EU Draft Reform Treaty: Changes to the Provisions on Judicial Cooperation in Civil Matters

As it is widely known, the European Council of 21/22 June decided to move on after two years of uncertainty due to the difficult ratification process of the Treaty establishing a Constitution for Europe, signed by the Member States in October 2004. It agreed to convene an **Intergovernmental Conference (IGC)**, pursuant to Art. 48 of the TEU, **to draw up a Treaty amending the existing Treaties, in order to introduce into them**, which remain in force, **the most part of the innovations resulting from the 2004 Constitutional Treaty**. As a first, noteworthy change, **the EC Treaty (TEC) should change its name to *Treaty on the Functioning of the European Union***, while the EU Treaty should keep its present name.

The IGC was convened on 23 July 2007 by the Portuguese Presidency, and a **Draft Reform Treaty** was circulated, drawn up in accordance with the mandate agreed upon by the Member States in the European Council of June. The IGC should complete its work as quickly as possible, and in any case before the end of 2007, so as to allow for sufficient time to ratify the resulting Treaty before the European Parliament elections in June 2009. The Portuguese Presidency aims to reach agreement on a text at the informal European Council in Lisbon on 18 October, and sign it off formally at the final European Council of its term, in next December (see an indicative timetable of the Working Party of Legal Experts, set up by the Presidency).

The new Treaty on the Functioning of the European Union (TFEU) will bring a number of modifications to the current Title IV ("Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons"), Part III ("Community Policies"), of the TEC, which provides the legal basis for measures in the field of judicial cooperation in civil matters (see Art. 61(c), Art. 65 and Art. 67(5) of the TEC, as amended by the Treaty of Nice).

As provided by Art. 2, point 60, of the Draft Reform Treaty, **the new Title IV of the TFEU** (included in the Part Three of the Treaty, "Community Policies and

Internal Actions"), **with the heading "Area of Freedom, Security and Justice", should keep the structure of the corresponding part of the Constitutional Treaty** (Articles III-257 to III-277), and be divided in five chapters:

- Chapter 1: General provisions
- Chapter 2: Policies on border checks, asylum and immigration
- Chapter 3: Judicial cooperation in civil matters
- Chapter 4: Judicial cooperation in criminal matters
- Chapter 5: Police cooperation

Chapter 3, which deals with judicial cooperation in civil matters, should consist of a single provision, Art. 69d, reading:

> ***CHAPTER 3 – JUDICIAL COOPERATION IN CIVIL MATTERS***
>
> ***Article 69d***
>
> *1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.*
>
> *2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:*
> *(a) the mutual recognition and enforcement between Member States of judgments and decisions in extrajudicial cases;*
> *(b) the cross-border service of judicial and extrajudicial documents;*
> *(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;*
> *(d) cooperation in the taking of evidence;*
> *(e) effective access to justice;*
> *(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;*
> *(g) the development of alternative methods of dispute settlement;*

(h) support for the training of the judiciary and judicial staff.

3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.

4. The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.
This proposal shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision.

The provision is **almost identical to Art. III-269 of the Constitutional Treaty**, with some minor adjustments and a major change: as regards the former, Art. 69d of the TFEU refers to "measures" adopted by the European Parliament and the Council, "acting in accordance with the ordinary legislative procedure" (the codecision procedure set out in Art. 251, as amended by Art. 2, point 242, of the Draft Reform Treaty), while in Art. III-269 reference was made to "European laws" and "Framework laws", the legislative acts replacing regulations and directives in the Constitutional Treaty (see Art. I-33 ff.).

A major innovation is the **power of veto granted to national Parliaments**, pursuant to the second part of Art. 69d(4), **as to the activation of the "passerelle" clause in respect of aspects of family law** which may be subject of acts adopted by the ordinary legislative procedure, following a decision by the Council on a proposal from the Commission: in this respect, each national Parliament can make known its opposition to the "passerelle". The provision should be read in conjunction with new Protocol n. 1 to the TFEU and TEU, on the role of national Parliaments in the European Union, which aims at a greater involvement of these institutions of the Member States in the activities of the EU.

A significant difference between the current text of Art. 65 TEC and the draft Art. 69d of the TFEU can be found in the link of the measures to be taken in the field of judicial cooperation in civil matters with the "proper functioning of the internal

market": while these measures, according to Art. 65 TEC, can be taken only "in so far as necessary for the proper functioning of the internal market", Art. 69d TFEU (along with Art. III-269 of the Constitutional Treaty) is far less stringent in respect of this requirement, stating that they can be adopted **"particularly when necessary for the proper functioning of the internal market"**. On the issue, see a short article (in Spanish) by *Prof. J.D. González Campos* (Universidad Autónoma de Madrid), commenting Art. III-269 of the Constitutional Treaty, published in the Spanish electronic journal *REEI – Revista Electrónica De Estudios Internacionales* (n. 9/2005): "La Constitución Europea y el Derecho internacional privado comunitario: ¿un espacio europeo de justicia en materia civil complementario del mercado interior?".

As regards the territorial scope of application of Title IV of the TFEU, there's **no substantial change to the opting-in system currently in force for UK and Ireland**, pursuant to Protocol n. 4 to the TEC on the position of these States in respect of the area of freedom, security and justice: see point n. 19 of the sole article of Protocol n. 11 to the Draft Reform Treaty, amending various protocols to the TEC and the TEU.

The special regime set out by Protocol n. 5 to the TEC on the **position of Denmark** is also maintained, but it can be changed at any time, upon notification by Denmark to the other Member States, with a more flexible one, similar to UK and Ireland (see the new Annex to Protocol n. 5, added by point n. 20 of the sole article of Protocol n. 11 to the Draft Reform Treaty, referred to above). As a result, **Denmark could have as well the possibility of opting-in to each specific measure** adopted pursuant to Title IV, on a case-by-case basis.

As a last remark, it must be pointed out that the special conditions provided by current Art. 68 TEC as regards the **jurisdiction of the European Court of Justice on Title IV** and acts of the institutions based on it should be set aside by the Draft Reform Treaty: accordingly, **the ordinary regime of Art. 234 TEC will apply**.

The text of the new TFEU can be read in its entirety, as resulting from the amendments provided by the Draft Reform Treaty, in a French version edited by *Marianne Dony* (Université Libre de Bruxelles).

All the documents relating to the Intergovernmental Conference are available in a

special section of the Council’s website.

(Thanks to Jean Quatremer, Coulisses de Bruxelles blog, for providing the link to the French consolidated text of the TFEU)