance of the Lugano Convention is that, when it entered into force, it created uniform rules of jurisdiction and mutual recognition of judgments of the courts of the contracting States for the whole Western European economic area. Although it lost some of its practical usefulness with the accession of Austria, Sweden, and Finland to the EU, it is still in force between the EU Member States and Norway, Switzerland, and Iceland.[6]

The drafters of the Lugano Convention, however, looked beyond the Western European economic area, and made it possible for other countries to accede to it if a Contracting State so requested on its behalf (Art. 62 I(b)) from the depositary country, Switzerland. After the required notifications and declarations have been made, a unanimous decision of the member countries is required to invite a new member state.

In the first half of the 1990s, the countries of Eastern Europe also began to take the diplomatic and legal steps necessary for accession. Thanks to the acceleration of our accession to the EU and the results of the changes in Community legislation following the entry into force of the Amsterdam Treaty, Poland was the only Eastern European country to accede to the Lugano Convention, with effect from February 1, 2000.[7]

Nevertheless, the Lugano Convention has left a lasting mark on the legal systems of many countries, including Hungary. The Hungarian legislator has comprehensively amended the Nmjt.[8]—and partly also the Pp.[9]—to comply with the text of the Convention.[10]

6 Coester-Waltjen, 2003, p. 321.
7 Wagner, 2000, p. 699.
8 Act XXVIII of 2017 on Private International Law.
9 Act III of 1952 on the Code of Civil Procedure.
10 It is important to note that accession to the Lugano Convention does not necessarily entail an obligation to amend domestic legislation, since the provisions of the Convention replace and supplement the relevant domestic legislation and apply to matters covered by the Convention.

### *4.2. European Union Sources of Civil Procedural Law*[11]

With the legislative powers conferred by the amendment to the Treaty of Amsterdam, the Council immediately set to work and adopted Regulation (EC) 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility on May 29, 2000.[12] The Council's task was made easier by the fact that it could work from 'ready-made material.' On May 28, 1998, the Member States of the European Union concluded a new international convention, modelled on the Brussels 'Convention, called the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters.' However, this Convention did not enter into force because the regulation entered into force before it.

Although the high priority of the subject of the regulation certainly justified the swift adoption of the regulation, there was not enough time to think through certain issues. Thus, on July 3, 2000, France presented a proposal to amend the regulation to extend the rules on parental supervision. This proposal was almost entirely taken up by the Council, which repealed Regulation (EC) 1347/2000 by Regulation (EC) 2201/2003, adopted on November 27, 2003. In the meantime, Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, recognition and enforcement of judgments, and decisions in matters of matrimony, parental responsibility, and the wrongful removal of children has been drafted and will apply to legal proceedings brought on or after August 1, 2022.

On December 22, 2000, the Council adopted Regulation (EC) 44/2001 'on the jurisdiction, recognition, and enforcement of judgments in civil and commercial matters.' This legislation owes its rapid adoption mainly to the fact that the fifth amendment to the Brussels Convention was essentially ready by that time, and the regulation took over the text of the Brussels Convention.[13] In view of all these antecedents and similarities, it is referred to in legal literature as the Brussels I Regulation. The latter regulation has been further developed, in particular by the abolition of exequatur in the context of the declaration of enforceability of judgments given in the Member States, by the Brussels I Regulation.

On May 29, 2000, the Council adopted, in addition to Regulation (EC) 1347/2000, two other regulations: Regulation (EC) 1346/2000 on insolvency proceedings[14] and Regulation (EC) 1348/2000 on the service in the Member States of judicial and

11 In the legal literature, there is no consensus on the exact classification of EU rules based on Art. 81 TFEU. There are several terminologies in use, of which the terminus technicus of European Union civil procedural law is used in this study, following the example of international civil procedural law. Kecskés, 2006, pp. 8–10.

12 Council Regulation (EC) 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160, 30.6.2000, pp. 19–36.

13 Junker, 2003, p. 366.

14 Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160, 30.6.2000, pp. 1–18.

extrajudicial documents in civil or commercial matters.[15] This latter legislation was again not without precedent, as the Council had already drawn up a convention on the same subject in 1997, which had not entered into force by the time the regulation was adopted. As regards service, on November 13, 2007, the European Parliament and the Council adopted Regulation (EC) 1393/2007[16] on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, repealing Regulation (EC) 1348/2000. This legislation entered into force on November 13, 2008, pursuant to Art. 26 thereof.

On May 28, 2001 the Council adopted Regulation (EC) 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.[17]

Gradually, the Council has regulated more new issues relating to cooperation in civil matters. Having decided the main rules on jurisdiction, mutual recognition, and enforcement of judgments in civil, commercial, and matrimonial matters, the rules on service of documents and the requests for evidence, it was able to start working on the detailed rules. As a first step, on January 27, 2003, it adopted Directive 2003/8/EC establishing minimum common rules relating to legal aid for cross-border disputes to facilitate access to justice in cross-border cases.[18] With this legislation, the Council aims to establish common minimum rules relating to legal aid for cross-border disputes throughout the European Union. It does this in the form of a directive, requiring Member States to bring their national legislation into line with these standards.

The specific substantive source of EU civil procedural law is Regulation (EC) 805/2004 of the European Parliament and of the Council of April 21, 2004, creating a European Enforcement Order for uncontested claims.[19] This legislation only entered into force on January 21, 2005, a date which even the most ardent supporters of the Single European Area of Justice could only hope for.[20] This regulation makes it unnecessary to obtain the approval of a court in a second Member State for uncontested claims, compared with the exequatur procedure provided for in Council Regulation (EC) 44/2001, with the delays and costs this entails.

15 Council regulation (EC) 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, OJ L 160, 30.6.2000, pp. 37–52.
16 Regulation (EC) 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) 1348/2000, OJ L 324, 10.12.2007, pp. 79–120.
17 Council Regulation (EC) 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, OJ L 174, 27.6.2001, pp. 1–24.
18 Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26, 31.1.2003, pp. 41–47.
19 Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143, 30.4.2004, pp.15–39.
20 Pfeiffer, 2004, p. 3.

New, hitherto nonexistent and separate procedures have been created by the European Parliament and the Council with Regulation (EC) 1896/2006, creating a European order for payment procedure, and Regulation (EC) 861/2007, establishing a European Small Claims Procedure. What both procedures have in common is that they are available to litigants as an alternative to the procedures under national law and can only and exclusively be used in cross-border cases. Such a case is one in which at least one of the parties is domiciled or habitually resident in the Member State of the court being petitioned. The objectives of the two regulations are largely identical, the Community legislator identifying it as facilitating access to justice. Para. 7 of the preamble to Regulation (EC) 861/2007 adds that the distortion of competition in the internal market caused by the uneven operation of procedural means available to creditors in the various Member States requires Community legislation to ensure uniform conditions for creditors and debtors throughout the European Union. In determining the costs of adjudicating a claim subject to the European Small Claims Procedure, it is necessary to uphold the principles of simplicity, speed, and proportionality. The Union legislature considers it appropriate that information on the costs to be charged should be publicly available, and that the way in which such costs are determined should be transparent. The European Small Claims Procedure should, while reducing costs, simplify and speed up the handling of small claims in cross-border cases by offering an additional optional instrument in addition to the unchanged options under the domestic law of the Member States. To this end, the regulation also simplifies the recognition and enforcement of judgments given in another Member State in the context of the European Small Claims Procedure.[21]

Mention should be made here of Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. This legislation, which will only be fully applicable in the territory of the Member States from 18 June 2011, contains a number of innovations and facilitates the transparency of the rules of jurisdiction in maintenance actions and the enforcement of such decisions in another Member State.

For the sake of completeness, we should mention two more sources: Regulation (EU) 650/2012 of the European Parliament and of the Council of July 4, 2012, on jurisdiction, applicable law, recognition, and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession and Regulation (EU) 2015/848 of the European Parliament and of the Council of May 20, 2015, on insolvency proceedings. There has been only one directive in this field, Directive 2008/52/EC of the European Parliament and of the Council of May 21, 2008, on certain aspects of mediation in civil and commercial matters, which had to be transposed by the Member States by May 21, 2011.

21 For a critical view of the regulation, see Varga, 2008, p. 9.

### *4.3. International Conflict of Laws*

For a long time, EU legislation in the field of conflict of laws did not seem to develop as dynamically. Even before the entry into force of the Amsterdam Treaty, the Convention on the law applicable to contractual obligations, which was an international legal norm, was signed in Rome on June 19, 1980, by the then EEC Member States.[22]

EU legislation in the area of conflict of laws has also started, with a time lag compared to the adoption of the jurisdictional regulations, with the adoption of two sources of legislation: Regulation (EC) 864/2007 of the European Parliament and of the Council of July 11, 2007, on the law applicable to non-contractual obligations (Rome II Regulation) and Regulation (EC) 593/2008 of the European Parliament and of the Council of June 17, 2008, on the law applicable to contractual obligations (Rome I Regulation). The former will apply from January 11, 2009, and the latter from December 17, 2009. The Regulations provide for a uniform set of conflict-of-law rules governing the law applicable to contractual obligations in all EU Member States except Denmark.[23] The Council Regulation (EU) 1259/2010 of December 20 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III Regulation) allows international couples to agree in advance on the law applicable to their divorce or legal separation, provided that the law chosen is the law of the Member State with which they have a closer connection. If the couple cannot agree on this, the courts can decide based on common rules which country's law applies. The regulation does not affect the application of regulation 2201/2003.

### *4.4. Cooperation with National Authorities and Courts*

The practical implementation of judicial cooperation in civil matters depends to a large extent on cooperation between the administrative authorities and courts of the Member States and with the Commission. The continuous exchange of information and experience and the implementation of permanent training are essential.

By Decision 2001/470/EC, adopted on May 28, 2001, the Council set up the European Judicial Network in civil and commercial matters, which is both an information database and a contact point of experts from all the Member States. The network shall pursue the following objectives in particular, in accordance with Art. 3 of Regulation (EC) 1049/2001 Art. 3(2): to ensure the smooth conduct of proceedings with cross-border implications, and to deal with requests for judicial cooperation between Member States, in particular where there is no relevant Community or international

22 This legislation has since become part of the legal systems of several Eastern European countries. In Hungary, it is based on the Convention on the law applicable to contractual obligations and its Protocols, opened for signature in Rome on 19 June 1980, and the Conventions amending it, as well as on the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Estonia, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Latvia, the Republic of Lithuania, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the said Convention and its Protocols, signed in Brussels on 19 June 2005, signed in Brussels on 14 April 2006.

23 Vékás, 2009, pp. 321–326.

legal provision; to ensure the effective and practical application of Community instruments and agreements in force between two or more Member States; and to establish and maintain an information system accessible to the public on judicial cooperation in civil and commercial matters in the EU, on relevant Community instruments and international agreements, and on the internal law of the Member States, in particular as regards access to justice.

## 5. The First Steps toward Digitalization

On November 25, 2020, the European Parliament and the Council adopted new Regulations on the taking of evidence[24] and on the service of documents.[25] The aim of the recast was to adapt the two previous Regulations to technical progress, to take advantage of digitalization, thereby increasing legal certainty and simplifying and streamlining cooperation mechanisms in cross-border cases.[26]

In 2018, around 3.4 million civil and commercial court proceedings in the European Union had a cross-border element, and the European Commission estimates that this number will reach 4.16 million by 2030.[27] In most of these cases, notably those where at least one of the parties resides in a Member State other than the Member State of the proceedings, courts often apply the regulation on the service of documents more than once, or the regulation on the taking of evidence if evidence from another Member State must be obtained. In 55% of cases, documents were still transmitted by post between Member States, and one in four of these notifications had to be repeated because of a postal deficiency.

Regulation (EC) 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters was an important instrument of European judicial cooperation: it allowed for the taking of evidence in another Member State, both directly and indirectly. In cross-border litigation, the way in which the court can obtain evidence, which is often decisive in a case, is of great importance, for example where the witness is resident abroad, the place to be inspected is in another State or the document may be kept outside the territory of the State of the court seized. However, almost 20 years have passed since the old regulation entered into force, and it was time for a more thorough 'facelift' to make

24 Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast), OJ L 405, 2.12.2020, pp. 1–39.

25 Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast), OJ L 405, 2.12.2020, pp. 40–78.

26 Muzsalyi, 2021, p. 14.

27 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), COM/2018/379.

cross-border taking of evidence faster and more efficient with the technological tools of the present day. It should be recalled that several points of the old Regulation aimed at a simple, quick, and efficient taking of evidence.[28] The CJEU has also ruled that the obtaining of evidence by a court of a Member State in another Member State should not have the effect of prolonging national proceedings. The Regulation therefore introduced a system obliging the Member States parties to overcome any obstacles that might arise in this respect.[29]

The main features of the EU-wide system established by the old regulation remain unchanged, but the use of electronic data transmission as the default channel for electronic communication and document exchange between Member States has become the primary means of communication. Other key innovations include the promotion of the use of modern means of taking evidence, such as videoconferencing, the removal of legal barriers to the admissibility of electronic digital evidence and the elimination of different interpretations of the concept of 'court.'

One of the common elements of the amendments is digitization, which is a priority in all areas of the European Union, as set out in the European e-Justice Strategy and Action Plan 2019–2023.[30] E-Justice aims to improve and simplify access to information in the field of justice and to support the digitization of cross-border judicial and extrajudicial proceedings. This action plan has three main objectives: to ensure and improve access to information, e-communication in the field of justice, and interoperability. The rules of the new regulation are aligned with all three objectives and are closely linked to several elements of the development of judicial cooperation, in particular the regulation on the service of documents and the proposal for the creation of a computerized system for cross-border communication—the e-CODEX system.[31]

## 6. The Emergence and Development of the Principle of Mutual Trust

As a precursor to the principle of mutual trust, the principle of mutual recognition emerged in the case law of the Internal Market in the interpretation of the free movement of goods in the case law of the CJEU.[32] The same concept has appeared in EU law in the area of mutual recognition of judgments in the field of judicial cooperation. The

28 Council Regulation (EC) 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, OJ L 174, 27.6.2001, Recitals 2, 7, 8, 10 and 11.

29 Judgment of the CJEU (First Chamber) of 17 February 2011, Artur Weryński v. Mediatel 4B spółka z o.o., Case C-283/09, ECLI:EU:C:2011:85, para. 62.; Judgment of the CJEU (First Chamber), 21 February 2013, ProRail BV. v. Xpedys NV and Others, Case C-332/11, ECLI:EU:C:2013:87, para. 43.

30 2019–2023 Action Plan European e-Justice (2019/C 96/05), OJ C 96, 13.3.2019, pp. 9–32.

31 Proposal for a Regulation of the European Parliament and of the Council on a computerised system for cross-border civil and criminal communications (e-CODEX) and amending Regulation (EU) 2018/1726, COM/2020/712.

32 Weller, 2015, p. 76.

principle of mutual trust has already been invoked by the EU legislator as one of the reasons for this.

It is interesting to note that among the secondary sources of EU law, only the preamble of Brussels I and IA, Brussels IIA, the Insolvency Regulation and Regulation (EC) 805/2004 contain a reference to the principle of mutual trust. Recital 26 of the Brussels I Regulation and recital 21 of the Brussels IIA Regulation justify the need for the automatic recognition of judgments given in the Member States on the grounds of mutual trust in the judicial systems of the Member States. Recital 18 of Regulation (EC) 805/2004 justifies the mutual trust in the administration of justice in the Member States which justifies the possibility for a court in a single Member State to decide on the certification of a judgment as a European Enforcement Order under the regulation, thus allowing enforcement of the judgment in all other Member States without the need for an additional court in the Member State of enforcement to examine the correct application of the minimum procedural standards. Recital 65 of the Insolvency Regulation also states that the recognition of judgments given by the courts of the Member States should be based on the principle of mutual trust and that the grounds for non-recognition should be reduced to the minimum necessary to this end. On this basis, it is possible to achieve the main objective of the regulation, which is that the decision of the court of first instance should be recognized by the other Member States and not be subject to review by those Member States. Recitals 16 to 17 of the Brussels I Regulation refer to the principle of mutual trust as a justification for the automatic recognition of judgments given in the Member States without any special procedure. It is also the basis for an efficient and rapid procedure for the enforcement of a decision given in one Member State in another Member State.

In Case C-433/18, the Court of Justice of the European Union confirmed that the rules on recognition and enforcement provided for in the Brussels I Regulation are based on mutual trust in the administration of justice in the European Union. According to the CJEU, this trust requires not only that judgments given in one Member State are automatically recognized in another Member State, but also that the procedure for establishing the enforceability of judgments given in one Member State in another Member State is efficient and expeditious. Such a procedure can consist only of a purely formal verification of the documents necessary for the declaration of enforceability in the Member State addressed, the declaration of enforceability being almost automatic.[33] The CJEU added in the case at hand that this objective cannot be achieved by weakening the rights of the defense in any way, and that, in the context of the objectives of the regulation, the procedures leading to the adoption of judicial decisions must be conducted in a manner which respects the rights of the defense.[34]

33 Judgment of the CJEU (First Chamber) of 12 December 2019, ML v. Aktiva Finants OÜ, Case C433/18, ECLI:EU:C:2019:1074, para. 23.

34 Judgment of the CJEU (First Chamber) of 12 December 2019, ML v. Aktiva Finants OÜ, Case C433/18, ECLI:EU:C:2019:1074, para. 26.

In case C-514/10, the issue was the temporal scope of the Brussels I Regulation. Here, the CJEU stressed that the simplified recognition and enforcement rules of the regulation are justified by mutual trust between Member States, in particular the trust of the court of the requested state in the court of the state of origin.[35]

In C-70/15, the CJEU confirmed that it follows from recitals 16 to 18 of the Brussels I Regulation that the system of judicial remedies for the recognition and enforcement of judgments is intended to strike the right balance between, on the one hand, the principle of mutual trust in the Union in the field of judicial cooperation (which justifies, principle of mutual trust in the Union (which requires that, as a general rule, judgments given in one Member State should be fully recognized and enforced in the other Member States) and the principle of the rights of the defense (which requires that the defendant, where appropriate, bring an action for a declaration of enforceability against the declaration of enforceability, examined in the context of an adversarial procedure, if he or she considers that one of the conditions for enforceability is lacking).[36] In this case, the CJEU placed the rights of the defense in the right to a fair trial, pointing out that they are not an unlimited right, that national legislation may contain restrictions, but that the latter must be proportionate to the public interest objectives pursued by the measure in question and must not constitute a disproportionate infringement of those rights in the light of the aim pursued.[37]

The Brussels IA Regulation was interpreted by the CJEU in case C-551/15, where it appeared to separate the principle of mutual trust between Member States from the principle of mutual recognition. According to the CJEU, both principles are fundamental to EU law, as they allow the creation and maintenance of an area without internal borders. The effect of these principles is that judgments given by the courts of a Member State must be treated and enforced as if they had been given in the Member State in which enforcement is sought.[38] The CJEU concluded by stating that one of the objectives of judicial cooperation in civil matters is to make freedom an area of freedom, security and justice based on the high level of trust that must exist between Member States.[39]

In recent years, the CJEU has increasingly interpreted the principle of the rule of law under Art. 2 TEU as a value common to all Member States.[40] In Case C-896/19, it has already linked the principle of mutual trust to the rule of law, stating that it follows specifically from Art. 2 TEU that the Union is based on values such as the rule

35 Judgment of the CJEU (Third Chamber), 21 June 2012, Wolf Naturprodukte GmbH v. SEWAR spol. s r.o., Case C-514/10, ECLI:EU:C:2012:367, para. 25.
36 Judgment of the CJEU (Second Chamber) of 7 July 2016, Emmanuel Lebek v. Janusz Domino, Case C70/15, ECLI:EU:C:2016:524, para. 36.
37 Judgment of the CJEU (Second Chamber) of 7 July 2016, Emmanuel Lebek v. Janusz Domino, Case C70/15, ECLI:EU:C:2016:524, para. 37.
38 Judgment of the CJEU (Second Chamber) of 9 March 2017, Pula Parking d.o.o. v. Sven Klaus Tederahn, Case C551/15, ECLI:EU:C:2017:193, paras. 51–52.
39 Judgment of the CJEU (Second Chamber) of 9 March 2017, Pula Parking d.o.o. v. Sven Klaus Tederahn, Case C551/15, ECLI:EU:C:2017:193, para. 53.
40 Lenaerts, 2019, pp. 6–8.

of law which are common to the Member States in a society of justice.[41] In this respect, the CJEU underlined that mutual trust between Member States, and in particular between their courts, is based on the fundamental premise that each Member State shares with all the others a number of common values on which the Union is founded, as stated in Art. 2 TEU.[42]

The principle of mutual trust is therefore one of the pillars of judicial cooperation in civil matters, and the sovereignty of the Member States is the limit. As the previous chapters of this study have shown, there have been changes in a number of areas which would have been unthinkable a few decades ago precisely because of the idea of national sovereignty: automatic recognition and enforcement of judgments of courts in other Member States, direct service of judicial documents in the territory of another Member State, direct taking of evidence, all of these can be seen as limitations on state sovereignty. In the area of judicial cooperation in civil matters, the conflict-of-law rules on personal status and matrimonial matters are the most controversial, as to how far the Union's jurisdiction can extend and what are the issues that each Member State can regulate differently. The issue of same-sex marriage and its recognition in another Member State stands out among these.

This was indirectly at issue in case C-490/20, which involved a Bulgarian woman married in Spain to a woman from the United Kingdom and had a child. The birth certificate issued by the Spanish authorities listed both parents as mothers. Subsequently, the Bulgarian mother asked the Sofia municipality to issue the Bulgarian birth certificate for the child, which was necessary, among other things, for the issue of the Bulgarian identity card. The Bulgarian municipality refused the request on the grounds that the model birth certificate in the national model birth certificates in force only provides one box for the mother and another for the father, and that only one name can appear in these boxes. The negative decision was challenged before an administrative court, which initiated a preliminary ruling procedure before the CJEU, asking, *inter alia*, whether respect for the national and constitutional identities of the Member States under Art. 4(2) TEU means that Member States have a wide margin of discretion as to the rules for establishing origin. In its judgment, the CJEU recalled Art. 4(2) TEU, according to which the Union shall respect the national identities of the Member States, which are an integral part of their fundamental political and constitutional organization.[43] According to the CJEU, the obligation for a Member State to issue an identity card or passport to a child who is a national of that Member State but was born in another Member State, and whose birth certificate issued by the authorities of that other Member State shows two persons of the same sex as the parents of the child, does not infringe the national identity of the Member State nor does it threaten public

41 Judgment of the CJEU (Grand Chamber) of 20 April 2021, Repubblika v. Il-Prim Ministru, Case C896/19, ECLI:EU:C:2021:311, para. 62.

42 Judgment of the CJEU (Grand Chamber) of 20 April 2021, Repubblika v. Il-Prim Ministru, Case C896/19, ECLI:EU:C:2021:311, para. 62.

43 Judgment of the CJEU (Grand Chamber) of 14 December 2021, V.M.A. v Stolichna obshtina, rayon "Pancharevo", Case C490/20, ECLI:EU:C:2021:1008, para. 54.

policy in that Member State.[44] Similarly, it does not infringe the national identity of a Member State to recognize a relationship of descent between that child and each of those two persons in the exercise by that child of his or her rights under Art. 21 TFEU and related secondary legislation. The CJEU has concluded that this obligation does not mean that the Member State of nationality of the child concerned must provide in its national law for the parental status of persons of the same sex or that it must recognize a relationship of descent between that child and the persons listed as the child's parents on the birth certificate issued by the authorities of the host Member State. [45]

The CJEU has therefore taken an explicitly moderate decision, skillfully balancing different values and interests: while it has required Member States to ensure that the rights of EU citizenship are granted equally to all persons, i.e., that there is no obstacle to the issuance of a passport or identity card if a child's parents are of the same sex, it has not imposed a legislative obligation on Member States regarding the parental status of same-sex couples. This compromise also seems to be well-suited to national legal systems with different rules, public authorities, and courts.

The case law of the CJEU clearly shows that it also treats national court judgments as a kind of commodity: what is accepted in one Member State under its organizational and procedural framework must be accepted in the other Member States. As a model, this is easy to understand and apply in practice. It should be pointed out, however, that after the Cassis de Dijon judgment, a community legislative dumping campaign was launched (and is still ongoing) to ensure that there are common minimum standards for all goods and thus reduce national differences. Such legislative process has been launched for 'judicial products' (procedural law, organizational standards). Although there is a growing body of legal literature calling for such a process,[46] it is easy to see that the EU is encountering a number of difficulties in this area, particularly jurisdictional obstacles.[47] The CJEU also has difficulties in overcoming this problem by means of a law-enforcement approach: paradoxically, the more and more specific the criteria it lays down for the fulfilment and verifiability of the condition of mutual trust, the more the practical applicability of mutual recognition is jeopardized. We therefore disagree with those authors who argue that trust should be optional (as opposed to mistrust), and that greater leeway should be given to national authorities and courts in a specific case. Whereas, for example, when the Brussels I Regulation was reformed, it was argued that the exequatur procedure should be abolished (because it goes against the principle of mutual recognition); a few years later, it is argued that guarantees should be included to protect fundamental rights and ensure a fair trial.

With regard to the latter, there are significant differences between judicial cooperation in civil and criminal matters, which is understandable, since in criminal cases the

44 Judgment of the CJEU (Grand Chamber) of 14 December 2021, V.M.A. v Stolichna obshtina, rayon "Pancharevo", Case C490/20, ECLI:EU:C:2021:1008, para. 56.
45 Judgment of the CJEU (Grand Chamber) of 14 December 2021, V.M.A. v Stolichna obshtina, rayon "Pancharevo", Case C490/20, ECLI:EU:C:2021:1008, para. 57.
46 Hamenstädt, 2021, pp. 13–16; Wischmeyer, 2016, pp. 360–363.
47 Cortés-Martín, 2018, pp. 34–36.

personal freedom of the accused and its restriction are at stake, and thus the effective enforcement of the rules of guarantee is even more important. In the preliminary ruling procedures initiated at the CJEU, the only cases in which a lack of mutual trust has arisen in the Eastern European region so far have been in criminal matters. In these cases, the CJEU has warned skeptical judges to be cautious: although it has opened up the possibility of this being examined by the national judge in the specific case—which, if it occurs frequently, could easily lead to a break in the momentum of judicial cooperation in criminal matters—it has limited it to the emergence of specific facts and evidence, rather than general ones. such spectacular doubt about the administration of justice in the Eastern European region has so far arisen in the area of judicial cooperation in civil matters, which perhaps also confirms that this is a less sensitive area compared to criminal matters.

## 7. Organizational Weaknesses in the Area of Judicial Cooperation in Civil Matters

The EU-wide rule on *lis pendens* is a necessary consequence of the shortcomings of the EU's system of legal protection: since all national courts in each Member State have the power and the obligation to apply national law, claims based on it can be brought anywhere, in accordance with the rules of jurisdiction. However, this risks creating a situation where two different national courts in the same dispute will hear and rule on the same case. The *lis pendens* rules in the Brussels Regulations allow national judges to avoid this undesirable situation quickly and efficiently in simple cases. However, in the case of more complex and complicated applications, it is not entirely clear, even in the light of the relevant case law of the CJEU, how the national courts concerned should act correctly. One of the main reasons for this is the differences in national rules of civil procedure, terminology, and thinking in the Member States, and the autonomous interpretation of these rules of the regulation. The national court concerned may then have recourse to the CJEU for a preliminary ruling, which takes time.[48] Moreover, the correct interpretation and application of the *lis pendens* rules is only an important preliminary question and does not affect the substance of the dispute. However, it can have very important practical consequences for litigants: it is not at all indifferent for them to choose between pursuing their case before a court in a country with which they are familiar, possibly based on domestic rules of civil procedure, where they have no language difficulties, or in a completely unfamiliar legal environment.

Perhaps the biggest practical shortcoming of the Brussels Regulations' *lis pendens* rules is that the national courts concerned are powerless to resolve the situation quickly and effectively. This is particularly true when both conclude that they must proceed or when neither wants to proceed. Such conflicts of jurisdiction and competence are not unknown among the national courts of a Member State, where most national procedural

48 Moreover, until the entry into force of the Lisbon Treaty, even this could not be done by the courts of first instance because of the limitation of Art. 68 TEC.

laws provide for a solution whereby the court higher up in the hierarchy of the court organization designates the court that is to act, whose jurisdiction and competence can then no longer be challenged. Such a model would also be extremely useful at EU level: in disputes, the CJEU, as a 'court of jurisdiction,' could not only give its interpretation of the *lis pendens* rules in the context of a preliminary ruling procedure, but could also designate by order the national court which has jurisdiction and is bound to hear the specific case. This might not even require a further amendment of the TFEU, since Art. 257 TFEU allows the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, to create specialized tribunals with jurisdiction ancillary to the General Court.[49] Such a new specialized tribunal would be able to resolve conflicts of jurisdiction between national courts much more quickly and efficiently than at present, which would be in the interests of the litigants in particular.

## 8. Summary

Judicial cooperation in civil matters is based on mutual recognition, which is based on the principle of mutual trust. The heart of cooperation is therefore trust in each other's legal and judicial systems, acceptance of the hypothesis that a judgment handed down in another Member State has been delivered by an independent and impartial court of the same professional standard as would have been the case by the national court.

This principle is most clearly reflected in the recognition and enforcement of judgments given in another Member State, but it is also the rationale behind the universal scope of the EU's jurisdiction regulations: as a general rule, it does not matter in which court in a civil or commercial dispute is raised—the more important aspect is that the forum is predictable for the parties involved.

Perhaps less is said about the other three legal instruments where mutual trust is of paramount importance: cross-border service of judicial documents, taking of evidence in another Member State and cross-border provisional measures. There are real breakthroughs here. A couple of decades ago, these solutions were still based on the classic legal aid system, where it seemed unthinkable that a state court could directly take procedural steps in the territory of another state.

It seems clear that any legal development in this area is only possible if mutual trust between Member States remains unchanged. Paradoxically, in the world of digitalization, it is often more difficult to navigate through the wealth of information and form an objective view of the challenges facing the institutions and legal systems of a Member State. This should also make national courts and authorities cautious and, as long as the EU's detailed legal provisions allow, they should trust each other. Let us trust that the words of Jean Monnet, quoted in the Introduction, will also prove true in this case: 'If a task is seen in the same way, and if everyone has the same interest in its solution, then differences and suspicions will disappear, and friendship will often replace the bad feelings of the past.'

49 Osztovits, 2017, p. 170.

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