Identifying the Impetus behind the Europeanization of the Private International Law Rules on Family Matters and Succession

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Abstract

The EU is currently in the midst of unifying the private international law rules on family matters and succession. This article seeks to explain this expansion into essentially non-economic territory. In order to do so, it presents the ideological, problem-based, and legal considerations that appear to lie at the heart of legislative action in these fields. However, as will become apparent, it is the role of the Member States that is crucial in guiding this process.

Keywords: area of freedom security and justice, EU citizenship, free movement of persons, international family matters, international succession.

A Introduction

The European Union is currently in the midst of an intensive period of Europeanizing the private international law relating to family matters and succession. Instruments containing uniform rules on jurisdiction, applicable law, and the recognition and enforcement of decisions have now been introduced in the areas of divorce and parental responsibility,[1] maintenance,[2] and succession.[3] In the upcoming years, this activity is set to continue, with proposals to unify private international law rules on property relations between spouses[4] and registered partners[5] pending at this moment.

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1 Council Regulation 2201/2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility OJ 2003 L 338/1; Council Regulation (EU) No. 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ 2010 L 343/10.

2 Council Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions, and cooperation in matters relating to maintenance obligations, OJ 2009 L 7/1.

3 Council and Parliament Regulation 650/2012 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, OJ 2012 L 201/107.

4 Proposal for a Council Regulation on jurisdiction, applicable law, and recognition and enforcement of decisions in matters of matrimonial property regimes, COM (2011) 126 Final.

5 Proposal for a Council Regulation on jurisdiction, applicable law, and recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM (2011) 127 Final.

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The EU legislator is evidently striving towards achieving uniformity amongst the private international law rules on family and succession throughout the Union. However, what is less clear is the drive and necessity that underlie this mandate. The Union has been, since its inception, an economic body, aimed at facilitating the free movement of goods, workers, services, and capital between the Member States. Legislative involvement in cross-border family and succession matters falls considerably outside its original remit.

In an attempt to explain this expansion into essentially non-economic territory, this article will map out the ideological (Section B), problem-based (Section C), and legal considerations (Section D) that appear to lie behind the emergence of legislative action in these fields. However, as will become apparent, when one is dealing with the highly sensitive realms of family and succession law, the role of the Member States emerges as a decisive factor (Section E)

B Ideological Transformation

In order to set the scene for this analysis, we must first look to the dramatic evolution that has taken place over the past 25 years in terms of the Union's ideology. During this time, we have seen the scope of EU action expand considerably, breaking away from its original remit of simply facilitating the free movement of economically active persons[6] (*e.g.* workers[7]) to embody a much wider set of aims designed to safeguard the right of all EU citizens to move freely within the European Union.

The first stage of this transformation can be linked to two developments that emerged in the early 1990s. It was at this point that the Community began to turn its attention towards enabling non-economic actors to benefit from the free movement rights contained in the Treaty. To this effect, the CJEU (or ECJ, as it was then known) developed a precedent for allowing the families of workers to accompany them in their exercise of free movement,[8] and directives were introduced that offered a right of movement and residence within the EU to retired persons,[9] students,[10] and those of independent means.[11]

During this same period, the concept of EU citizenship was first introduced into the Community setting. Building upon a 1990 proposal by the Spanish government entitled 'The Road to European Citizenship',[12] the Maastricht Treaty of 1992 formally endorsed this concept, establishing the right of all persons holding the nationality of a Member State: "to move and reside freely within the territory

6 C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, 3rd edn., Oxford University Press 2010, p. 224.
7 Articles 49-51 EEC.
8 *E.g.* Judgment of 7 July 1992 in *Case 370/90 R v Immigration Appeal Tribunal and Surinder Singh* [1990] ECR I-4265.
9 Council Directive 90/365, OJ 1990 L180/28.
10 Council Directive 90/366, OJ 1990 L180/30
11 Council Directive 90/364, OJ 1990 L180/26.
12 *See* the unpublished Council document, Spanish Delegation to the Intergovernmental Conference on Political Union: The Road to European Citizenship (24 September 1990), 3940/90.

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of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect".[13]

Whilst the CJEU initially appeared to regard the new citizenship rights as merely an addendum to the existing economic-based rights,[14] it steadily began to recognize the status of citizenship in itself (*e.g.* the right of non-economically active persons to collect social security[15]). This culminated in the adoption of the Citizenship Directive[16] in 2004, which consolidated the case law and piecemeal legislation in order to bring about a raft of rights designed to facilitate the free movement of citizens and their families throughout the Union. The free movement of citizens had now emerged as a fifth freedom, alongside and independent of the other free movement rights relating to goods, services, capital, and workers.[17]

The development in the conception of the free movement of persons, and the introduction of citizenship, undoubtedly signified that the EU had shifted its scope of interest well beyond economic concerns. The question, however, remains as to the significance of citizenship to the Union's involvement in civil matters and, more specifically, its impetus to unify private international law rules on family matters and succession. In order to answer this, one has to look to the final piece of this puzzle: the establishment of the Area of Freedom, Security and Justice (AFSJ).

Upon the signing of the Treaty of Amsterdam in 1997, a new goal set out to give "citizens a common sense of justice throughout the Union"[18] and established that steps should be taken to "simplify and facilitate the judicial environment in which they live in the European context".[19] In order to ascertain how to bring this plan into action, a European Council meeting was convened in 1999 in Tampere, which culminated in the conclusion that the Union should move towards creating a "genuine European area of justice",[20] in which individuals (citizens, as well as third-country nationals[21]) "should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States".[22]

The Tampere conclusions and the subsequent implementation programmes for the newly emerged AFSJ called for proposals to be submitted on a variety of civil and criminal law matters, amongst which were included the private interna-

13 Part two of the Maastricht Treaty, Article 8a.

14 *E.g.* Judgment of 29 February 1996 in *Case 193/94 Criminal proceedings against Sofia Skanavi and Konstantin Chryssanthakopoulos. Reference for a preliminary ruling* [1996] ECR I-6193, at para. 22.

15 Judgment of 12 May 1998 in *Case 85/96 María Martínez Sala v Freistaat Bayern. Reference for a preliminary ruling* [1998] ECR-I 2691; Judgment of the 20 September 2001 in *Case 184/99 Grzelczyk* [2001] ECR I-6193.

16 Council and Parliament Directive 2004/38, OJ 2004 L 229/35.

17 M. Fallon, Constraints of Internal Market Law on Family Law, *in* J. Meeusen *et al.* (Eds.), *International Family Law for the European Union*, Antwerp, Intersentia 2007, pp. 151-152.

18 Council and Commission Action Plan, OJ 1999 C 19/1, para. 15.

19 *Ibid*.

20 Tampere European Council Conclusions 1999, para. 28.

21 *Ibid*., para.18.

22 *Ibid*., para. 28.

tional law relating to maintenance, divorce, property relations, and succession.[23] Through this, the mandate for expansion had now been firmly established, and the scene was set for the Europeanization of family and succession matters.

C The Existence of Obstacles to Free Movement

The European leaders in Tampere paved the way for the unification of the private international law rules in family matters and succession. However, beyond mere ideology, why was the introduction of legislation in these fields viewed to be necessary? The answer to this stems from a general belief that the introduction of free movement rights and the increased cooperation of the Member States have brought about greater mobility within the Union's population. In addition to citing an overall increase in the number of international couples and families within the Union,[24] the Commission states that 13% of marriages and divorces[25] and 10-12% of successions[26] in the EU involve a cross-border element, whilst 2.5 million items of property owned by spouses are located abroad.[27] According to Commission documentation and accompanying consultancy reports, such internationally active persons suffer from a number of specific difficulties in the legal organization of their relations.

First and foremost, it is stated that these persons suffer from a lack of legal certainty in the organization of their family and succession relations.[28] In particular, it is said that they may find it difficult to predict legal outcomes[29] due to the multiplicity of different private international laws,[30] alongside the fragmented ratification of Hague Conference instruments.[31] In addition, a potential for the frustration of legitimate expectations has also been indicated,[32] for instance, arising as a result of an unanticipated shift in the governing legal system, particularly

23 *Ibid*., para. 30; Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ 2005 C 53/1, para. 3.4.2.; Stockholm Programme: An Open and Secure Europe, Serving and Protecting Citizens, OJ 2010 C 115/1, para. 3.1.2.

24 *See* assertion set out in Commission Green Paper on divorce matters 2005, para. 1.

25 Commission EU Citizenship Report 2010, COM(2010) 603 final, para. 2.1.1.

26 *See* Commission Staff Working Document on matters of successions 2009, p. 61.

27 Commission Green Paper on conflict of laws in matters concerning matrimonial property regimes, COM (2006) 400 final.

28 *E.g.* Commission Communication on bringing clarity to property rights for international couples, COM(2011) 125/3, pp. 1-3, 5-6, 8-9; Council Regulation 4/2009 ('Maintenance Regulation'), Recital 19; Explanatory memorandum accompanying the proposal for a regulation on jurisdiction, applicable law, recognition and enforcement of decisions, and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM(2009) 154 final, paras. 3.2 and 3.3.

29 *E.g.* Commission Staff Working Document on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of successions SEC(2009) 410 final, para. 3.1.2.

30 *E.g.* Commission Green Paper on applicable law and jurisdiction on divorce matters, COM(2005) 82 final, para. 2.3.

31 *E.g.* 1978 Hague Convention on the law applicable to matrimonial property regimes that was only ratified by France, Luxembourg, and the Netherlands.

32 *E.g.* Commission Green Paper on divorce matters 2005, para. 2.3.

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if a new law applies to decisions that have been made in the past (*e.g.* the disposal of property[33]).

It is also purported that international parties lack sufficient flexibility in the determination of the law that applies to their relationships.[34] Although Member States' own conflict of laws rules are usually designed to direct a relationship towards a legal system of close connection (*e.g.* habitual residence), these rules tend to be objective in nature and focus their determination upon a particular period in time (*e.g.* the moment when the court is seized). This construction is unsuited to tackling the nuances inherent in establishing individual affinity, since they fail to account for the longevity and depth of connections.[35] This means that internationally active persons are at risk of having a law apply to their relationships that does not reflect their lives, culture, and expectations.

Another oft-quoted phenomenon is the so-called 'rush to court', whereby an estranged couple, upon being faced with a multiplicity of available fora for the dissolution and consequences of their marriage, compete to seize the court (and often, as a result, the applicable law) that is most amenable to their individual needs.[36] This is said to bring about unfair situations in which the 'losing' spouse has a legal system imposed upon them with which they do not have a close affinity and/or which does not reflect his or her interests.[37]

Finally, various practical hindrances that prevent or impede access to justice are said to be encountered in proceedings involving a cross-border element. For instance, parties could find that they have to travel to another country to attend the case (*e.g.* where divorcing spouses are living in different states) or struggle to comprehend the language in which a legal system operates. Proceedings may also be longer and more complex than purely internal cases, due to the process of determining competence and applicable law, as well as the application of foreign law. These obstacles are said to give rise to greater expenditure for the parties involved (*e.g.* travel costs, lost income, and specialist expertise),[38] as well as conflicts with fundamental rights (*e.g.* the right to enjoyment of property and equality before the law[39]).

In the context of the aims of the AFSJ, the obstacles identified in the Commission documentation and consultancy reports collectively comprise a strong case for Union action in the fields of family matters and succession. For instance, the existence of unified rules may help parties to more easily predict the law that will apply to their relationships, and introducing party autonomy on an EU level

33 *See* the 'problem tree' outlined in EPEC Impact Assessment on Community Instruments concerning matrimonial property regimes and property of unmarried couples with transnational elements 2010, p. 92.

34 *E.g. ibid*., para. 2.2.

35 EPEC Study to inform a subsequent Impact Assessment on the Commission proposal on jurisdiction and applicable law on divorce matters 2006, p. 45.

36 *E.g.* Commission Green Paper on divorce matters 2005, para. 2.5., and Commission Communication on bringing clarity to property rights for international couples, COM(2011) 125/3, pp. 1-3

37 Commission Green Paper on divorce matters 2005, *ibid*.

38 *See* the 'problem tree' outlined in EPEC property relations study 2010, p. 8, and the Commission Staff Working Document on matters of successions 2009, paras. 3.2.3-3.2.5.

39 EPEC divorce study 2006, pp. 205 and 221.

gives them the opportunity to secure an applicable law with which they share an actual close connection.

However, upon scratching the surface, the credibility of these cited obstacles appears somewhat shaky. The origins of this problem-based rhetoric can be traced back to consultancy reports, which tend to draw their conclusions from data collected from national statistical bureaux, as well as interviews with stakeholders. The difficulty here is that national data is often scarce or missing,[40] and the pool of stakeholders is usually rather small and comprised mostly of legal professionals.[41]

Furthermore, it can be questioned whether the actual scale of the purported obstacles has been proven to be 'appreciable'.[42] Although the Commission commonly cites statistics in order to illustrate the extent of the problems (*e.g.* 13% of divorces have a cross-border element), a strong degree of doubt can be cast upon the strength of such data. For instance, the statistics do not take into account every Member State[43] and are no longer up to date.[44] It is also worrisome that such data not only serves as a justification for the current course of action but also forms the basis for the cost calculation of further problems.[45]

This is not to say that the problems highlighted by the Commission and consultancies do not exist. It is, in fact, the author's own belief that there is a considerable transient population in the European Union and that such persons do face additional complications in legal aspects of their family and succession relations. However, mere perception is not sufficient to merit legislative action: there needs to be adequate evidence to corroborate such claims. It is therefore argued that the Union should take steps to compile a bank of current, comprehensive data on international families through coordinated action with national statistical

40 *E.g.* (incomplete) data on the percentage of international marriages and divorces, *ibid*., pp. 109-112.

41 *E.g. ibid*., p. 115 and Annex 12: Only 17 stakeholders were interviewed (15 legal practitioners and two interest groups were interviewed for the purposes of this study) and EPEC property relations study 2006, Annex 4, pp. 16-17: only 21 stakeholders were interviewed (12 lawyers, four notaries, one judge, two civil registrars and two advice bureau representatives).

42 Obstacles to free movement ought to be of an 'appreciable' scale: *See* Judgment of 11 June 1991 in *Case 300/89 Commission of the European Communities v. Council of the European Communities. Directive on waste from the titanium dioxide industry – Legal basis* [1991] ECR I-02867, para. 23 and Judgment of 5 October 2000 in *Case 376/98 German/European Parliament and Council* [2000] ECR I-8419, paras. 97 and 106.

43 The UK's House of Lords critiqued the origin of the statistics used to support to (failed) Brussels IIter proposal, citing that only 13 Member States were surveyed in the study accompanying the Commission's Impact Assessment. *See* House of Lords, European Union Committee, 52nd Report of Session 2005-06, Rome III – choice of law in divorce, Report with Evidence, HL Paper 272, paras. 18-19.

44 *E.g.* estimate for the percentage of international marriages dates back to 2007: EPEC property relations study 2010, p. 8.

45 *E.g.* the 13% figure for international marriages was recently used to calculate the costs arising from cross-border incapacity and the non-recognition of same-sex marriages. *See* N. Bozeat (GHK), 'Annex: The Perspective of Having a European Code on Private International Law', *CoNE*, No. 3, 2013, pp. 39 and 50.

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bureaux as well as through direct consultation with those who exercise their right to free movement.

Notwithstanding the above critique, one should however acknowledge that it is ultimately left to the Member State governments to decide whether there is an actual necessity to introduce a measure. The adoption of family law instruments is generally carried out through the Special Legislative Procedure,[46] whereby Council of the EU unanimity is required, and the European Parliament assumes a merely consultative role. The success of a measure is therefore not dependent on the additional scrutiny of (evidence for) the proposed measures by the MEPs. Furthermore, given this requirement of Council unanimity, it is highly unlikely that a family law measure, once passed, would subsequently be challenged by a Member State in the CJEU on account of a lack of corroboration or appreciability.

D The Emergence of a Suitable Legal Basis

The preceding sections have outlined the ideology underlying the Europeanization of the private international law on family matters and succession, and the problems that the introduction of unified measures purports to tackle. However, in order for such legislation to be brought to fruition, there presumably had to also exist an appropriate legal basis.

Although somewhat surprising given the current raft of legislation, EU law and private international law were, for a long time, regarded as "uneasy bedfellows".[47] In fact, prior to 1999, the Union had no specific competence in the Treaty to legislate in the field of private international law. However, a limited number of instruments were nevertheless created before this time, taking the form of conventions, and brought about on the basis of intergovernmental cooperation between the Member States.[48] Whilst negotiations concerning these instruments were facilitated within the framework of the treaties,[49] this was not actually necessary for their conclusion.

The Maastricht Treaty of 1992 introduced an opportunity for limited involvement of the EU institutions in legislative action in this field.[50] However, it was not until judicial cooperation in civil matters was *communitarized* by the Treaty of Amsterdam and brought within the scope of the newly created Title IV on "visa, asylum, immigration and other policies related to the free movement of persons"

46 Article 81(3) TFEU, first indent. It should be noted that measures concerning succession can be adopted using the ordinary legislative procedure.

47 J. Meeusen, '"What has it got to do necessarily with the European Union?": International Family Law and European (Economic) Integration', *Cambridge Yearbook of European Legal Studies*, Vol. 9, 2006-2007, p. 329.

48 *See* the Brussels I Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ 1968 L 299, and the Rome I Convention on the law applicable to contractual obligations, OJ 1980 L 266.

49 Article 220 served as an underlying basis upon which negotiations on the Brussels I Convention were based.

50 The Council and Commission had the right of initiative, whilst the Parliament could be consulted and provide recommendations.

that the Union became competent to adopt private international law measures of its own accord.[51]

The years that followed gave rise to a surge in legislative activity in the field of private international law.[52] The new legal basis, Article 65 EC, served as a means of communitarizing several existing conventions (*e.g.* Brussels I Regulation[53] and Rome I Regulation[54]), bringing about entirely new measures (*e.g.* Maintenance Regulation and Rome II Regulation[55]) and resurrecting a number of instruments which never entered into force under the previous system[56] (*e.g.* Brussels II Regulation, which was based on the unratified Brussels II Convention of 1998[57]). In the space of less than a decade, Union involvement in private international law increased dramatically, and the first successful instruments concerning family matters had emerged.

Issues nevertheless remained as to the formal suitability of Article 65 as a basis for the adoption of family law measures. This provision established that measures should be taken in the field of judicial cooperation in civil matters 'in so far as necessary for the proper functioning of the *internal market* [emphasis added]'. According to Article 14 EC, the internal market is to be viewed as concerning economic integration.[58] Given the settled case law establishing that the Union cannot rely on such a basis to adopt measures that merely have an incidental effect of harmonizing the internal market,[59] the question emerges as to how problems that arise from differences between national family law rules affect economically active persons *in particular* (as opposed to all citizens who exercise their

51 K. Boele-Woelki, 'Unification and Harmonisation of Private International Law in Europe', *in* E. Hondius & F.W. Grosheide (Eds.), *International Contract Law 2003*, Antwerp, Intersentia 2004, pp. 325-326, and K. Boele-Woelki & R.H. van Ooik, 'The Communitization of Private International Law, *in* E. Hondius & F.W. Grosheide (Eds.), *International Contract Law 2003*, Antwerp, Intersentia 2004, pp. 344-345.

52 Partly helped by the alterations to the voting requirements brought about by the Treaty of Nice. A. Fiorini, 'The Evolution of European Private International Law', *International and Comparative Law Quarterly*, Vol. 57, No. 4, 2008, p. 974.

53 Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12/1.

54 Council and Parliament Regulation 593/2008 on the law applicable to contractual obligations (Rome I), OJ 2008 L 177/6.

55 Council and Parliament Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007 L 199/40.

56 *See* Council Regulation 1346/2000 on insolvency proceedings, OJ 2000 L 160/1 and Council Regulation 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, OJ 2000 L 160/37.

57 Council Regulation 1347/2000, on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ 2000 L 160/19.

58 Meeusen 2006-2007, p. 336; G. Straetmans, 'Non-Economic Free Movement of EU Citizens and Family Law Matters', *in* J. Meeusen *et al.* (Eds.), *International Family Law for the European Union*, Antwerp, Intersentia 2007, p. 235.

59 *See*, for example, *Case 376/98 German/European Parliament and Council*, para. 33, and Judgment of 28 June 1994 in *Case C-187/93 Parliament v. Council* [1994] ECR I-2857, para. 25, Case C-84/94 *United Kingdom v. Council*, [1996] ECR I-5755, para. 45.

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right to free movement within the Union).[60] Given the essentially non-economic nature of family relations, it is difficult to see how this could be the case.

As a means of solving this tension, one could attempt to reconcile the emergence of the AFSJ with an evolved conception of the internal market. The AFSJ could be envisaged as a deepening of the internal market – a level of further integration going beyond purely economic concerns. Indeed, the absence of an express reference to the 'internal market' in the Tampere conclusions may be taken to signify the Union's desire to evolve beyond the formal limitations placed on its actions by this concept.[61] However, there is also strong evidence to the contrary. For instance, within Article 3 TEU, the internal market and the AFSJ are clearly enumerated in separate goals.[62] Thus, in the absence of further clarification, it cannot be assumed that the concept of 'internal market' contained within the context of Title IV ('visas, asylum, immigration and other policies related to the free movement of persons') carried a different meaning from the rest of the treaty.[63]

This critique aside, following the signing of the Lisbon Treaty in 2007, Article 81 TFEU replaced Article 65 EC and brought with it a reformulated provision stating that measures concerning civil matters with cross-border implications could be adopted "*particularly* when necessary for the proper functioning of the internal market" [emphasis added].[64] The replacement of the phrase 'in so far as' with the word 'particularly' means that measures adopted under this provision are no longer *required* to meet the internal market criterion.[65] Instead, this has been transformed into exemplification of one of a number of aims private international law provisions should pursue.[66] The formal scope of Union competence to act in this field has been expanded,[67] and the question of the relevance of measures concerning family matters and succession to the proper functioning internal market has become markedly less crucial.

Although the removal of the internal market imperative did not actually appear to have had an impact on the pace or form of legislative action in the fields of family matters and succession (since action already occurred on the basis of Article 65 EC), it can be seen as an alignment with the ideological trends already in place. The broader scope offered by this provision better accommodates the goals of the AFSJ and allows the legislator to manoeuvre with greater vindication.

60 Meeusen 2006-2008, p. 336.

61 J. Israel, 'Conflicts of Law and the EC after Amsterdam: A Change for the Worse?', *Maastricht Journal of European and Comparative Law*, Vol. 7, No. 1, 2000, p. 95.

62 Article 3(2) TEU – area of freedom, security and justice; Article 3(3) TEU – internal market.

63 Meeusen 2006-2007, at p. 336; Straetmans 2007, p. 235.

64 Article 81(2) TFEU.

65 G.R. de Groot & J.J. Kuipers, 'The New Provisions on Private International Law in the Treaty of Lisbon', *Maastricht Journal of International and Comparative Law*, Vol. 15, No. 1, 2008, pp. 111-112.

66 Although the use of the word 'particularly' instead of, for example, 'such as', would indicate that the proper functioning of the internal market is still formally placed at the top of the hierarchy of goals which should be pursued in judicial cooperation in civil matters.

67 Fiorini 2008, p. 976.

E The Decisive Influence of Member State Will

By now, it has been seen that the unification of the private international law relating to family matters and succession arose from a combination of ideology and perceived necessity (with the emergence of a suitable legal basis being the result rather than the cause of action). There is, however, one crucial influence that has become apparent during the course of this analysis, an underlying force that permeates all of the above processes: the desire of the Member State governments to take action.

Looking back to the genesis of the Europeanization of family and succession matters, one can see that the collective will of the Member States was the decisive force in shaping the governing ideology. Through the European Council and the Council of the EU, their desire to expand the conceptualization of the Union manifested in concepts such as citizenship and the AFSJ and mandated the Commission to take action in order to give form to these notions. The unanimous support of the Member States has also been central to treaty reform, determining the form and extent of the legal basis upon which measures can be adopted.

It would appear that formal or actual necessity to introduce measures is subordinate to the perceived necessity of the Member States within the Council. Despite the lack of a clear formal necessity for action under Article 65 EC, legislation on family matters was nevertheless adopted by the Council. Likewise, whilst questions may arise over the appreciability of the problems that the Commission cites in support of proposed measures (*e.g.* the 'rush to court'), the lack of evidence does not appear to have impeded the continuing Europeanization of the private international law on family matters and succession.

If anything, it is the sovereignty-based concerns of the Member States that form the greatest obstacle to the legislative process. One can see that the proposed Brussels II-ter regulation[68] failed, in part, because of certain countries' reluctance to apply a more restrictive divorce law than their own.[69] The proposal on the property relations of registered partners is currently at risk of suffering the same fate, due to concerns from states that do not legally recognize this form of relationship. It is the extent of the Member States' tolerance towards the encroachment upon the sensitive sphere of family matters that is ultimately decisive in this process of Europeanization.

F Concluding Remarks

The collective desire of the Member States to expand the scope of Union influence to the everyday life of its citizens was, and continues to be, the dominant

68 Proposal for a Council Regulation as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM(2006) 399.

69 K. Boele-Woelki, 'For Better or for Worse: The Europeanization of International Divorce Law', *Yearbook of Private International Law*, Vol. 12, 2011, pp. 25-28: Sweden and Finland were concerned about the possibility of having to apply a foreign divorce law gives rise to drawn-out proceedings.

driving force behind unification. In the presence of such support, the ideology of Europeanization proceeds forward, with only limited regard for the 'small print' involved in taking legislative action (*i.e.* identifying a suitable legal basis or proving the existence of appreciable obstacles).

However, it is also becoming increasingly apparent that the Member States are themselves obstructing the way towards deeper Europeanization. Due to cultural and legal divergences, they fear impingement by foreign rules upon the closely guarded realm of domestic family law. Thus, in order for the unification process to continue, the Member States must find a way to reconcile their differences, and accept comity, in spite of their own diversity.