Europeanizing Civil Justice in Amsterdam (1997) and Tampere (1999): Legal Elites and the Politics of Private International Law, Civil Procedure and the Administration of Justice in the European Union

By

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Abstract

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In the 1997 Amsterdam Treaty, the European Union (EU) communitarized civil justice by transferring competence over "judicial cooperation in civil matters" from the EU's Third Pillar to its First Pillar. Soon afterwards, the European Council prepared a detailed five-year plan ('Tampere Milestones') at its 1999 summit in Finland. These two steps unleashed a deluge of law- and policy-making aimed at reforming the European legal system. While consisting largely of technocratic issues dealing with procedural law, the conflict of laws (private international law), and the administration of justice (e.g., judicial networks and judicial training), the changes introduced since communitarization took effect in 1999 have transformed the European legal system, and have ongoing potential to transform it further. Part II maps the changes, places them in historical context, and provides an analytical framework for grasping their significance.

Part III of this dissertation explains my two case studies: the communitarization of civil justice in Amsterdam and the long-term policy planning process in Tampere. My data is drawn from 70 qualitative interviews with (mostly) legal elites and the available documentary sources. My explanation draws on theories of European (dis)integration as well as on neoinstitutional (new institutional) theories and others that provide insight into the agency of legal elites in transnational governance settings, such as the EU.

The 'Grand Debate' between neofunctionalism and intergovernmentalism provides the theoretical starting point for my analysis. My findings provide considerable support for neofunctionalism (Haas 1958, Niemann 2006) and little support for intergovernmentalism (Moravcsik 1993 & 1998a). As to the former, I trace the complex interactions among national and supranational actors and find strong evidence of functional, social, and cultivated spillover, but no evidence of exogenous spillover. As to the latter, I find virtually no evidence that the preferences articulated by national legal elites were oriented towards preserving national legal culture or institutions. Rather, legal elites treated the exercise of preference formation as a collaborative effort to imagine and construct an ideal European legal order, which might, in some cases, benefit from particular national legal institutions or from the experience of subregional legal cooperation, such as in the Nordic countries. The one exception that provides some support for an intergovernmentalist explanation is that the

decision to communitarize civil justice was indirectly driven by the preferences of some Member States *not* to communitarize criminal justice issues. In this sense, civil justice was the easier and less intrusive path.

The traditional theories – neofunctionalism and, to a lesser extent, intergovernmentalism – go a long way towards explaining my two case studies (i.e., Amsterdam and Tampere), but are not adequate standing alone. For this reason, I draw upon postfunctionalism (Hooghe & Marks 2009a) to explain the role of communal identity as a driver. My findings show that subregional identity oriented towards Nordic legal culture and cooperation were an important factor in Finnish preference formation.

Finland plays a key role in explaining both case studies, not least because the Tampere summit took place in Finland during the first Finnish Presidency. Chapter 7 shows, however, that Finland also played a key role in regard to the communitarization of civil justice in Amsterdam. Mine is not, however, a single-actor explanation, since the efforts of Finland were partly shaped by the work of other (national but especially supranational) actors who were active in the field, notably the Commission, the Council Secretariat, and the European Parliament. Although the treaty-revision and summitry processes in the EU are highly path dependent, they leave considerable room for contemporaneous actors – including strong-willed civil servants – to leave their mark on the course of European integration.

My explanation draws on neoinstitutional theories oriented towards the "logic of consequences" and the "logic of appropriateness." Both contribute towards an understanding of the role of the Dutch Presidency (Amsterdam, 1997) and the Finnish Presidency (Tampere, 1999). In addition, neoinstitutionalism contributes to my explanation of the specific agency of legal elites. Sociological institutionalism, in particular, affords deep insights into the role of "knowledge-bearing occupational groups" (Ziegler 1997) – such as legal elites – as does the literature on epistemic communities (Haas 1992, Cross 2013). Using my data, I link particular outcomes to the professional worldviews and ideational predisposition of key legal elite actors.

This work is dedicated to the memory of my parents,

Nancy McCunniff Hartnell

and

George William Hartnell, Jr.

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Acknowledgments

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The case studies in Chapters 6, 7 and 8 draw on extensive interviews, as well as on public as well as confidential government documents. In order to protect the confidentiality of informants, I have refrained from attributing statements. Only where the identity of a particular individual or institution is a matter of public knowledge, that is, where it has been reported in the press and the individual or institution has identified himself or herself with a particular act in public settings or government filings, have I identified them as such. This limitation on sourcing conforms to disciplinary ethical practices for ethnographic research.

I. INTRODUCTION

Chapter 1: Introduction

Civil justice has emerged as a dynamic field of European Union (EU) governance since 1999. This field is populated by many new legislative measures and policy initiatives, although the legislative dynamism that characterized the field since 1999 has slowed since the Juncker Commission took office in November 2014. Two major events opened the door to this new chapter of EU legal integration: the 1997 Treaty of Amsterdam (Amsterdam Treaty), which changed the EU's foundational treaties, and the 1999 Tampere summit, which drew up a five-year plan for implementing the changes agreed in Amsterdam. Together, these two events unleashed a tidal wave of legal reform that has transformed the European legal order in significant ways and has the potential to transform it further in the years to come. This dissertation is not primarily about the importance of the EU's emerging civil justice field, which surpasses the intrinsic importance of the individual steps taken. These concrete developments are, however, examined in order to demonstrate the significance of the 1997 and 1999 decisions that I seek to explain.

This dissertation seizes the opportunity presented by the dramatic institutional changes in the late 1990s to test theories about European (dis)integration. My case studies not only provide an opportunity to test these theories in an atypical policy arena, but also raise questions about the agency of legal elites in the construction of transnational governance. With few exceptions (notably, Stein 1981), this topic was overlooked in the early literature on European governance. My main goal is to investigate the political dynamics that led to a major reorientation of legal policy in the EU in the late 1990s. I do so by examining two events in the construction of the EU's field of civil justice. First, the 1997 Amsterdam Treaty amended the EU's founding treaties to add civil justice as a Europeanized field. This 'communitarization' transferred legislative and policy-making authority (or competence) over vital aspects of civil justice from the Member States, where it had historically resided, to the EU's supranational realm of governance. Communitarization is tantamount to partial federalization of some key dimensions of national legal sovereignty. Second, at the 1999 summit meeting of the European Council in Tampere (Finland), EU Member States agreed on an ambitious multi-year blueprint – the 'Tampere Milestones' – for developing the EU's new civil justice policy field. For each of these two case studies, my dissertation ascertains which actors were (or were not) important at each stage of the process that led to the turning points, then seeks to explain what factors – political, economic, cultural, ideological, professional – shaped their preferences and animated their actions, and what strategies they deployed in pursuit of their aims.

My empirical findings tell both a particular historical story and a generalizable theoretical one. At the most prosaic level, my dissertation is an historical account of events in the "process of creating an ever closer union" (EU Treaty preamble & art. 1) in Europe. Yet it is equally a set of case studies about transnational governance and policy-making in the EU context, the sources and trajectories of institutional change, and the agency of legal elites. Using different theoretical lenses to examine these two events affords numerous insights into the integration process.

Part I of the dissertation consists of this introductory Chapter 1, which identifies different ways in which this story might be told, lays out the major theoretical framework for analysis, summarizes my argument, and describes my methodology.

As a prelude to my empirical findings, which are presented in Part III of this dissertation, Part II provides a more detailed picture of the recently Europeanized field of civil justice, together with a conceptual framework for assessing the developments that have motivated this study. Part II consists of four chapters (2, 3, 4, and 5). Chapter 2 provides an historical and contextual frame of reference for understanding the emergence of civil justice as a Europeanized field, while Chapter 3 maps the development of the civil justice field within the EU up to the two historical turning points in the late 1990s, i.e., Amsterdam (1997) and Tampere (1999). Chapter 4 then examines the EU's evolving policy discourse on civil justice, while Chapter 5 maps the changes unleashed by these EU-level institutional changes and traces their trajectories up to the present. Part II concludes with a discussion that explores the broader significance of communitarizing civil justice (supbart II.3).

Part III of this dissertation, which presents the results of my empirical investigation into the key events in the 1990s that set these developments in motion, consists of three chapters (6, 7, and 8). Chapters 6 and 7 investigate the communitarization of civil justice by the 1997 Amsterdam Treaty, while Chapter 8 examines the 1999 Tampere summit that adopted the first five-year plan for fleshing out the EU's newly communitarized civil justice field.

Section IV of this dissertation consists of Chapter 9, which synthesizes my findings, provides a literature review and theoretical framework, and presents my arguments.

1.1 "Civil Justice" – Specification of the Dependent Variable

Even a task as concrete as specifying a dependent variable requires context to render it sensible. For this reason, I begin by offering a preliminary overview of the concept of 'civil justice,' in which I note its emergence, identify its basic parameters, and delineate its relationship to other concepts commonly encountered in this recently Europeanized policy field.[1] This discussion necessarily involves introducing in greater detail the two case studies that are the focus of my dissertation.

The concept 'civil justice' captures the broad nature and import of the institutional changes that motivate my study, but is imprecise as a dependent variable. Among the many labels that have been applied to these developments, some are more evocative than others. The EU itself has devised two official labels, which are anchored in its foundational treaties – the 'Area of Freedom, Security and Justice' and 'judicial cooperation in civil matters' – while scholars and policymakers have devised other notions, such as the 'European judicial area' or 'European legal area.' Former French Justice Minister Élisabeth Guigou captured the drama of the emerging field when she proclaimed in 2000 that

> If it has taken forty years to create an Internal Market, and thirty years to create a single currency, we will be doing well if we achieve a *single judicial space* within twenty years (Guigou 2000).

I have coined the term 'EUstitia' to describe this emerging field (Hartnell 2002), partly as shorthand, partly to urge readers to view these developments in a broader historical context, and partly to draw attention to the nexus between these developments and debates about the relevance of the Roman *ius commune* (common law) in the contemporary European legal order (id. at 68-71, 131-2).

More concretely, the term 'civil justice' as used here encompasses a wide range of issues related to procedural law, the administration of justice, and that arcane body of rules known as the 'conflict of laws' or 'private international law.' I turn now to mapping the precise content of

'civil justice' and delineating the emergence of the EU's new legal field.

The EU legal order has undergone a dramatic transformation since 1 May 1999, when the 1997 Amsterdam Treaty entered into force and amended the EU's two foundational treaties: the Treaty Establishing the European Community (EC Treaty), which was renamed the Treaty on the Functioning of the European Union (TFEU) in 2009, and the Treaty Establishing the European Union (EU Treaty). The EU's foundational treaties have been amended twice more since Amsterdam. First, the 2001 Nice Treaty (in force 1 February 2003) introduced a number of institutional changes deemed essential to prepare the EU for the accession of ten new Member States in May 2004. Second, the 2007 Lisbon Treaty (in force 1 December 2009) salvaged a number of elements from the failed 2004 Treaty Establishing a Constitution for Europe, and introduced many major structural changes to the EU's politico-legal order.

Notwithstanding the institutional importance of the 2001 Nice Treaty and the 2007 Lisbon Treaty, it was the 1997 Amsterdam Treaty that both enabled and triggered the emergence and rapid development of civil justice as a Europeanized field. For that reason, the empirical chapters found in Part III of this dissertation are limited to explaining the pertinent 1997 amendments to the EU's foundational treaties and the 1999 Tampere European Council summit, which took place shortly after the Amsterdam Treaty entered into force.

The event that formally unleashed the wide-ranging set of changes in the EU's civil justice policy field – and which serves as my first case study (Chapters 6 and 7 below) – was the amendment of the EC Treaty[2] to include new language that expanded Community[3] (EC) competence to encompass matters related to "judicial cooperation in civil matters" (EC Treaty art. 61(c)). In the EU legal order, 'competence' is a constitutional principle connoting the locus of authority over a matter.[4] Expanding Community competence thus implies transferring legislative, policy-making, and eventually also judicial authority from the Member States to the EU's institutions, and is akin to federalization.[5] For both political and conceptual reasons, the term 'federalization' is largely shunned in connection with the EU, and the terms "communitarization" (Basedow 2000; Besse 1999; Betlem & Hondius 2001; Israël 2000; Kennett 2000: 21; Remien 2001) or "Europeanization" (Snyder 2000: 302)[6] are used instead.

Civil justice – or "judicial cooperation in civil matters" – is just one of numerous policy-fields over which the Community (EC) gained competence under the Amsterdam Treaty, which inserted a new Title IV on "Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons" to the EC Treaty. In the context of EU governance, transferring competence to the EC meant shifting the designated policy fields – including civil justice – out of the EU's 'intergovernmental' realm of decision-making ('Third Pillar') and into its 'supranational' realm of governance ('First Pillar'). This switch had major institutional implications at the time.[7] The EU's pillar structure was formally abolished by the Lisbon Treaty, but EU policy fields continue to vary in terms of how 'supranational' or 'intergovernmental' they are. Differences include the extent to which the EU can adopt binding legislation, whether such legislation is passed by unanimity or by some type of majority vote, what role the European Parliament (EP) plays in decision-making, and whether the Court has the power of judicial review. According to these criteria, civil justice was communitarized in a way that made it almost – but not quite – entirely supranational. The new EC competence created by the Amsterdam Treaty could be exercised in accordance with detailed legislative procedures spelled out in the EC Treaty (art. 67).[8] As such, communitarization not only meant making legislation *possible* but also implied making EU governance over civil justice issues more formally legal, as well as more

democratic. Taken together, Articles 61 and 67 of the EC Treaty created a new legal basis[9] upon which the EU institutions could act.

The EU's new legal basis for civil justice matters, which stated that the Council[10] of the EU "shall adopt" measures in the field of "judicial cooperation in civil matters" (EC Treaty art. 61), did not emerge from a vacuum, as my empirical findings in Chapters 6 and 7 show, nor is it an isolated phenomenon. Rather, "judicial cooperation in civil matters" is conceived as a means towards the greater end of progressively establishing "an area of freedom, security and justice" (AFSJ).[11] This new and overarching goal – also added in Amsterdam – was incorporated into the Preamble of the EU Treaty, which proclaimed that the Member States are:

> RESOLVED to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice, in accordance with the provisions of this Treaty.

The scope of the AFSJ includes, but is not limited to civil justice, which is the focus of this dissertation. Rather, the AFSJ also includes other issues related to the free movement of persons – which is one of the EU's four fundamental freedoms – such as external border controls, asylum, immigration, and the fight against crime.[12] While it might be desirable to isolate my explanation of the emergence of civil justice from other AFSJ issues, for the sake of simplicity, it is in fact not possible to do so. Chapters 6 and 7 (in Part III) below reveal that explaining the communitarization of civil justice requires taking into account the relationship between civil justice and other AFSJ issues, notably criminal justice and police cooperation. To the extent possible, however, I focus on civil justice and exclude consideration of other AFSJ issues, which – unlike civil justice – have drawn substantial scholarly attention (e.g., Occhipinti 2003; Niemann 2006; Kaunert 2011). So far as I know, no one else has conducted a thorough investigation into the emergence of civil justice as a Europeanized field.

Regarding the scope of the civil justice field itself, the competence introduced by the Amsterdam Treaty in Article 65 of the EC Treaty[13] stretches the concept of "judicial cooperation in civil matters" to include a broad range of activities. It provides that

> measures in the field of judicial co-operation in civil matters having cross-border implications ... shall include: (a) improving and simplifying the system for cross-border service of judicial and extra-judicial documents; co-operation in the taking of evidence; the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases; (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction; (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

The treaty language itself already demonstrates that the scope of the EU's new civil justice policy field is broader than the label "judicial cooperation in civil matters" seems to suggest. Civil justice is not limited to the notion of helpful "cooperation" among judicial authorities in the various Member States in the context of ongoing litigation. Rather, the treaty also contemplates more far-reaching (and politically sensitive) measures, such as measures to harmonize civil procedure rules and the effect of judicial decisions outside the borders of the rendering Member State. The scope of civil justice has expanded considerably since Amsterdam added Article 65 to the EC Treaty, as Chapters 4 and 5 below demonstrate. The first major expansive step was taken a few short months after 1 May 1999, when the treaty amendments agreed in Amsterdam entered

into force.

Many key parameters of the EU's freshly minted civil justice policy field were established at the Tampere summit meeting of the European Council[14] held in Finland in October 1999, which is my second case study (Chapter 8 below). This meeting, which brought the Heads of State and Government of the Member States together with the President of the European Commission for high-level political summitry, met in Tampere, because the meeting took place during Finland's first stint in the EU's rotating Presidency.[15] While the EU Treaty (art. 15(3)) contemplates that each national Head of State or Government could be accompanied by a national minister having relevant expertise to the topics under discussion, this did not occur in Tampere. In terms of timing, the Tampere summit took place five months after the effective date of the Amsterdam Treaty in May 1999, at which moment the creation of the AFSJ and the communitarization of civil justice became law. The European Council's summit meeting in Tampere was a very special occasion, both because it is very rare for high-powered summit meetings of the European Council to limit discussions to a particular policy area, and because this was the first ever summit devoted to the AFSJ (including its civil justice component).

In Tampere, the European Council sent out a "strong political message to confirm the importance" of the goal of developing the AFSJ and agreed on an elaborate plan to operationalize it within the short span of five years between 1999 and 2004 (Tampere Milestones 1999: ¶¶ I.8 - I-11). The European Council declared that it would place the goal of making the AFSJ "a reality" as quickly as possible "at the very top of the political agenda" and promised to make "full use of the possibilities offered by the Amsterdam Treaty" (id. at ¶ I.2) – including but not limited to civil justice measures as provided in Article 65 of the EC Treaty – by creating a "genuine European area of justice" (id. at ¶ I.8.28).[16]

Despite some delays along the road mapped out in Tampere, both the pace and scope of change in the field of civil justice since the Amsterdam Treaty entered into force in 1999 have been breathtaking, although the pace slowed after fifteen years, when the Juncker Commission took office in November 2014 and pulled back on the legislative reins. The recent slowdown notwithstanding, the Treaty's modest reference to "judicial cooperation in civil matters" (EC Treaty art. 65, now TFEU art. 81) hardly does justice to what has transpired in the past two decades. The AFSJ – including the civil justice component, which is my focus – has become the rallying point for a startling program of legal reform that has transformed the European legal order from above, even while leaving substantial elements of Member State law in place below.

The EC has utilized the new legal basis introduced by the Treaty of Amsterdam to consider – and in many cases since 1999 to adopt – a wide variety of measures affecting the conduct of civil litigation, the conflict of laws, and the administration of justice in the Member State.[17] Civil justice is a relatively small policy field, compared to its headline-grabbing 'neighbors' in the AFSJ. Owing to the technical legal nature of most civil justice issues, it tends to be invisible in EU policy circles, noticed mainly by legal experts who work in these specialized legal fields. Despite these features, I argue in Part II (subpart II.3.) below that the implications of Europeanizing civil justice extend beyond the narrow confines of the particular legal sub-specialties that fall within the scope of EU activities, and have the potential to affect the European legal order in profound ways. While it is premature to speak of long-term effects of the apparently technocratic changes introduced in Amsterdam and Tampere in the late 1990s, civil justice measures have already cut a broad and deep swathe across the European legal landscape and evoked substantial controversy in some instances.

The term 'civil justice' is admittedly broader than the narrow treaty language "judicial cooperation in civil matters" upon which it is based (EC Treaty art. 65, TFEU art. 81). This is by design. I use the loftier (albeit vaguer) term 'civil justice' for four reasons. First, the treaty language found in some official EU languages is considerably broader and more general than the English phrase "judicial cooperation in civil matters," insofar as it is not limited to the notion of measures directly affecting courts in general, or judges in particular (Storksrubb 2008: 11-12). For example, "legal cooperation" is a more accurate English rendering of the treaty language found in the Finnish and Swedish versions of the EC Treaty.[18] Second, the operative treaty language in all official versions of the Treaty is in fact considerably narrower in scope than the measures that have been adopted pursuant to this legal basis (Chapter 5 below). The treaty language is a vague schematic term that gets fleshed out elsewhere. Its contours are drawn not only by Article 65 of the EC Treaty, which mapped the initial range of measures that should be taken "insofar as necessary for the proper functioning of the internal market," but also by the subsequent practices of the EU institutions and Member States.[19] Third, the term 'civil justice' is preferable because it evokes the higher aspirations that are embodied in the amendments that the Amsterdam Treaty made to the EU's foundational treaties, and points toward the broader significance of the developments in this field (Chapters 4 and 5 and subpart II.3 in Part II below). Finally, I use the term 'civil justice' because it is the generic term that has recently emerged in some EU bureaucratic discourse,[20] which reflects a common tendency within EU institutions (and particularly the European Commission) towards conceptional expansionism. For example, the home page of the Commission's Directorate-General for Justice and Consumers (DG Justice) has embraced this term, which is now prominently featured on its website.[21] Appendix A shows how DG Justice conceptualizes the civil justice field (as of May 2018).

At first glance, the treaty's reference to "judicial cooperation in civil matters" appears to contain little more than technocratic rules allowing the EU to tweak procedural and private international law rules, when doing so would make the wheels of justice turn more smoothly in cross-border civil disputes. Yet this appearance is deceptive, and more is at stake than meets the eye. The disarming label "judicial cooperation in civil matters" has proved to be the camel's nose under the tent of residual Member State sovereignty.[22] Article 65 of the EC Treaty extended the EU's reach into sensitive bastions of national prerogative that affect the operation of the Member States' national legal systems, which prior to 1999 were matters reserved almost exclusively to the Member States. Despite their innocuous appearance, all three types of measure impinge upon core Member State power. Appendix B provides a schematic overview of the civil justice measures that have been taken (or proposed). Some examples are briefly noted here, in order to illustrate some of the interests at stake.[23]

Each type of measure initially identified in Article 61(c) of the EC Treaty has generated considerable controversy and discussion. Type (a) measures pertaining to mechanical issues related to cross-border service of process and taking of evidence have unleashed discussions of 'due process' concerns,[24] and even a push to develop "common minimum standards" for civil procedure as a way to ensure fundamental rights protection in the context of civil litigation (European Parliament 2015). Moreover, measures on recognition and enforcement of judicial and extra-judicial judgments have transformed this area of law in the EU, by introducing the concept of 'mutual recognition' and curtailing the ability of the enforcing jurisdiction to refuse enforcement to a foreign judgment on account of its own public policy. Similarly, type (b) measures relating to conflict of laws have resulted in heated debates, particularly in regard to

limits imposed on the Member States' ability to invoke public policy considerations in the context of ascertaining the law that is to govern an issue in a particular type of case. In addition, type (a) and (b) measures have been adopted not only in connection with civil and commercial matters, but have also been pushed forward in sensitive areas of law – such as family law and decedent's estates – that fall clearly outside the traditional bounds of EU competence. Thus, civil justice not only cuts deeply into fundamental values and principles, but has also spread horizontally to new fields of substantive law, which may be further Europeanized through the back door of procedural law and private international law. For its part, type (c) establishes an open-ended route toward harmonizing measures aimed at "eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States." The EU has been increasingly active in this field. Finally, the EU has taken some infrastructural measures that pertain to the administration of justice, but fall outside the express language of Article 65 of the EC Treaty, such as those institutionalizing judicial networks, creating the 'Judicial Atlas,'[25] promoting mediation as a form of alternate dispute resolution,[26] and stepping gingerly towards European judicial training and other measures aimed at fostering European legal culture.[27]

Finally, Article 65 of the EC Treaty (now TFEU art. 81) not only allows the EU to step on some of the most sensitive toes of Member State sovereignty, but allows this to happen in an alarmingly efficient manner, thanks in large part to the EU's increasingly streamlined legislative procedures.[28] One of the most remarkable outcomes of the institutional changes described here is a near total reversal in the dynamics of law- and policy-making in the civil justice field. Prior to 1999, EU Member States relied on traditional multilateral means to address coordination problems related to civil justice matters. The *ancien régime* was characterized by the slow and meticulous meshing of diplomatic gears, high-level expert delegations that studied perceived problems (often for years) and drafted proposed solutions (usually in the form of public international law conventions), unanimous decision-making, and further delays attending the (often unsuccessful) campaigns to secure the necessary ratifications for the resulting convention to enter into effect. After 1999, however, the pace of civil justice law- and policy-making in the EU became dynamic and rapid, owing not just to the relative simplicity of the legislative process (in comparison to the diplomatic method) but also to the prominent role of the EU Commission in pushing to occupy the civil justice field and the altered role of experts in the EU's increasingly transparent democratic legislative procedure.

This brief overview might leave the reader wondering what it is about this as yet only partially specified set of developments that warrants the sustained attention of a dissertation. Such doubts might be allayed by describing the reactions of some legal practitioners and academics – toilers in the affected legal fields – to the news that the EU had communitarized civil justice in the late 1990s. Surprise was common, even among experts from academia and legal practice; while others (myself included) reacted with astonished disbelief. Sjef van Erp, a prominent Dutch scholar, exclaimed "It's the revolution!" over coffee.[29] While a few scholars overtly welcomed these developments, others greeted them with skepticism or outright hostility. To quote an iconic German law professor, a "whole millennium . . . is being thrown over board ... legal science swoons in anticipation of what lies ahead" (Jayme 2001: 161).

1.2 Explaining the Institutionalization of Civil Justice – Puzzles and Tales

The first questions that came to mind, when I learned that the EU had communitarized

civil justice, were, how did they pull this off, and what were they thinking? These questions have motivated my quest to uncover the story behind the emergence of civil justice as a Europeanized policy field. The transfer of regulatory authority over civil justice from a national to a supranational level of governance raises questions about the actors and drivers behind far-reaching and tranformative legal integration in the EU. In the context of theories about European integration, it raises in addition the question whether the key actors were operating within the framework of the Member States, of EU institutions, or both, since this question plays a role in theoretical debates about transnational governance in Europe.

My initial surprise about these developments was rooted in three basic (and possibly flawed) assumptions. The first was that the legal issues affected are so closely tied to traditional Member State sovereign interests that governmental legal elites – or at least some of them – would have fiercely resisted handing their reins over to the EU. My second assumption was that the legal issues implicated by these developments are so deeply embedded in existing legal practices and legal culture that the affected users of the civil justice system – ranging from judges, to legal practitioners, to business firms whose activities were adapted to the pre-existing Member State legal environment – would resist change to the entrenched order. And third, a rough comparison between federal arrangements in the EU and the United States suggested to me, as a lawyer trained in the USA, that there is no obvious need to federalize issues that remain largely within the province of states in the U.S. constitutional order. These are the puzzles that motivated my dissertation.

Moreover, as a legal scholar with expertise in some of the legal fields affected by communitarization, I was initially (and remain) intrigued by the questions of whether EU efforts have succeeded, or whether they have rendered legal life in the EU more hopelessly complicated than ever before. The answer to both of these questions, twenty years after the fact, is yes. Debates on these issues, which would fill many volumes, are beyond the scope of this dissertation. I raise the question here because ongoing controversies sustain my curiosity about the causes that have led to the present situation.

European reactions to the emergence of civil justice as a Europeanized field have been more varied than the initial surprise that I noted earlier in this chapter (section 1.1 above). Many legal experts responded to these developments with criticism, consternation, and occasionally anger.[30] In fact, it was rare to encounter an unreservedly enthusiastic embrace of this new EU policy field in the early years after communitarization. The initial outrage and rejection have faded, however, as the EU institutions have risen to the tasks put before them and as Europeanized civil justice has become a *fait accompli*. Other pressing questions about the rule of law in the EU – such as what to do about rule-of-law backsliding in some Member States from the former Soviet Bloc – have captured contemporary headlines and scholarly imaginations. While the goal of Europeanization of civil justice matters continues to have supporters, others critically scrutinize the practical implications of the measures that the EU has adopted. The dilemma is illustrated by one prominent scholar who welcomes the Europeanization of civil procedure in principle, but feels constrained to criticize its flaws quite sharply in practice (Storskrubb 2008). Overall, Europeanized civil justice remains controversial.

While my initial decision to explain the two events in the 1990s that set the EU down this path was motivated by curiosity, my questions remain unanswered twenty years later. Taken together, these events mark a critical juncture that triggered not only a new era in the construction of the European legal order, but also a fundamental shift in the nature of the EU's legal order (see

Part II below). The story of Amsterdam and Tampere, while one that addresses decision-making on peculiar legal issues in an unusual historical context, has broader relevance to European integration and transnational governance more broadly. Behind these elite-driven decisions are a host of (predominantly) legal elites who occupy civil service positions in national governmental and supranational settings. Legal elites play a key role in the process of European integration, and scholars have paid increasing attention to their role in transnational governance in recent years. Until recently, the literature about legal actors has tended to focus on judges and courts, on the one hand, or private attorneys, on the other. Little attention has been paid, in contrast, to other types of legal elites who populate much of the terrain from which European integration and other forms transnational governance emerge, notably legally-trained civil servants in Member State service or in the service of the European Union (EU) itself, along with academics and other legal experts. Such persons are virtually omnipresent, and yet they – along with the relationship between their professional identities and outcomes – have been largely invisible. My two case studies examine the role of such actors in situations where their actions are directed towards the legal system itself. This setting is an ideal one for examining the agency of legal actors in a transnational context, such as the EU.

Both of my case studies have been difficult to unravel empirically, since they occurred largely removed from public gaze, in a field of politics that is permeated by the "diplomatic secrecy culture" that characterizes the EU's intergovernmental processes (Bjurulf: 146). Such a culture leads to a considerable amount of speculation, particularly among interested observers who are not privy to inside information. At the early stage of my research, I encountered three types of anecdotal account – untheorized stories in circulation among legal experts (primarily academics) – about the decision to transfer competence over civil justice from Member States to the EU.[31] After sketching these anecdotal accounts, which are elaborated further in Chapter 9 below, I link them to theoretical frameworks, then summarize my argument.

The first type of anecdotal account is a *state-centric* one that emphasizes the key role of a pro-integration Member State government in shifting power away from the Member States and towards the EU. There are two versions of this account. Some believe that the Dutch Government[32] spearheaded the push to communitarize civil justice in a dramatic 'European land grab,' while others emphasize the role of Finland, which was an enthusiastic new Member State at the time.

The second type of anecdotal account is an *EU-centric* one that emphasizes the centripetal force of Brussels to draw ever more matters into the sphere of the EU's authority. This tale comes in multiple versions, ranging from fatalistic to critical. Some observers simply see the accretion of authority by the EU as inevitable (i.e., naturalistic or pragmatic), while others emphasize strategic behavior by 'Brussels' in a scheme to enhance its power. There are two versions of the strategic account. The first believes that the real driver behind communitarization was a power-hungry Eurocracy – eager to enhance its own power vis-à-vis the Member States – which manipulated the unwitting representatives of the Member States into doing its bidding. In contrast to this version, which emphasizes *internal* power relations within the EU as the driving force, the second version of the strategic account emphasizes the *external* (i.e., foreign relations) power of the EU (and its supranational institutions) vis-à-vis third countries (notably, the United States, with which EU Member States were negotiating at the time in The Hague over a Global Judgments Convention). This version of the strategic account supposes that the EU supranational institutions – notably the Commission, which takes the lead in international treaty negotiations

on behalf of the EU and its Member States – engineered communitarization as a way to expand its own external competence. Finally, strategic accounts vary in terms of which Brussels-based actor they point to. Brussels outsiders tended to focus on the Commission, whereas Brussels insiders tended to focus on the Council Secretariat as the key Brussels-based actor.

A third type of anecdotal account points to *legal elites* as drivers of the process, rather than Member States or EU supranational actors. These accounts tend to be vague in terms of which legal experts were involved, which institutions they were affiliated with, or what their motives were, beyond a general assumption that some legal experts, somewhere, wanted to push legal integration forward. One more nuanced version of this type of account assumed that the key actors were the national legal experts who had represented their governments in intergovernmental negotiations within the EU's Third Pillar and were frustrated that the conventions they so painstakingly negotiated were rarely ratified and largely left to gather dust on the shelf. Another version suggests that Member States became uneasy in the face of mounting pressure from non-governmental legal elites (primarily academics) to codify private law in the EU and opted for communitarization as a less radical solution and one that they believed they could control. As these variations suggest, the third type of account cannot be fully differentiated from the first two types, insofar as the legal elites might occupy positions with national governments or EU institutions. It is also conceivable that legal elites might have been acting more autonomously in pursuit of their own professional interests.

To conclude this overview of the stories I heard at the outset of my research, I wish to stress that these are merely anecdotal accounts, told by law professors who were knowledgeable about the civil justice subfield, but not necessarily knowledgeable about the detailed workings of the EU institutional system or the events that I have investigated. It is incumbent upon me to translate these anecdotal accounts into theoretical frameworks that can explain the events that are the subject of my research.

My empirical findings in Part III reveal that some of these anecdotal accounts are flat wrong, while others contain kernels of truth. As a general matter, my findings show that single-actor explanations attribute too much agency and tend to underestimate the structural complexity and role of the institutional process that generated these changes. They also tend to overlook the significance of the institution in which the actor is embedded. What is needed is an explanatory framework that incorporates all relevant actors and structural variables, as well as the special role played by legal elites in the processes that led to communitarization and the Tampere Milestones. The anecdotal accounts recounted above provide a good starting point, albeit an incomplete set of possible explanations for the developments in the 1990s.

1.3 Theoretical Framework

The core theoretical debates about European (dis)integration in political science have remained relatively stable over time, and revolve around two theories: neofunctionalism and intergovernmentalism. These two traditional approaches provide some theoretical infrastructure for the first (state-centric) and second (EU-centric) anecdotal accounts noted above, but are not a perfect fit. My analysis begins with the traditional theories of European integration, then turns to more recent theoretical approaches that expand upon them. Finally, I supplement these theories by drawing upon theories that help to illuminate the role of legal elites in transnational and multi-level settings. Ultimately, I conclude that the leading theories of European integration go a long way towards explaining my findings, but are insufficient on their own, and thus must be

supplemented by neoinstitutional theories that are oriented towards explaining the role of knowledge-bearing professionals (Ziegler 1997).

Neofunctionalism and intergovernmentalism emerged to explain why Member States transferred (or pooled) sovereignty to create institutions capable of governing at the regional level in Europe. Intergovernmentalist accounts prioritize the interests of Member States (e.g., Hoffmann 1964 & 1966; Moravcsik 1993 & 1998), whereas neofunctionalists argue that states are not the only actors engaged in international relations, and draw attention to the role of supranational actors and the process by which actors' loyalties might gradually shift away from national towards supranational configurations (Haas 1958: 16). Both theories take account of national civil servants, but also expect to domestic political contestation and civil society actors to play a role.

In connection with my case studies, an intergovernmental explanation would expect to find Member State actors acting to vindicate what they perceive to be national interests. As such, this approach can be linked to the first, *state-centric* anecdotal account mentioned above. A neofunctional explanation, on the other hand, would expect supranational actors to play a role and that national actors might come around to a supranational view. As such, this approach can be linked to the second, *EU-centric* anecdotal account. Neofunctionalism provides a more complex understanding, insofar as it demonstrates that national actors can also be strong proponents of European integration.

Neofunctionalism (Haas 1958, Niemann 2006) is a dynamic theory that aims to explain the expansionist logic of regional integration. The key to this dynamism, it argues, is the 'spillover' mechanism. Scholars have identified numerous types of spillover. 'Functional' spillover, for instance, denotes task expansion from one set of issues (e.g., managing the production of coal or steel) to interconnected issues (e.g., transport or tax policy). The civil justice arena, like other AFSJ issues, is often said to be a functional spillover from other policies relating to free movement of persons in the EU. 'Exogenous' spillover refers to pressures coming from the EU's external (e.g., political and economic environment) (Niemann 2006: 32). Conceivably, the variant of the *EU-centric* anecdotal account that posits the Commission's desire to gain external power to negotiate international treaties on behalf of EU Member States, might be framed as an instance of exogenous spillover. Another mechanism identified by neofunctional scholars is 'cultivated' spillover, which refers to the intentional efforts of the EU's supranational institutions to gain support for their preferred outcomes by cultivating relations with interest groups and national civil servants (Tranholm-Mikkelsen 1991: 6). 'Social' spillover (Niemann 2006: 36) examines the "processes of elite enmeshment, socialisation and learning ... among ... governmental elites" as a way to explain integration outcomes. Finally, a neofunctional explanation would balance its search for spillover pressure towards further integration by searching for countervailing forces that impede further integration, such as sovereignty concerns.

Many scholars have become weary of the 'Grand Debate' between neofunctionalism and intergovernmentalism. Arguing that neofunctionalism and intergovernmentalism "have become less useful guides" for EU research, (Hooghe & Marks 2009a: 3) have developed a 'postfunctionalist" theory of European integration. Postfunctionalism draws greater attention to the nexus between domestic politics and EU-level decision making. Further, these scholars depart from neofunctionalism's functional logic, and draw attention to identity as a driver of European integration (id. at 1). Their view of identity differs, however, from the national/supranational dichotomy that differentiates neofunctionalism and intergovernmentalism.

Rather, Hooghe and Marks (2016: 23) draw attention to "communal identities" and stress the "sociality of governance," which includes "geographical, cultural, and historical sources of group distinctiveness" (id. at 151).

The third anecdotal account that focuses on legal elites straddles intergovernmentalism and neofunctionalism, since both theories take elite actors into account. However, neither theory goes beyond economic or political interest to explain the preferences of elite actors. To explain the agency of legal elites, different theoretical foundations are needed. Rationalist and sociological variants of neoinstitutionalism argue, respectively, that actors may be animated by a "logic of consequences" or a more normative "logic of appropriateness" (March & Olsen 1998), while historical institutionalism draws attention to the role of path-dependence in explaining outcomes (e.g., Pierson & Skocpol 2002). Ziegler (1997) argues that "knowledge-bearing occupational groups" – such as legal and other professionals – can play an important role in explaining policy outcomes. Ziegler (1997: 21) argues that the worldviews and ideational predispositions of such elite actors "generate the ideas that dominate the symbolic aspect of any institutional order," and that the "symbolic ideational elements of occupational identity" play an important role in explaining outcomes (id. at 14). In particular, sociological institutionalism predicts that policy strategies and programs will be fashioned in a way that renders them "consistent with the self-images of the [relevant] knowledge-bearing groups" (id. at 17). In a related vein, the epistemic communities approach (Haas 1992, Cross 2013) also emphasizes the role of knowledge-based experts in explaining outcomes.

In an early formulation of liberal intergovernmentalism, Moravcsik (1993: 494-5) created a typology for explaining the determinants of state action. Decisions about commercial liberalization and the provision of socio-economic goods would be driven, he hypothesized, by economic, political and social pressures. In connection with the third type of decision, which he labeled "Political, Institutional, or Redistributional Policies," he hypothesized that elites would not necessarily be similarly constrained by pluralist forces, but rather would enjoy "relatively broad autonomy" to pursue "idiosyncratic goals" according to reasoning that is "symbolic and ideological, rather than calculated and concrete" (id.). While not inextricably linked to his liberal intergovernmentalist theory, this hypothesis provides a useful adjunct to Ziegler's sociological institutionalist approach to illuminating the preferences of legal elites.

Finally, a growing body of work emphasizes the importance of institutional fields for illuminating the role of legal elites in European integration (Kauppi & Madsen 2013a, Vauchez & de Witte 2013). According to this concept, institutional action reflects "perspectives defined by the group of members that comprise the institutional environment" (Wooten & Hoffman 2017: 55), with the result that the environment itself is viewed as a unit of analysis (Warren 1967). Thus, rather than examine particular institutions in isolation, the dynamic 'field' approach examines complex relational constellations. Given its emergence from organizational sociology, the 'field' approach overlaps with neoinstitutionalism in significant ways, and follows a similar developmental trajectory (see Chapter 9). Contemporary theoretical work on fields seeks to uncover "field-level 'logics' " or "schemas" that consist of "material practices and symbolic constructions" to guide behavior (Wooten & Hoffman 2017: 58). This research tradition has moved away from an "over-socialized view" (Granovetter 1985) that "depicted recipients of field-level influence as a homogeneous collection" of zombie-like actors, "each behaving according to a social script designed by the institutional environment" (Wooten & Hoffman 2017: 59), and has come around to seeing fields as contested arenas of "struggles" (Bourdieu &

Wacquant 1992), as places of strategic action (Fligstein & McAdam 2012) where actors "relate to one another out of shared, though not necessarily consensual, understandings about the field" (Wooten & Hoffman 2017: 63). The contemporary understanding of fields is thus "as much about the relationship between the actors as ... about the effect of the field on the actors" (id. at 64). The field approach can be used to "track actors' concrete perceptions and practices in an open-ended way, whatever mix of objective and subjective (or material and ideational)" may be animating them (Parsons 2010: 150). While perhaps more a method than a theory, the 'field' approach offers a congenial framework for analyzing the EU, given the complex array of actors and institutions.

My explanation of the communitarization of civil justice in Amsterdam (1997) and the Tampere Milestones (1999) draws on all of these theories, as elaborated in Chapter 9 and summarized in section 1.4 below. Neofunctionalism can partly explain my case studies, while postfunctionalism contributes important insights into the processes I seek to explain. The predictions of (liberal) intergovernmentalism, on the other hand, are not born out as such, though my explanation is partly guided by Moravcsik's predictions about the preferences of national elites when socio-economic interests are not in play. Neoinstitutionalism – particularly Ziegler's work on "knowledge-bearing occupational groups" – picks up where the 'Grand Debate' leaves off. Finally, field theory offers a useful way for conceptualizing Europe's complex institutional environment, and stresses the need to attend to conflicts that might arise within the field.

1.4 Summary of Argument

Civil justice was quite possibly the least salient issue under discussion in the mid-1990s, when the EU institutions and its Member States launched the path-dependent process of revising the EU's foundational treaties once more. Dissatisfaction with the pillar structure created by the 1992 Maastricht Treaty was widespread, but this was just one of the many pressing problems that confronted the national and supranational actors who were called upon to play a part in the treaty-revision process that led *inter alia* to the creation of the AFSJ and the communitarization of civil justice in Amsterdam (1997), and soon afterwards in Tampere (1999), to drafting a detailed five-year plan for building the AFSJ (including a "genuine area of justice"). The European field was populated by fifteen Member States and a handful of EU institutions, which had various roles to play, notably the European Parliament, the Commission (including the Task Force devoted to Justice and Home Affairs), the Council of the EU (including its Council Secretariat), and the European Council. Unlike most studies of legal integration in the EU, the Court of Justice was not a key figure in regard to the Europeanization of civil justice, although its jurisprudence is an important element of the epistemic environment in which these developments occurred. The field was also teeming with legal elites who were knowledgeable about, and who might have had quite a lot to say about the proposal to communitarize civil justice, or how to go about doing it. Yet my findings show that these legal elites were almost entirely excluded from the discussions that led to the Amsterdam and Tampere outcomes. As such, the decisions that are the focus of my two case studies (see Part III below) did not involve an open pluralistic discussion with members of the public; rather, they were largely driven by legal elites who occupied civil service positions in national governments or supranational institutions. There was, accordingly, no open political contestation over these transformational changes to the European legal system.

My findings provide a great deal of support for neofunctionalism. There is substantial

evidence of functional, social, and cultivated – but not exogenous – spillover. Most (but not all) key legal elites had substantial experience working in supranational settings, either as EU civil servants or as national civil servants involved in EU-level coordination. Some key national actors did not share this experience, but had developed supranationalist views by virtue of other forms of transnational coordination, such as in the framework of Nordic legal cooperation and in academic settings, or through personal experience of free movement of persons within the EU (i.e., working as a lawyer in Brussels). There is, by contrast, no evidence to support an intergovernmentalist argument that national actors were oriented towards preserving national traditions or prerogatives, except of an indirect nature, and pertaining to criminal rather than to civil justice. (Ultimately, resistance to communitarizing criminal justice helps to explain the decision to communitarize civil justice, which was perceived as involving a lesser sacrifice of national legal sovereignty.) Where national legal elites did invoke national legal traditions, it was in the spirit of contributing a suitable piece to the mosaic of an emerging European legal order, rather than fighting to retain a familiar legal institution.

What neither neofunctionalism nor intergovernmentalism offers is a theory for understanding the concrete preferences asserted by the legal elites who participated in this process. Postfunctionalism provides an important piece of the theoretical puzzle, by stressing the potential role of other identities besides the national and supranational ones posited by intergovernmentalism and neofunctionalism. My findings reveal that the tradition and practice of Nordic legal cooperation plays an important role in explaining Finnish preferences, which played a key role in both Amsterdam and Tampere. Further, while I have no interview data to support the conclusion that the tradition and practice of deeper legal integration among Benelux countries directly affected the preferences of key actors from Belgium, Luxembourg, and the Netherlands, I argue that this long-standing practice is embedded in the worldview of legal elites from these countries.

As predicted by Moravcsik (1993: 494), key legal elites enjoyed "relatively broad autonomy" to pursue "idiosyncratic goals" and deployed reasoning that is "symbolic and ideological, rather than calculated and concrete." Understanding the concrete preferences they advanced calls for theories that offer deeper insights into human motivation. Neoinstitutional theory – particularly its rational and sociological variants – provide tools for this task, and raise the question whether the key actors were animated by a "logic of consequences" or a "logic of appropriateness" (March and Olsen 1998). Sociological institutionalism, as embodied in Ziegler's (1997: 2) work on "knowledge-bearing occupational groups," provides the missing theoretical tools needed to explain my case studies. The legal elites who were the key actors in both of my case studies were demonstrably animated by their legal worldviews, and pushed to ensure that the outcomes achieved in Amsterdam and Tampere were consistent with their self-conceptions. They were thus not only motivated to ensure a more just EU but particularly concerned that the emerging normative order be coherent and comprehensive ('holistic'), precisely and correctly formulated, and pragmatically oriented towards solving the problems faced by real people. Moreover, the lack of resistance displayed by legal elites who were deeply interested in what was afoot but excluded from participation in the political discussions that were underway in the 1990s, can be partly explained by the tendency among some legal elites to limit their role to that as 'expert' and shy away from engaging in more direct political action in connection with EU governance.

1.5 Methodological Overview

Little information about the events I study is available in print, and most of what does exist falls within the realm of governmental or diplomatic secrecy. Thus, while I utilized all documentary evidence that could find, the bulk of my research consists of elite interviews with legal actors in Europe. In all, I interviewed 70 people (Appendix C), starting with low-level observers and participants, then winding my way slowly, as if up a mountain on a spiral path, into ever narrower circles and high-level participants. I conducted semi-structured qualitative interviews, which began with a series of questions about the interviewee's education and career path, then turned towards their knowledge about, involvement in, and views of the communitarization of civil justice in Amsterdam and the Tampere summit. Ultimately, my explanation rests on the information gained from interviews with a handful of insiders.

In terms of sampling, I first targeted persons by virtue of their expertise (e.g., based on publications in the field) or position, whether academic, bureaucratic, or professional, then relied on snowball sampling to identify other knowledgeable persons and, ultimately, the key inside actors. In a number of important cases, however, I stumbled upon key sources by chance. In one case, a British friend practicing competition law in Brussels happened to have worked on a case with a member of Finland's negotiating team for the Tampere summit. In another, a Belgian friend who has worked for many years as a *référendaire* (legal secretary)[33] at the Court of Justice of the EU (CJEU) in Luxembourg just happened to have started working for the new Finnish judge after Finland became an EU Member State in 1995, and introduced me to her Finnish colleagues at the Court, one of whom happened to have been deeply involved in the Amsterdam treaty-revision process. In another case, I chanced to take the empty seat at a Copenhagen conference lunch table that was packed with perfect strangers, who turned out to be Finns from the University of Helsinki. These women were not only knowledgeable about the events I was investigating, but willing to make introductions in Finland, and ultimately invited me to be the first Fulbright Professor at the University of Helsinki Faculty of Law in 2012.

The chance meetings that led me straight into the heart of my research on Finland occurred early in my research, which meant that I had access to a deep well of detailed information, but insufficient context to understand the treasures I had stumbled upon. It took many more years of peripatetic interviewing to map the institutional terrain thoroughly, identify key actors and speak with many of them,[34] and put the story together. I have been extraordinarily fortunate that nearly everyone whom I contacted to request an interview readily agreed to meet with me, in some cases multiple times, and on occasion for hours – in one case, days, over a weekend at the countryside cottage[35] – at a stretch. Only two people refused outright to speak with me, both on account of their government service at the time I contacted them: in one case, the Dutch Minister of Justice, and in the other, the Finnish Foreign Minister. A number of other key (and high-ranking) officials simply ignored my repeated requests for an interview.

My subjective position also played a role in my research (Ratner 2002: 1). First, the fact that I am a law professor with expertise in civil justice topics opened many doors (professional courtesy, plus contacts developed through many years working in leadership roles at the American Bar Association and the American Society of International Law). In addition, my years of work and study in Europe generated a personal network of friends who made key introductions. It is not a coincidence that the Belgian and British friends mentioned above also know each other; we had studied law together in Germany in 1980-81. Second, and paradoxically, the fact that I am an American helped. Many interviewees were curious to know

why an American would be researching such obscure European developments. Moreover, in a number of cases involving extraordinarily forthcoming high-level senior interviewees, I was told – at the end of the interview, after I had turned off the tape recorder – about the interviewee's childhood experiences in Europe during World War II, and the day the Americans arrived to liberate their towns. In one case, an interviewee asked, at the end of the interview, if I had time for him to show me something. I agreed, and he drove me into the countryside, to the Luxembourg American Cemetery, where General George S. Patton lies buried with members of his Third Army.

Most of the interviews were taped and on the record and for attribution, which enables me to quote particular persons in my empirical chapters, which I have done, albeit discretely. Since many interviews involved one colleague speaking about another colleague, I have in those instances taken pains to shield the speaker from being identifiable. Finally, on some occasions, interviewees asked that I not attribute a particular statement to them, and in those instances I do not identify the speaker individually, but do identify them by role (e.g., a Member State government official, a law professor, etc.), where it is possible to do so and still guard their confidentiality.

My research design has been guided by Brady and Collier (2004). I seek to explain two sequential events in the 1990s, both of which involve decisions oriented towards significant increases in legal integration by Member States which agreed to cede more sovereignty to the EU. Both of these cases – the treaty amendment that communitarized (or federalized) cross-border aspects of civil justice (Chapters 6 and 7), and the five-year plan that operationalized the amended treaty (Chapter 8) – are similar insofar as they entail decisions by the heads of state and government of the EU Member States (acting as the European Council), and hence differ formally from legislation or other 'internal' or 'domestic' EU policy-making. These two cases differ, however, in terms of the formal nature of the decision made (in the first, amendments to the EU's founding treaties, in the second, a five-year policy program), the procedures followed, and the institutional configurations involved. Despite these differences, I argue that the two cases, taken together, provide insight into fundamental aspects of European integration, in particular, and transnational governance in general. As such, I treat the challenge of explaining them as an exercise in "within-case analysis," which involves bringing "diverse forms of internal evidence about causation" to bear on "explaining a single, overall outcome within that case" (Brady & Collier 2004: 93).

Endnotes to Chapter 1

1. A more comprehensive exposition of the nature and significance of Europeanized civil justice can be found in Part II (Chapters 2, 3, 4, and 5) below.

2. I use the term 'EC Treaty' when referring to the treaty as it existed *prior to* 1 December 2009, on which date the treaty was renamed pursuant to the Lisbon Treaty. I use the term 'TFEU' when referring to the treaty as it has existed since that date.

3. Another change introduced by the Lisbon Treaty is that the 'European Community' – which was formerly called the 'European Economic Community' (EEC) – has been fully replaced by the 'European Union' (EU). I use the term 'Community' when referring to this entity in the period before the Lisbon Treaty entered into force (1 December 2009), and the terms 'EU' or 'Union' for the period since then.

4. 'Competence' corresponds to the term "regulatory (or prescriptive) jurisdiction" in U.S. constitutional discourse.

5. Similar to the preemption doctrine in U.S. constitutional discourse, the supranational competence of the EU may be either exclusive or shared with the Member States. Historically, it has fallen to the Court of Justice of the EU (CJEU) – formerly called the European Court of Justice (ECJ) – to rule on whether the Member States remain competent to act, if and when the question arose in a concrete case. The 2007 Lisbon Treaty demarcates in great detail the boundaries between the competences of the EU and its Member States.

6. "Europeanization" has been defined as the phenomenon of shifting the "locus of control ... from the Member States to the European Community" (Snyder 2000: 302), or more generally as "the emergence and the development at the European level of distinct *structures of governance*" (Cowles, Caporaso & Risse 2001: 1) (emphasis added).

7. The EU's pillar structure is explained in greater depth in Chapter 3 below.

8. Article 67 of the EC Treaty was complex, since it covered all Title IV issues, which are diverse and often controversial, and not just civil justice (or "judicial cooperation in civil matters") issues. With regard to civil justice, the key legislative characteristics were: first, as an exception to the normal legislative procedure, Member States shared the right of initiative with the Commission during the first five years of this new policy field (i.e., until 2004); and second, the co-decision procedure of Article 251 of the EC Treaty was generally applicable, although any measures relating to family law required unanimous (rather than qualified majority approval) of the Council. Post-Lisbon changes are addressed in Chapter 3 below.

9. The terms 'legal basis' or 'legal base' (from the French term *base juridique*) are used in EU law to refer to a concrete treaty provision that empowers Community legislative or other action in the field delimited by that provision. The importance of this doctrine in EU law can be explained with reference to judicial review by the Court of Justice (CJEU). One type of case that can be brought before CJEU is an annulment action, whereby someone with standing challenges an EU act or measure "on the grounds of lack of competence" (EC Treaty art. 230, now TFEU art. 263). This type of legal action amounts to an argument that the act or measure adopted by the EU institutions is *ultra vires*, because it falls outside the scope of the treaty provision upon which it is based. The Court is obliged to invalidate any such *ultra vires* act or measure (EC Treaty art. 231, now TFEU art. 264). Article 253 of the EC Treaty (now TFEU art. 296) provides that: "Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based ...". In practice, this means that EU institutions must not only designate the proper legal basis for the act or measure in question, but also explain why it is appropriate to adopt the act or measure on that basis. Historically, the Court has insisted that the EU institutions select *one* correct legal basis per act or measure, rather than provide a list of multiple possible bases. This has been deemed necessary because the EU's legislative procedures have historically varied from one legal basis to the next. Thus, the requirement to state reasons is doubly fundamental to judicial review, since an EU act or measure can also be challenged before the CJEU if there has been an "infringement of an essential procedural requirement" (EC Treaty art. 230, now TFEU art. 263), such as would occur if the improper legislative procedures were followed. See Shapiro (1992).

10. The Council of the EU – formerly called the Council of Ministers, sometimes referred to as the Consilium – is the principal decision-making institution in the EU, including for legislative matters. The Council of the EU is easily – and often – confused with the European Council, which in fact is an entirely different EU institution, as noted below.

11. Since 1999, some official EU sources reversed the order and referred instead to the "Area of *Justice*, Freedom, and Security." This usage reflected a decision made within the Commission to foreground the issue of justice.

12. The Amsterdam Treaty amended Article 2 of the EU Treaty by adding as a new objective of the Union "to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime." Since 2009, this language is found in Article 3(2) of the EU Treaty.

13. This legal basis was subsequently expanded, and renumbered as Article 81 of the TFEU, as elaborated in Chapter 3 below.

14. The European Council is a unique EU institution. Article 15 of the EU Treaty states in part: "(1) The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof. (2) The European Council shall bring together the Heads of State or Government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy shall take part in its work. (3) The European Council shall meet twice every six months, convened by its President. When the agenda so requires, the members of the European Council may decide each [sic] to be assisted by a minister and, in the case of the President of the Commission, by a member of the Commission. When the situation so requires, the President shall convene a special meeting of the European Council." The formal office of the President of the European Council was only added in 2009, pursuant to the Lisbon Treaty, so the only official Tampere attendee on the EU side was the President of the Commission.

15. The Presidency of the EU refers to the leadership of the Council of the EU, which has historically been held for six months by each Member State on a rotational basis, in an order determined by the Council from time to time (EC Treaty art. 203, now EU Treaty art. 16(2) & (9)). Finland joined the EU in 1995, along with Austria and Sweden. Austria held the presidency during the second half of 1998, Finland during the second half of 1999, and Sweden during the first half of 2001. The rotating *Presidency* of the Council of the EU should not be confused with the *President* of the European Council, which is an elected office (EU Treaty art. 15).

16. Since the AFSJ is not limited to civil justice issues, the Tampere Milestones also addressed the priorities for developing the "common EU asylum and migration policy" and the "Union-wide fight against crime" (Tampere Milestones 1999: ¶¶ I.4 - I.7 and ¶¶ I.12 - I.15, respectively). The Tampere Milestones also called for "stronger external action" (id. at ¶ I.16) and agreed on the "composition, method of work and practical arrangements ... for the body entrusted with drawing up a draft Charter of fundamental rights of the European Union" (id. at ¶ I.2 and Annex).

17. The content of the EU's civil justice policy field is examined in detail in Chapter 5 below.

18. The Finnish term used in the EC Treaty is "*oikeudellinen yhteistyö*" and the Swedish term is "*rättsligt samarbete*" (Storskrubb 2008: 11).

19. One important example was amending the legal base in the treaty itself in the Lisbon Treaty (TFEU art. 81).

20. Early examples of this geologic shift can be seen in the EU's Second Funding Framework – Civil Justice, adopted in 2007 to cover the period 2007-2013. This is the first EU document I have identified in which the official EU discourse shifts away from the more limited "judicial cooperation in civil matters" language (see the First Funding Framework, adopted in 2002 to cover the period 2002-2007) and towards the more ambitious 'civil justice' label. The Second Funding Framework identified Civil Justice as one of five components of an even larger field which it called "Fundamental Rights and Justice."

21. DG-JHA Website, "Civil Justice," *available at* <https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/civil-justice_en> (visited 20 May 2018).

22. The metaphor, which is of disputed origin, holds that once you allow a camel to stick its nose under the tent, the rest of the body will follow. The logic is that of slippery slope, but the image is of encroachment.

23. Chapter 5 contains a systematic and thorough analysis of these developments and their significance.

24. It bears mention that the principle of due process had no textual basis in the law of the EU, at least prior to December 2009, and that the more important sources of such right within the European legal order have been the Member State constitutions, on the one hand, and the European Convention on Human Rights, to which all EU Member States are party, on the other. For discussions of the status of fundamental rights in the EU legal order, see Alston & Weiler (1999); Dauses (1985); Hilson (2004); Smismans (2010).

25. The European Judicial Atlas in Civil Matters is an on-line resource that is part of the EU's e-Justice Portal (European Judicial Atlas Website). It aims to provide user-friendly access to information pertaining to affected areas of civil justice. For example, the Atlas makes it possible for anyone to ascertain the competent court or other authority to which they might need to use in an EU Member State, to determine how to obtain legal aid or serve process or take evidence or enforce a judgment, and to do so in most cases in their own language. The Atlas, also contains features that allow users to obtain forms needed for particular actions, to fill them in on-line in their own language, to translate the completed form into the language of the receiving country, and even to transmit the completed forms electronically.

26. No legal base for such measures was provided in Article 65 of the EC Treaty added in Amsterdam. However, the Lisbon Treaty later amended the legal basis and expanded it to include "the development of alternative methods of dispute settlement" (TFEU art. 81(2)(g)).

27. As was the case in regard to mediation (see preceding endnote), the original legal basis (EC Treaty art. 65) did not explicitly cover judicial training or related matters. However, the Lisbon Treaty also expanded the legal basis to include "support for the training of the judiciary and judicial staff" (TFEU art. 81(2)(h)).

28. As noted in footnote 8 above, the legislative procedures for the adoption of EU measures pursuant Article 65 of the EC Treaty included an unusual *shared* right of initiative by the Commission and Member States, and the use of the streamlined *co-decision* legislative procedure, which allows measures to be adopted by qualified majority, except for family law measures, which require unanimity. Legislative procedures for civil justice matters were further eased by the Lisbon Treaty.

29. See also van Erp 2001 ("The changes . . . follow one another so rapidly that it sometimes takes even specialists by surprise as to which legal areas can be 'Europeanised' – I need only refer to the recent regulations in the area of private international law.").

30. As discussed in Chapter 5 below, some French academics have been very critical of some developments in the field.

31. I am aware of no published accounts of the precise events that I have studied, though some authors have published pieces of the story, which are cited in Part III below.

32. The Netherlands had the Presidency of the Council during the first half of 1997, and the Treaty of Amsterdam was adopted at the meeting of the Amsterdam European Council meeting on 16-17 June 1997.

33. Bobek (2014: 14) explains that "somewhat hidden in the shadows of the collegiate bench" of the EU courts "are the legal secretaries or in French the *référendaires*. Not members of [either the CJEU or the General Court], they are *just* assisting individual judges or [Advocates-General]. What precisely 'assisting' means will depend on the individual court member and the working habits within the respective judicial chambers. In practical terms,

'assisting' may mean anything between researching the case law and writing memoranda down to the function of a ghost writer, drafting but never signing a judgment or opinion." The label 'legal secretary' obscures the fact that these staff members "exercise intellectual influence over the judicial decision-making of the [Court], coupled with the fact that a number of past legal secretaries have later became members of one of the [EU] courts, or had illustrious careers in legal academia or practice" (id. at 15).

34. Much more difficult than identifying my interviewees was tracking them down and getting in touch with them. Many had changed jobs multiple times, or retired with no publicly available address, phone or e-mail contact information. It took years to find some of them. In one case, a Dutch friend visiting me in Berlin happened to live down the street from a retired government official whom I wanted to interview in the Netherlands, and carried a letter back home with her and dropped it in her neighbor's mailbox.

35. A lovely country weekend in France was spent with my interviewee and his wife, whom I had never met before. When we arranged for him to pick me up at the nearest railway station, he told me he would be carrying a blue folder. I told him that I am unusually tall.

II. EUROPEANIZED CIVIL JUSTICE: NATURE, CONTENT, SIGNIFICANCE

II.1 Overview

No step in the historical process of European integration can be understood in isolation from its larger context, and in the case of civil justice in the European legal order, the context is large indeed. This Part II of the dissertation provides an historical framework within which to situate the two historical events that are investigated in Part III (Chapters 6, 7, and 8 below) – the 1997 Amsterdam Treaty and the 1999 Tampere summit meeting of the European Council – as well as a conceptual framework within which the significance of these events and their consequences may be grasped. Chapters 2, 3, 4 and 5 in this Part II aim to elaborate the EU's emergent civil justice field in a manner that is sufficiently detailed to provide an accurate picture of the changes that have occurred in the EU, yet sufficiently conceptual to show why sustained investigation into the causes of these changes is warranted. The two historical events that form the core of my empirical investigation in Part III were the triggers that unleashed these far-reaching developments since 1999.

After a brief overview and a discussion of terminology, this Part provides two optics for viewing the emergence of civil justice as a Europeanized field: the first entails wide-angle and historical perspectives on European developments, and the second focuses more narrowly on the EU itself. Given the temporal and topical ranges covered, Part II breaks each of these general tasks into smaller and more manageable parts, which together facilitate an understanding of the significance of transferring competence over civil justice matters from Member States to the European Union, and how this has led to fundamental changes in the EU's legal order.

Chapter 2 offers a broad perspective by sketching the overarching international legal framework, other pan-European developments, and key developments at the national level of some EU Member States, which frame the developments within the EU itself. In temporal terms, Chapter 2 focuses on the period from the nineteenth century to 1999, when EU Member States transferred competence over a wide range of civil justice issues from the national to the EU regional level.[1] Overall, Chapter 2 paints a picture of sustained efforts towards harmonization over a period lasting roughly a century, with few concrete successes that might justify the investment of public resources or reward the experts who labored in these arcane legal fields, but which ultimately culminated in a period of growing dynamism from the 1990s until the present.

Chapter 3, which narrows the focus to the EU itself, maps the doctrinal and institutional features of the EU's new civil justice field and locates them within the EU's own historical trajectory. Chapter 3 tracks relevant macro- and micro-level developments from the EU's post-war founding era through the most recent amendments by the Lisbon Treaty (effective December 2009), insofar as they impact civil justice issues. Chapter 3 also introduces the first of my two case studies, namely the 1997 Amsterdam Treaty, which triggered the opening of civil justice as a dynamic EU policy field.

Chapter 4 traces the development of EU-level policy statements in the civil justice field. It focuses primarily on the discourse of civil justice, with some attention to matters of funding, but stops short of assessing the impact of EU activity in the field.

Chapter 5 surveys the topography of the civil justice field since the effective date of the communitarization of civil justice in May 1999. It begins by zooming in to provide a micro-level map of the terrain of this newly Europeanized field, beginning with the Tampere summit in October 1999 – my second case study – which elaborated a five-year plan for developing the civil

justice field, and culminating with the present state of the field. Chapter 5 does not merely map but also contextualizes these developments by presenting arguments about the significance of EU developments in the civil justice field.

Taken together, the chapters in this Part II build a stage for the empirical studies in Part III, which seek to explain the Europeanization of the civil justice policy field in the late 1990s. The chapters in this Part II do not themselves offer causal arguments, but rather identify a range of actors and structural features that are relevant to and, in some cases, suggestive of the dynamics that play out in Part III of this dissertation.

II.2 Scope and Definitions

As a practical matter, the scope of the historical explorations provided in this Part II must be bounded by reference to the 'civil justice' label used to describe the contemporary EU developments that are of interest. In order to flesh out this concept, some definitions are required, despite my suggestion in Chapter 1 above that the EU's official label for this new field of competence – "judicial cooperation in civil matters" – is not a familiar legal term, but rather a new construct. It is nonetheless necessary to provide preliminary definitions, not least because the treaty language from which Europeanized civil justice has evolved invokes a number of traditional legal terms.

Europeanized civil justice is more about procedural issues than it is about substantive law. However, this fundamental legal dichotomy does not exhaust the scope of Europeanized civil justice as a policy field, as explained and illustrated[2] below.

Procedure (or procedural law)[3] and substance (or substantive law) are commonly considered the two main types of law found in any legal system, although more sophisticated analyses challenge this simple dichotomy.[4] 'Procedure' and 'procedural law' refer to the "body of law concerned with methods, procedures and practices used in ... litigation" (Black 1991). According to Nasmith (1879: 2), "[e]very rule of [Procedural] Law is an answer to the questions – How do you prove that a particular right, duty, or obligation resides in, is encumbent upon, or has been violated by a particular individual? How, assuming that you do prove the right, or the wrong, can you secure the one and redress the other?" Procedural law thus encompasses the array of rules that must be followed by parties, lawyers and courts alike, when seeking to enforce rights or to obtain some remedy or redress for a violation of rights. It governs the operation of the legal machinery and comprises, in a sense, the 'operating system' of the law. Procedural rules are thus constitutive of a particular legal institutional context, tend to be historically embedded, and embody a core (and typically highly path-dependent) dimension of legal culture.

In contrast, 'substance' or 'substantive law' refers to rules, whatever their source or status, that define the content of rights and obligations, both public and private. Substantive law is "concerned with the ends which the administration of justice seeks to attain" (*Sutt* 1969: Opinion of Justice Schroeder). Thus, according to Nasmith (1879: 2), "[e]very rule of the Substantive Law is an answer to the question – What rights, duties, and obligations exist?" For purposes of this dissertation, the key point is that *substantive civil law* is largely (albeit not entirely) excluded from the scope of EU competence in the field of civil justice, although the EU may be competent to adopt substantive measures pursuant to a legal basis found elsewhere in its treaties.[5]

There is some potential for confusion in the substance-procedure dichotomy, particularly in connection with the term 'civil law,' which has multiple meanings in EU discourse, depending

on the context in which it is used. The term 'civil law system' generally refers to a national legal order characterized by codification (in contrast to a 'common law system'). When used in this context, 'civil law' implicates both substantive and procedural law. However, confusion may result because some contemporary EU sources use the term 'civil law' as a short-hand reference to *substantive* private law matters, such as the law of contract or tort, or in connection with discussions about an EU civil code not unlike those found in the codes of civil law Member States.[6] Finally, EU sources also use the term 'civil law' as a synonym for the more *procedurally-inflected* 'civil justice' (e.g., Civil Law at your Fingertips Brochure 2007), which is the focus of this dissertation.

After procedural law, the next type of law implicated by Europeanized civil justice takes us beyond the relatively simple distinction between 'substance' and 'procedure,' and into the fog that surrounds the terms 'conflict of laws' and 'private international law.'[7] These terms crop up so often in the field of Europeanized civil justice that an effort must be made to define them, even in the face of certainty that it is impossible to come up with a definition that would be universally accepted. My modest goals here are simply to explore the differences between the terms and to clarify my usage of them.

Defining 'conflict of laws' and 'private international law' is more difficult than defining procedural and substantive law, for three reasons. First, the terms themselves are culturally loaded. 'Conflict of laws' is the term that has historically been preferred by the common law world, while 'private international law' tends to be preferred in the civil law world.[8] Second, some perceive this field of law as belonging to domestic or national law, while others see it as being part of international law.[9] Third – and most problematic – each of these terms has both a narrow and a broad meaning, with the result that the terms are ambiguous, even when used within the confines of one particular legal system. The narrow meaning of the term 'conflict of laws/private international law' (*sensu stricto*) refers to rules that tell a court how to decide which body of (substantive) law it should apply to a case that is connected in some way with more than one legal system.[10] Here the label 'choice of law' most accurately describes what is intended. By contrast, the broader meaning of the term 'conflict of laws/private international law' (*sensu lato*) is not limited to the rules to be used in sorting out which (substantive) law a court should apply to a case before it, but also encompasses other procedural issues that are relevant to litigating a case that touches more than one country, such as rules about jurisdiction of the court, recognition and enforcement of the resulting judgment, taking evidence, serving process, and so on. Here, the label 'international (or transnational) civil procedure' provides a more accurate sense of what is meant, since the special rules that apply to the resolution of international or transnational disputes comprise a subset of procedural law. The broader meaning of the term 'conflict of laws/private international law,'[11] which includes both choice of law and transnational civil procedure, appears to be the one used within the EU. For example, the EU Commission noted in an early civil justice study that private international law "does not have the same meaning in all Member States," but that it consists of "mechanisms to facilitate the settlement of international disputes" (Rome I Green Paper 2002: ¶1.2). Still, usage of these terms in EU civil justice discourse is not uniform,[12] confusion is rife, and caution is warranted.

These terminological challenges go a long way towards explaining why the drafters of the treaty revisions that ultimately became Article 65 of the EC Treaty (now TFEU art. 81) avoided relying on traditional terminology to delimit its scope, opting instead to use an open-ended and under-specified term – "judicial cooperation in civil matters" – and then to spell out in some

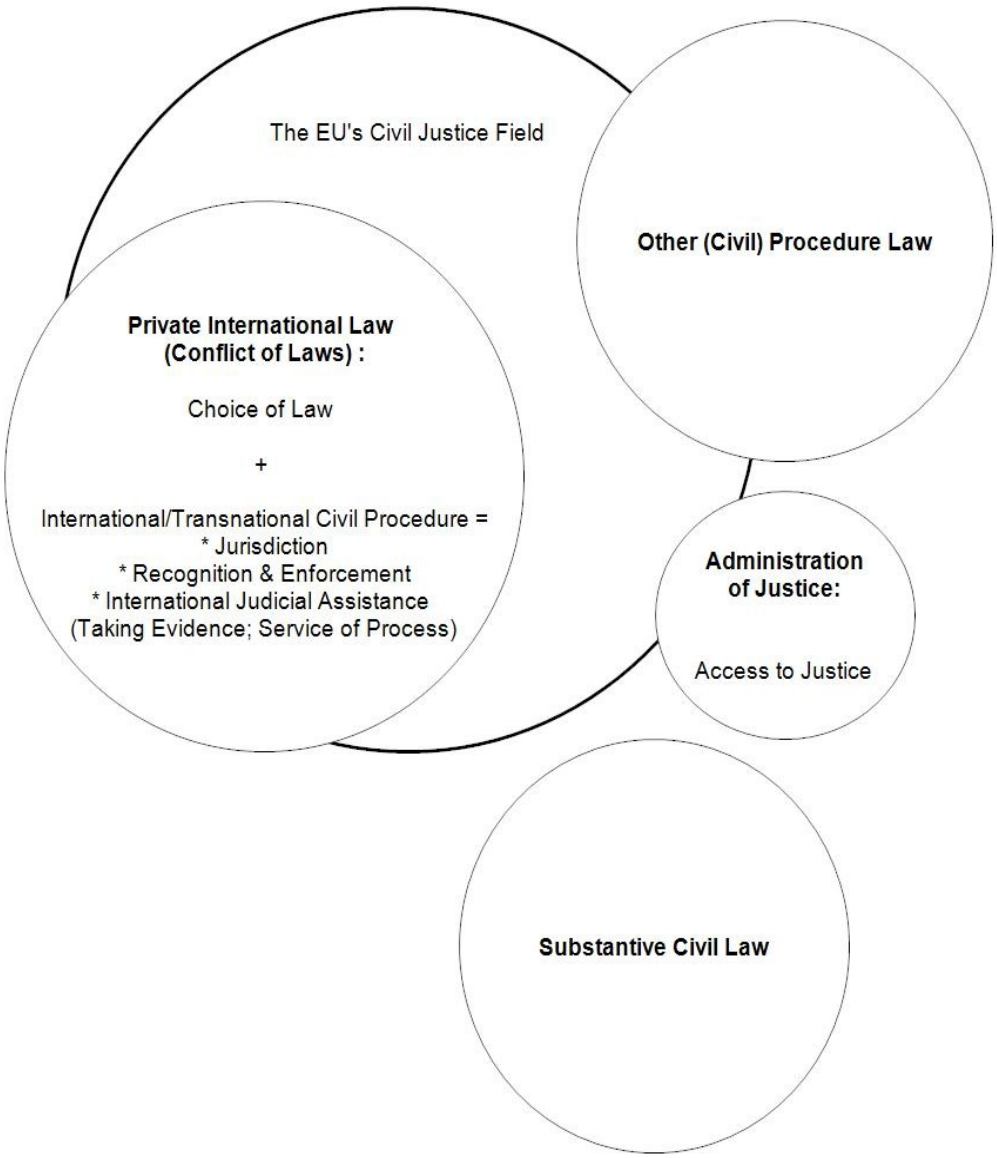
detail what they had in mind.[13] According to its first iteration in the 1997 Amsterdam Treaty's revisions to the EC Treaty,[14] "judicial cooperation in civil matters" explicitly encompassed five types of measures:

- First, the EU's competence was extended to matters that fall under the traditional rubric of 'judicial assistance' (Ristau 2000), which refers to situations where a court (or other organ) in one country assists its counterpart in another country to perform an act connected to legal proceedings that are ongoing in the latter country, such as serve process or take evidence.[15] This type of measure is a subset of international civil procedure, or of private international law in the broad sense, as noted above.
- Second, EU competence includes the choice of law rules by which Member States allocate adjudicative jurisdiction among themselves, i.e., private international law in the narrow sense.[16]
- Third, EU competence includes rules by which Member States allocate adjudicative jurisdiction among themselves, that is, the competence of their respective courts to decide cases having cross-border implications.[17]
- Fourth, Europeanized civil justice includes an open-ended reference to rules of civil procedure.[18]
- Fifth, EU competence also includes rules about recognition and enforcement of judgments,[19] which are cognate to the rules on "full faith and credit" found in Article IV of the U.S. Constitution.[20]

To summarize, the five types of measures identified by the Amsterdam Treaty as the core of the EU's civil justice field combine the narrow (i.e., choice of law) and broad (i.e., international or transnational civil procedure) meanings of private international law, with a broader reference to civil procedure in general. Figure 2.1 represents these conceptual relationships visually.

[FIGURE 2.1 ABOUT HERE]

Figure 2.1: Civil Justice Field in the European Union: "Judicial Cooperation in Civil Matters"



And yet, this taxonomy merely describes the core features of this new field at its dawn and does not fully capture its current contours. Further discussion of the scope of EU competence in the field of civil justice is deferred to Chapter 5, which documents the expansion of "judicial cooperation in civil matters" and maps its current boundaries and contents.

What should be clear at this point, beyond the annoying tendency of lawyers to insist upon defining even admittedly indefinable terms, is that the scope of civil justice is broad, albeit not without limits.[21]

The following discussions of international, pan-European, EU and national-level

developments related to civil justice are informed by the scope of the EU's competence, as roughly demarcated above. In particular, the historical analysis in Chapter 2 below explores developments related to procedural law and to all dimensions of private international law, but excludes issues of substantive law. Chapters 3, 4 and 5 reintroduce the topic of substantive law, insofar as it is implicated by developments in the EU's civil justice field.

Chapter 2: A Century of Effort, or 'EUstitia' in Broad Historical Context[22]

The dramatic emergence of civil justice as a dynamic EU policy field has not occurred in a vacuum. Rather, the issues that comprise the civil justice field (per subpart II.2 above) have also received attention at other governance levels and in different fora for more than a century, ranging from multilateral initiatives at the international level, through pan-European and subregional developments, to reforms in the national legal systems upon which the European Union (EU) legal order is perched. Indeed, the EU's move into the civil justice field continues a long tradition – traceable back to Roman times – of using legal pluralism, procedural law, and the administration of justice as tools to govern large and diverse territories in Europe (Hartnell 2015). While not the first to enter these waters, the EU has undertaken the most ambitious and successful effort to date to fashion transnational solutions to civil justice problems, short of abolishing national boundaries and founding a state.

This chapter contextualizes EU developments by providing an overview of similar efforts in other spheres, namely at the international, pan-European, subregional, and national (i.e., Member State) levels.[23] This wide-angle view encompasses significant efforts prior to the transformation of civil justice in the EU in 1999, when the 1997 Amsterdam Treaty entered into force and unleashed the developments examined in Chapters 4 and 5 below.

Three factors unite the otherwise disparate initiatives surveyed in this chapter. First, all initiatives pertain to matters that now fall within the scope of EU competence in the field of civil justice. Second, none were explicitly linked to the process of creating the EU. And third, all involve countries (or persons based in countries) that are presently EU Member States. Thus, these efforts are separate from, but parallel to and complexly interconnected with the EU developments that are explored in the remaining chapters of this Part II.

The following analysis is organized according to the level of governance at which the initiative occurred – international, pan-European and subregional, or national – rather than according to a strict chronology, or to the types of measure used in these different settings. Historically, initiatives addressed to civil justice issues have tended to be of two basic types. The first, or *differentiated type*, consists of detailed instruments that provide 'hard' or 'soft' normative regimes aimed at resolving particular problems. Such pragmatic initiatives can be found across the entire historical span considered here, which ranges from the nineteenth century through the end of the twentieth century, and are utilized by international organizations as well as by more informal initiatives rooted in the private sector. The second, or *overarching type*, encompass more general human rights norms that address some aspects of civil justice. The creation of this second type is concentrated in the post-World War II period, and found primarily in international and regional organizations having lofty (quasi-constitutional) aspirations.

2.1 Civil Justice in the International Legal Realm

Prior to 1999, EU Member States, like other countries, relied mainly on traditional public international law approaches to coordination problems involving civil justice matters. The *ancien régime* was characterized by the slow and meticulous meshing of diplomatic gears; high-level expert delegations that studied perceived problems – often for many years – and drafted proposed solutions (usually in the form of public international law conventions or treaties); unanimous decision-making; and further delays attending the (often unsuccessful) campaigns to secure the necessary ratifications for the resulting convention to enter into effect. Since the late 1990s,

however, the pace of civil justice law- and policy-making has been dynamic and rapid, as is particularly visible in the break-neck pace of developments in the EU since 1999 (especially Chapter 5 below). The search for an explanation for these changes in the EU realm must begin in the traditional realm of international law.

2.1.1 The Hague Conference on Private International Law

At the international level, the most important actor for over a century has been the Hague Conference on Private International Law (Hague Conference) – the "World Organisation for Cross-border Co-operation in Civil and Commercial Matters" – which was first convened in 1883 on the initiative of Dutch lawyer and academic T.M.C. Asser.[24] The Hague Conference was founded as an international organization in 1893, during an era characterized by a strong movement in Europe to bolster peace by strengthening international (and, to a lesser extent, comparative) law and dispute resolution mechanisms (Caron 2000). This period saw the creation of numerous institutions devoted to the study and practice of international and comparative law concentrated in Europe (Abrams 1957; Parra-Aranguren 1993; Symposium 1993), but also found elsewhere.[25] The Hague Conference was active during the years between its founding and World War I, languished during the war decades, and revived after World War II ended.[26] While founded by European countries – among them the nineteenth-century predecessors of the six countries that founded the European Communities[27] in the 1950s – the Hague Conference currently has 83 members from across the globe, including all current EU members.[28]

The stated goal of the Hague Conference is to achieve "progressive unification of the rules of private international law,"[29] in order to resolve difficulties stemming from the diversity of legal systems that affect "personal and family or commercial situations ... connected with more than one country."[30] The key motivations for this enterprise are to provide legal security for transborder actors, and to promote the "orderly and efficient settlement of disputes, good governance and the rule of law, while respecting the diversity of legal traditions."[31]

The principal tool used by the Hague Conference is the traditional public international law convention or treaty: a set of rules negotiated among member countries operating under the norm of consensus, signed at the conclusion of negotiations, and subsequently available for ratification at will by individual countries. Overall, Hague Conference conventions are of the first, or 'differentiated' type of measure, and aspire to create 'hard' norms aimed at providing solutions to particular concrete problems. Hague Conference conventions address a wide range of topics affecting international judicial and administrative co-operation in the area of private law, especially as it affects children and the family, civil procedure, trusts and estates, and commercial law. Table 2.1 shows the fields in which the Hague Conference has been active, the types of measures adopted in each field, and the year in which conventions were signed.

[TABLE 2.1 ABOUT HERE]

Table 2.1

Hague Conference Conventions before 1999 - Years of Signature[1]

	Choice of Law	Jurisdiction	General Procedure	Recognition and/or Enforcement	Mixed
Marriage, Separation, Divorce, Maintenance, Marital Property	1902; 1905; 1973; 1978			1970; 1973; 1978	1902
Children	1956			1958	1902; 1961; *1965*; 1980; 1993; 1996
Personal Status - Nationality; Protection of Adults	*1955*				1905
Procedural Matters		*1965*	1905/1954; 1961; 1965; 1970; 1980	1971	
Commercial Law	1955; *1958*; 1978; *1986*	*1958*		*1956*	
Wills, Trusts & Succession	1961; 1985; *1989*			1973	
Torts	1971; 1973				

Altogether, the Hague Conference produced seven conventions between 1893 and 1945, and another 38 between 1951 and the end of the 20th century, of which 24 (around 63%) are currently in force following ratification by the requisite number of countries.[32] However, this figure does not accurately convey the impact of Hague Conference conventions, for two reasons. First, the fact that a convention may have entered into force does not imply widespread unification of law, since only a small number of countries – often as few as two – must ratify before a given convention becomes legally binding. To take one example, the 1971 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters is in force among four member countries (Albania, Cyprus, Netherlands, Portugal) and one non-member country (Kuwait). Thus, despite the Hague Conference's universalist orientation, it would be erroneous to view this Convention as the foundation of a global legal order for resolving important civil justice questions, such as the effect of a court judgment outside the

[1] Conventions that have not entered into force are indicated by the use of italics.

territory of the State where it was rendered. And second, the work of this international organization has a broader impact than these data imply, since Hague Conference conventions are available for adoption by non-member countries as well, and in rare instances have been widely adopted. For example, 30 non-member countries are party to the 1993 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, in addition to the 68 member countries that have formally ratified the treaty. Moreover, following a Conference in Manila in October 2011 to discuss the relevance, implementation, and practical operation of a number of important Hague Conventions within the Asia Pacific Region, the Hague Conference established an Asia Pacific Regional Office in Hong Kong in December 2012.

The significance of the Hague Conference is not exhausted by Table 2.1, by the foregoing consideration of broader impact of its work, or by the fact that current EU countries actively participated in drafting and ultimately adopted many of the resulting conventions.[33] Far more significant, for the purposes of this dissertation, is that certain work ongoing in the Hague Conference – particularly in the 1990s – provides the immediate context for the EU developments that are the main focus of this dissertation. This work must be sketched to provide a foundation for the discussion (in Chapter 9 below) of a possible causal relationship between developments at the international (i.e., Hague Conference) and EU levels.

Already in 1992, the U.S. Department of State proposed that the Hague Conference should "undertake work on a convention dealing with the recognition and enforcement of foreign judgments" (von Mehren 1994: 271-2). Pursuant to a decision taken at the Seventeenth Session of the Hague Conference in May 1993 to pursue this project, a Special Commission commenced work in June 1994, and negotiations began in earnest in 1996. The efforts to achieve a global judgments convention were intense, controversial, and involved heated conflict between U.S. delegates and those from EU countries (Woesthoff 2005). Notwithstanding these difficulties, the Special Commission managed to adopt a Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters on 30 October 1999. However, the Draft was met by widespread criticism, and the effort to achieve a global judgments convention ultimately failed, in no small part because of irreconcilable conflicts between positions staked out by delegations from the U.S. and from EU countries.[34]

The work of the Hague Conference is relevant in the context of this dissertation for four reasons. First and foremost, the negotiations aimed at achieving a global judgments convention overlapped temporally with the intra-EU developments examined in Part III of this dissertation, and constitute an essential piece of the contextual puzzle. Second, and more generally, the Hague Conference long served as *the* multilateral forum in which (initially just European) countries met to address a wide range of problems in the field of civil justice. This situation changed significantly after communitarization in the late 1990s, since which time the EU itself has become a hotbed of efforts to provide uniform solutions to cross-border civil justice problems. Third, some fields of law that now fall within the EU's own civil justice field also demonstrate a high level of issue saturation at the international level. An apt example is family law, where more than fifteen Hague Conference conventions were concluded over the course of a century, most of which subsequently entered into (and remain in) force. And fourth, there exists a huge potential for overlap and conflict between the work of the Hague Conference – with its aspiration to achieve world-wide conventions – on the one hand, and the work of the EU – with its orientation towards more exclusive regional initiatives in the civil justice policy field – on the other.

2.1.2 United Nations International Covenant on Civil and Political Rights

The United Nations International Covenant on Civil and Political Rights (Covenant), which entered into force on 23 March 1976, provides a leading example of the second, or 'overarching' type of civil justice measure. Article 14(1) of the Covenant provides that

> All persons shall be equal before the courts and tribunals. In the determination of ... rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...

171 countries are party to the Covenant. The tools provided for implementation of the Covenant, which comprise reporting and diplomatic conciliation, are relatively weak; however, the First Optional Protocol foresees that the Human Rights Committee may "receive and consider communications from individuals" who claim to be victims of violations of the rights contained in the Covenant.[35] All EU Member States are party to the Covenant itself, and most (but not all) have ratified the First Optional Protocol. The case law in this field is growing (Möller & de Zayas 2009), but is considerably less dynamic than developments under the European Convention on Human Rights, which are noted below in section 2.2 of this chapter.

2.1.3 Soft Law on Transnational Civil Procedure

Efforts to develop global transnational rules on civil procedure have their origins in the private collaboration of two leading law professors, Geoffrey C. Hazard, Jr. (United States) and Michele Taruffo (Italy), who began exploring their mutual interest in comparative civil procedure in the 1980s. More than a decade after their collaboration started, they published under their own names the 1996 "Draft Transnational Rules of Civil Procedure" in an American law journal (Hazard & Taruffo 1997). The American Law Institute (ALI) subsequently picked up their project, and this collaboration culminated in the publication in 1998 (in yet another American law journal) of the ALI's "Preliminary Draft No. 1 of Transnational Rules of Civil Procedure," together with commentaries by civil procedure experts from many different countries. The authors aimed to create a "code that addresses comprehensively the problems that all procedural systems must face" (Hazard 1998: 492), and to do so in a way that fused the "most attractive attributes of the two systems in the context of transnational litigation" (Hazard & Taruffo 1997: 493).

To move the Transnational Civil Procedure project forward, the ALI next allied with another international organization – UNIDROIT, the Rome-based Institute for the Unification of Private Law – starting in 1999. UNIDROIT was established as an organ of the League of Nations in 1926[36] to "study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States."[37] UNIDROIT has 63 members, including all 28 EU Member States. Thus, like the Hague Conference, UNIDROIT was at work long before World War II, is independent of the EU, and has successfully expanded its membership beyond the confines of Europe. Yet, unlike the Hague Conference, UNIDROIT has focused the bulk of its attention on substantive harmonization of civil and commercial law, rather than on civil justice issues.[38] Thus, the UNIDROIT/ALI collaboration that produced the 2004 ALI/UNIDROIT Principles of Transnational Civil Procedure is a rare example of UNIDROIT activity in the (more procedural) civil justice field.[39]

The entrepreneurial law professors whose collaboration resulted in the two sets of draft Transnational Rules for Civil Procedure in the late 1990s, and later in an the ALI/UNIDROIT

Principles, have noted a number of influences on their work. First, while both professors are known beyond their work on civil procedure for their academic writing on ethical and jurisprudential topics, they are "strongly appreciative of law practice as well as legal theory," and both "practice law on the side as well as carrying forward [their] academic pursuits" (Hazard 1998: 490). Second, they have acknowledged that their work was partially inspired by an earlier European effort that was also spearheaded by a law professor, namely the Belgian Marcel Storme (id. at 491), whose contribution is examined in subsection 2.2.4 below.

2.1.4 Summary Observations

During most of the century surveyed here, even the two major international organizations noted above – the Hague Conference and UNIDROIT – had their greatest impact in Europe, despite their ambitions to work at the global level. When initially founded in the late nineteenth century, the membership of the Hague Conference was exclusively European. Upon its revival in the aftermath of World War II, the Hague Conference continued to consist of predominantly (east and west) European countries, though Japan and Turkey also joined in the 1950s. On the other hand, UNIDROIT's ambitions, owing to its inter-war origins in the League of Nations, were always broader than those of the Hague Conference, and its members included many non-European countries as early as 1940. Still, UNIDROIT's early efforts were poured into two 1964 conventions dealing with the law of sales, neither of which was widely adopted outside Europe.[40] Thus, in view of the membership and impact of the work of both organizations, the former Secretary-General of UNIDROIT has characterized their early unification projects as being of two types: "truly regional [or] 'universal' (= 'disguised' regional)" (Kronke 2003: 12). Like other universal initiatives in the late nineteenth century, they "primarily involved Europeans and were global only in the sense that the century was a European one" (Caron 2000: 6). This previously apt characterization no longer holds, however, since both organizations have dramatically expanded their membership beyond Europe, and their conventions have found growing acceptance among (member and non-member) countries world-wide.

2.2 Pan-European and Subregional Initiatives

All of the original six countries that created the EU's predecessor Communities in the 1950s were also founding members of the Hague Conference, members of the League of Nations, and early joiners of UNIDROIT.[41] Yet neither of those international organizations, nor the embryonic EU itself, provided the only fora in which today's EU Member States could address civil justice (or other civil and commercial law) issues. This section explores the major pan-European and subregional initiatives that flanked the emerging EU and that continue, even today, to provide alternative constellations and institutional structures for addressing civil justice (as well as a wide range of other) issues.

This section 2.2 focuses on *non-EU* European initiatives, with the goal of identifying further dimensions of the landscape within which EU developments occur. The picture that emerges here is one of complex nested, overlapping and parallel relationships (Aggarwal 1998; Alter & Meunier 2008), in which the same countries belong to and interact in a plethora of multilateral settings. Historically, this picture was further complicated by the fact that the six founding members of the EU also concluded bilateral treaties among themselves in the civil justice field on occasion,[42] although the bilateral activity ceased after World War II, with the renewed commitment to multilateral institution-building.

As was the case in the international realm surveyed in section 2.1 above, two types of initiatives may be found at the European regional level.[43] The 'overarching' type is represented here by the discussion of the European Convention on Human Rights, while the 'differentiated' type is represented by the discussions of cooperation in the Benelux and Nordic subregions, as well as by the work of the Storme Commission.

2.2.1 The Council of Europe and the European Convention on Human Rights

The Council of Europe is an international organization that was established in 1949, prior to the creation of the European Communities. It is a pan-European organization whose 47 members include all 28 EU Member States. However, despite confusingly similar names[44] and overlapping memberships and missions, the Council of Europe is separate from and legally independent of the EU. The primary aim of the Council of Europe is to create a "common democratic and legal area throughout the whole of the continent, ensuring respect for its fundamental values: human rights, democracy and the rule of law."[45]

The core of the Council of Europe is the European Convention on Human Rights, to which all EU Member States are party, together with the powerful European Court of Human Rights (ECHR). The relationship between the Council of Europe and the EU, and in particular between the Court of Justice of the European Union (CJEU) – formerly the European Court of Justice (ECJ) – and the Council of Europe's ECHR, is exceedingly delicate, given the powerful mandates enjoyed by both courts and the EU's ambition to incorporate fundamental rights into the EU's own legal order.

In terms of civil justice, the key provision in the European Convention on Human Rights is Article 6(1), which provides:

> In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and [the] public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

A body of pan-European procedural law governing civil litigation[46] is emerging largely (but not exclusively) from case law based on this treaty language.[47] This evolving body of law "has had (and still has) a harmonizing effect on the systems of civil procedure in Europe" (van Rhee & Verkerk 2006: 124).

Article 6 of the Convention is not, however, the sole basis upon which the Council of Europe can act in regard to civil justice issues. In fact, the Council of Europe's activities extend far beyond the creation of a pan-European human rights regime. Aside from its engagement in the political and social fields,[48] the Council of Europe has played an active and increasingly important role in the legal field since its founding in the post-war era. The mandate of its Directorate General for Human Rights and Rule of Law (DG I)[49] includes standard-setting, monitoring of adopted standards, and engaging in numerous forms of cooperation and advising. In terms of standard-setting, DG I prepares a wide range of binding and non-binding legal instruments, predominantly conventions and recommendations. More than 200 conventions have been concluded under Council of Europe auspices, of which some fall within the scope of civil

justice, as broadly defined in this dissertation.

The Council of Europe's normative (i.e., standard-setting) activities outside the human rights field include substantial efforts related to criminal and family law, with particular emphasis on the position of children. Initiatives in the criminal law field, which reach back to the late 1950s, have enjoyed considerable success, at least when measured in terms of conventions that enter into force after having been concluded by a diplomatic conference. Six Council of Europe conventions devoted to basic criminal law issues have entered into force,[50] as have three conventions on cooperation in the context of administrative proceedings,[51] two on corruption and three dealing with money laundering and other financial offences.[52] In regard to families and children, the Council of Europe's record includes seven conventions that have entered into force,[53] and dozens of soft-law recommendations and resolutions (CoE Family Law Report 2008: 43-159).

In contrast to its work in the criminal and family law fields, where the overwhelming majority of Council of Europe conventions have entered into force, the success rate of Council of Europe initiatives dealing with civil justice issues is uneven. Thus, conventions attempting to harmonize the law of arbitration,[54] various procedural issues relating to the recovery of money claims,[55] and bankruptcy have never entered into force.[56] In contrast, conventions dealing with such routine matters as providing information on foreign law and calculating time-limits in connection with civil litigation,[57] registering wills,[58] and transmitting applications for legal aid[59] have entered into force.

What is perhaps most surprising is that the Council of Europe has concluded any civil justice conventions at all. Shortly after the Council of Europe was founded in 1949, the venerable Hague Conference charged the Dutch government with the task of concluding a mutual cooperation agreement with the Council of Europe, with the aim of ensuring that the Council of Europe "should refer to the [Hague] Conference all matters relating to the unification of private international law," and setting up liaison mechanisms to "assure ... close co-operation" between the two organizations (Kuhn 1952: 515). The overarching goals were to avoid duplication of efforts and undue complexity by stipulating that issues falling within the Hague Conference's remit were for the Hague Conference, and to secure one another's cooperation in promoting and monitoring the fruits of their respective labors. This initiative resulted in the conclusion of a treaty in 1955, which remains the basis of the relationship between the Hague Conference and the Council of Europe today (van Loon 2011: 1).

Overall, the relationship between the two organizations has been complementary, although not without occasional tension. The complementarity is twofold: "the Council of Europe's focus is on substantive law and regional work, [while] the Hague Conference focuses on private international law and global work" (van Loon 2011: 2). On occasion, an idea proposed within the Council of Europe has been referred entirely to the Hague Conference, such as in the case of the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, which was based on a proposal made by the United Kingdom to the Council of Europe (van Loon 2011: 1). In other instances, an idea generated within the Council of Europe to improve or supplement an existing Hague Convention is referred for action, such as in connection with notices accompanying documents to be served abroad (Möller 1982). However, cases also exist, such as in the field of family law, where the Council of Europe has not passed the ball to the Hague Conference, but has instead merely noted in passing its obligation "to take account of the intention of the Hague Conference" to draft a convention on a topic related to the

one that the Council of Europe is also considering (CoE Explanatory Report on Adoption Convention).

Parallel work by the 'global' and 'regional' organizations may, but does not inevitably result in overlap or conflict, at least at the normative level. For example, Hague Conference and Council of Europe conventions dealing with aspects of adoption and child abduction (van Loon 2011: 1-2) dovetail and are formally complementary. Still, problems have emerged in connection with the application of the norms, partly resulting from the uneven judicialization within these two legal regimes. While the Hague Conference has no court to provide authoritative interpretations of its texts, the Council of Europe has the European Court of Human Rights (ECHR), which is empowered not only to interpret the various differentiated Council of Europe texts but also the overarching norms contained in the European Convention on Human Rights. In this environment, the ECHR has on occasion filled the void by using its power to articulate abstract human rights norms to flesh out the meaning of 'parallel' obligations that are found in both Council of Europe and Hague Convention texts by (van Loon 2011: 3-5). Such activity points toward a growing potential in the normatively dense European legal environment that rulings by a regional court – the ECHR – could undermine global (i.e., Hague Conference) treaties to which members of the regional organization are also party.

The increasingly complex "interaction" (van Loon 2011) between the global Hague Conference and the regional Council of Europe legal orders is an important feature of the normatively and institutionally pluralistic environment in which EU decisions relating to civil justice issues are taken. The EU's own trajectory, which is elaborated in Chapters 3, 4, and 5 below, must not be viewed in isolation from this larger context. All EU Member States are also members of both the Hague Conference and the Council of Europe. Thus, all are party to the European Convention on Human Rights and subject to the jurisdiction of the European Court on Human Rights, alongside their extensive normative and institutional commitments under the EU's own treaties. In addition, most of the 28 EU Member States have ratified at least some of the differentiated civil justice conventions concluded under Hague Conference or Council of Europe auspices. For example, all 28 EU Member States are party to the 1980 Hague Child Abduction Convention, while 26 EU Member States (i.e., all but Croatia and Slovenia) are party to the 1980 European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration or Custody of Children (along with ten other countries). In a separate measure, the Council of Europe made a limited recommendation in 1984 to speed up the formal course of civil proceedings (van Rhee & Verkerk 2006: 129).

While the Hague Conference and the Council of Europe are, aside from the EU, the most important actors in the civil justice field, they are by no means the only ones. The remainder of this section 2.2 is devoted to surveying some of the subregional and private actors that have also occupied – and in some cases still occupy – this teeming field.

2.2.2 The Benelux Union

Historically speaking, today's Belgium, Luxembourg and the Netherlands were once part of the region known from the late middle ages as the Low Countries. Rulers and borders changed frequently before the nineteenth century, at which point Belgium and Luxembourg were separated from the United Kingdom of the Netherlands and became independent.[60] Whether due to their common history, their small size, or other affinities, these three countries have been pioneers in the exploration of shared governance, and have served as "forerunners and

fountainhead of ... voluntary integration and rational cooperation" in Europe (Blumenfeld 1969).

Already in the period after World War I, Belgium and Luxembourg formed an Economic Union (1921),[61] which aimed *inter alia* to achieve monetary stabilization by fixing the exchange rate between their currencies and to facilitate trade by implementing common tariffs. During World War II, the governments-in-exile of Belgium, Luxembourg and the Netherlands met in London, where they concluded the 1944 London Customs Convention establishing the Benelux Customs Union (effective 1948).[62] This treaty remained in force until 1960, when it was replaced by the 1958 Treaty Establishing the Benelux Economic Union.[63] These three countries also created a Benelux Parliament in 1955,[64] as well as a Benelux Court of Justice in 1974, which was tasked with guaranteeing the uniform interpretation of any common legal rules that might be agreed.[65]

As its name suggests, the Benelux Economic Union (BEU) dealt primarily with core issues relating to free movement of persons, goods, capital and services and to external trade. The provisions of the 1958 treaty largely track the provisions of the 1957 Treaty Establishing the European Economic Community (EEC Treaty or Rome Treaty), and dovetail the pre-existing BEU with the new EEC. For its part, the EEC Treaty expressly permitted the Benelux countries to continue pursuing their own integration agenda, so long as doing so did not conflict with their obligations under the EEC (and today, EU) treaties. Article 233 of the EEC Treaty (now TFEU art. 350) provides that

> The provisions of this Treaty shall not preclude the existence or completion of regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg and the Netherlands, to the extent that the objectives of these regional unions are not attained by application of this Treaty.

Even after numerous revisions to the EU treaties, this clause enabling Benelux cooperation remains, and no similar privilege has been extended to other subregional groups among EU Member States (Wouters & Vidal 2008: 5-6). The enabling clause recognizes the long-standing role of Benelux countries in seeking new forms of integration, even outside the narrow frame of economic cooperation. And yet, the BEU and its predecessors only begin to tell the story about cooperation among Benelux countries or their role in the Europeanization of civil justice.

As early as 1948, Belgium, Luxembourg and the Netherlands separately formed a permanent committee of experts to prepare drafts containing uniform rules on matters of private and penal law. A formal proposal to establish a European code of private international law – authored by German emigré Ernst Frankenstein, who had begun working on the topic in exile as early as 1939 – was published in the Netherlands in 1950 (Frankenstein 1950; see also Siehr 1999; Weber 2004: 1-2). Shortly thereafter, the 1951 Benelux Convention on Private International Law was proposed (Meijers 1953, Nadelmann 1970). According to Nadelmann, the moving force behind the 1951 initiative was the Dutch jurist E.M. Meijers,[66] but the "project lost its spiritual father" when Meijers died in 1954 (Nadelmann 1970: 407-408), and the convention never entered into force.[67] Renewed efforts in the 1960s produced the 1969 Benelux Treaty Concerning a Uniform Law on Private International Law (Nadelmann 1970), along with a parallel treaty that conferred jurisdiction on the as-yet-nonexistent Benelux Court to interpret both the treaty and the uniform law that it prescribed for adoption by each of the three countries. These Benelux treaties suffered a similar fate to the earlier effort and never entered into effect. Yet, despite these formal failures during the early postwar decades, the Benelux countries continued to cooperate and to push forward incrementally their shared vision in the field of civil

justice.

2.2.3 Nordic Cooperation

The Benelux countries are not the only EU Member States to share common history or sustained commitment to close regional cooperation. The Nordic Region consists of five countries – Denmark, Finland, Iceland, Norway, and Sweden – along with a number of autonomous territories (i.e., the Åland Islands, the Faroe Islands, and Greenland). Of these, just Denmark, Finland and Sweden are currently EU Member States in their own right, Denmark having joined in 1973, and Finland and Sweden in 1995.[68]

The Nordic countries have a "long history of cooperation and collaboration (if not without friction and not always on a voluntary basis)" (European Tribune 2008). Historically, the kingdoms of Denmark, Norway and Sweden emerged from their Viking pre-history around one thousand years ago, and were united from 1397 through 1521 in the Kalmar Union, which entailed personal union under a common monarch.[69] The coronation of Gustav Vasa as Swedish king in 1521 split up the Union, and Denmark and Sweden spent the ensuing three centuries fighting for dominance and territory. By the Napoleonic era, Sweden lost control over contemporary Finland to Russia, while Denmark ceded Norway to Sweden under the terms of the 1814 Treaty of Kiel. Finland remained part of the Russian Empire from 1809 until 1917, while Norway remained part of Sweden until 1905.

Various forms of Nordic cooperation began in the nineteenth century, ranging from grassroots organizations to a formal monetary union in 1875, when Sweden, Denmark and Norway created a Scandinavian monetary union based on a common unity of currency, the Crown (*krona*).[70] Legal cooperation by means of regular Conventions of Nordic Jurists began in 1872 (Carsten 1973; Letto-Vanamo 2013a). In 1919, a Nordic "association" process was launched, which involved "independent, non-party organisations that promote closer Nordic co-operation, open borders in the Region and a deeper sense of cultural affinity," and that "work together under the auspices of the Confederation of Nordic Associations."[71] The association process involves mainly civil society contacts, such as youth programs and city twinning.

More official Nordic cooperation got underway in the period after World War II. A Joint Committee of the Nordic Social Democratic Labour Movement (SAMAK) brought Nordic Social Democrats and trade union representatives together as early as 1945 to work for joint Nordic policies in a number of fields, while the 1948 proposal to create a Scandinavian defense union failed to take root in the Cold War climate. In 1952, the Nordic Council was formed by Denmark, Iceland, Norway and Sweden, which Finland joined in 1955 after Stalin's death. It is this Nordic Council that has flourished since the mid-twentieth century, despite the growing centripetal force of the EU.

The Nordic Council is extensively institutionalized and active in a wide range of policy fields. In this respect, the Nordic Council bears some similarities with Benelux. Unlike Benelux, however, efforts failed to formalize Nordic economic cooperation in the form of a customs union parallel to the (then) EEC. Also unlike Benelux, the role of Nordic cooperation in the larger European frame has been ambivalent, in large part because Nordic Council members have not all entered the EU, and those that have joined did so at different historical periods. Thus some have long viewed the Nordic Council as an alternative to EU membership, while others have tended to see it as a stepping stone towards EU membership. The fact remains, however, that key members of the Nordic Council – in particular, Norway[72] and Iceland[73] – appear unlikely to join the EU

anytime soon, which suggests that Nordic cooperation through the Nordic Council will remain active in the years ahead.[74]

Nordic cooperation has produced a number of far-reaching innovations over the years. Already in the 1950s, numerous measures were taken to ensure free movement of persons, including but not limited to workers, which put Nordic integration in this field decades ahead of what has subsequently been achieved in the EU. A passport-free travel area was agreed upon in 1952, followed by the creation of a Nordic labor market in 1954, a Nordic Convention on Social Security in 1955, and the completion of the Nordic Passport Union in 1958.[75]

The 1960s saw a number of moves to institutionalize alternatives to the (then) European Economic Community (EEC). These were spurred in part by the failed negotiations by Denmark and Norway to join the EEC in the early 1960s.[76] The 1962 Helsinki Treaty – sometimes referred to as the 'Nordic Constitution' – formalized the aims and workings of the Nordic Council. Its preamble states:

> The Governments of Denmark, Finland, Iceland, Norway and Sweden, desiring to promote and strengthen the close ties existing between the Nordic peoples in matters of culture, and of legal and social philosophy, and to extend the scale of co-operation between the Nordic countries; Desiring to attain uniformity of regulation throughout the Nordic countries in as many respects as possible; Desiring to achieve, where possible, an appropriate division of labour between the Nordic countries in all those fields; Desiring to continue the co-operative efforts of significance to the Nordic countries that take place within the Nordic Council and other co-operative agencies, have agreed ...

Article 1 of the Helsinki Treaty emphasizes the overarching goal of maintaining and developing further cooperation "in the legal, cultural, social and economic fields ... ."

The Nordic Council has created an extensive set of institutions to address common concerns. The Council itself consists of 87 members elected from national parliaments, and has a rotating presidency. It focuses on inter-parliamentary cooperation. In 1971, a Nordic Council of Ministers was established to institutionalize coordination among Nordic governments, partly in reaction to the prospect of fragmentation as Nordic countries joined the EEC one by one, starting with Danish accession in 1972. The aim to deepen intergovernmental cooperation was bolstered by the creation of a Secretariat in 1973, along with numerous specialized institutions throughout the 1970s. To be sure, the institutional apparatus within the Nordic Council framework remains intergovernmental (and not supranational, as in the EU).[77] Still, habits of cooperation involving "joint consultations on a permanent basis"[78] were established early and practiced regularly by the Nordic countries. Unlike Benelux, however, the Nordic Council did not set up a court.[79]

In the economic realm, early efforts to create a Nordic common market were abandoned in the wake of the 1960 Stockholm Convention, in which Denmark, Norway and Sweden joined Austria, Portugal, Switzerland and the United Kingdom to create the European Free Trade Association (EFTA). The aims of EFTA were to provide a framework for liberalizing trade in goods among its Member States, and to establish an "economic counterbalance to the more politically driven [EEC]."[80] Finland joined EFTA in 1961, and Iceland in 1970. As EFTA countries gradually joined the EEC (now EU), EFTA's membership dwindled.[81] In 1968, pursuant to a Danish proposal, negotiations began with the aim of formalizing Nordic economic cooperation by creating a Nordic economic community (Nordek). Agreement was reached in 1970, but then faltered when Finland backed out because of its close ties with the USSR.

Denmark and Norway applied for EEC membership in the wake of the failure of Nordek. Economic coordination today is managed by the Nordic Council of Ministers for Finance (MR-Finans).

The 1962 Helsinki Treaty also formalized an extensive program of legal cooperation, which is based on long-standing practices in this field. Nordic countries have met regularly to discuss and coordinate law-making since 1872,[82] pursuant to an ancient Nordic tradition holding that "by law shall the land be built."[83] Already in 1962, Nordic countries had agreed to continue cooperating "with the aim of attaining the greatest possible uniformity in the field of private law" (Article 4). In addition, they agreed to "seek to establish uniform rules relating to criminal offences and the penalties for such offences," as well as to coordinate their procedures for investigating and prosecuting such offences (Article 5). Moreover, they had agreed to "seek to achieve a co-ordination of legislation in such areas, other than the aforementioned, as are considered appropriate" (Article 6), and to "... allow decisions by a court of law or other public authority in another Nordic country to be executed also in the territory of" another Nordic country (Article 7). Unlike the EEC/EU, which aimed more modestly at harmonization of legislation in fields linked to free movement goals, Nordic legislative co-operation was "activated by the desire to achieve *similar, preferably identical legislation* in all the Nordic countries in the central areas of law," yet was never "coupled with any kind of integration objective" (Bernitz 2000: 33-4) (emphasis added).

The work of promoting common principles of Nordic legislation is formally led by the ministers of justice, who compose the Nordic Council of Ministers for Legislative Affairs (MR-LAG). In fact, however, the "actual cooperation in the legislative field has been conducted mainly in the form of rather informal, continuous contacts and meetings between respective ministries and legislative committees" (Bernitz 2000: 34), such as the Nordic Committee of Senior Officials for Legislative Issues (NÄL) (Blomstrand 2000: 63). These efforts led to agreement in the early 20th century on uniform legal texts in core areas of private law, such as contract and family law (Blomstrand 2000). "General conformity" has also been achieved in regard to other dimensions of the law of obligations (including tort), family law, maritime law, debt instruments, intellectual property law, bankruptcy, company law, and even citizenship law (Bernitz 2000: 34; Blomstrand 2000: 59-60).[84] And yet, such legislative cooperation, "although certainly of paramount importance, does not give the whole picture" (Bernitz 2000: 30). Thus, Nordic legal cooperation encompasses not only "purely legislative issues," but also addresses itself to the administration of justice in the civil and criminal justice sectors.[85]

Nordic legal cooperation continues, despite considerable soul-searching since the mid-1990s, when Finland and Sweden joined Denmark in the EU. While the "golden age" of Nordic legal cooperation in the 1950s and 1960s is long past (Bernitz 2000: 40), and the "remaining space left for legal cooperation in 'reserved' areas outside the European scope of collaboration" steadily shrinks (id. at 30), Nordic legal cooperation is far from dead. Indeed, it remains at the center of regular ongoing meetings and conversation, as one of the core duties undertaken by Nordic Council countries in the 1962 Helsinki Treaty, and proposals to redefine its mission and revitalize the process abound.

The aim of this historical overview has not been to argue for the ongoing viability or importance of Nordic legal cooperation, but rather to sketch the extent and nature of its practices. The Nordic countries have long-standing, deep traditions of legal cooperation, which encompass some of the fields that now fall within the scope of Europeanized civil justice. Yet even the most

dramatic legal innovations in the EU appear more modest when viewed in the light of their Nordic predecessors.

In contrast to the Benelux countries, Nordic Council members focused more on unifying substantive private law than on procedure and private international law, though issues related to recognition and enforcement – in civil as well as criminal law – have been on the Nordic agenda since the 1962 Helsinki Treaty. What these two subregions share in common is the fact that both pioneered various dimensions of civil justice cooperation long before these issues reached the EU's agenda. Moreover, the traditions of subregional cooperation in both Benelux and Nordic states plays a significant role in the context of European integration. These traditions play a role in the EU case studies examined in Part III below (Chapters 6, 7, and 8), as well as in my argument (Chapter 9 below).

2.2.4 The Storme Commission

The last pan-European initiative to be examined here is the work of the so-called Storme Commission in the 1980s. Unlike the Council of Europe, Benelux or Nordic Cooperation, the Storme Commission represents the initiative of a single man with a mission, Belgian law professor Marcel Storme († 2018). Even before conceiving his plan to draft a European procedural (judicial) code for adoption by EEC (now EU) Member States, Professor Storme was an active member of the International Association of Procedural Law, which had been launched in Florence, Italy, in 1948. He organized the first World Congress on Procedural Law, which was held in Ghent, Belgium, in 1976 and brought together more than 300 participants from over 50 countries. On the heels of this success, Storme sought collaborators and some form of official backing for his plan to draft a European procedural (judicial) code. Although these efforts never came to fruition, Storme remained a prominent member of the academic community, where he served as president of the International Association of Procedural Law from 1995 until 2007, and is celebrated today as the father of Europeanized civil justice, despite the lack of any direct causal link between the work of his Commission for the Approximation of Procedural Law in Europe (Storme Commission) and the EU's communitarization of civil justice issues in the late 1990s.

On his own initiative in 1987, Professor Storme convened a group of twelve specialists in procedural law, one from each of the then Member States. At that stage, he had no official backing beyond "some informal encouragement from a few European officials" (Jolowicz 2002: 727). After presenting a memorandum on the need for a European code of civil procedure to the EEC Commission in 1988, the Storme Commission received a fixed-term contract which "gave the working group some standing with the Commission and some funding, but not enough to provide a permanent secretariat or even qualified translators. A representative of the Commission usually attended meetings, but the group operated ... more or less as a private organization. Its members were not appointed by their respective governments or by the Commission, but became members by invitation. The group met, on average, three times per year for several days" (id. at 727). Harlow (2000: 3) refers to the Storme Commission as a "semi-official body set up under the sponsorship of the European Parliament."

The final report of the Storme Commission was presented to the EU Commission in March 1993 and subsequently published as an independent study in 1994 (Storme 1994). The report contained a general introduction and an explanatory memorandum, and elaborated a number of discrete procedural topics as to which sufficient agreement was reached among members of the Storme Commission,[86] including formulation of claims, the development of

evidence, and the decision procedure (Hazard & Taruffo 1997). The rules proposed are "limited in scope, and leave much to national law. Their harmonization focuses on the most pressing points of procedural friction between systems – points ... that involve nonsystemic and independent aspects of procedure" (Clermont 2004: 13).

After its release, the report of the Storme Commission generated some critical discussion (e.g., Lindblom 1997), which focused on the complexities of partial harmonization and the interaction between harmonized and non-harmonized rules (van Rhee & Verkerk 2006: 130), as well as on the feasibility of bridging the apparent divide between adversarial and inquisitorial procedures (Harlow 2000: 3). Jolowicz (2002: 727) has labeled the project "over-ambitious" and noted that even some members of the Storme Commission itself "had doubts" about its viability, despite Professor Storme's optimism.

In the end, no action was ever taken by the EU to implement the Storme Commission's recommendations, and a prominent scholar has expressed doubt as to "whether the drafts ... have had any practical results" (Jolowicz 2002: 729). Later scholars have taken note of the work of the Storme Commission, arguing that they were "well reasoned and accordingly instructive" (Clermont 2004: 13). Professors Hazard and Taruffo (1997) explicitly referred to the Storme Commission report as a "standard reference in the comparative study of civil procedure," adding that they intended to "adopt a number of formulations" for their international ALI/UNIDROIT project. Still, in the end, the work of the Storme Commission was largely an academic exercise that generated no concrete results, although it did lay intellectual foundations for some of the contemporary legislation in the burgeoning field of European (as well as transnational) civil procedure law.

2.2.5 The Lando Commission

Danish law professor Ole Lando was inspired to begin work towards a European code of obligations by a remark made to him over dinner in 1974 (Lando 1997: 103-4). His initial plan "was not well received in government circles," and his early effort to secure funding from the EEC Commission for the work of his project was unsuccessful; he understood that the officials "regarded [him] as a dreamer" and told him that "Europe is not ripe for such an enterprise" (id. at 104). Lando was persistent, however, and founded the Commission on European Contract Law (popularly known as the 'Lando Commission') in 1976, with the aim of drafting Principles of European Contract Law (PECL). He gathered like-minded experts, primarily legal academics, among them Ulrich Drobnig, a director of the Max-Planck-Institute for Comparative and Private International Law in Hamburg, with whom Lando had studied at the University in Michigan in 1955, which is the same year that Eric Stein came to Ann Arbor as a professor of law. Lando ultimately managed to obtain funding for the work of his Commission from the Commission Legal Service beginning in 1982 (Hesselink 2001: 8; Nottage 2004: 173), during the period (1977-1987) when the Director-General of the Commission Legal Service was Claus-Dieter Ehlermann, who had also been at the University of Michigan in 1955. The Lando Commission commenced work, and ultimately produced a Restatement-like set of general rules for contracts in three parts between 1995 and 2003.

2.2.6 Some Concluding Remarks on Regional Dynamics

It is worth noting that the *non-EU* regional and subregional dynamics surveyed here are in some sense the mirror image of what was seen at the international level in the same period. In

this narrower European context, the overarching type of initiative is vastly more potent and dynamic than in the global setting. Yet, at the same time, efforts to achieve differentiated regional or subregional instruments to address civil justice issues have largely failed, at least outside the EU and Nordic frameworks.

2.3 National Reforms

The growing number of global, regional and subregional initiatives addressing civil justice issues has been *parallel to*, rather than in lieu of national-level reforms. Transnational initiatives complement, but do not replace national governance in this field. Indeed, the late twentieth century has been aptly characterized as an "age of procedural reform" (Jolowicz 2002: 724; see also Hazard 1998: 495; van Rhee & Verkerk 2006: 125-8).

The EU-level civil justice developments in the late 1990s, which this dissertation seeks to explain, have largely coincided with major national civil procedure reforms in a number of European countries and elsewhere in the world. This coincidence raises the question whether there is any causal relationship between developments in the transnational and national realms. While a full exposé of the details of national reforms in EU Member States is beyond the scope of this dissertation, some observations are noted here in order to sharpen the contrast between developments in the transnational and national realms, and to lay a foundation for the causal analysis that follows in Part III of this dissertation.[87]

The list of EU Member States that have undertaken significant civil justice reforms in recent decades is not limited to those countries undergoing root-and-branch transformation, as they transition from state socialism to capitalism, but also includes long-standing European democracies. For example, the United Kingdom commenced an overhaul of its civil justice system in 1985, which led to the Interim (1995) and Final (1996) Woolf Reports to the Lord Chancellor calling for system-wide reforms, and culminated in the adoption in 1999 of new Civil Procedure Rules (Andrews 2003). However, procedural reform during this period is by no means limited to Europe. For example, Japan's new Code of Civil Procedure was adopted in 1996 and entered into force in 1998 (Hasebe 1999). Reform efforts during this same period can also be found throughout Latin America and the Caribbean, the United States, Canada, Australia, and Hong Kong.[88]

Zuckerman is not alone in perceiving a civil litigation "crisis" in many countries, though systematic inquiries into the precise nature and causes of the perceived global crisis are less frequent. While academic authors often emphasize an overall explosion in civil litigation (Cadiet 1999: 291; Zuckerman 1999: 42), the British Master of the Rolls, who was charged in 1994 with the task of preparing a report on access to justice in the United Kingdom, focused more narrowly on the problems of excessive cost, delay, unpredictability, and complexity (Interim Woolf Report 1995: chapter 3).

Despite the global nature of the trend and the similarity of the problems sought to be remedied, "procedure reform has been largely a nationalist activity" in Europe, where "overt borrowing has played little part in the formulation of new ... rules" (Jolowicz 2002: 724). The types of solutions vary widely and cannot be detailed here, except to note that they range from modifying the rules of civil procedure, to reorganizing the court system, to trying to change procedural culture (van Rhee & Verkerk 2006: 125). This "truly global trend to reform the administration of civil justice" (Zuckerman 1999: v) has been accompanied by an accelerated trend towards creating specialized institutions to handle a growing number of increasingly

differentiated legal tasks, including those adapted to handling cross-border claims, such as in the transnational EU arena.

2.4 Conclusions

Overall, Chapter 2 paints a picture of sustained efforts towards transnational harmonization over a period of nearly a century, with relatively few concrete successes to justify the investment of public resources or reward the experts who labored in these arcane legal fields. The pace of such cross-border developments accelerated dramatically in the 1990s, at the same time as a wave of national reform swept across the legal landscape in Europe and beyond. The EU developments that are the focus of this dissertation must be viewed in this larger context.

Endnotes to II.1, II.2, and Chapter 2

1. 1999 is the key date for the purposes of this dissertation, since the 1997 Amsterdam Treaty entered into force in May 1999 and the Tampere Summit took place in October 1999. These two events are the case studies examined in Part III of this dissertation.

2. "Judicial cooperation in civil matters" has its origins in the 1992 Maastricht Treaty, which is discussed in Chapter 3 below. Its current parameters are elaborated in Chapters 3 and 5 below.

3. The corresponding (somewhat archaic) terms 'adjective' or 'adjectival law' are synonyms.

4. In principle these are separate and discrete areas of the law, but the distinction does not always hold. In a classic statement about the English common law system, Maitland asserted that substantive law is "secreted in the interstices of procedural law" (Maitland et al. 1936: 2). Another difficulty with the distinction is that an issue may be viewed as procedural in one legal system but substantive in another (e.g., statutes of limitations). For a discussion in the context of EU law, see Illmer (2009). The dichotomy plays a crucial (and contested) role in the U.S. legal order, particularly in connection with the *Erie* doctrine, which pertains to the power of federal courts to apply federal in lieu of state law (e.g., Hendricks 2011).

5. One of the major debates in the discussions surrounding the proposal for a European Civil Code concerns the proper legal basis for such a measure (Hesselink 2004 & 2006; Mak 2011: 344-6; Rutgers 2011).

6. Similarly, the term 'criminal justice' is increasingly found in official EU documents dealing with the penal law counterpart to 'civil justice,' which per treaty is officially labeled "judicial cooperation in criminal matters" (TFEU art. 82, ex EU Treaty art. 31).

7. Another synonym for these two terms is 'international private law,' which is simply an alternate English translation of the terms used in European civil law systems, for example, *derecho internacional privado*; *direito internacional privado*; *diritto internazionale privato*; *drept internaţional privat*; *droit international privé*; *internationaal privaatrecht*; *international privatret*; *internationales Privatrecht*; *internationell privaträtt*; *nemzetközi magánjog*, *kansainvälinen yksityisoikeus*.

8. There are many signs that this distinction is eroding, at least in the EU context. A prominent new journal in the UK, for instance, is the *Journal of Private International Law*, and many British authors use this term in their writings. See, for example, Dickinson (2005) ("European Private International Law: Embracing New Horizons or Mourning the Past?").

9. As a matter of fact, this field of law is both domestic and international, depending on the setting. Thus, for example, the question whether a court sitting in California should apply California or Illinois law to a case that comes before it is a *domestic* conflict of laws within the U.S. federal legal system, whereas a court in Germany asked to decide whether to apply German or Finnish law is facing an *international* conflict of laws. Although Germany is a federal state, a court in Germany would not be faced with the question whether to apply the contract law of Berlin or of Bremen in a contract dispute, since there is just one (national) substantive law of obligations in Germany.

10. For example, if a contract that was signed in one country between nationals of another country and involves performance in a third country, a court asked to decide a case arising out of a contract dispute would have to decide which of the three countries' laws to apply to the issues that arise in the case. Similarly, if a tort is committed by a national of one country while on holiday in a second country, and causes harm to a person from a third country, a court asked to decide whether the injured party can recover damages from the tortfeasor would face similar questions about which countries' laws to apply to the issues in the case before it. To take a third example, if husband and wife have different nationalities, marry in a third country, and live and raise a family in a fourth country, which countries' laws govern the issues of divorce, property settlement, and child custody? These examples suggest that the more people and their activities cross borders, the harder it becomes for courts to ascertain which law governs issues that arise in a single case.

11. For simplicity's sake, I will henceforth only use the term 'private international law' and avoid further reference to 'conflict of laws,' except where quoted in cited sources.

12. For example, the author of an important early contribution to the field (Storskrubb 2008) applied the label 'Civil Procedure' to Article 65 of the EC Treaty, but then excluded the issues of choice of law – i.e., conflict or laws or private international law *sensu stricto* – from the scope of her analysis.

13. This is a common technique in efforts to harmonize or unify law, and is not limited to the EU context. Drafters of international instruments generally try to use descriptive 'lay' terminology that is not pre-loaded with meaning linked to a particular legal system.

14. The term 'EC Treaty' as used here refers to the original 1957 Treaty Establishing the European Economic Community (Rome Treaty), as it has been amended and renamed over the years since it entered into force in 1958, and until it was renamed the Treaty on the Functioning of the EU (TFEU) in 2009. Prior to the Amsterdam Treaty, the EC Treaty was named the EEC Treaty (i.e., the Treaty Establishing the European Economic Community).

15. The English-language version of Article 65 of the EC Treaty refers to measures "(a) improving and simplifying the system for cross-border service of judicial and extra-judicial documents; [and] co-operation in the taking of evidence; ... ."

16. The English-language version of Article 65 of the EC Treaty refers to measures "(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws ... ." The French-language version uses the term "*conflit de lois*" and the German-language version "*Kollisionsnormen*", which makes clear that the narrow meaning of the term – i.e., choice of law – is intended here, and not the broad meaning.

17. The English-language version of Article 65 of the EC Treaty refers to measures "(b) promoting the compatibility of the rules applicable in the Member States concerning ... jurisdiction."

18. The English-language version of Article 65 of the EC Treaty refers to measures "(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States."

19. The English-language version of Article 65 of the EC Treaty refers to measures "(a) improving and simplifying the ... recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases."

20. Article IV Section 1 of the U.S. Constitution states: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

21. I speak here of conceptual limits, rather than geographical ones, although the latter are also significant in the context of Europeanized civil justice, but not pertinent to this discussion. Both Denmark and the United Kingdom objected to the communitarization of Title IV issues during the negotiations leading up to the 1997 Amsterdam Treaty, and both secured opt-outs. Thus, any measure adopted under Article 65 of the EC Treaty (now TFEU art. 81) does not automatically apply to Denmark or the UK (Monar 2010c: 280-2; Tekin 2012). The UK and Ireland may opt in and participate in AFSJ measures. In some cases, the UK announced its intention to be bound by such measures early enough to allow it to participate in the legislative process.

22. Except where otherwise noted, the analysis presented in this section reflects the state of the law as of March 2018.

23. Given that the EU consists of 28 Member States, since Croatian accession in July 2013, it is impossible to consider national-level developments in all of them.

24. Asser, who was a professor at the University of Amsterdam for over 30 years, was co-founder of the *Revue de droit international et de législation comparée* (1868), and shared the Nobel Peace Price (1911) with A.H. Fried for their efforts to establish the Permanent Court of Arbitration during the first Hague Peace Conference in 1899.

25. The Organization of American States (OAS) dates back to the First International Conference of American States (1889-90).

26. The Hague Conference was reconvened in 1951 and became a permanent intergovernmental organization in 1955. By contrast, another major player on the unification scene – UNIDROIT, the Rome-based International Institute for the Unification of Private Law – was established in 1926 as an auxiliary organ of the League of Nations, and re-established in 1940 after the demise of the League.

27. Before there was a European Union, there were three communities: the European Coal and Steel Community (ECSC), the European Atomic Energy Community (Euratom), and the European Economic Community (EEC). The ECSC expired in 2002, while Euratom and the EEC – later renamed the European Community (EC) – have been fully superceded by and absorbed into the EU, by virtue of the Lisbon Treaty (effective December 2009).

28. Its members consist of "82 States and 1 Regional Economic Integration Organisation." Members, Hague Conference Website, *available at* https://www.hcch.net/en/states/hcch-members (visited 18 July 2018). Virtually all former West and East European countries are members of the Hague Conference. By way of illustrating the range of countries participating in its work today: Turkey joined the Hague Conference in 1955; Japan in 1957; Egypt in 1961; Israel and the United States in 1964; Canada in 1968; Mexico in 1986; China in 1987; Morocco in 1993; Brazil, Jordan and Russia in 2001; Malaysia, New Zealand and South Africa in 2002; Ukraine in 2003; Paraguay in 2005; India in 2008; Philippines in 2010; Costa Rica and Mauritius in 2011; Burkina Faso, Viet Nam and Zambia in 2013; Azerbaijan and Singapore in 2014; Andorra and Armenia in 2015; and Saudi Arabia and Moldova in 2016.

29. Statute of the Hague Conference on Private International Law, art. 1. The Statute was adopted during the Seventh Session of the Hague Conference on Private International Law on 31 October 1951, and entered into force on 15 July 1955. Amendments were adopted during the Twentieth Session on 30 June 2005 (Final Act, C), approved by Members on 30 September 2006, and entered into force on 1 January 2007.

30. Overview, Hague Conference Website, *available at* https://www.hcch.net/en/about (visited 18 July 2018).

31. Vision & Mission, Hague Conference Website, *available at* https://www.hcch.net/en/about/vision-and-mission (visited 18 July 2018).

32. None of the pre-1945 conventions appear to be currently in force, though in some instances their provisions have been incorporated into more modern post-World War II texts. For this reason, they are excluded from the calculation, which is based on the status of conventions as of March 2018.

33. For example, all 28 EU Member States have adopted the 1980 Hague Convention on the Civil Aspects of International Child Abduction, along with more than 50 other countries.

34. On the failure of the ambitious effort to achieve a world-wide convention on jurisdiction and on recognition and enforcement of judgments in civil and commercial actions, see, e.g., Yackee (2003), Calliess (2004), Oestreicher (2008). The Hague Conference relaunched discussions on a global judgments convention in 2012, and a new Draft Convention was announced in 2018, along with plans for a Diplomatic Conference in 2019. The Judgments Project, Hague Conference Website, *available at* https://www.hcch.net/en/projects/legislative-projects/judgments (visited 18 July 2018).

35. The First Optional Protocol entered into force on 23 March 1976. For those 116 countries that have bound themselves to it, the Human Rights Committee functions as a mechanism for the international redress of human rights abuses, similar to the regional mechanism of the European Court of Human Rights, which is discussed in section 2.2 of this chapter.

36. UNIDROIT was re-established in 1940, after the demise of the League of Nations.

37. UNIDROIT Website, *available at* https://www.unidroit.org/about-unidroit/overview (visited 18 July 2018).

38. Another significant difference is that UNIDROIT has been more innovative, methodologically speaking, and has supplemented the use of traditional 'hard' conventions with a variety of 'soft' instruments, notably model laws, legal guides, and general principles addressed directly to judges, arbitrators and contracting parties.

39. Another UNIDROIT initiative that has civil justice implications is the 1973 Convention providing a Uniform Law on the Form of an International Will (Washington Convention), which entered into force in 1978.

40. Both the 1964 Convention relating to a Uniform Law on the International Sale of Goods and the 1964 Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods were adopted by seven European countries, plus Israel and Gambia, but were subsequently repudiated by five of the European countries.

41. Belgium, Germany, Italy, and the Netherlands joined UNIDROIT in 1940, while France joined in 1948, and Luxembourg in 1951.

42. Notably, the Convention between Belgium and France on jurisdiction and the validity and enforcement of judgments, arbitration awards and authentic instruments, signed at Paris on 8 July 1899; the Convention between Belgium and the Netherlands on jurisdiction, bankruptcy, and the validity and enforcement of judgments, arbitration awards and authentic instruments, signed at Brussels on 28 March 1925; the Convention between France and Italy on the enforcement of judgments in civil and commercial matters, signed at Rome on 3 June 1930; and the Convention between Germany and Italy on the recognition and enforcement of judgments in civil and commercial matters, signed at Rome on 9 March 1936.

43. The particular and unique types of measure that are found within the EU legal order, on the other hand, are examined in Chapters 3, 4, and 5 below.

44. The Council of the EU (formerly known as the Council of Ministers) and the European Council are both organs of the EU.

45. History, Council of Europe Website, *available at* https://www.coe.int/en/web/language-policy/history (visited 18 July 2018). The most recent statement of political objectives is contained in the Warsaw Declaration, which was produced at the Third Summit of the Member States of the Council of Europe (16-17 May 2005).

46. Article 6 of the European Convention on Human Rights also covers criminal trials, but discussion of this issue is beyond the scope of my dissertation.

47. Today, Article 6 is applied and interpreted primarily by the European Court of Human Rights, but in the past some decisions were rendered by the European Commission on Human Rights (Mole & Harby 2006). It may also be applied directly by the courts of some members of the Council of Europe, such as in Austria (Öhlinger 1990).

48. The Council of Europe is active *inter alia* in the fields of democratic and political affairs; education, culture and heritage, and youth and sport; and social cohesion.

49. Prior to reorganization in October 2011, this body was known as the Directorate General of Human Rights and Legal Affairs (DG-HL).

50. European Convention on Mutual Assistance in Criminal Matters, CETS No. 030 (Strasbourg, 20 April 1959); European Convention on the International Validity of Criminal Judgments, CETS No. 070 (The Hague, 28 May 1970); European Convention on the Transfer of Proceedings in Criminal Matters, CETS No. 073 (Strasbourg, 15 May 1972); Convention on the Transfer of Sentenced Persons, CETS No. 112 (Strasbourg, 21 March 1983);

European Convention on the Compensation of Victims of Violent Crimes, CETS No. 116 (Strasbourg, 24 November 1983); Convention on Cybercrime, CETS 185 (Budapest, 23 November 2001). Technically speaking, the 1983 Convention deals with civil law compensation for criminal acts.

51. European Convention on the Service Abroad of Documents relating to Administrative Matters, CETS No. 094 (Strasbourg, 24 November 1977); European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters, CETS No. 100 (Strasbourg, 15 March 1978); Convention on Mutual Administrative Assistance in Tax Matters, CETS No. 127 (Strasbourg, 25 January 1988).

52. Convention on Insider Trading, CETS No. 130 (Strasbourg, 20 April 1989); Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, CETS No. 141 (Strasbourg, 8 November 1990); Criminal Law Convention on Corruption, CETS No. 173 (27 January 1999); Civil Law Convention on Corruption, CETS No. 174 (Strasbourg, 4 November 1999); Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, CETS 198 (Warsaw, 16 May 2005).

53. European Convention on the Adoption of Children, CETS No. 058 (Strasbourg, 24 April 1967); European Convention on the Repatriation of Minors, CETS No. 071 (The Hague, 28 May 1970); European Convention on the Legal Status of Children born out of Wedlock, CETS No. 085 (Strasbourg, 15 October 1975); European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, CETS No. 105 (Luxembourg, 20 May 1980); European Convention on the Exercise of Children's Rights, CETS No. 160 (Strasbourg, 25 January 1996); Convention on Contact concerning Children, CETS 192 (Strasbourg, 15 May 2003); Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, CETS 201 (Lanzarote, 25 October 2007).

54. European Convention providing a Uniform Law on Arbitration, CETS No. 056 (Strasbourg, 20 January 1966).

55. European Convention on Foreign Money Liabilities, CETS No. 060 (Paris, 11 December 1967); European Convention on the Place of Payment of Money Liabilities, CETS No. 075 (Basel, 16 May 1972).

56. European Convention on Certain International Aspects of Bankruptcy, CETS No. 136 (Istanbul, 5 June 1990).

57. European Convention on Information on Foreign Law, CETS No. 062 (London, 7 June 1968); European Convention on the Calculation of Time-Limits, CETS No. 076 (Basel, 16 May 1972).

58. Convention on the Establishment of a Scheme of Registration of Wills, CETS No. 077 (Basel, 16 May 1972).

59. European Agreement on the Transmission of Applications for Legal Aid, CETS No. 092 (Strasbourg, 27 January 1977).

60. Belgium gained independence in 1830, whereas the personal union between Luxembourg and the Netherlands remained intact until 1890. The Kingdom of itself had been created by the 1815 Congress of Vienna.

61. The Belgian-Luxembourg Economic Union (BLEU) remains in existence. It was amended in Brussels on 18 December 2002 and approved by the Law of 27 May 2004 (Gazette A no. 89 of 17.06.2004), which authorized the two countries to extend their collaboration beyond purely economic and monetary spheres. The revised Convention provides the necessary framework for enhanced political and administrative cooperation, in particular in the customs and excise, justice, citizens' security and health arenas. Luxembourg Government Website, Ministry of Foreign and European Affairs, "Regional and economic organisations and regional cooperation," *available at* https://maee.gouvernement.lu/en/directions-du-ministere/affaires-europeennes/organisations-economiques-regcoop.html (visited 22 May 2018).

62. Convention douanière néerlando-belgo-luxembourgeoise (Londres, 5 septembre 1944).

63. Treaty Establishing the Benelux Economic Union (The Hague, 3 February 1958). This Treaty makes explicit reference to key provisions of the 1957 Treaty Establishing the European Economic Community (Rome Treaty or EEC Treaty), which was signed on 25 March 1957 by the Benelux countries, France, Germany, and Italy.

64. Initially, the formal name of this body was the Benelux Interparliamentary Consultative Council. This consultative body did not have legislative authority, and decision-making within Benelux was (and remains) intergovernmental.

65. Treaty between Belgium, Luxembourg and the Netherlands concerning the establishment and the statute of a Benelux Court of Justice, signed at Brussels on 31 March 1965, in force 1 January 1974. *UNTS* no. 13176.

66. My research has not uncovered any explicit link between Frankenstein's preparatory work and the Benelux 1951 draft convention, but it is unlikely that they were completely isolated events, given the close-knit nature of the private international law academic community.

67. Luxembourg ratified this treaty in 1954, but was the only country to do so (Cheng 1990: 34; Nadelmann 1970: 406-7; Sauveplanne 1991: 18).

68. The Åland Islands, which are part of Finland, are inside the EU but subject to special rules, while the Faroe Islands and Greenland – both part of Denmark – are not formally part of the EU, but have special fisheries agreements with it. Greenland had been part of the EEC, but withdrew in the 1980s, although it remains one of the 'overseas countries and territories' that is recognized as having a 'special association' with the EU, pursuant to Articles 198-204 of the TFEU.

69. The primary source for this historical overview is the Nordic Co-operation Website, *available at* https://www.norden.org/en/fakta-om-norden-1/the-history-of-the-nordic-region (visited 20 July 2018).

70. Formally, the monetary union existed until 1924, but in fact parity broke down during World War I.

71. The Nordic Association and the Confederation of Nordic Associations, Website for Nordic Co-operation, *available at* http://www.norden.org/en/om-samarbejdet-1/organisations-and-institutions/the-nordic-association/the-nordic-association-and-the-confederation-of-nordic-associations (visited 20 July 2018).

72. Norway has twice come close to joining the EU – in 1972 and 1994 – but a narrow majority of the Norwegian population rejected membership in a referendum on both occasions. However, Norway remains closely associated with the EU through its membership in the 1994 European Economic Area (EEA), which allows Norway (along with Iceland and Liechtenstein) to participate in the EU's internal market, so long as they apply relevant EU internal market rules and regulations ('*acquis*').

73. Iceland applied for EU membership in 2009, commenced formal negotiations in 2010, and was on what looked like a fast-track to membership. However, this outcome was slowed by financial crisis and political difficulties. A planned referendum was never held, and the government dissolved its accession team in 2013, thereby suspending plans to join the EU (Pop 2013; Reuters 2014), despite ongoing popular pressure to join (Hilmarsdóttir & Bomsdorf 2014). Iceland's Foreign Minister sent a letter withdrawing the membership application in 2015, but the legal status of this act remains unclear. Election results in late 2017 produced a coalition in which not a single party called for EU membership (Gudmundsson 2017). Iceland is, however, a member of the EEA, and thus remains closely associated with the EU's internal market.

74. Bernitz (2000) provides an extensive analysis of the future challenges for Nordic cooperation posed by increasingly close integration with the EU and Council of Europe at the pan-European level of governance.

75. In 1996, the Nordic Passport Union was incorporated into the EU's Schengen Area in a legally complex way.

76. Along with the United Kingdom, Denmark and Norway first applied for EEC membership in 1961. However, President de Gaulle's opposition to UK membership also caused negotiations with Nordic aspirants to stall (Aalto 2006).

77. According to Bernitz (2000: 34), the "provisions of the Helsinki Agreement have never been incorporated into national law, and are not applied by the courts. Briefly, the decision-making mechanisms governing Nordic judicial cooperation are conspicuously weak, whereas those governing the EC's legislative activity are particularly strong."

78. Helsinki Treaty art. 39.

79. On Nordic reluctance towards judicial review, see Follesdal & Wind (2009).

80. European Free Trade Area Website, *available at* http://www.efta.int/ (visited 18 July 2018).

81. Today the EFTA Member States are Iceland, Liechtenstein, Norway and Switzerland.

82. The "Nordic Law Meeting" (or "Meetings of Nordic Jurists") is held every three years (Blomstrand 2000: 59-60).

83. "Met lov skal man land bygge."

84. Blomstrand (2000: 60-2) discusses the techniques employed by Nordic legal cooperation.

85. Nordic Legislative Co-operation Website, *available at* http://www.norden.org/en/nordic-council-of-ministers/council-of-ministers/nordic-council-of-ministers-for-legislative-affairs-mr-lag/ (visited 20 July 2018).

86. According to Jolowicz (2002: 728), the "report contains no account of the numerous topics which were studied but on which .... ultimately ... insufficient agreement ... ."

87. This question is beyond the scope of this dissertation, which seeks only to explain developments in the EU. That said, two hypotheses come to mind: first, both sets of developments are independent responses to the same external stimulus (e.g., increases in litigation brought on by globalization or the collapse of the Soviet bloc); and second, both are causally related (e.g., national reforms in Europe are a response to pressure exerted by regional courts, such as the European Court of Human Rights and its extensive civil justice jurisprudence).

88. Continuing my speculations, the fact that the phenomenon of civil justice reform is so widespread during the period I study suggests that EU developments cannot be seen in isolation from broader causal forces.

Chapter 3: Civil Justice and the EU's Legal Order from its Founding through the 2007 Lisbon Treaty

This chapter maps the doctrinal and institutional features of the EU's new civil justice field, and locates them within the EU's own historical trajectory, depicting the founding, development, and key features of the EU, with particular emphasis on the systemic nature of the evolving legal order and the position of civil justice within it. In addition, Chapter 3 introduces the first of my two case studies, namely the 1997 Treaty of Amsterdam, which opened up civil justice as a new EU policy field.

Section 3.1 of this chapter provides a brief overview of the EU's origins and treaty structure. Section 3.2 examines the position of civil justice in the EU legal order and considers the trajectory of this field prior to 1997. Section 3.3 examines the macro-level institutional changes in and after 1997, focusing on those changes relevant to the field of civil justice. In particular, it provides a detailed examination of the first of the two events that form the core of my empirical research – the 1997 Amsterdam Treaty – which communitarized civil justice by moving "judicial cooperation in civil matters" from the intergovernmental[1] realm (Third Pillar) to the supranational[2] realm (First Pillar) of Community action.[3] Section 3.4 surveys macro-level treaty changes subsequent to the 1997 Amsterdam Treaty. Finally, Section 3.5 argues that the Amsterdam Treaty was the turning point in the transformation of civil justice in the EU, and thus that sustained study of this historical event is warranted.

3.1 The EU's Legal Order Prior to the 1997 Amsterdam Treaty: The Treaty Infrastructure

In 1957, six founding Member States – Belgium, France, Germany, Italy, Luxembourg, and the Netherlands – concluded the Treaty of Rome, thereby creating the European Economic Community (EEC). The original 1957 Treaty of Rome – officially called the Treaty Establishing the European Economic Community (EEC Treaty) – comprises the core of EU law. The EEC Treaty has been amended many times since it entered into force in 1958, and its name has been changed more than once. Yet all the different labels that have been applied to this foundational document since the 1950s – the EEC Treaty, the EC (European Community) Treaty, and currently, the TFEU (Treaty on the Functioning of the European Union) – refer to the same legal core, as it has been amended from time to time.

At a meeting in Maastricht (the Netherlands) in December 1991, the EEC Member States not only agreed to amend the core treaty, but also decided to expand the scope of their integration efforts from a mere 'community' towards a more encompassing 'union.' To this end, they concluded a second foundational treaty, called the Treaty on European Union (EU Treaty).[4] The EU Treaty supplemented, but did not replace the Rome/EEC Treaty, with the result that the EU's legal infrastructure – its 'primary' or constitutional legal core – has stood on the legs of this pair of treaties since the early 1990s.[5] Like the original Rome/EEC/EC Treaty that preceded it, the EU Treaty has been amended numerous times since Maastricht, although its name has remained the same. An effort to change its name and abolish the clumsy two-treaty architecture – namely, the ill-fated 2004 Treaty Establishing a Constitution for Europe – failed. Thus, the EU Treaty retains its name, and the dual-treaty architecture remains, even after far-reaching structural changes to streamline the treaty structure were agreed in Lisbon in 2007.[6]

3.2 The Place of Civil Justice in the EU Legal Order Prior to the 1997 Amsterdam Treaty

The field of civil justice in the EU has been radically transformed since the birth of the EEC in 1958. This section examines the position of civil justice in the EU legal order and maps the trajectory of the field prior to 1997. In particular, it examines: (a) the Rome/EEC Treaty's exclusion of civil justice issues from its scope and the conclusion of parallel or 'flanking' treaties – namely, the Brussels and Rome Conventions – dealing with some civil justice issues; (b) the enforcement of Community law and the role of national civil procedure within this system; and (c) macro-level (i.e., constitutional) changes that have remodeled the EU's institutional architecture.

The field of civil justice began as a reserved domain of national sovereignty and has evolved into a domain in which the EU is not only competent to act, but has become active in often startling ways. Civil justice has become an increasingly important dimension of European integration since the birth of the EU in the early 1990s.

3.2.1 Article 220 of the Rome/EEC Treaty, the Brussels Convention, and the Rome Convention: First Approaches to Civil Justice in the EEC

The original Rome/EEC Treaty excluded civil justice issues (as the term is used here to include private international law[7] and other rules of civil procedure) from the treaty's scope and left them in the hands of the Member States (*domaine réservé*). Basedow (2000: 687) has observed that the original Treaty

> hardly took account of the legal framework of the business transactions ... it was meant to favour. It did not provide for the harmonization or unification of contract law, nor did it touch [directly] upon the issues of private international law.

To the extent the Rome/EEC Treaty mentioned such issues at all, it expressly allocated responsibility to the Member States themselves.

In language clearly resonant of the traditional intergovernmental methods of public international law, Article 220[8] of the original 1957 Rome/EEC Treaty provided that "Member States shall, so far as necessary, enter into negotiations with each other" in order to secure certain benefits for their nationals. One type of benefit expressly contemplated by Article 220 was the civil justice issue of "simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts and tribunals or of arbitral awards."[9]

By placing such issues outside the legal framework of the EEC, Article 220 implicitly recognized that the original six Member States were already addressing these pragmatic concerns in other settings, albeit not always successfully. As discussed in Chapter 2 above, some of the original six EEC Member States had concluded bilateral treaties among themselves on a variety of civil justice issues,[10] while others had pursued subregional solutions, such as within the framework of the Benelux Customs Union, which in 1948 formed a permanent committee of experts to prepare drafts containing uniform rules on matters of private and penal law. At a broader regional level, the original six EEC Member States were also among the founding members of the Strasbourg-based Council of Europe (1949), whose broad mandate eventually led to work in the civil justice field. Finally, the six original EEC Member States were also involved in the work of the Hague Conference on Private International Law, which first met in 1893 to address the international dimensions of civil justice issues.

Even today, there is no consensus on why civil justice issues were left outside (or brought

tangentially inside) the Rome/EEC Treaty framework in the 1950s. One expert has suggested that drafters left civil justice issues outside because they considered them unnecessary, or else inappropriate for inclusion due to their complexity.[11] Another expert, in contrast, argues that the drafters anticipated that private actors would become the drivers of integration through their economic activity, and hence that private international law rules would eventually be needed as a corollary to their private transactions.[12]

Whatever the reason(s) for its inclusion, Article 220 of the Rome/EEC Treaty was peculiar. The key institutional requirement it imposed was that any negotiations pursued by the Member States must be conducted outside the institutional framework of the EEC itself, relying on the traditional methods of intergovernmental relations (i.e., treaties), in lieu of using the unique legislative and institutional tools of the EEC itself. In other words, Article 220 was a treaty provision that addressed itself to issues that fell formally outside the treaty's scope. Yet despite its limitations, Article 220 was put to important use before it was ultimately repealed in 2009, when the Lisbon Treaty entered into force.

The most important achievement under Article 220 of the Rome/EEC Treaty was the 1968 Brussels Convention, which was itself a multilateral treaty establishing common rules regarding jurisdiction and the enforcement of judgments to be applied by EEC Member State courts in civil and commercial cases.[13] The Brussels Convention was something of a legal hybrid. On its face, it was a multilateral international treaty that was negotiated among EEC Member States, albeit outside the legislative framework of the supranational/Community method (as it existed at the time), as contemplated by Article 220 of the EEC Treaty.[14] Yet unlike ordinary international treaties, it possessed a quasi-Community nature in two distinct respects. First, the Brussels Convention (art. 60) stipulated that any country later joining the Community would be required to become a party to it. Thus, up until 1996, each enlargement of the EEC/EC/EU entailed accession by the new Member States to the Brussels Convention, which in turn required corresponding "adjustments" to the Brussels Convention in order to accommodate the new Member States, first in 1978 (Denmark, Ireland, and the United Kingdom), then in 1982 (Greece), in 1989 (Spain and Portugal), and again in 1996 (Austria, Finland and Sweden). Each of these occasions not only served to adapt the existing treaty structure to the presence of new Member States but also provided an opportunity for making desired amendments to the Brussels Convention, which – like enlargement itself – required consensus by all parties to the treaty. Second, a 1971 Protocol conferred jurisdiction on the European Court of Justice (ECJ) – now the Court of Justice of the EU (CJEU)[15] – to give preliminary rulings on the interpretation of the Brussels Convention in order to promote uniform interpretation. The Court was frequently called upon to interpret provisions of the Brussels Convention, which generated an extensive body of case law. While early debates questioned whether the Brussels Convention should be interpreted according to traditional public international law precepts, it became assimilated to Community law over time (Kennett 2000: 5). The Brussels Convention was thus 'of' the EU, though not wholly 'in' it.

Despite its *sui generis* nature, the Brussels Convention came to be regarded as the "most significant instrument for judicial cooperation in Europe" (id.). Indeed, it was so successful that the EU extended it (beginning in the late 1980s) by means of a parallel treaty – the 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention) – to include a number of non-EU countries.[16] Despite skepticism on the part of some experts,[17] the dominant view was that "the Brussels Convention and the Lugano

Convention that has followed in its wake are the most successful of the last century in the realm of international procedural law" (Geimer 2002: 19). So convinced was the EU of its merits, that the EU pushed the Brussels Convention format in the 1990s as a model for a global treaty on jurisdiction and judgements in the context of negotiations in the Hague Conference of Private International Law.

EU Member States concluded two additional treaties pursuant to Article 220, one dealing with the recognition of companies (1968 Convention on the Mutual Recognition of Companies), and the other with insolvency (1996 Convention on Insolvency Proceedings). However, neither of these treaties was ever ratified by a sufficient number of countries, and thus neither has ever entered into force.

In the field of conflict of laws – which is a core component of private international law – the EC/EU became increasingly active after the 1980s, though not always with satisfactory results. In one major initiative, the EEC Member States concluded a treaty in 1980 creating common choice-of-law rules to be applied by Member State courts to contractual issues in civil and commercial cases, called the Rome Convention on the Law Applicable to Contractual Obligations (1980 Rome Convention). The EEC Member States were in no sense obliged to take such a measure, since the hortatory language of Article 220 of the Rome/EEC Treaty did not mention conflict of laws (or private international law more generally) as fields in which cooperative benefits should be sought. This omission notwithstanding, the Member States declared in the Preamble to the Rome Convention that they were "anxious to continue ... the work of unification of law which has already been done within the Community, in particular in the field of jurisdiction and enforcement of judgments." One may well wonder, however, how "anxious" the Member States truly were, in view of the fact that the Rome Convention, which was signed in 1980, did not enter into force until 1991 after a decade of efforts to achieve ratification by a sufficient number of Member States. Even after entering into force, the Rome Convention lagged behind the Brussels Convention in terms of its integration into the European legal fold. Although the Member States had granted jurisdiction to the Court of Justice to interpret the Rome Convention as early as 1988, no such case reached it until 2008, less than a month before the death bell tolled for the Rome Convention, in the wake of the EU's communitarization of civil justice issues.[18] Moreover, the EC/EU addressed choice-of-law issues legislatively for years (Basedow 2000: 696), in the form of a growing (and some have argued unwieldy) thicket of "Community and para-Community conflict provisions" embedded in legislative measures such as in the financial services sector (Jessurun d'Oliveira 1992: 267, 280-2), despite its lack of general competence to legislate on such matters.[19]

The triumph of the Brussels Convention diverts attention from the fact that Article 220 of the Rome/EEC Treaty, together with the lack of general competence over private international law, hindered the emergence of civil justice as an EU policy field. The delays encountered in connection with the Rome Convention and the failure of the treaties on recognition of companies and insolvency illustrate some of the weaknesses of using traditional international law treaties as a regulatory mode of governance, notably those stemming from the need for unanimous multilateral agreement, and the need for national ratification of the treaty after agreement on the text has been reached. Moreover, the lack of general legislative competence over civil justice issues led the EC to adopt a haphazard patchwork of rules to address some of the conflict-of-laws and other civil justice challenges facing the Member States. The 1997 Amsterdam Treaty swept these away in one fell swoop, but brought new problems (discussed below) in its wake.

3.2.2 Enforcement of Community Law and the Role of National Civil Procedure

Unlike the private international law issues discussed above, which were traditionally viewed as appropriate subjects of international cooperation, the rules of procedural law were seen as quintessentially domestic and hence inappropriate for the European stage. This traditional view was reflected in the emerging European legal order, where EU Member States were said to possess "national procedural and remedial autonomy and competence" (Craig & de Búrca 2008: 306). For its part, the Court of Justice (ECJ/CJEU) discretely averted its gaze from procedural issues that arose in connection with the enforcement of Community law in Member State tribunals, at least initially. In its classic formulation, the Court declared that "it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law ..." in the absence of "Community rules on this subject" (*Rewe*, p. 1997).

This traditional vision of the relationship between the EU and the legal orders of its Member States – and hence of the autonomy of national legal orders – has long since vanished, as the glare of the ECJ's evolving standards for the enforcement of Community law has gradually dispelled the mist surrounding this fundamental repository of national sovereignty.[20] Judicial intrusion into the realm of Member State civil procedure has been controversial. In the earliest cases, the ECJ was cautious; it stopped short of requiring Member States to create new remedies for the enforcement of Community law, opting instead to articulate general standards by which to evaluate national procedures. However, the Court's growing body of case law examining the suitability of national procedures has steadily imposed tighter constraints on Member State procedural law, insofar as it affects the enforcement of Community law in judicial as well as administrative tribunals.

The first requirements imposed by the Court in its 1976 *Rewe* decision merely required that "equivalent" national procedures be available to enforce Community claims to those available for claims arising under national law (non-discrimination) and stated that national procedures must not make it "practically impossible" to exercise the Community rights. Subsequent developments, however, gradually undermined the "no new remedies" bulwark[21] and articulated additional and ever more demanding standards against which to measure national procedures. For example, in a leading 1984 case – *von Colson*, which involved remedies for sex discrimination in the workplace – the ECJ adopted a less deferential approach and insisted that national measures must as a general matter "guarantee real and effective judicial protection," and further insisted, quite concretely, that the remedies must be both "adequate" to compensate the damage suffered and "effective" to deter such violations of Community law in the future.

In a series of more recent cases dealing with judicial passivity – that is, the question of whether national court judges may or even must raise questions of Community law "of their own motion" even when the parties before them have not raised such questions – the Court of Justice has shown an increasingly interventionist tendency by insisting that they may do so, notwithstanding contrary provisions in national procedural law, and even on occasion that they must do so, at least where the Community right in question is a fundamental one.[22] The law in this area, according to Craig & de Búrca (2008: 328), involves a delicate balancing act in which the CJEU "often gives firm guidance on the requirements of effectiveness and equivalence," while at the same time "generally [acknowledging] the legitimacy of diverse national rules and the primary role of the national court in assessing these."

By the time European integration was jump-started in the mid-1980s, after a period of stagnation, the process of developing European procedural standards for the enforcement of Community law claims in national courts was already well underway. Still, the Community then possessed no general legislative power over civil procedure or other civil justice issues that might arise in cases before Member State courts. It took three more rounds of treaty revisions, and more than a decade, for this citadel to fall.

The focus in this historical overview now shifts away from considering various substantive dimensions of civil justice prior to the 1997 Amsterdam Treaty, to considering institutional dimensions affecting the civil justice field.

3.2.3 Macro-Level Treaty Changes Prior to the 1997 Amsterdam Treaty: Remodeling the EU's Institutional Architecture

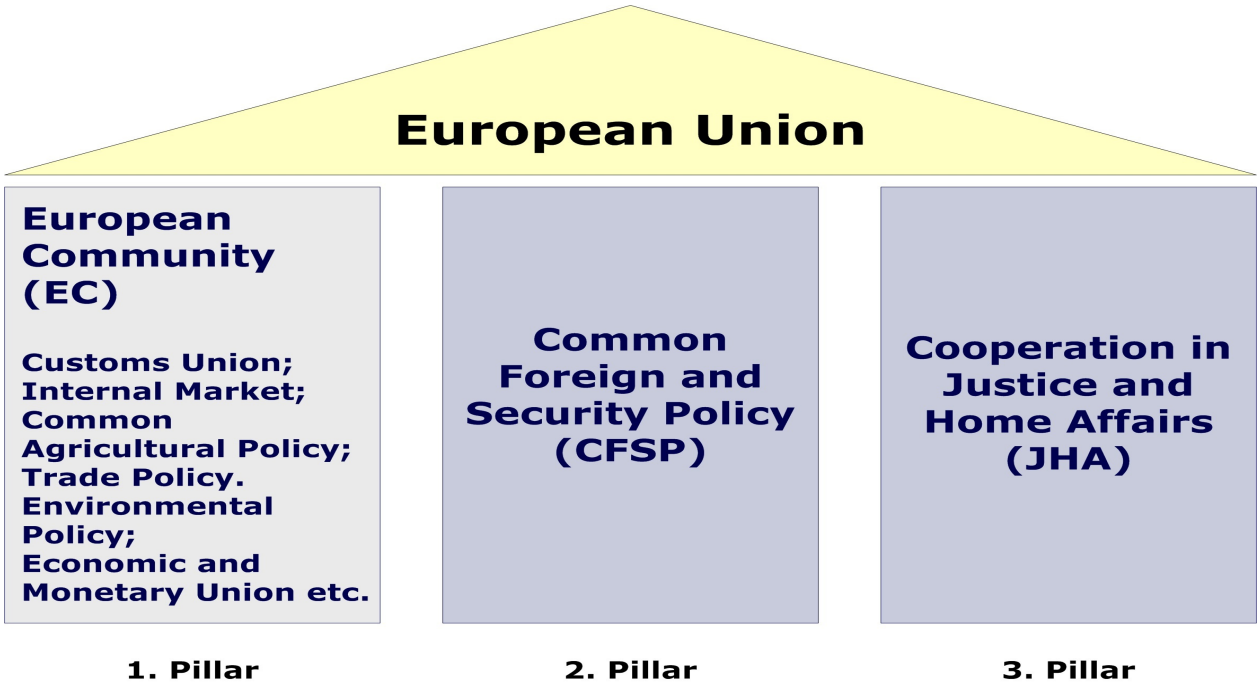
The position of civil justice in the EU was directly or indirectly affected by a series of macro-level institutional changes that resulted from amending the EU's foundational treaties. In particular, this section examines relevant changes introduced by the 1986 Single European Act and the 1992 Maastricht Treaty on European Union (TEU).

The 1986 Single European Act (SEA) was the first step towards institutional reform in regard to civil justice, albeit a very indirect step. Among other things, the SEA formally institutionalized European Political Cooperation (EPC)[23] by placing it on an intergovernmental footing parallel to – albeit largely separate from – the supranational Community (then still called the EEC).[24] Title III of the SEA contains a single provision (art. 30) that lays out principles for co-operation "in the sphere of foreign policy." While Title III made no explicit mention of judicial cooperation or other justice policy issues, an intergovernmental working party on this topic was nonetheless established in 1986.[25] The efforts of this group, which Member State representatives carried out on the periphery of activities of the Community institutions, resulted in the conclusion of three treaties relating to civil aspects of judicial cooperation: the 1987 Convention Abolishing the Legalisation of Documents in the Member States of the European Communities,[26] the 1988 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention) (subsection 3.2.1 above), and the 1990 Convention on the Simplification of Procedures for the Recovery of Maintenance Payments.[27] Despite considerable efforts invested in drafting these treaties, only one of them – the 1988 Lugano Convention, which extended the Brussels Convention framework to a handful of other European countries – obtained sufficient ratifications to enter into force. The other two – the Legalisation and Maintenance Conventions, which would have bound only the EEC countries themselves – never entered into force for lack of ratification and remained sitting on the shelf, where they continue to gather dust.

The 1986 Single European Act was quickly followed by the ambitious 1992 Maastricht Treaty on European Union (TEU), which not only amended the pre-existing Rome/EEC Treaty (and renamed it the EC Treaty) but also expanded the EU's treaty infrastructure by adding the Treaty on European Union (EU Treaty). The major structural changes made to the European architecture by the Maastricht Treaty include some that had a direct impact on the civil justice field. First, Maastricht folded the three pre-existing European Communities[28] into a single supranational European Community, which came to be known as the 'First Pillar' of the newly created European Union (EU). Second, Maastricht expanded and upgraded European Political Co-operation (EPC), as it had been introduced by the 1986 Single European Act, by formally

institutionalizing cooperation in two ostensibly new policy fields: a Common Foreign and Security Policy (the 'Second Pillar') and Cooperation in Justice and Home Affairs (the 'Third Pillar').[29] The iconic image of the pillar metaphor was provided by Guild (1998: 65), who depicted a "Greek temple with three pillars joined together by a roof, the whole of which is the European Union."

Figure 3.1



The creation of the Second and Third Pillars as component parts of the newly minted European Union implied a formal extension of EU activity into these emerging policy fields, albeit on an intergovernmental basis that was far more limited than the supranational 'Community method' available for taking decisions or adopting legislation within the First Pillar.[30] It bears repeating that neither foreign and security policy (Second Pillar) nor justice and home affairs (Third Pillar) were entirely new policy fields, since a modicum of formalized intergovernmental cooperation among Member States in these fields had begun within the EPC framework that had been institutionalized by the 1986 Single European Act.

The Third Pillar on Justice and Home Affairs (JHA) crystallized into institutional structure the practices that had emerged for cooperation in these fields (Guild 1998: 65-66; Weyembergh 2000).[31] JHA entailed a limited mandate for EU activities in nine enumerated policy fields, which were designated as being "matters of common interest" related to the free movement of persons, including among them the innocuous-sounding "judicial cooperation in civil matters."[32] In these fields, the Member States were obliged to "inform and consult one another within the Council with a view to coordinating their action," as well as to "establish collaboration between the relevant departments of their administrations" (EU Treaty art. K.3(1)).

Third Pillar decision-making remained intergovernmental, and thus firmly in Member

State hands. Unlike the supranational First Pillar, where Member States gave up their right of legislative initiative to the Commission decades ago, they retained a right of initiative in regard to Third Pillar measures. Moreover, the Third Pillar limited action to three types of *non-legislative* common action: joint positions,[33] joint actions,[34] and conventions or treaties (EU Treaty art. K.3(2)).[35] Furthermore, most decisions by the Council of Ministers required unanimity, which requirement reflects the intergovernmental nature of the Third Pillar.

Despite its formal intergovernmental nature, the Third Pillar contained an unusual procedure that foresaw the possibility of adopting *legislative* measures in some JHA fields, but the Member States never availed themselves of this option. Under the so-called 'passerelle' or 'bridge' clause (EU Treaty art. K.9), the Council, "acting unanimously on the initiative of the Commission or a Member State, may decide" to pursue a legislative harmonization measure under the First Pillar (EC Treaty art. 100) in some JHA fields, among them "judicial cooperation in civil matters." The passarelle clause made it possible, in other words, to circumvent the normal treaty revision process, in the event that the Member States might find themselves in unanimous agreement about the need to adopt a legislative measure on a civil justice matter, despite the lack of specific treaty competence to do so. The passarelle clause was never used as intended, but it was considered as an option during treaty reform debates in the late 1990s (see Chapter 7 below).

In institutional terms, Maastricht's Third Pillar foresaw a limited (albeit significant) role for the EU's institutions, which renders it something of a hybrid and prevents it from being characterized as a wholly intergovernmental policy field. First, the Maastricht Treaty deemed the Commission to be "fully associated with the work" of the Third Pillar (EU Treaty art. K.4(2)) and granted it a right of initiative in some of the policy fields (including civil justice)[36] parallel to the right retained by the Member States. As a consequence, the Commission set up a task force to address justice and home affairs issues in 1992.[37] Despite these inroads, the Commission's role in this emerging field remained much more limited than in the EU's core supranational First Pillar, where it plays a central role in the EU's legislative process. Second, the Maastricht Treaty accorded some responsibility to the European Parliament (EP) in the Third Pillar, but its role was marginal compared to its steadily growing role in the First Pillar legislative process. In particular, the EP had the right to be informed about Third Pillar activities by both the Commission and the Presidency, to consult with the Presidency on Third Pillar issues,[38] and to ask questions of, and make recommendations to the Council (EU Treaty art. K.6). In practice, however, the Parliament was generally informed after the fact (Fiorini 2008a: 972), and played virtually no role in the decision-making process. Third, the Maastricht Treaty's Third Pillar provided that the Court of Justice could be granted jurisdiction to interpret the provisions of any treaty (convention) that might emerge from Third Pillar cooperation (EU Treaty art. K.3(2)), as had occurred, after the fact, with the earlier Brussels and Rome Conventions.

Decision-making in the Maastricht Treaty's Third Pillar was far from simple, despite the fact that it was relatively unencumbered by involvement of the EP or the Commission, when compared to legislative procedures in the EU's supranational First Pillar. Indeed, the intergovernmental governance structure of the Third Pillar, as formalized in the Maastricht Treaty, was extraordinarily cumbersome. Article K4 called for the establishment of a Coordinating Committee for Third Pillar issues, which came to be known as the K4 Committee. This Coordinating (K4) Committee consisted of senior officials who had a mandate to coordinate work under the Third Pillar, prepare opinions for the Council (either at the Council's request or on its own initiative), and contribute to the preparation of the Council's discussions.[39] Third

Pillar decision-making was cumbersome because it required measures to be adopted unanimously at each of four or more different institutional levels. From the bottom up, these were the working groups (or working parties) of the K4 Committee, the K4 Committee itself, Coreper (i.e., the Committee of Permanent Representatives of the Member States),[40] and the Justice and Home Affairs Council.[41] At one point in time, a fifth level – steering groups – was also involved, but this level was eventually abolished (Fiorini 2008: 972). As later chapters will show, this unwieldy structure changed over time, and plays a role in explaining the events examined in Part III of this dissertation.

Overall, the 1992 Maastricht Treaty portended, but did not yet effectuate much overt change in the civil justice field. It made only a "partial transfer of incomplete competence" in the fields comprising the Third Pillar (Guild 1998: 87), which turned out in the end to be "rather ineffective" (Basedow 2000: 691). In terms of outcomes, the highest achievement in the field of civil justice under the Third Pillar was the conclusion of two treaties that never entered into force, since neither obtained the necessary number of ratifications, namely the Convention of 26 May 1997 on the Simplification of the Transfer of Judicial and Extrajudicial Documents in Civil and Commercial Matters, and the Convention of 28 May 1997 on Jurisdiction, Recognition and Enforcement of Decisions in Matrimonial Matters (Brussels II).

If crassly measured in terms of output in the civil justice field, the 1992 Maastricht Treaty appears to have been even less successful than the 1986 Single European Act that preceded it, insofar as the SEA produced one successful civil justice treaty – the Lugano Convention – in addition to the two that never entered into force. Yet this would be too harsh a judgment, in two respects. First, while the Brussels II Convention never entered into force, it did provide a foundation for the family law legislation that came along some years later (see Chapter 5 below). And second, the creation of the Third Pillar by the 1992 Maastricht Treaty established a firm basis for expanding common activities in regard to civil justice issues and laid the cornerstone for the dramatic Europeanization of law- and policy-making that was unleashed in 1999. Thus despite the shortcomings of the intergovernmental Third Pillar approach, Maastricht marks the definitive departure from the original model embodied in Article 220 of the Rome/EEC Treaty, which exhorted Member States to address such matters on their own time and outside the Community's formal institutional architecture.

The institutional innovations introduced by the 1986 Single European Act and the 1992 Maastricht Treaty constituted the first – albeit very tentative – steps towards Europeanizing the field of civil justice. This landscape was utterly transformed by the 1997 Amsterdam Treaty, which is explored in section 3.3 below. Yet before turning to those developments, it is worth pausing to recall the larger historical context in which these developments took place, notably the fall of the Berlin Wall in 1989 and – in 1991 – the collapse of the USSR and the outbreak of war in former Yugoslavia. These events unleashed massive social and political restructuring in Europe and placed the EU under increasing pressure in the 1990s to support post-Communist transition and admit many former East Bloc countries as EU Members. These pressures contributed to dramatic changes in the face of European integration, including the transformation of the civil justice field in the wake of the 1997 Amsterdam Treaty.

3.3 The 1997 Amsterdam Treaty and Communitarization of Civil Justice Issues

The rupture of the original model embodied in Article 220 EEC Treaty came with the 1997 Amsterdam Treaty, which articulated a new objective for European integration – "to

maintain and develop the union as an area of freedom, security and justice, in which the free movement of persons is assured"[42] – and provided many of the tools needed to achieve this goal. The most significant change, for the purposes of this study, was the Member States' decision in Amsterdam to "communitarize" (Basedow 2000) many aspects of "freedom, security and justice" by shifting them from the EU's Third to its First Pillar. This decision, which is the subject of Chapters 6 and 7 below, reflects a decision to abandon the Third Pillar's intergovernmental 'cooperative' mode in favor of the First Pillar's supranational 'integrative' mode of regional governance.

Communitarization was a selective process. The Treaty of Amsterdam communitarized not only those aspects of civil justice that are the focus here but also the fields of asylum and immigration law. In contrast, the police cooperation and judicial cooperation in criminal matters were left behind in the intergovernmental Third Pillar (EU Treaty art. 29).

With respect to civil justice, the key mechanism responsible for the shift is Article 65 of the EC Treaty, which expanded the Community (First Pillar) legislative competence to include measures "in the field of judicial co-operation in civil matters having cross-border implications,"[43] insofar as "necessary for the proper functioning of the internal market." Article 65 of the EC Treaty drew the parameters of this new field broadly to *include* the following tasks:

(a) improving and simplifying
- the system for cross-border service of judicial and extra-judicial documents,
- co-operation in taking evidence,
- the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases,

(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction; and

(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

The scope of Article 65 thus engulfs the traditional field of private international law (i.e., international judicial assistance and the conflict of laws), along with the broader field of civil procedure, subject to two important limitations. First, Article 65 empowers Community action only in regard to "measures having cross-border implications ... insofar as necessary for the proper functioning of the internal market." And second, three Member States – Denmark, Ireland, and the United Kingdom – succeeded in securing opt-outs from Community measures in the fields communitarized by the Treaty of Amsterdam.[44] These limitations aside, Article 65 made clear that the EU had crossed the Rubicon: private international law and general procedural law were no longer "national domains completely untouched by Community law" (Staudinger & Leible 2000/01: 228).

This expansion of EU competence was accompanied by changes pertaining to decision-making in the civil justice field. In this regard, the communitarization effected by the Amsterdam Treaty was only partial. The Amsterdam Treaty established new policy- and decision-making procedures for building the EU's new "Area of Freedom, Security and Justice" (AFSJ), which extended well beyond those found in the Third Pillar, but fell short of the procedures already in use in the First Pillar for other fields of Community competence. Some operational features characteristic of the intergovernmental Third Pillar tagged along into the First Pillar, thus

preserving – albeit in an altered form – the hybrid nature of the civil justice field (Kohler 1999: 8).

The main procedural features of the newly communitarized fields (including civil justice) are found in Articles 67 and 68 of the EC Treaty (Barrett 1997; Monar 1998; Basedow 2000: 692-695; Storskrubb 2008: 47-55).[45] First, during the first five years after the effective date of communitarization in May 1999, Member States continued to share the right of initiative with the Commission, as they had done in the Third Pillar. Since May 2004, however, the Commission's right of initiative became an exclusive one (EC Treaty art. 67(1)), albeit one which requires the Commission to "examine any request made by a Member State" that the Commission submit a legislative proposal to the Council (EC Treaty art. 67(2)(1)). Second, during the first five years after communitarization, the Council voted on the basis of unanimity (EC Treaty art. 67(1)), with the possibility of switching decision-making in the field to the 'normal' Community method[46] if all Member States agreed to do so (EC Treaty art. 67(2)). However, as with the passarelle clause before it, the Council never exercised this option under the Amsterdam Treaty. Third, the Amsterdam Treaty formally upgraded the European Parliament's role in the decision-making to that of consultation. However, the EP remained marginalized, notwithstanding this change.

Similarly to the partial nature of communitarization of policy- and decision-making, the Amsterdam Treaty created yet another half-way house in regard to the role of the Court of Justice. Overall, the Court gained ground in the newly communitarized (First Pillar) policy fields (including civil justice), in comparison to its highly constrained role in the Third Pillar, but this enhanced role still fell short of the Court's normal role for other (First Pillar) policy areas in some respects. One clear gain for the Court was in regard to the annulment procedure,[47] which entrusts the Court of Justice with the task of reviewing the legality of acts of the EU institutions.[48] Here, the Amsterdam Treaty aligned the treatment of the newly communitarized policy fields (including civil justice) (EC Treaty, Title IV) with other First Pillar policy areas, which represented a clear enhancement *vis-à-vis* the Court's limited role in the Third Pillar.[49] However, in connection with the crucial preliminary reference procedure, Amsterdam situated the newly communitarized AFSJ policy fields midway between the treatment of Third Pillar and other First Pillar policy fields. In particular, Amsterdam gave the ECJ the right to make preliminary rulings in the newly communitarized AFSJ fields, but severely limited the nature (and hence also the number) of Member State courts that could refer a question of interpretation or validity to the Luxembourg Court.[50] Still, this represented a major improvement of the Court's role *vis-à-vis* the 'rump' Third Pillar issues.[51] Finally, the Amsterdam Treaty empowered the Council, the Commission or any Member State (but not the European Parliament) to ask the Court to rule "on a question of interpretation" of primary EC Treaty provisions pertaining to the newly communitarized topics in Title IV, as well as of secondary "acts of the institutions of the Community based on" those primary legal provisions (EC Treaty art. 68(3)),[52] but accorded the Court no such power in regard to Third Pillar issues.

3.4 Macro-level Changes in the EU Legal Order from Amsterdam (1999) to Lisbon (2009)

By the time the 1997 Amsterdam Treaty entered into effect in May 1999, Member States were already hard at work negotiating yet another set of amendments to the EU's founding treaties. The 2001 Nice Treaty made a number of institutional changes needed to enlarge the EU to take in the twelve countries that joined in 2004[53] and 2007.[54] These changes had already been

discussed in the negotiations leading up to the Amsterdam Treaty, but no agreement could be reached in 1997. In regard to civil justice, the only pertinent change introduced by the Nice Treaty was an amendment to Article 67 of the EC Treaty, to the effect that the normal co-decision legislative procedure – including qualified majority voting in the Council – would henceforth apply to all measures provided for in Article 65 of the EC Treaty, "with the exception of aspects relating to family law," as to which unanimity continued to be required.[55] In this regard, the Nice Treaty represents a further incremental step along the road towards communitarization of civil justice issues.

Had it entered into force, the ambitious 2004 Treaty Establishing a Constitution for Europe (Constitutional Treaty) would have supplanted the pre-existing dual treaty structure and introduced many profound changes to the EU legal order, including numerous changes to the scope of activities under the "judicial cooperation in civil matters" banner (Article III-170). However, Dutch and French voters rejected this treaty in national referenda held in 2006, thereby preventing the Constitutional Treaty from receiving the ratifications needed for it to become law.

In the wake of the malaise following the failure of the Constitutional Treaty, agreement was reached on the compromise 2007 Lisbon Treaty, which entered into force in December 2009. The Lisbon Treaty introduced a great many treaty changes, among them a root-and-branch reorganization of the EU's primary law, including the abolition of the awkward pillar structure that had been introduced by the 1992 Maastricht Treaty. The Lisbon Treaty retains the dual-treaty structure, but renamed one of them, with the result that primary EU law[56] is now anchored in the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union[57] (TFEU). To the dismay and ongoing confusion of many, Lisbon also renumbered virtually every provision of the EU's two foundational treaties.

In regard to civil justice, the 2007 Lisbon Treaty contains a provision that is virtually identical to the one that was contained in the 2004 Constitutional Treaty. Lisbon introduced five substantive changes to the provisions governing civil justice as they stood after Amsterdam and Nice, beyond re-labeling Article 65 of the EC Treaty as Article 81 of the TFEU:

- First, Article 81 of the TFEU (ex EC Treaty art. 65) expands the scope of EU activities in the field of civil justice by adding a number of new arenas in which the EU is empowered to act. In particular, Lisbon added three new areas of competence to the civil justice policy field, thus further broadening the contours of Article 65 of the EC Treaty, namely: effective access to justice, the development of alternative methods of dispute settlement, and support for the training of the judiciary and judicial staff.[58]
- Second, Lisbon loosens the most constraining fetter that Amsterdam had imposed on legislative activity in the field. Recall that Article 65 of the EC Treaty limited EU action to civil justice matters "having cross-border implications ... in so far as necessary for the proper functioning of the internal market." While Article 81(1) of the TFEU continues to limit EU action to matters "having cross-border implications," Article 81(2) of the TFEU slips the 'necessity' noose by stating that the EU institutions "shall adopt measures, *particularly when necessary for the proper functioning of the internal market*" (emphasis added). The addition of the word "particularly" makes clear that this is no longer a necessary precondition to the adoption of legal measures in the field. This change makes it significantly easier for the Commission to exercise its right of initiative in the civil justice field.
- Third, Lisbon normalizes the decision-making procedure in the field of civil justice by

subjecting it to the ordinary legislative procedure per Article 289(1) of the TFEU, which is characterized by qualified majority voting (except in the field of family law, which continues to require unanimity),[59] full involvement of the European Parliament, and the Commission's right of initiative.[60]

- Fourth, the field of "judicial cooperation in civil matters" is no longer subject to special limitations on the power of the ECJ.[61]
- Fifth, Lisbon eliminated the original Article 220[62] (discussed in section 3.1 above) entirely, thereby driving the final nail into the coffin of intergovernmental cooperation in the field of civil justice and replacing it entirely with the EU's supranational method.

3.5 Summary and Conclusions

Serial amendments to the EU's basic treaties have gradually communitarized and, since the entry into force of the Lisbon Treaty, normalized EU law- and policy-making on fundamental aspects of the administration of civil justice by aligning the legislative and judicial treatment of this policy field with other core policy fields regulated by the provisions of the TFEU.[63] The changes introduced over time have been of three basic types: first and foremost, an expansion of EU competence, i.e., jurisdiction to legislate and take other authoritative actions in the expansive field that hides behind the modest official label of "judicial cooperation in civil matters"; second, procedural features connected to the EU's decision-making process; and third, institutional aspects, particularly pertaining to Court's role in the field.

Given the evolutionary nature of the changes sketched above, it bears asking at this juncture why I consider the 1997 Amsterdam Treaty to be the crucial turning point, particularly given its partial communitarization and the fact that full communitarization only occurred more than a decade later, when the Lisbon Treaty entered into force. In my view, final communitarization and institutional normalization by the Lisbon Treaty – while important to the future development of the field – were anticlimactic. The key change that unleashed the waves of new law that have inundated the civil justice field during the past two decades was the paradigm shift from the Third Pillar (intergovernmental mode), which aimed at the limited goal of adopting rules of "coordination and authorization," to the First Pillar (supranational mode), which aimed at achieving more comprehensive "genuine Community solutions," such as harmonization or common rules (i.e., unification).[64] It is this paradigm shift that calls for explanation, more than the incidental (albeit significant) changes introduced later by the Nice and Lisbon Treaties. Despite being hobbled by procedural and institutional limitations, law- and policy-making in the field of civil justice since 1999 has been frenetic and has transformed the European legal order, as detailed in Chapters 4 and 5 below.

Endnotes to Chapter 3

1. With regard to the EU, the term 'intergovernmental' represents the low end of the integration spectrum, close to traditional international relations, in which Member States act in a sovereign capacity. The 1992 Maastricht Treaty on European Union (TEU) formally institutionalized the distinction between the 'intergovernmental' and 'supranational' methods in the 'pillar' structure. Maastricht brought sensitive policy areas, such as the Common Foreign and Security Policy (Second Pillar) and Justice and Home Affairs (Third Pillar), into the EU's realm of action, but there was a minimal transfer of competence to EU institutions in these fields.

The paradigmatic intergovernmental *method* is the conclusion of binding treaties (or conventions), to which no State can be bound except by consent, and which only enters into force after a sufficient number of States have ratified or otherwise adopted the treaty. However, the EU also created a number of other non-traditional legal instruments for use in the intergovernmental pillars created by the TEU, including common positions, joint actions, and common strategies in the Second Pillar, and framework decisions and common positions in the Third Pillar. These legal instruments are weakly binding, when compared to the legislative methods used in the supranational First Pillar (described in note 2 below).

In general, the key characteristics of the EU's intergovernmental method are: first, very limited judicial review by the Court of Justice of the EU, in comparison to the scope of judicial review in the supranational First Pillar; and second, decision-making procedures that maximize each Member State's sovereignty. More concretely, the decision-making process in the intergovernmental pillars was characterized by unanimous voting requirements, a marginal (purely consultative) role for the European Parliament, and a limited role for the Commission, whose right of legislative initiative was either non-existent or at best non-exclusive in the intergovernmental realm. In other words, intergovernmental decision-making leaves most power in the hands of the Council, which consists "of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote" (EU Treaty art. 16(2)).

The 2007 Lisbon Treaty formally abolished the pillar structure, but the intergovernmental method remains for the Common Foreign and Security Policy. Remnants of this distinction also remain in the field of police and judicial cooperation in criminal matters, where special procedures exist to protect Member State prerogatives.

2. In the EU context, the term 'supranational' represents the high end of the integration spectrum, closer to the operation of centralized power in a federal State. The original 1957 Treaty Establishing the European Economic Community (Rome Treaty or EEC Treaty, later renamed EC Treaty), which is the legal foundation upon which the EU has been built, was characterized by the supranational (or 'Community') *method*, which involved a more extensive transfer or pooling of national sovereignty in the designated policy fields. The 1992 Maastricht Treaty (TEU) labeled this foundational treaty the First Pillar, in order to differentiate it from the newly established intergovernmental (and hence less integrated) Second and Third Pillars. The 2007 Lisbon Treaty formally abolished the cumbersome pillar structure, and renamed the Rome/EEC7EC Treaty once again. Since the Lisbon Treaty entered into force in 2009, this core treaty is called the Treaty on the Functioning of the European Union (TFEU).

The *methods* available for EU action in the supranational realm – i.e., most of the policy fields encompassed by the TFEU – consist of a variety of binding and non-binding measures. TFEU art. 288 states: "To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions." Regulations, directives, and decisions are binding. Regulations and directives have a legislative character, while decisions can refer both to administrative and judicial decisions. These binding legal instruments tend to have a stronger legal force within the EU legal order than the legal instruments available in the intergovernmental realm (see note 1 above), in large part because they are capable of having direct effect, which means they create actionable rights that can be enforced by (or against) public as well as private parties in the context of judicial or administrative proceedings.

In general, the key characteristics of the EU's supranational method are: first, uniform interpretation of EU law by the Court of Justice; and second, decision-making procedures that limit each Member State's sovereignty. More concretely, the supranational decision-making process for legislation (called the 'ordinary legislative procedure,' or OLP, since 2009) is characterized by the widespread use of qualified majority (rather than unanimous) voting in the Council, an active role for the European Parliament, and the Commission's near monopoly on the right of initiative. Thus, in formal terms, the supranational or Community method formally favors the Commission, whose task is to "promote the general interest of the Union" (EU Treaty art. 17(1)), and the European Parliament, which is "composed of representatives of the Union's citizens" (EU Treaty art. 14(2)), at the expense of the Council, which

represents the Member States. How things work in practice is another story.

3. Further differences between intergovernmental and supranational methods are explored in subsection 3.2.3 below.

4. The Maastricht Treaty – itself a treaty that incorporates both the new EU Treaty and amendments to the EU's pre-existing treaties – was signed on 7 February 1992. This treaty, which encountered considerable difficulties during the ratification process, finally entered into force on 1 November 1993. Confusingly, the term 'Maastricht Treaty' refers technically to the agreement reached by Member States in December 1991 for the purpose of amending the pre-existing treaties, as well as to the newly created EU Treaty, but is also used as a temporal shorthand to mean all changes introduced to the EU's foundational treaties at that time.

5. In contrast, 'secondary' EU law is based largely on *regulations*, which despite their name are the functional equivalent of federal legislation, and *directives*, a unique form of harmonizing legislation in the EU legal order, which are also of a legislative nature.

6. The Euro crisis that erupted in 2010 resulted in conclusion of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (also called the Fiscal Compact, the European Fiscal Union and the Fiscal Stability Treaty). This Treaty was signed in March 2012 by 25 out of 27 EU Member States (i.e., all but the Czech Republic and the United Kingdom), and entered into force on 1 January 2013 for the 16 Member States that had ratified by that date. In any case, this new treaty does not affect the analysis here, since it has no bearing on the civil justice issues that are the focus of this dissertation.

7. The difficulty of defining 'private international law' is explored subpart II.2 above. For the sake of convenience, the term as used here encompasses the panoply of rules governing transnational litigation, including those on the conflict of laws (i.e., rules that guide courts on the selection of the proper law(s) to govern issues in dispute), as well as those on various aspects of transnational civil procedure (i.e., the jurisdiction of courts over transnational disputes, the recognition and enforcement in one country of a judgment rendered by a foreign court, rules pertaining to gathering evidence, service of process, etc.).

8. Subsequent revisions to the EC Treaty renumbered many of its provisions, including Article 220, but that provision remained essentially unchanged in substance until it was repealed by the 2007 Lisbon Treaty. For an early study, see Drobnig (1966-67).

9. Article 220 also contemplated *inter alia* the possibility that Member States might adopt rules pertaining to "the mutual recognition of companies or firms ... , the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries ... ."

10. Notably, the Convention between Belgium and France on jurisdiction and the validity and enforcement of judgments, arbitration awards and authentic instruments, signed at Paris on 8 July 1899; the Convention between Belgium and the Netherlands on jurisdiction, bankruptcy, and the validity and enforcement of judgments, arbitration awards and authentic instruments, signed at Brussels on 28 March 1925; the Convention between France and Italy on the enforcement of judgments in civil and commercial matters, signed at Rome on 3 June 1930; and the Convention between Germany and Italy on the recognition and enforcement of judgments in civil and commercial matters, signed at Rome on 9 March 1936.

11. Kennett argues that these issues were left out of the Treaty of Rome because the "complexity of the considerations involved" led the negotiators to conclude that "secondary Community law legislation would not be appropriate" (Kennett 2000: 5) (no citations provided).

12. Professor Jürgen Basedow put this hypothesis to me at the conference "How European is European Private International Law?" in Berlin (3-4 March 2018), based on his extensive review of the drafting history of the Rome Treaty, but he has not published this supposition.

13. The Brussels Convention (art. 55) superseded pre-existing conventions among the Member States, with limi ted exceptions. In addition to those bilateral agreements listed in note 10 above, the Brussels Convention also superseded the Convention between the Federal Republic of Germany and the Kingdom of Belgium on the mutual recognition and enforcement of judgments, arbitration awards and authentic instruments in civil and commercial matters, signed at Bonn on 30 June 1958; the Convention between the Kingdom of the Netherlands and the Italian Republic on the recognition and enforcement of judgments in civil and commercial matters, signed at Rome on 17 April 1959; the Convention between the Kingdom of Belgium and the Italian Republic on the recognition and enforcement of judgments and other enforceable instruments in civil and commercial matters, signed at Rome on 6 April 1962; the Convention between the Kingdom of the Netherlands and the Federal Republic of Germany on the mutual recognition and enforcement of judgments and other enforceable instruments in civil and commercial matters, signed at The Hague on 30 August 1962; and the Treaty between Belgium, the Netherlands and Luxembourg on jurisdiction, bankruptcy, and the validity and enforcement of judgments, arbitration awards and authentic instruments, signed at Brussels on 24 November 1961.

14. The Preamble to the Brussels Convention explicitly recognized that the Brussels Convention implements Article 220 of the Rome Treaty, as amended, and that its aim was to "strengthen in the Community the legal protection of persons therein established."

15. The 2007 Lisbon Treaty renamed the European Court of Justice (ECJ) as the Court of Justice of the European Union (CJEU).

16. The 1988 Lugano Convention was created to link EFTA (European Free Trade Area) countries to the Brussels Convention regime, but it provided that other countries might also join. It is currently in force between many (but not all) EU Member States, on the one hand, and Iceland, Norway and Switzerland, on the other. The Lugano Convention was revised in March 2007, and was ratified by Norway and the EC in 2009, by Switzerland in 2010, and by Iceland in 2011. The new Lugano Convention entered into force in 2010 and binds all EC Member States (with the exception of Denmark, for reasons discussed at the end of this chapter), Iceland, Norway and Switzerland. The status of the UK post-Brexit is uncertain.

17. Not everyone believed that the EU (or EEC, as it was then known) should get involved in exporting its model to other countries. For example, a Scottish jurist argued in 1992 that the Council of Europe was already doing a fine job in regard to "regional international law" (Brown 1997: 175-80).

18. As explained in Chapter 5 below, the Rome Convention – an international law treaty – was replaced by an EU legislative measure – a regulation – in June 2008.

19. Jessurun d'Oliveira (1992: 280-2) has noted that EC harmonization measures in particular sectors, such as those pertaining to financial services, frequently include conflict of laws provisions. Basedow (2000: 696) has noted that the EC "has been active in the field of conflicts legislation for many years," despite lack of general competence to legislate on such matters.

20. Craig & de Búrca (2008: 307) suggest that "a better term than 'national procedural autonomy' is 'procedural competence' or 'primary national procedural responsibility', since the [Court's] cases clearly emphasized the responsibility of the Member States, where there are no relevant Community rules, for determining the procedural conditions under which Community rights are to be protected." For extended analyses, see Craig & de Búrca (2008: 305-43). See also de Búrca (1997); Caranta (1995); Dougan (2004); Kilpatrick, Novitz & Skidmore (2000); Lindholm (2007); van Gerven (1995).

21. See, for example, *Amministrazione delle Finanze dello Stato (Court* insisted that Member States grant a right to recover a payment that had been levied in violation of Community law); *Factortame II* (holding that English court must "set aside" the rule prohibiting the grant of an injunction against the Crown and grant interim relief in order to ensure the full effectiveness of Community law).

22. Compare *Van Schijndel* with *Océano* and *Eco Swiss*.

23. European Political Cooperation (EPC) – a term referring to foreign policy co-ordination among Member States – was first introduced in 1970 (Nuttall 1992). See the discussion in section 6.2 in Chapter 6 below.

24. Article 1 of the Single European Act provides that the "European Communities and European Political Co-operation shall have as their objective to contribute together to making concrete progress towards European unity. ... Political co-operation shall be governed by Title III [the provisions of which] confirm and supplement the procedures agreed in the Reports of Luxembourg (1970), Copenhagen (1973), London (1981), the Solemn Declaration on European Union (1983), and the practices gradually established among the Member States."

25. French Ministry of Justice, *History of European Cooperation on Justice and Home Affairs - In Five Stages, available at* http://www.justice.gouv.fr/anglais/acoopjudi.htm (visited Oct. 18, 2000). The activities of this Working Group are explored more fully in subsection 6.2.1 of Chapter 6 below.

26. The Legalisation Convention, which aimed to create "free movement of documents" among the Member States by reducing problems surrounding the use of documentary evidence in official proceedings, has only been ratified by Denmark, France and Italy, and is unlikely ever to enter into force. This Convention overlaps with two other pre-existing treaties, one prepared by the Hague Conference on Private International Law (i.e., the 1961 Convention Abolishing the Requirement of Legalisation for Foreign Public Documents) and the other by the Council of Europe (i.e., the 1968 European Convention on the Abolition of Legalisation of Documents Executed by Diplomatic or Consular Officers). As of March 2018, all 28 EU Member States were party to the multilateral Hague Convention on this subject, and 17 were party to the regional Council of Europe Convention.

27. The Maintenance Convention (also known as the 1990 Rome Convention) has not yet been ratified by a sufficient number of Member States for it to enter into effect, and it appears unlikely that it will ever do so, owing to more recent developments within the EU itself, as well as in the Hague Conference (Curry-Sumner 2008: 10-1). This field is also characterized by a number of multilateral treaties, including the 1956 New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance, to which 24 EU Member States were party as of March 2018, and the 1973 Hague Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations (which, in turn, replaced the 1958 Hague Convention concerning the Recognition and Enforcement of Decisions relating to Maintenance Obligations towards Children), to which 17 EU Member States were party as of March 2018.

28. The original three communities established in the 1950s were the European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (EURATOM). The ECSC expired in 2002.

29. See generally Bieber & Monar (1995); Denza (2002); Guild (1998); Kuijper (2005); Müller-Graff (1994); Schutte (1994); de Witte (1998).

30. While the precise details of the 'Community method' have evolved over time, the use of the term generally signals a legislative process in which the Commission has the right of initiative, decision-making is shared by the Council and the European Parliament, and most decisions are taken by qualified majority (rather than by unanimity, which characterizes the intergovernmental realm of decision-making). See generally notes 1 and 2 above.

31. Fiorini (2008: 970) claims that the Member States consulted with one another and frequently took common positions in international organizations in connection with private international law matters from the 1970s on, that is, long before the EPC was formalized by the 1986 Single European Act.

32. The other eight policy areas deemed to fall within the scope of Justice and Home Affairs were: asylum policy; rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon; immigration policy and policy regarding nationals of third countries; combating drug addiction; combating fraud on an international scale; judicial cooperation in criminal matters; customs cooperation; and police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the

organization of a Union-wide system for exchanging information within a European Police Office (Europol).

33. A "joint position" defined by the Council requires Member States to "ensure that their national policies conform to the common positions" (EU Treaty art. J.2). While technically non-binding, the legal status of joint positions was ambiguous, insofar as the Maastricht Treaty requires that "[w]ithin international organizations and at international conferences in which they take part, Member States shall defend the common positions adopted" under the Third Pillar (EU Treaty art. K.5). See generally den Boer (1996).

34. A "joint action" is defined as follows: "Whenever the Council decides on the principle of joint action, it shall lay down the specific scope, the Union's general and specific objectives in carrying out such action, if necessary its duration, and the means, procedures and conditions for its implementation" (EU Treaty art. J.3(1)). See, e.g., 1996 Joint Action - Extraterritorial Application of Third-Country Legislation.

35. The Council was encouraged to "draw up conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements" (EU Treaty art. K.3(C)).

36. Article K.3(2) of the EU Treaty denied the Commission the right of initiative only in regard to judicial cooperation in criminal matters, customs cooperation, and police cooperation.

37. DG-JHA Website, *available at* http://europa.eu.int/comm/dgs/justice_home/index_en.html (visited May 16, 2003). See also Uçarer (2001: 6).

38. For its part, the Presidency is obliged to ensure that the European Parliament's views on such issues are "duly taken into consideration" (EU Treaty art. K.6).

39. The Coordinating Committee was intended to operate "without prejudice to" the role of Coreper and the Council Secretariat, as spelled out in Article 151 of the EC Treaty, both within the Third Pillar itself and possibly also in connection with harmonization under Article 100 of the EC Treaty. The roles of these institutions, as well as the Coordinating Committee, are discussed in greater detail in Chapters 5, 6 and 7 below.

40. Coreper consists of the Member States' ambassadors to the EU ('Permanent Representatives') and is chaired by the Member State that which holds the rotating Council Presidency. Coreper "occupies a pivotal position in the EU's [supranational] decision-making system," in which it is both a "forum for dialogue (among the Permanent Representatives and between them and their respective national capitals) and a means of political control (guidance and supervision of the work of the expert groups)." *Europa Glossary*, *available at* http://eur-lex.europa.eu/summary/glossary/coreper.html (visited 7 March 2018).

41. The Justice and Home Affairs Council (JHA Council) is that configuration of the Council of the European Union (also known as the Consilium, formerly called the Council of Ministers) that acts with regard to JHA issues. The Council (or Consilium) is an institution of the EU that is composed of one representative from each Member State who is competent to discuss and decide on the particular issues brought before it. Paradoxically, the Council is "a single body, but for reasons relating to the organisation of its work, it meets – according to the subject being discussed – in different 'configurations', which are attended by the Ministers from the Member States and the European Commissioners responsible for the areas concerned." Consilium Website, *available at* http://www.consilium.europa.eu/en/council-eu/configurations/ (visited 11 July 2018). The number of Council configurations has been reduced from 22 in the 1990s to just ten since 2014, one of which is the JHA Council consisting of Justice or Interior Ministers from each Member State.

42. Article 2 of the EU Treaty (emphasis added), replacing Article B of the pre-Amsterdam EU Treaty, which included among the Union's objectives the goal of developing "close cooperation on justice and home affairs."

43. Article 61(c) of the EC Treaty provided that the Council shall adopt "measures in the field of judicial co-operation in civil matters as provided for in Article 65," while details of the decision-making process to be followed in this new field of law- and policy-making are spelled out elsewhere.

44. To be sure, their vociferous objections were to the communitarization of rules on asylum and immigration, but they opted out of "judicial co-operation in civil matters" as well, since it was part and parcel of the set of provisions added as Title IV of the EC Treaty by the Treaty of Amsterdam. See generally Storskrubb (2008: 56-8). Over time, these countries have in varying degrees gotten on board with the EU's growing body of civil justice measures.

45. Basedow (2000: 692-5) provides a thorough analysis of the complex legislative details in this area, and argues that the legislative changes introduced by the Amsterdam Treaty did not represent a dramatic advance over the pre-existing procedures for lawmaking in this field.

46. By 'normal' Community method I mean the co-decision procedure pursuant to Article 251 of the EC Treaty, which was subsequently renamed the 'ordinary legislative procedure' and renumbered (as TFEU art. 294) by the 2007 Lisbon Treaty. The method implies qualified majority voting by the Member States in the Council, full participation of the European Parliament, and a virtually exclusive right of initiative in the Commission.

47. TFEU art. 263 (ex EC Treaty art. 230).

48. Article 263 para. 2 of the TFEU (ex EC Treaty art. 230) provides that the Court "shall, for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers." Natural and legal persons also have standing to bring annulment actions in the limited cases spelled out in Article 263 para. 3 of the TFEU (ex EC Treaty art. 230). If the challenge is "well founded, [the Court] shall declare the act concerned to be void," pursuant to Article 264 of the TFEU (ex EC Treaty art. 231).

49. In contrast, the opportunity to bring an annulment action was much more limited in regard to the police and judicial cooperation in criminal law matters that the 1997 Amsterdam Treaty left behind in the Third Pillar. Article 35(6) of the EU Treaty, as it stood when the Amsterdam Treaty entered into effect in May 1999, limited the number of 'privileged plaintiffs' who had standing to bring annulment actions to the Court to Member States and the Commission, but excluded the European Parliament and individual plaintiffs from bringing such cases. See generally Peers (2006c); Hatzopoulos (2010: 156-7).

50. Article 68(1) of the EC Treaty made the preliminary reference procedure available only to courts or tribunals "against whose decisions there is no judicial remedy under national law," meaning that only Member States *courts of last resort* could invoke the procedure in regard to a matter involving judicial co-operation in civil matters. In contrast, the normal procedure under Article 234 of the EC Treaty (now TFEU art. 267) provides that Member State courts and tribunals of last resort *must*, while lower Member State courts and tribunals *may* refer questions to the CJEU. This is a serious limitation, considering the plethora of procedural details that arise at an early stage of litigation, and the inefficiency and potential unfairness of postponing resolution of such issues until after the lawsuit has run its course all the way through the Member State court system. These limitations are magnified by the fact that EU law does not permit Member State tribunals to declare an act of EU law to be invalid, which means that they would be required to apply EU law measures even if they believed them to be void (*Foto Frost*).

51. Preliminary rulings were doubly limited in the Third Pillar. According to Article 35 of the EU Treaty (as it stood when the Amsterdam Treaty entered into effect in May 1999), preliminary references could only be made from tribunals in those Member States that made a special declaration to that effect, which not all Member States did. Moreover, Article 35 of the EU Treaty only allowed the Court to interpret secondary legislation and conventions (treaties) in its preliminary rulings on Third Pillar issues, but denied the Court the power to interpret the primary law found in the Treaty provisions themselves. See Hatzopoulos (2010: 154-5).

52. However, Article 68(3) of the EC Treaty circumscribed the effects of this power, insofar as any ruling by the Court of Justice "in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become *res judicata*."

53. The countries that joined on 1 May 2004 are: Cyprus; Czech Republic, Estonia; Hungary, Malta; Latvia, Lithuania; Poland, Slovakia and Slovenia.

54. The countries that joined on 1 January 2007 are: Bulgaria and Romania.

55. 2001 Nice Treaty, Protocol on Article 67, p. 184. The unanimity requirement remains, even after the 2007 Lisbon Treaty (TFEU art. 81(3)).

56. The Charter of Fundamental Rights also has the status of primary EU law. Article 6(1) of the EU Treaty provides: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."

57. While simplistic, it is helpful to think of the TFEU as the renamed Treaty Establishing the European Community (EC Treaty), which itself comprised the 1957 Rome/EEC Treaty, as it had been amended over the years.

58. Article 81(1) of the TFEU provides that the EU "shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States." It goes on in 81(2) to explain that the "European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures ... aimed at ensuring: (a) the mutual recognition and enforcement between Member States of judgments and of 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."

59. Article 81(3) of the TFEU provides that "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. 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. The proposal referred to in the second subparagraph 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 final two sentences of this provision were not contained in Article III-170 of the 2004 Constitutional Treaty.

60. Article 289(1) of the TFEU provides: "The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294 [of the TFEU]."

61. The power of the ECJ remains limited, however, in connection with the former 'rump' Third Pillar issues of police and judicial cooperation in criminal matters, pursuant to Article 276 of the TFEU, which provides that the Court "shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security." For a thorough analysis of the profound effects of the Lisbon Treaty on the role of the (renamed) Court of Justice of the EU (CJEU), particularly in the AFSJ context, see Hatzopoulos (2010: 145), who notes that the Court "is the body whose institutional role is to benefit most from ... 'depilarisation', possibly more than that of the European Parliament."

62. The Amsterdam Treaty had renumbered Article 220 of the Rome/EEC Treaty as Article 293 of the EC Treaty.

63. As noted in note 61 above, the 'rump' Third Pillar issues of police and judicial cooperation in criminal matters, which are now found in the TFEU (i.e., the former supranational First Pillar), remain subject to institutional constraints reminiscent of the Third Pillar, even after the formal abolition of the pillar structure. As for the former Second Pillar, the EU's Common Foreign and Security Policy remains a predominantly intergovernmental policy field, and is subject to special rules found in TEU Title V, Chapter 2.

64. Mortelmans (2002: 1308-10) explains that coordination rules are primarily aimed at "coping with national rules," and have a lesser "integrative effect" than those secondary rules taking the form of "common or harmonized measures."

Chapter 4: A Macro-Level View of the EU's Civil Justice Policy Field since Communitarization by the 1997 Amsterdam Treaty

This chapter provides a macro-level view of the EU's civil justice policy field. More concretely, it traces discursive patterns and surveys institutional features in the field since the 1997 Amsterdam Treaty laid down "judicial cooperation in civil matters" as the cornerstone upon which to erect what former French President Giscard d'Estaing hoped would one day become a European Judicial Space ("*espace judiciare Européen*").[1] After the Amsterdam Treaty entered into force in May 1999, it was followed in short order by a unique summit in October 1999, at which EU leaders met in Tampere (Finland) to map out a five-year plan for developing the spanking new 'Area of Freedom, Security and Justice' (AFSJ).[2] The civil justice field, which is the focus of this dissertation, is a component part of the AFSJ. From 1999 on, the newly communitarized AFSJ field was "transformed ... into a huge 'building site' " (Weyembergh 2000). My empirical investigation of Amsterdam and Tampere in Part III of this dissertation rests on the claim that those two turning points triggered the manic development of the EU's civil justice field that are anticipated in this chapter and examined in greater detail in Chapter 5 below.[3]

The organization of this chapter proceeds as follows. First, section 4.1 addresses a number of preliminary issues, in order to facilitate the analysis that follows. Second, section 4.2 analyzes the EU's overarching discourse pertaining to civil justice, which is found primarily in key policy and financial documents. Finally, section 4.3 concludes briefly.

4.1 Preliminary Matters

4.1.1 Labels

Given wide variance in the literature on how particular labels are used and concepts bundled, and the fact that the varying approaches often conflict with one another, I pause here briefly to revisit my terminological choices. The focus here is on academic usage, in contrast to official EU usage, which is discussed in subsection 4.2.2 below. As noted earlier,[15] some authors treat 'European Private Law' as the umbrella term for the developments studied here, others use 'European (Civil) Procedure,' and still others prefer 'European Private International Law.' Not surprisingly, these choices tend to reflect a particular author's own disciplinary 'home' field or academic institutional base. Yet this terminological diversity does not mean that there is no consensus whatsoever. In fact, no one in academia still uses the official label found in the Treaty – "judicial cooperation in civil matters" – when discussing these developments, since it is clearly too narrow to capture the sweep of the EU's civil justice policy field.

I use the term 'civil justice' for three distinct reasons. First, this term does not correspond to any recognized academic specialization, thus neither reproduces peculiar national (or systemic) subdivisions, nor tries to force one legal subfield into unnatural subordination to another. Second, this is the term that the EU itself increasingly uses, as seen most prominently on the website of, as well as in the documents prepared by, the Commission's Directorate-General (DG) Justice and Consumers.[16] And third, this term resonates with the overarching concern for justice that animates the broader AFSJ project.

On occasion, I use the term 'EUstitia' as a short-hand label for the Europeanization of civil justice, because it implicates the historical roots of these EU developments.[17]

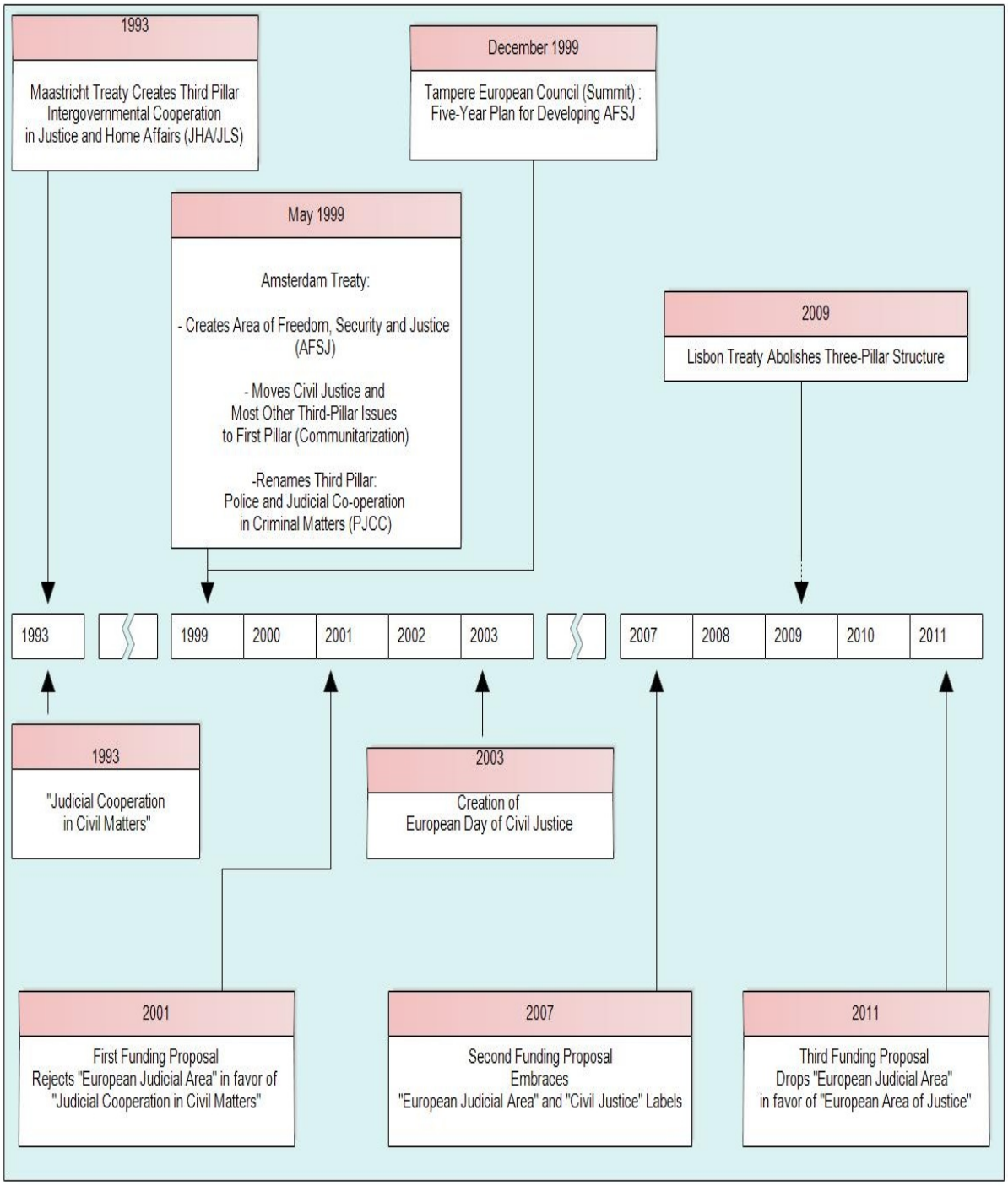
4.1.2 Scope

The current scope and content of the EU's civil justice field are defined by multiple parameters. First, as explained in Chapter 3, scope depends on the EU's formal competence, which is delineated in Article 81 of the Treaty on the Functioning of the European Union (TFEU). This base of EU competence was first staked out by the 1997 Amsterdam Treaty (effective 1999) and expanded a decade later by the 2007 Lisbon Treaty (effective 2009).[18] Second, the actual scope of the field, along with the perimeters marking its potential content, are elaborated by EU policy statements and programs. Third, scope and content are manifested by the actual exercise of the EU's competence. Finally, the Court of Justice of the European Union (CJEU) has a growing role to play in marking out the field of civil justice.[19] Figure 4.1 provides a temporal roadmap to orient the reader.

[FIGURE 4.1 ABOUT HERE]

Figure 4.1

JHA-AFSJ Time Line (through 2011)



4.2 The Discursive Dimension: The EU's Policy Statements and Programs on Civil Justice since the 1997 Amsterdam Treaty

The discursive dimension of the civil justice field, which comprises both conceptual and justificatory elaboration in policy statements and financial programs, has tended to expand the EU's aspirations in the civil justice field beyond the formal bases of competence that are spelled out in the foundational treaty language. After briefly revisiting the crucial treaty language on civil justice (subsection 4.2.1) and noting the shifting official labels that have been applied to this policy field (subsection 4.2.2), subsection 4.2.3 scrutinizes the EU's rhetoric, as a first step towards mapping the civil justice terrain.[20] The discussion here necessarily also elucidates the roles of different institutional actors within the EU, at least in a preliminary way.

4.2.1 The Treaty Language

The EU's expansionist tendencies in the civil justice field, which appear today as a *fait accompli*, were by no means inherent in the circumscribed language introduced by the 1997 Amsterdam Treaty. That language merely permitted the EU to take measures "in the field of *judicial cooperation in civil matters having cross-border implications*, *... in so far as necessary* for the proper functioning of the internal market" (EC Treaty art. 65, emphasis added).[21] To some degree, the revisions wrought a decade later by the 2007 Lisbon Treaty codify the expansive interpretation of "judicial cooperation in civil matters" that had occurred since the EU first occupied this policy field. The Lisbon Treaty, which entered into force in 2009, renumbered and amended the language of Article 65 of the EC Treaty.

The EU's current civil justice treaty provision – Article 81 of the TFEU[22] – altered the original framework created a decade earlier by the Amsterdam Treaty, in two respects. First, the Lisbon Treaty formally extended EU competence into three additional and far-reaching policy subfields: access to justice, the development of alternative methods of dispute settlement, and training for the judiciary and judicial staff. And second, the Lisbon Treaty enhanced the EU's power to legislate in the civil justice field, both by lowering the hurdle for justifying EU action and by expanding the range of tasks assigned to its institutions. Since 2009, the EU need no longer show, as a precondition to taking measures in the field, that a proposed action is "necessary for the proper functioning of the internal market,"[23] as was required pursuant to the Amsterdam Treaty (i.e., EC Treaty art. 65). Rather, Article 81 of the TFEU empowers the EU institutions[24] more broadly to "*develop* judicial cooperation in civil matters having cross-border implications," which shall include the adoption of harmonizing legislation, "*particularly when necessary* for the proper functioning of the internal market" (emphasis added). The authority conferred on the EU by this revised mandate is considerably more general in nature, in addition to being untethered from the rope of necessity. Moreover, the current treaty language ratchets up the EU's role by calling upon it to "ensure" achievement of the listed goals, in contrast to earlier treaty language, which envisioned a more modest role, along the lines of "improving and simplifying" (EC Treaty art. 65(1)) procedures in the civil justice field.

4.2.2. What's in a Name? Labels, Revisited[25]

Another *fait accompli* since 1999 is the gradual displacement[26] of the crabbed label "judicial cooperation in civil matters" – which remains even today the formal treaty basis for EU action – by more sweeping labels, such as the 'European Judicial Area' and 'civil justice.'[27] While some academic commentators embraced broad labels early on (e.g., Barrett 1997),[28]

official EU usage was slow to follow. To be sure, the Commission, whose institutional role within the EU is to "promote the general interest of the Union" (EU Treaty art. 17(1)) rather than the specific interests of the Member States, was keen from the outset to embrace more ambitious language. However, the Commission met initial resistance from the Council of the EU (formerly known as the Council of Ministers), which represents the interests of the Member States in EU legislative and budgetary decision-making.

While more ambitious language did manage to slip through the net on some important occasions,[29] it was suppressed on others. Today, the ambitious labels have become prominent in virtually all official EU sources, including the websites of, and official communications from the European Commission, the European Parliament, and the European Judicial Training Network (EJTN). However, these more sweeping labels have only recently lost their controversial edge and achieved widespread acceptance.

Funding measures in the justice field nicely illustrate both the institutional dynamic and the discursive shift. The Commission's 2001 'Proposal for a Council Regulation Establishing a General Framework for Community Activities to Facilitate the Implementation of a *European Judicial Area in Civil Matters*' (emphasis added) stated that the "overriding aim is to create a European judicial area in civil matters, where citizens have a common sense of justice throughout the Union and where justice is seen as facilitating the day-to-day life of people."[30] The Council, however, refused to go along with such broad language at that early stage and insisted on a more constrained formulation that tracked the language of Article 65 of the EC Treaty, with the result that the adopted measure was entitled 'Council Regulation 743/2002 Establishing a General Community Framework of Activities to Facilitate the Implementation of *Judicial Cooperation in Civil Matters*' (First Funding Framework) (emphasis added). Only five years later did the Council – this time acting jointly with the European Parliament – relent and use both terms – 'European Judicial Area' and 'civil justice' – in the Second Funding Framework (2007).[31] The broad vision advanced by the Commission has gradually prevailed over more circumspect visions for the EU's AFSJ, in general, and for the civil justice policy field, in particular.

The first consistent official use of the audacious term 'civil justice' appears in 2003, in conjunction with the creation of an annual event – the 'European Day of Civil Justice' – which emerged from collaboration between the EU and the Strasbourg-based Council of Europe.[32] Thus, the 'civil justice' term was first deployed instrumentally, in a bid to build legitimacy within civil society for justice-related activities at the pan-European level.[33] This usage, in turn, provided leverage for using the term in internal EU discourse. Over time, the term 'civil justice' has become firmly entrenched in EU institutional[34] discourse.

In contrast to the 'civil justice' label, which is now firmly embedded in the EU's conceptual architecture, the once so desirable label 'European Judicial Area' has suffered a different fate. The Commission appears to have abandoned this hard-fought label, in order to 'trade up' for an even broader umbrella term. The website of the Directorate-General that deals with civil justice issues[35] – formerly DG-Justice, now DG-Justice and Consumers – prominently announces the goal of building a 'European Union area of justice.'[36] Until November 2014,[37] the justice mandate was divided into four pillars: Civil Justice, Criminal Justice, Fundamental Rights and Union Citizenship, and Equality.[38] Since November 2014, the work of DG Justice and Consumers is divided into five pillars: Civil and Commercial Justice, Criminal Justice, Fundamental Rights and Rule of Law, Equality and Union Citizenship, and Consumers.

This discursive shift – from the term 'European Judicial Area,' for which the Commission fought a decade ago, to the more generic 'Area of Justice' – is also visible in the Justice Program for 2014-2020,[39] which is examined below (in subsection 4.2.3.2.5).

What might appear at first glance as either a cosmetic shift that brings the funding terminology into line with the Commission's public face presented on its website, or even as a retreat to treaty language,[40] appears on closer analysis to reflect another expansive move by the EU. The shift from 'judicial area' to 'area of justice' is indicative of an even broader conceptual scope for EU activities. The 2007 Lisbon Treaty formally added "support for the training of the judiciary and judicial staff" to the EU's remit (TFEU art. 81(2)(h)) in the civil justice field.[41] In its Justice Program for 2014-2020, the Commission has defined "judiciary and judicial staff" expansively to include "judges, prosecutors and court officers, as well as other legal practitioners associated with the judiciary, such as lawyers, notaries, bailiffs, probation officers, mediators and court interpreters" (preamble, art. 4). In view of the Commission's goal of drawing so many additional actors into the scope of EU justice activities – not least among them autonomous professional groups such as lawyers (advocates) and notaries – the formerly desirable label 'European Judicial Area' began to chafe.

4.2.3 Policy Statements and Funding Programs

This subsection looks behind the labels applied to the new policy field, and examines the evolution of the conceptual schemata underpinning "judicial cooperation in civil matters" and 'civil justice' from inception until the present. This discussion has two goals. First, it provides historical context for my second case study, the Tampere summit meeting of the European Council (Chapter 8). And second, it lends support to my claim that the events of the late 1990s, which are the focus of Part III of this dissertation, were pivotal moments in the history of civil justice in Europe.

I trace the rhetorical elaboration of Europeanized civil justice in two phases. The first phase (subsection 4.2.3.1) begins with the conclusion of the Amsterdam Treaty in June 1997 and culminates with the approval of the five-year program known as the 'Tampere Milestones' in October 1999. Since this first phase corresponds to the time period between my two case studies (see Part III below), the pictures presented here are simple snapshots; a dynamic frame-by-frame analysis of the process is reserved for the explanatory analysis in Chapters 6, 7, and 8. The second phase (subsection 4.2.3.2) corresponds to the period after the Tampere summit in October 1999 and thus falls outside the historical time frame of my explanatory study. The second phase is surveyed here nonetheless, since it substantiates my claim that the events I seek to explain did in fact transform the civil justice field.

Taken as a whole, these policy statements reveal not only the EU's blueprint for institutionalizing civil justice (along with other aspects of the AFSJ) but also the driving vision behind the startling number of new measures in this field. My modest ambition here is merely to describe developments, not to explain how they came about, which is the task of Chapters 6, 7, and 8 in Part III below.

4.2.3.1 First Phase (June 1997- October 1999): Preparing

What happened between the European Council meeting in Amsterdam on 16-17 June 1997, when the Member States successfully concluded the Intergovernmental Conference (IGC) and reached full agreement on a draft text of the Amsterdam Treaty – including the provision

transferring competence over civil justice issues to the EU[42] – and 1 May 1999, when the Amsterdam Treaty entered into force? Formally speaking, the EU's competence to legislate was on hold during this hiatus, pending the nearly two-year ratification procedure.[43]

It would be a mistake to conclude, however, that efforts to develop the EU's civil justice field were in abeyance between June 1997 and May 1999. Indeed, this hiatus constituted a crucial stage in the Europeanization of civil justice. Transition from the former (Maastricht) to the future (Amsterdam) Treaty framework did not await the moment when the Amsterdam Treaty became legally binding, but was well underway by that time. The Commission was very active during the time leading up to the moment (in May 1999) when it acquired a formal legislative role in regard to civil justice (and other AFSJ subfields). To a certain degree, the Commission's work during this period was an extension of the work it had begun after the Maastricht Treaty had drawn Justice and Home Affairs – including "judicial cooperation in civil matters" – into the EU's intergovernmental Third Pillar.

Once conceived by the Amsterdam Treaty, the AFSJ rapidly took on a life of its own, thanks largely to the Commission, the Council, the European Parliament (EP), and the Heads of State and Government of the Member States (meeting periodically as the European Council), who together articulated justifications for the AFSJ and elaborated visions of civil justice and other AFSJ policy subfields. Six policy statements on the EU's emerging "genuine European area of justice" were issued during the first phase, which can best be understood as a time of *preparing to implement* the new competences added by the Amsterdam Treaty:

- Commission Communication on Judgments (January 1998)
- European Council: Cardiff Presidency Conclusions (June 1998)
- Commission AFSJ Communication (July 1998)
- European Council: Vienna Action Plan (December 1998)[44]
- European Parliament (EP) Resolution on the Draft Action Plan (April 1999)
- European Council: Tampere Milestones (October 1999)

The Vienna Action Plan (December 1998)[45] was the sketch for a five-year plan, which the European Council – under Finnish leadership – later used as raw material when forging the Tampere Milestones (October 1999), after taking into consideration the views of the European Parliament expressed in its April 1999 Resolution on the Vienna Action Plan. Together, these foundational documents reveal not only the preliminary schematics for developing civil justice (as well as other AFSJ policy subfields), but also the driving vision behind the profusion of new measures that have been adopted since the Amsterdam Treaty entered into force. The earlier Commission Communication on Judgments (January 1998), on the other hand, was a policy paper devoted to a particular dimension of civil justice, but it, too, contains language that came to be embedded in the bedrock of the EU's civil justice field.

These early policy statements contain important articulations of the 'negative' and 'positive' integration goals to be pursued in the field of civil justice. Negative integration refers to measures that eliminate national barriers or "restraints on trade and distortions of competition," while positive integration pertains to "common European policies to shape the conditions under which markets operate" (Scharpf 1996: 15), including harmonization of law. These traditional notions are anchored in the trade of goods, and must be rethought in connection with EUstitia. Civil justice is not linked to movement of goods, but rather to free movement of

persons,[46] which is the "cornerstone of ... freedom and democracy" in the EU (EP Resolution on Freedom and Democracy 1999: ¶4). Civil justice is thus oriented towards the 'negative' liberalization goal of removing barriers to free movement of persons, but also towards the 'positive' goal of establishing "progressively an area of freedom, security and justice" (EC Treaty art. 61). This grander vision of a European legal order, as well as its key role in establishing European political order, is discernible beneath the thicket of new measures and proposals surveyed in Chapter 5 (section 5.2) below. It can be difficult to disentangle the 'positive' and 'negative' dimensions in practice, since they are conjoined in the policy documents. This is clearly illustrated by the 1998 Vienna Action Plan, which contains the first systematic statement of the "general approach and philosophy inherent in the [AFSJ] concept" (¶ I.5). The Vienna Action Plan emphasizes that the notion of 'freedom' includes not only the free movement of persons but also the wider "freedom to live in a law-abiding environment ... , complemented by the full range of fundamental human rights, including protection from any form of discrimination" (¶ I.6).

The Commission forcefully articulated the liberal argument for 'negative' integration in its Communication on Judgments (January 1998), where it honed in on the fate of judgments rendered by a court in one Member State in a private law dispute. In that policy document, the Commission clearly characterizes national legal institutions as *impediments* to the internal market.[47] In particular, the Commission argued that the existence of "widely-divergent procedural systems ... render procedures less transparent than they might be," and that such "barriers impede the free movement of judgments between Member States" (¶ 6).[48] Such deficiencies are problematic in "an integrated area," where "all ought to have easy access to the rules of the game, and ought to know, before deciding to embark on proceedings, what their rights and duties are, what formalities are to be complied with, what the effect of the resultant documents will be, what effect the judgment will have and what redress procedures are available, not to mention the rules governing enforcement of judgments" (id.).

The Commission was also quick to take up and spin out arguments pertaining to the 'positive' integration face of civil justice. It showed early concern, for example, with the principle of *efficiency*,[49] and later added *certainty* to the roster.[50] These systemic goals, while closely linked to the logic of negative integration, have increasingly been characterized as ends in themselves, rather than as instrumental means to an end. Even more fundamental than those principles are the overarching goals of promoting *equality* and *non-discrimination*. The Commission thus deplored that the "heterogeneity of national procedural systems" places litigants in the EU on an unequal footing and deprives them of "access to instruments of equal performance levels," since "equality of citizens and business partners in an integrated area presupposes equal access to the weapons of the law" (Commission Communication on Judgments 1998: ¶ 30). In this context, 'equality' refers both to the fundamental principle of EU law that prohibits discrimination on the basis of nationality, as well as to the notion of "equality of armaments" (sic) (id. at ¶ 12),[51] which is considered a precondition to access to justice, and later assumes an iconic role in the EU's civil justice arena.

Meeting in Cardiff in June 1998, the European Council emphasized that the forthcoming "genuine European area of justice" – including civil justice – is part of a "sustained effort ... to bring the Union closer to people"[52] by achieving "progress in policy areas which better meet the real concerns of people, notably through greater openness, and progress on ... justice and home affairs" (Cardiff Presidency Conclusions 1998: ¶ I.1.37).[53] The idea embraced by the Member

State Heads of State and Government in Cardiff, acting in their capacity as the European Council,[54] was initially elaborated in the Commission's 1998 Vienna Action Plan (¶ I.2 & I.15):

> The ambition is to give citizens a common sense of justice throughout the Union. Justice must be seen as facilitating the day-to-day life of people and bringing to justice those who threaten the freedom and security of individuals and society. This includes both access to justice and full judicial cooperation among Member States. What Amsterdam provides is a conceptual and institutional framework to make sure that those values are defended throughout the Union.

Moreover, "law-abiding citizens have a right to look to the Union to simplify and facilitate the judicial environment in which they live in the European Union context" (Vienna Action Plan 1998: ¶ I.16).

Ultimately, EUstitia has become the lynchpin of a rights-based strategy that aims to generate legitimacy for EU governance through concrete measures designed to enhance the rule of law and rights 'in action.' The goal of ensuring to "each European citizen security for themselves and their property and the respect of individual freedoms and fundamental rights" is a crucial component of the evolving notion of European citizenship (Avignon Declaration 1998). This view was forcefully articulated by the European Parliament in its 1999 Resolution on the Vienna Action Plan (preamble, point K), which presupposes:

> that the establishment of [the AFSJ] is urgently demanded by European public opinion ..., that its consolidation is intimately linked to the development of real – and not merely theoretical – European citizenship, and that it constitutes the only possible outcome of the internal market ... .

The preliminary policy documents surveyed above suggested a general approach and philosophy for the AFSJ. However, the decisive event that set the stage for the explosive development of the civil justice field after 1999 was the meeting of Tampere European Council in October 1999 during the first Finnish Presidency. At that special summit, the Heads of State and Government of the Member States and key EU officials refined and expanded the earlier proposals,[55] and agreed on a detailed five-year plan for making the newborn AFSJ a reality in short order.[56] That plan was embodied in the Tampere Presidency Conclusions – better known as the 'Tampere Milestones' – in which the European Council elaborated the "policy orientations and priorities" needed to put the AFSJ into place quickly, placed the goal of making the AFSJ "a reality" as quickly as possible "at the very top of the political agenda," and promised to make "full use of the possibilities offered by the Amsterdam Treaty."[57] Even more crucial, the Tampere Milestones operationalized these goals with great specificity, and established supporting institutional mechanisms that contributed to the unusual dynamism of the policy field after 1999, when the Amsterdam Treaty entered into force.

In terms of general policy orientations, the Tampere Milestones took the new civil justice rhetoric to a higher level, in two ways. First, they cemented the fusion of the negative and positive integration logics, as seen in the claim that "individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of the legal and administrative systems in the Member States" (Tampere Milestones 1999: ¶ 28). And second, Tampere articulated an end-point (*telos*) of the dawning era – a "genuine European area of justice" – in which people

> can approach courts and authorities in any Member State as easily as in their own. ... Judgements and decisions should be respected and enforced throughout the

> Union, while safeguarding the basic legal certainty of people and economic operators. Better compatibility and more convergence between the legal systems of Member States must be achieved (Tampere Milestones 1999: ¶ 5).

The goal was nothing less than to make the EU "more open, more understandable and more relevant to daily life" by addressing "policy areas which better meet the real concerns of people, notably through greater openness, progress on environment and justice and home affairs" (Cardiff Presidency Conclusions 1998: ¶ IV.27).

Crucially, however, the Tampere European Council did not stop at rhetoric, but also mapped out a detailed program for the ensuing five years. The Tampere Milestones articulated the civil justice field into three components:

- Better access to justice
- Mutual recognition of judicial decisions, and
- Greater convergence in civil law

Of these three, the only one that is explicitly mentioned in Article 65 of the EC Treaty is the recognition of judicial decisions. Thus, Tampere was the first – but by no means the last – expansive policy stretch beyond the parameters established in the foundational treaty text. First, the Tampere Milestones add two entirely new parameters – access to justice and convergence in civil law. The former is conceptualized in very pragmatic terms, rather than in the abstract language of fundamental human rights, while the latter refers explicitly to substantive law as well as procedural law.[58] Second, the Tampere Milestones stretch the notion of 'recognition' of judicial decisions by substituting the label 'mutual recognition' which, in the context of EU law, unmistakably invokes the radically deregulatory (or negative integration) logic of the Court of Justice's decision in the *Cassis de Dijon* case.[59] The far-reaching character of these components expose "judicial cooperation in civil matters" as a modest treaty basis upon which to erect an ambitious agenda to transform the rule of law in action throughout the EU.

The combination of Tampere's detailed agenda and timetable for the first five years after the entry into force of the Amsterdam Treaty (1999-2004), plus the institutional dynamics explored below, resulted in a period of legislative frenzy akin to a perpetual-motion machine.[60] Despite some delays along the road mapped out in Tampere, the pace of change that is documented in Chapter 5 below has been, at times, breakneck.

4.2.3.2 Second Phase (since October 1999): Implementing

One might expect the conceptual architecture for the civil justice field to remain static in the wake of a path-breaking five-year plan, but this was not the case. Once the Amsterdam Treaty entered into force in May 1999, the tools for creating secondary EU legislation became available in regard to matters falling within the scope of Article 65 of the EC Treaty.[61] Since 1999, therefore, the policy process in the civil justice field has been dominated by measures aimed at particular legislative proposals (consultations, Green Papers, proposals, etc.), rather than by general policy statements, as it had been during the first phase. And yet, the second phase is not devoid of policy agendas and other documents of a more general nature, some of which are examined here in order to trace the evolving discursive macro-structure of the civil justice field.

Two main types of general policy documents are surveyed for their contributions to the evolving conceptual architecture of civil justice: multiannual (7-year) funding frameworks, and

multiannual (5-year) policy agendas for the AFSJ field.[62] A third important type of document – the scoreboard – is not analyzed separately, despite the important role it has played in the dynamics of the evolving field.[63] The analysis below reveals that the EU institutions engage in ceaseless efforts to 'improve' the framework – the conceptual architecture, the content, and the rationales – of the emerging civil justice field, as well as the institutional apparatus for managing it. These efforts, and their justifications, respond to and embody the changing political landscape in the EU.

4.2.3.2.1 The EU's Multiannual Funding Framework (2002-2006)

The EU regularly adopts 'Multiannual Funding Frameworks' (MFFs), which establish ceilings for spending during a cycle lasting at least five years.[64] Each MFF is "an expression of political priorities as much as a budgetary planning tool" (Commission MFF Memo 2013: 1). As such, the EU's funding programs for 2002-2006 – along with those for the periods 2007-2013 and 2014-2020, which are discussed below – are important sources of general statements about policy priorities in the civil justice field.[65] Moreover, they clearly show how subsequent practices of the EU institutions have extended the scope of the civil justice field that is – still formally – demarcated by the language of Article 81 of the TFEU. As a matter of fact, these funding programs demonstrate how quickly the EU moved beyond the three tasks that the 1999 Tampere Milestones identified as the core of the "genuine European area of justice": access to justice, mutual recognition, and convergence in civil law.

The First Funding Framework (2002: ¶ 2), which articulates the following objectives, provides a convenient starting point for tracing post-Tampere changes:

1. to promote judicial cooperation, aiming in particular at:
   (a) ensuring legal certainty and improving access to justice;
   (b) promoting mutual recognition of judicial decisions and judgments;
   (c) promoting the necessary approximation of legislation; or
   (d) eliminating obstacles created by disparities in civil law and civil procedures;
2. to improve mutual knowledge of Member States' legal and judicial systems in civil matters;
3. to ensure the sound implementation and application of Community instruments in the area of judicial cooperation in civil matters; and
4. to improve information to the public on access to justice, judicial cooperation and the legal systems of the Member States in civil matters.[66]

These objectives reveal that the First Funding Framework elaborates upon the 1999 Tampere Milestones, but does not stop at that. Rather, it also supplements them by adding a few new tasks to the list that had been hammered out at the Tampere summit. The First Funding Framework leaves no doubt that "judicial cooperation in civil matters" is just the kernel of a larger project that reaches beyond private international law/conflict of laws, civil procedure, and the harmonization of at least some aspects of civil (i.e., private) law and civil procedure,[67] and extends into the realms of government officials, legal professionals, and civic education. Over time, these incipient small steps take on a life of their own.

4.2.3.2.2 The Hague Program (2005-2009)

The 1999 Tampere summit established a five-year cycle (1999-2004) for major policy

statements about the future direction of the AFSJ (including civil justice). It is the responsibility of the European Council to "define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice" (TFEU art. 68). However, the European Council's process is strongly girded by the efforts of the Commission, which conducts the mid-term reviews, makes proposals for the future, communicates its views to the European Parliament and the Council, and conducts public debates on the future direction of the AFSJ.

The Commission's June 2004 review of Tampere, which was conducted in the white-heat surrounding the accession of ten new (mostly post-Communist) countries to the EU on 1 May 2004, as well as the negotiations leading up to conclusion of the Constitutional Treaty (17-18 June 2004), notes that – despite "undeniable and tangible" progress – Tampere's "original ambition was limited by institutional constraints, and sometimes also by a lack of sufficient political consensus" (Tampere Assessment 2004: 3-4). The Commission proposed thirteen concrete priorities for the next five years, noting that most of them "flow logically from" Tampere. This explains the existence of "some overlap between them and the future priorities" (id. at 7), two of which pertain to civil justice:

> ¶ 2.6: Establish a European judicial area respecting the legal traditions and systems of the Member States, and closely associating those working in relevant areas.
>
> ¶ 2.7: Establish a judicial area in civil and commercial matters to facilitate cooperation and access to justice.

The Commission elaborated on these cryptic headings in its 2004 Tampere Assessment. It explains that ¶ 2.6 is oriented towards the twin tasks of implementing the principle of mutual recognition, which is "at the heart of European integration in this field," and simultaneously preserving the legal and judicial traditions of the Member States. These goals are in tension with each other. On the one hand, "mutual recognition requires a common basis of shared principles and minimum standards" as a means to "strengthen mutual confidence" (id.). Yet the "effectiveness of the European policy on judicial matters" can only be achieved if there is a "high degree of involvement of those working in this field" (id.). It is foreseeable that enrolling members of the Member States' national judiciary and legal profession in the task of establishing a common European basis of "shared principles and ... standards" [will alter], however subtly, their national "legal and judicial traditions."

¶ 2.7 of the 2004 Tampere Assessment turns its attention from institutional actors to the perceived needs of European citizens, and expands on the goal of making "tangible improvements in the daily life of individuals and businesses by enabling them to assert their rights at Union level." The Commission's 2004 document identifies a number of citizen-oriented priorities. First, it states that EU efforts in the civil justice subfield should "concentrate on fields where there are as yet no Community rules on mutual recognition," such as the property-law aspects of death and of relationship breakdown (marriage or co-habitation).[68] Second, the Commission recognizes that Tampere's emphasis on the "traditional problem of the recognition of judgments" fails to address the needs of ordinary people, who are more likely to encounter problems arising out of the non-recognition of *documents* – such as those arising in family or succession or property law contexts[69] – than problems relating to enforcement of judgments resulting from litigation. In this sense, the 2004 Tampere Assessment significantly sharpens the EU's focus on the types of civil (i.e., private) legal relationships that are implicated by free movement of persons. This reorientation does not mean, however, that the EU averts its gaze

from the enforcement of judgments.

On the contrary, this agenda item is pushed forward. The 2004 Tampere Assessment insists on the need for "rapid and effective execution procedures" so that "citizens and businesses [can] exercise their full legal rights," and observes that "progress with mutual recognition depends on greater mutual trust between Member States," which in turn requires the "adoption of certain minimum procedural standards" (Tampere Assessment 2004: ¶ 2.7).[70] Finally, the Commission articulates the need to avoid creating a more complex legal environment, in which "two separate legal regimes" exist in each Member State, "one relating to the disputes with a cross-border implication and the other to purely internal disputes" (id.). This dilemma is not new to European integration, but is starkly presented in the civil justice context, where EU institutions are compelled to do exactly what they recognize they should avoid doing.

The EU's second five-year AFSJ plan covering the period 2005-2009 was adopted by the European Council at its meeting on 4-5 November 2004. It came to be known as the Hague Program[71] because it was adopted during a Dutch Presidency, despite the wish of some to call it 'Tampere II' (e.g., EurActiv, *Tampere II* 2004). The Hague Program aimed to build on Tampere's achievements, and "reflects the ambitions ... expressed in the Treaty establishing a Constitution for Europe" (Dutch Presidency Conclusions 2004: ¶ II.15).[72] Notably, it seeks to "improve the common capability of the Union and its Member States to guarantee fundamental rights, minimum procedural safeguards and access to justice" (Hague Program 2004: 12). Lofty rhetoric aside, the 'justice' field brings up the rear in the Hague Program (¶ III.3), behind 'freedom' and 'security' (¶¶ III.1 and III.2, respectively).

The Hague Program addresses both institutional and normative aspects of the civil justice subfield. On the *normative* side, it emphasizes that "civil law, including family law, concerns citizens in their everyday lives" (Hague Program 2004: ¶ III.3.4.1), and "attaches great importance to the continued development" of judicial cooperation in civil matters, as well as "full completion" of the Commission's ambitious 2001 Mutual Recognition Program.[73] In this regard, it calls for increasing the effectiveness of existing mutual recognition instruments by "standardising procedures and documents and developing minimum standards for aspects of procedural law, such as the service of judicial and extra-judicial documents, the commencement of proceedings, enforcement of judgments and transparency of costs" (id. at ¶ III.3.4.2). Moreover, it calls for measures to ensure "the mutual recognition of judicial decisions and certificates both in civil and in criminal matters, and to eliminate legal and judicial obstacles in litigation in civil and family matters with cross-border implications" (id. at 12).[74] In particular, the Hague Program calls for concrete steps towards legal measures in the field of family and succession law, notably measures relating to maintenance (i.e., post-separation spousal support or alimony), wills and inheritance, divorce, and matrimonial property (id.). What's new and noteworthy here is, first, the addition of "certificates" to the mutual recognition mandate,[75] which heralds the extension of this paradigm into the realm of personal documents, and second, the explicit addition of private law fields – notably, family law and property aspects of death – that lie outside EU legislative competence as such. In the private international law/conflict of laws subfield, the Hague Program calls for work on choice of law rules for contractual and non-contractual (e.g., tort-based) obligations. Details about particular policy measures are provided in Chapter 5 (section 5.2) below.

What is important to note here are the twin dynamics of European integration at work. First, the EU widens the number of measures that are included under the already familiar

headings, such as by endorsing the move into civil law areas over which the EU has no legislative jurisdiction in regard to substantive law, i.e., property, family, and inheritance law. And second, the EU deepens its work in the civil justice field by means of measures aimed at making the existing rules – such as those pertaining to mutual recognition – more effective.

On the institutional side, the Hague Program asserts the need for "progressive development of a European judicial culture based on diversity of the legal systems of the Member States and unity through European law" (id. at ¶ III.3.2), in order to build confidence and trust in the European legal area. This appears to be the first official endorsement of the far-reaching goal of creating a European judicial culture, which has gained strength over time.[76] The aim of improving "mutual understanding among judicial authorities and different legal systems" is to be furthered by EU support for networks of judicial institutions and organizations, as well as judicial training.[77]

At the request of the European Council (Dutch Presidency Conclusions 2004: ¶ 17), the Commission presented its priorities for an action plan to help realize the Hague Program (2005 Hague Program Priorities). Subsequently, the Council and the Commission jointly concluded the 2005 Hague Action Plan. Once again, civil justice brings up the rear of AFSJ program planning. But still, these documents contribute towards an understanding of the development of the civil justice field, and thus warrant brief attention.

The Commission's 2005 Hague Program Priorities document identifies ten priority areas for developing the AFSJ between 2005 and 2009, which list includes "guaranteeing an *effective* European area of justice for all" in regard to both civil and criminal matters (Hague Program Priorities 2005: ¶2.3(9)) (emphasis added). The overarching aim thus formulated is more concrete than the original goal – "a genuine European area of justice" – that was articulated in the Tampere Milestones. In the Commission's view, the European area of justice is "more than an area where judgements obtained in one Member State are recognised and enforced in other Member States, but rather an area where *effective access to justice* is guaranteed in order to obtain and enforce judicial decisions" (id.) (emphasis added). This compels the EU to go beyond the types of measure identified in the Tampere Milestones, and to strive towards the "progressive creation of a 'European judicial culture' " and towards the adoption of:

> measures which build confidence and mutual trust among Member States, creating minimum procedural standards and *ensuring high standards of quality of justice systems*, in particular as regards fairness and respect for the rights of defense (Hague Program Priorities 2005: ¶ 2.3(9)) (emphasis added).

The Commission's concern with ensuring the high quality of national justice systems is hardly surprising, in light of concerns at that time about the integrity of the rule of law in some of the EU's new post-Communist Member States. While the referenced language in this document is linked specifically to developments in the criminal justice field, the logic that dictates trust-building measures applies equally in the civil justice field, and was subsequently explicitly extended to include civil as well as criminal justice (Second Funding Framework 2007). Finally, the Commission expands the list of civil law issues on its agenda by adding "substantive contract law"[78] to the existing list (i.e., family property issues, successions, and wills), and clarifies that mutual recognition of documents must encompass both "public and private documents" (id.).

The 2005 Hague Action Plan, which was adopted jointly by the Council and the Commission, is essentially a list of legislative and non-legislative measures to be pursued in each of the AFSJ policy subfields. Once again, civil justice (Hague Action Plan 2005: ¶4.3) brings up

the rear. Still, the Action Plan contains an extensive list of 24 civil justice measures – (a) through (x) – related to mutual recognition, the elimination of obstacles to the proper functioning of proceedings, and institutional measures designed to enhance cooperation. The proposed measures – as well as their fates – are detailed in Chapter 5 (section 5.2) below, rather than here, in order to facilitate a more coherent analysis of what has been achieved in each civil justice policy subfield, along with an assessment of the significance of those developments. Suffice it to say here that the Hague Action Plan – like the Tampere Action Plan and the Mutual Recognition Program before it – contains a timetable in addition to a list, and thus sets an ambitious agenda for EU action in the civil justice arena.

During the period covered by the Hague Program (2005-2009), the Commission continued the process of constantly reviewing and reporting on its achievements, in the form of scoreboards (2005, 2006 & 2007 Scoreboards), but also in the form of the 2009 Hague Assessment, which was carried out (as after Tampere) by the Commission.

4.2.3.2.3 *The EU's Multiannual Funding Framework (2007-2013)*

The Second Funding Framework (2007: ¶ 3) expands the specific objectives in the field of civil justice beyond those that were identified in the First Funding Framework (2002) (emphasis added) to the following:

(a) to foster judicial cooperation in civil matters aiming at:
  (i) *ensuring legal certainty* and improving access to justice;
  (ii) promoting mutual recognition of decisions in civil and commercial cases;
  (iii) eliminating obstacles to cross-border litigation created by disparities in civil law and civil procedures and promoting the necessary compatibility of legislation for that purpose;
  (iv) *guaranteeing a proper administration of justice* by avoiding conflicts of jurisdiction;

(b) *to improve mutual knowledge of Member States' legal and judicial systems in civil matters and to promote and strengthen networking, mutual cooperation, exchange and dissemination of information, experience and best practices*;

(c) to ensure the sound implementation, the correct and concrete application and the evaluation of Community instruments in the area of judicial cooperation in civil and commercial matters;

(d) to improve information on the legal systems in the Member States and access to justice;

(e) to *promote the training of legal practitioners* in Union and Community law;

(f) to *evaluate the general conditions necessary to reinforce mutual confidence, while fully respecting the independence of the judiciary*;

(g) to facilitate the operation of the European Judicial Network in civil and commercial matters.

The Second Funding Framework thus not only elaborates the goals that had already been articulated in the Tampere Milestones, the First Funding Framework, and the Hague Program, but also supplements them in subtle but important ways.[79] In particular, it spells out mechanisms for building the trust and mutual understanding that were foregrounded in the Hague Program, and calls for more systematic reflection on this fundamental challenge. Even more important, conceptually, is that the Second Funding Framework frames the challenge at hand holistically, as

"guaranteeing proper administration of justice" (¶ 3(a)(iv)), which confirms the trajectory of EU ambition that I predicted more than a decade ago (Hartnell 2002: 70, 102, 117, 131). Finally, the Second Funding Program explicitly adds legal practitioners to its training remit (¶ 3(e)).

4.2.3.2.4 The Stockholm Program (2010-2014)

The Commission launched a public consultation of the Hague Program in late 2008, and issued its written evaluation in mid-2009, along with a statement of its own priorities, in time for the European Council to approve the next five-year plan in December 2009 during the Swedish Presidency. The discussions leading up to the conclusion of the Stockholm Program (2010-2014) were informed by voluminous material prepared by the Commission – including the Commission Priorities for Stockholm 2010-2014 and its 2009 Hague Assessment[80] – as well as by the European Parliament, pursuant to joint deliberations by the Committees on (i) Legal Affairs, on (ii) Civil Liberties, Justice and Home Affairs, and on (iii) Constitutional Affairs (EP Resolution on Stockholm Program 2009). At this point, the possibility of summary analysis becomes daunting. However, the volume of material generated in preparation for the Stockholm Program itself is telling.

Within a mere decade after coming 'online,' the AFSJ had not only grown to massive proportions but was attracting ever more institutional and public attention. The Commission itself has struggled since 1999 to stay abreast of developments in the entire field, using semi- and later annual scoreboards to track the moving targets. The situation has not improved with experience. Rather, the topical matrices, which the Commission uses to organize the ever-growing welter of legal instruments, have grown in length and complexity, and the conceptual headings and sub-headings shift with each programmatic iteration. This reflects in part the artificiality of the 'big tent' nature of the AFSJ, which houses an increasing array of topics, and the ceaseless efforts to impose some order and render it coherent.

The Stockholm Program that emerged from this in-depth review process rejigged the conceptual architecture of the AFSJ field, in a major step towards increasing the internal coherence of the policy arena. While my main focus is on the civil justice field, it is instructive to see how the European Council reconceptualized the position and meaning of justice, relative to the other AFSJ subfields, without altering its content. Figure 4.2 provides a summary overview of the schema introduced by the Stockholm Program.

[FIGURE 4.2 ABOUT HERE]

Figure 4.2

Overview of the Area of Freedom, Security and Justice (AFSJ)
Conceptual Schema Introduced by Stockholm Program (2009)

- Towards a Citizens' Europe in the AFSJ

- Promoting Citizens' Rights: A Europe of Rights
  - A Europe built on fundamental rights
  - Full exercise of the right to free movement
  - Living together in an area that respects diversity and protects the most vulnerable
  - Rights of the individual in criminal proceedings
  - Protecting citizens' rights in the information society (i.e., data privacy)
  - Participation in the democratic life of the Union
  - Entitlement to [diplomatic] protection outside the EU

- Making People's Lives Easier: A Europe of Law and Justice
  - Furthering the implementation of mutual recognition (criminal & civil)
  - Strengthening mutual trust (i.e., training & networks)
  - Developing a core of common minimum rules (criminal & civil)
  - The benefits for citizens of a European judicial area (i.e., access to justice, supporting economic activity)
  - Increasing the Union's international presence in the legal field

- A Europe that Protects
  - Internal security strategy
  - Protection against serious and organized crime (e.g., human trafficking, sexual exploitation of children, cybercrime, economic crime and corruption, drugs)
  - Terrorism
  - Comprehensive and effective Union Disaster Management

- Access to Europe in a Globalized World
  - Integrated management of external borders
  - Visa policy

- A Europe of Responsibility, Solidarity, and Partnership in Migration and Asylum Matters

- Europe in a Globalised World – The External Dimension of Freedom, Security and Justice

In the Stockholm schema, justice has been 'promoted' to a position above security concerns, thus it no longer brings up the rear as in prior five-year plans. But at the same time, justice appears to have been 'demoted' in terms of its political import, insofar as it is branded as having more to do with convenience – i.e., making citizens' lives easier – than with justice as such. This first impression vanishes, however, upon close reading of the text, where access to justice is clearly presented as the flip-side of the 'rights' coin. The Stockholm Program (¶ 1.1) emphasizes these political priorities in a "Europe of law and justice":

> The achievement of a European area of justice must be consolidated so as to move beyond the current fragmentation. Priority should be given to mechanisms that facilitate access to justice, so that people can enforce their rights throughout the Union. Training of and cooperation between public professionals should also be improved, and resources should be mobilised to eliminate barriers to the recognition of legal decisions in other Member States.

New here is the emphasis on the need to overcome the bewildering fragmentation of the field (both civil and criminal). Not new, but still noteworthy, is the elevation of efforts focused on "public professionals" from a pragmatic project to a fundamental political priority. The Stockholm Program also emphasizes the importance of legal consciousness – of "raising overall awareness of rights" (¶ 3) – as a key element in the EU's strategy for the justice arena.[81] Finally, it bears mention that the Stockholm Program *does not* pick up the 'quality of justice systems' trope, which the Commission had put on the table in its Hague Program Priorities (2005: ¶2.3(9)), and later reiterated in its review of the Hague Program and proposals for the next policy cycle (Commission Priorities for Stockholm Program 2009:¶ 2.3).[82] The Stockholm Program does, however, elaborate an approach towards the goal of "strengthening mutual trust" (¶3.2) among Member State legal systems that is rather more solicitous of Member State sensitivities in regard to their national legal sovereignty:

> The Union should support Member States' efforts to improve the efficiency of their judicial systems by encouraging exchanges of best practice and the development of innovative projects relating to the modernisation of justice.

Strengthening mutual trust also requires, according to the Stockholm Program, deeper efforts directed towards professional training and networking. It is noteworthy here, however, that the Stockholm Program did not take up the European Parliament's call for "root-and-branch revamping of university curricula" as part of the program of building "European judicial culture" (EP Resolution on Stockholm Program 2009: ¶ O).[83]

As in prior five-year plans, the Stockholm Program continued the process of expanding the scope of EU policy activity. The concrete proposals, and their fates, are examined in Chapter 5 (section 5.2) below. Some examples from the civil justice field include: a wider range of measures in core civil law areas; attention to language as a barrier to access; greater use of alternate dispute resolution in consumer disputes; development of 'e-Justice' methods; and a strong push to supplement the mutual recognition approach through the adoption of "common minimum [procedural] standards or standard rules of civil procedure" (Stockholm Program 2009: ¶ 3.2.2). The Stockholm Program also takes an important conceptual step by devoting more systematic attention to the "benefits for citizens of the European judicial area" (id. at ¶ 3.4), which include not only access to justice for ordinary citizens but also a strong statement about the role of civil justice in "supporting economic activity" (id. at ¶ 3.4.2), which hitches the civil justice agenda to the political concerns arising from financial crisis. For example, the Stockholm

Program contains a wide array of proposals to extend civil justice measures pertaining to debt collection in the context of bankruptcy or litigation, contract law, company law, and other commercial matters.

Finally, the Stockholm Program marks a moment of reckoning with the volume of new measures that have been adopted. For example, the European Council calls upon the Member States to implement the EU measures that have been put in place, and

> highlights the importance of starting work on consolidation of the instruments adopted so far ... First and foremost the consistency of Union legislation should be enhanced by streamlining the existing instruments. The aim should be to ensure the coherence and user-friendliness of the instruments, thus ensuring a more efficient and uniform application thereof (id. at ¶ 3.2.1).

As in prior AFSJ policy cycles, the European Council asked the Commission to prepare a plan for translating the Stockholm Program into action. The Commission obliged with its ambitious 2010 Stockholm Action Plan. In contrast to the 2005 Hague Action Plan, the European Council refused to sign off on the Commission's 2010 Stockholm Action Plan, because it exceeded the (already ambitious) agenda mapped out in the Stockholm Program itself (Wagner 2014a: 470). In quick succession, the European Parliament adopted two far-reaching resolutions: the EP Resolution on Judicial Training (June 2010) and the EP Resolution on Civil, Commercial, Family, and Private International Law (November 2010), which make the Commission's vision look humble in comparison.[84] Pursuant to the Commission's "broad consultation with all stakeholders" in 2010 – including the EP – the Commission issued another path-breaking civil justice document, the Judicial Training Proposal (2011: 5). Further details are deferred to the discussion of concrete civil justice developments in Chapter 5 (subsection 5.2.2) below.

4.2.3.2.5 The EU's Multiannual Funding Framework (2014-2020)

After much delay, agreement on the EU's budget for 2014-2020 – the Multiannual Financial Framework (MFF) – was finally reached in 2013.[85] Consistent with the EU's ongoing economic and financial crisis, the MFF reflects an overarching paradigm shift that was already visible in the Stockholm Program, but has come to permeate every area of EU policy,[86] including civil justice.[87] The European Council states, in its February 2013 Conclusions on Multiannual Financial Framework (¶ 1):

> the [EU] and its Member States have taken important steps in response to the challenges raised by the economic and financial crisis. Looking to the future, the next Multiannual Financial Framework (MFF) must ensure that the [EU's] budget is geared to lifting Europe out of the crisis ... [and] must be a catalyst for growth and jobs across Europe, notably by leveraging productive and human capital investments. ... [S]pending should be mobilised to support growth, employment, competitiveness and convergence ... .

According to the Commission, the goals are to ensure that "*economic, cultural and social growth* may develop in a stable, lawful and secure environment," and to "help people to feel at ease when living, traveling, studying or making business in other Member States. The future budget will support cooperation on civil and criminal law, allow people to better exercise their rights as EU citizens, and promote equality" (MFF Press Release 2013: ¶ 11) (emphasis added). This statement by the Commission does not add much new to the existing conceptual framework for civil justice, or, for that matter, the larger AFSJ of which it is part. However, the Commission's

statement does mention civil justice first – which is in itself a first – and yokes more closely than before the familiar objectives to the overarching goal of growth. It is worth noting, however, that the Commission's conception of "economic, cultural and social growth" is – consistent with past practice – noticeably broader than the European Council's formulation, i.e., to "support growth, employment, competitiveness and convergence" (Conclusions on Multiannual Financial Framework 2013: ¶ 1).

Appendix D (Conclusions on Multiannual Financial Framework 2013: 47) provides an overview of appropriations. Justice and rights-related issues fall under the general heading 'Security and Citizenship' – at € 17,723,000,000, the smallest among the five major appropriations categories. This figure represents 2% of the entire MFF for the seven-year period and a 26.5% increase vis-à-vis the prior budget cycle (MFF Press Release 2013). 'Security and Citizenship' include a very broad range of issues, including asylum, migration, and both external and internal security, as well as measures in the field of justice.[88] Civil justice policies themselves are split between the two sub-headings under the 'Security and Citizenship' heading: Rights and Citizenship (€ 439.47 million at current prices) and Justice (€ 377.60 million at current prices). These funds will be allocated in accordance with the formulas summarized in Figure 4.3, and with the priorities articulated in the Rights, Equality and Citizenship Program for 2014-2020 and in the Justice Program for 2014-2020, respectively.[89]

[INSERT FIGURE 4.3 ABOUT HERE]

Figure 4.3

EU Budgetary Allocations for 2014-2020 (italics highlight civil justice policy goals)

For Rights, Equality and Citizenship
(Source: Rights, Equality and Citizenship Program for 2014-2020)

57% of financial envelope:	• *implementation of the principle of non-discrimination* on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, and other grounds per Article 21 of the Charter • prevent/combat racism, xenophobia, homophobia and other forms of intolerance • promote and protect the rights of persons with disabilities; • promote equality between women and men and advance gender mainstreaming
43% of financial envelope:	• prevent/combat all forms of violence against children, young people and women, as well as violence against other groups at risk, in particular groups at risk of violence in close relationships, and to protect victims of such violence • promote/protect the rights of the child; • protection of privacy and personal data; • *promote and enhance the exercise of rights deriving from citizenship of the Union* • *enable individuals in their capacity as consumers or entrepreneurs in the internal market to enforce their rights* deriving from Union law, having regard to the projects funded under the Consumer Programme

Figure 4.3

EU Budgetary Allocations for 2014-2020 (italics highlight civil justice policy goals)

For Justice (Source: Justice Program for 2014-2020)

30% of financial envelope:	• *facilitate and support judicial cooperation in civil* and criminal *matters*
35% of financial envelope:	• *support and promote judicial training*, including language training on legal terminology, *with a view to fostering a common legal and judicial culture*
30% of financial envelope:	• *facilitate effective access to justice for all*, including to promote and support the rights of victims of crime, while respecting the rights of the defense
5% of financial envelope:	• support initiatives in the field of drugs policy as regards judicial cooperation and crime prevention aspects closely linked to the general objective of the Programme, in so far as they are not covered by other financial instruments pertaining to police cooperation, preventing and combating crime, and crisis management, or as part of the Internal Security Fund, or by the Health for Growth Programme

The Rights, Equality and Citizenship Program for 2014-2020, which builds on the Stockholm Program's goal of making "the achievement of a Europe of rights" (preamble, ¶ 2) a political priority, contains a very broad formulation of this ambition (preamble, ¶ 1):

> The [EU] is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights and fundamental freedoms. Those values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. Persons are entitled to enjoy in the Union the rights conferred on them by the [TFEU] and the [EU Treaty]. Furthermore, the Charter of Fundamental Rights of the [EU] (the "Charter"), which [is] legally binding across the Union, reflects the fundamental rights and freedoms to which persons are entitled in the Union. Those rights should be promoted and respected. The full enjoyment of those rights, as well as of the rights deriving from international conventions to which the Union has acceded, ... should be guaranteed and any obstacles should be dismantled. ... [T]he enjoyment of those rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

From the Commission's pragmatic perspective, the goal is to "make people's rights and freedoms effective in practice by making them better known and more consistently applied across the EU" (Future Budget Press Release 2011). This goal is to be achieved by a host of measures having "European added value," including "national and small-scale projects" (Rights, Equality and Citizenship Program for 2014-2020, preamble, ¶ 22; see also art. 2). The specific measures envisioned are those denoted in Figure 4.3. Funds are to be distributed according to the

Commission's annual work program. Of particular interest, from the civil justice perspective, is that Article 3(2) of the Rights, Equality and Citizenship Program for 2014-2020 foresees measures aimed at:

> (a) enhancing awareness and knowledge of Union law and policies as well as of the rights, values and principles underpinning the Union;
> (b) supporting the effective, comprehensive and consistent implementation and application of Union law instruments and policies in the Member States and the monitoring and evaluation thereof;
> (c) promoting cross-border cooperation, improving mutual knowledge and enhancing mutual trust among all stakeholders; and
> (d) improving knowledge and understanding of potential obstacles to the exercise of rights and principles guaranteed by the [EU Treaty], the TFEU, the Charter, international conventions to which the Union has acceded, and secondary Union legislation.

The Justice Program for 2014-2020 is largely consistent with the basic features already outlined for the Rights, Equality and Citizenship Program for 2014-2010. It differs mainly in its general and specific aims, as well as some of the means outlined for achieving them. The general aim of the Justice Program for 2014-2020 is "to contribute to the further development of a European area of justice based on mutual recognition and mutual trust, in particular by promoting judicial cooperation in civil and criminal matters" (Article 3). The specific aims denoted in Figure 4.3 include, but are not limited to measures designed to "facilitate and support judicial cooperation" (Article 4(1)(a)).

Two specific aspects are of particular interest, from the civil justice perspective. First, the Justice Program places great emphasis on the role of training the judiciary and judicial staff, which is seen as "central to building mutual trust and [improving] cooperation between judicial authorities and practitioners" throughout the EU, and is recognized as an "essential element in promoting a genuine European judicial culture" (preamble, ¶ 5).[90] Moreover, as noted in another context in subsection 4.2.2 above, the term "judiciary and judicial staff" is expansively defined (preamble, ¶ 4) to include:

> judges, prosecutors and court officers, as well as other legal practitioners associated with the judiciary, such as lawyers, notaries, bailiffs, probation officers, mediators and court interpreters.[91]

In order the encourage participation, the Justice Program (preamble, ¶ 7) goes so far as to declare that the "salaries of participating judiciary and judicial staff incurred by the Member States' authorities" are "eligible costs" for reimbursement or co-financing by the EU. And second, the Justice Program for 2014-2020 aims to "facilitate access to justice for all" (art. 4(1)(c)), which is defined broadly to "include, in particular, access to courts, to alternative methods of dispute settlement, and to public office-holders obliged by the law to provide parties with independent and impartial legal advice" (preamble, ¶ 8).

Finally, with regard to the specific means envisioned, the Justice Program for 2014-2020, Article 4(2)) contemplates measures aimed at:

> (a) enhancing public awareness and knowledge of Union law and policies;
> (b) ... ensuring efficient judicial cooperation in civil and criminal matters, improving knowledge of Union law, including substantive and procedural law, of judicial cooperation instruments and of the relevant case-law of the [CJEU], and

of comparative law;
(c) supporting the effective, comprehensive and consistent implementation and application of Union instruments in the Member States and the monitoring and evaluation thereof;
(d) promoting cross-border cooperation, improving mutual knowledge and understanding of the civil and criminal law and the legal and judicial systems of the Member States and enhancing mutual trust;
(e) improving knowledge and understanding of potential obstacles to the smooth functioning of a European area of justice;
(f) improving the efficiency of judicial systems and their cooperation by means of information and communication technology, including the cross-border interoperability of systems and applications.

Something out of the ordinary occurred in the latest iteration of planning and financial cycles. Previously, the multiannual financial planning cycle followed (chronologically) and tracked (conceptually) the overarching five-year policy cycle (i.e., Tampere, Hague, Stockholm). However, this sequence was not followed in 2014, because the multiannual financial planning cycle was out of sync with the five-year policy cycle that has characterized the AFSJ field since Tampere (1999).[92] Moreover, as discussed below (subsection 4.2.3.2.6), the five-year policy cycle became disrupted and lagged behind. Under these unusual conditions, the MFF itself, along with the EU budget and specific funding programs concluded at the end of 2013, became the more forward-looking policy documents, the budgetary 'cart' that preceded the normal policy process 'horse.'

4.2.3.2.6 Post-Stockholm 'Strategic Guidelines' (2015-2020)

Review of the Stockholm Program lagged behind schedule, but agreement on a new multiannual plan was finally reached in June 2014, following a lengthy debate over whether any new AFSJ five-year plan should be drawn up at all (Semmler 2009; Carrera & Guild 2012). Opponents insisted that there was "little need" for a new program that would add to the "significant number of rules" that have already been adopted, since the AFSJ field is "today and will remain for the next couple of years in 'implementation mode' " (European Policy Centre 2013).[93] Proponents of new strategic guidelines, on the other hand, drew attention to "unfilled gaps in several fields which call for further action," and pointed to "new challenges" that "modify the landscape in which action is taking place" (id.).

Institutional factors also impeded the latest round of the multiannual planning process. Institutional squabbling became quite pronounced during the second Barroso Commission, in significant part because of the extreme diversity of the AFSJ policy arena. The creation of two separate Commission Directorate-Generals for the AFSJ policy field – DG Justice and DG Home – did not resolve the problems, but rather led to border skirmishes. Beyond that, the fact that these two policy subfields are large and amorphous also resulted in *intra*-DG squabbling. The other major reason for delay is that 2014 was a 'turnover' year for the EU, in the wake of elections to the European Parliament in May 2014.[94] EU institutions tend to be weak during such transitions, in part owing to doubts about the legitimacy of allowing outgoing stakeholders to commit incoming ones (id.).

The AFSJ policy planning wheels continued to turn, despite these delaying factors. For its part, the Commission announced as early as 2013 that it saw no need for another detailed five-

year policy program, appealed to Member States to resist the temptation to put forward detailed wish lists, and expressed its preference for a set of strategic guidelines instead (Wagner 2014a: 470).[95] The Commission's posture, which ultimately prevailed, is consistent with both its sole right of legislative initiative in the civil justice field, as well as with the European Council's more limited policy role under Article 68 of the EU Treaty,[96] which is to "define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice" (id.). In contrast to the constraint that was urged upon the Member States (and hence the European Council), both the Commission and the European Parliament (EP) offered detailed visions of the future trajectory of the AFSJ – the Commission's Justice Agenda 2020 and the EP Resolution on Stockholm Program Review[97] – and presented them in advance of the June 2014 meeting of the European Council.

The Commission's Directorate-General for Justice was especially proactive under Commission Vice-President and Justice Commissioner Viviene Reding's leadership during the final years of her term.[98] Two far-reaching measures taken by DG Justice in 2013 laid the foundation for the Commission's ambitious Justice Agenda 2020 (adopted in 2014). First, DG Justice organized a civil society forum – the *Assises de la Justice* – on the theme of "Shaping Justice Policies in Europe for the Years to Come" in Brussels (21-22 November 2013), which drew more than 700 people – including some high-profile legal elites – to discuss five discussion papers on civil justice, criminal justice, administrative justice, the rule of law, and fundamental rights. According to Commissioner Reding, who hosted the event,

> In the space of just a few years, justice policy has come into the limelight of European Union activity – comparable to the boost given to the single market in the 1990s. We have come a long way, but there is still a lot more than we can do to develop a true European area of Justice.[99]

It can hardly be a coincidence that the results of a Eurobarometer poll on "Justice in the European Union" were made public at the same time. Appendix E contains an excerpt that illustrates the Commission's creatively ambitious agenda for knitting the EU legal order more tightly together.[100]

The Commission's second major innovation at the tail end of the second Barroso Commission was the new Justice Scoreboard program,[101] which gathers and analyzes data on the "quality, independence and efficiency of *national* justice systems," as a means of "ensuring the effectiveness of EU law" (2013 Justice Scoreboard: 1-2) (emphasis added). DG Justice explains (id. at 2) that, in the reform process that followed in the wake of the EU's economic and financial crisis,

> the national justice systems play a key role in restoring confidence and the return to growth. An efficient and independent justice system contributes to trust and stability. Predictable, timely and enforceable justice decisions are important structural components of an attractive business environment.

It bears repeating here that the Commission had already once proposed to add "quality of justice" to the five-year policy plans for the European judicial area, in connection with the Hague Program a decade earlier, but the European Council was unwilling to embrace this objective at that time. In the latest policy cycle, DG Justice not only asked the European Council once again to take this goal on board but also – to be on the safe side – enshrined this objective formally in its Annual Growth Survey for 2013, which identifies five priority areas designed to guide Member States through the financial crisis and back to growth. One of these priorities is to

modernize public administration, which includes "improving the quality, independence and efficiency of judicial systems as well as ensuring that claims can be settled in a reasonable time frame and promoting the use of alternative dispute mechanisms," so as to "reduce costs for businesses and increase the attractiveness of the country to foreign investors" (Annual Growth Survey for 2013: ¶ 5, p. 13). Whether or not this represents a deliberate Commission end-run around the European Council, it is clear that the Member States – or at least some of them[102] – were miffed by the EU's move into the 'quality of justice' arena, as were some at the Council of Europe in Strasbourg.[103] The European Parliament reacted quickly with its EP Resolution on 2013 Justice Scoreboard, which endorses the Commission's foray into judicial bench-marking, but also seeks to smooth ruffled feathers, both in those Member States that were unfavorably reviewed in the 2013 Scoreboard,[104] as well as in the Council of Europe and its 'Commission on the Efficiency of Justice' (CEPEJ).[105]

Turning now to the concrete changes that the Commission and EP put on the table, in connection with discussions surrounding the new multiannual plan for the AFSJ, a few warrant mention here. The Commission's Justice Agenda 2020, which builds on the *Assises de la Justice* and the 2013 Justice Scoreboard, is every bit as ambitious as its title suggests.[106] It "sets out the political priorities that should be pursued in order to make further progress towards a fully functioning common European area of justice oriented towards trust, mobility and growth by 2020" (Justice Agenda 2020: 2), and asserts that "EU justice policy ... has a major role to play in enforcing the common values upon which the Union is founded, in strengthening economic growth and in contributing to the effectiveness of other EU policies" (id. at 10). Great weight continues to be accorded to the theme of respecting, but also of "building bridges between the different justice systems" (id. at 3), on the one hand, and the need to firm up the "bedrock" of mutual trust, on the other. It comes as no surprise that mutual trust presupposes, in the Commission's view, "the independence, quality and efficiency of the judicial systems and the respect of the rule of law" (id. at 4).[107]

To achieve these goals, the Commission proposed a catchy tripartite approach that aims to *consolidate* what has already been achieved (¶ 4.1), *codify* EU law "when necessary and appropriate" (¶ 4.2), and *complement* the existing framework with new initiatives (¶ 4.3) (id. at 5). In the Commission's view, "*every national legal practitioner* – from lawyers and bailiffs on the one hand, to judges and prosecutors on the other – should also be knowledgeable in EU law and capable of interpreting and effectively enforcing EU law, alongside his or her own domestic law" (id. at 6). This theme is reiterated in the Commission's 2014 Justice Scoreboard (16), which insists that "effective justice requires *quality throughout the whole justice chain*" (emphasis added). This language points towards broadening the already broad "judicial training" mandate. On the theme of *codification*, the Commission's vision (id. at 8) is equally breath-taking:

> Codification of existing laws and practices can facilitate the knowledge, understanding and the use of legislation, the enhancement of mutual trust as well as consistency and legal certainty while contributing to simplification and the cutting of red tape. In a number of cases, the codification of certain parts of the existing EU legislation relating to justice or to relevant case-law of the Court of Justice of the Union in the area of justice can be beneficial in terms of providing consistency of legislation and clarity for the citizens and users of the law in general.

The Commission's codification proposal extends *inter alia* to civil, commercial, and consumer

law, and also includes the suggestion that a code of private international law rules "could be useful" (id.). But what really stuns here is not the list of projects contemplated, so much as the wholesale embrace of the codification method as an appropriate paradigm for the EU legal order, with all the historical baggage that it entails.

When compared to the sweeping vision contained in the Commission's Justice Agenda 2020 and its 2014 Rule of Law Framework, the EP Resolution on Stockholm Program Review (2014) takes a much more sober view. The Parliament's report draws attention to the fact that only a few of the civil justice measures that were proposed in the prior Stockholm Program have been achieved, and urges continuing efforts along those lines (id. at ¶¶ 36-37). However, the EP also notes that "legislative initiatives in the field of civil law have so far been focused largely on substantive law," and "calls for a greater focus on procedural law in the future" (id. at ¶ 39).[108] Finally, the EP reiterates its call for a "truly European legal culture," along with "common standards and an understanding of other legal systems," and observes that "mutual recognition and trust can lead to gradual changes in national civil law traditions through an exchange of best practices between Member States," which does not necessarily "detract from the value of national legal traditions" (id. at ¶ 38). Here appears, at least in incipient form, a recognition – indeed an endorsement – of the idea that training and other measures aiming at fostering European legal culture may over time result in spontaneous harmonization of the national legal orders.

As scheduled, the Member States (acting as the European Council) reached agreement at its June 2014 summit meeting on 'Strategic Legislative and Operational Planning for the coming years within the EU's Area of Freedom, Security and Justice' (Strategic AFSJ Guidelines for 2015-2020). The new Guidelines are far less visionary than previous five-year programs, and vastly less detailed. They have been criticized as a regressive throw-back to the Third Pillar mentality,[109] at least in some of the AFSJ policy subfields, but do embody the Commission's preferred approach, which limits the European Council to general strategic guidelines and allows the Commission itself greater flexibility. In terms of concrete policy statements, the new Guidelines state unambiguously that the "priority now is to consistently transpose, effectively implement and consolidate the legal instruments and policy measures in place" (id. ¶ I.3.).[110] However, the guidelines also express ongoing commitment to the goal of ensuring "the protection and promotion of fundamental rights" (id. ¶ I.4.), and identify a few desirable new measures for each of the policy subfields.

In regard to civil justice, the European Council once again refused to embrace 'quality of national justice' as an overarching political priority for the EU in the latest multiannual plan for the AFSJ, despite the Commission's repeated urging. Rather, the specific goal articulated for the civil justice field is to ensure the "smooth functioning of a true European area of justice" that simultaneously respects the "different legal systems and traditions of the Member States" and enhances "mutual trust in one another's justice systems," as a way to "contribute to economic growth" (id. ¶ I.11). As Wagner (2014a: 472) has noted, this reference to the different legal systems and traditions of the Member States could not have been uttered "in polite company" (*salonfähig*) during the early years after communitarization, but was added to the TFEU a decade later by the Lisbon Treaty.[111] To be sure, the crabbed vision of the role of civil justice presented in the Post-Stockholm Strategic Guidelines is supplemented by a few new objectives, such as promoting the "consistency and clarity of legislation"; simplifying access to justice by promoting "effective remedies and use of technological innovations including the use of e-justice";

reinforcing the "rights of persons, notably children, in proceedings to facilitate enforcement of judgements"; and enhancing "training for practitioners" (id.). This is hardly the sweeping vision that former Commissioner Reding had hoped for. Seen in conjunction with incoming Commission President Juncker's proposed reorganization of the Commission, it is hard to escape the conclusion that the wings of DG Justice have been severely clipped.

How civil justice and other AFSJ policy subfields will fare under the incoming Juncker Commission will depend greatly on the actions of Juncker's incoming "right arm," former Dutch Foreign Minister Frans Timmermans, the Commission's new 'First Vice-President in charge of Better Regulation, Inter-Institutional Relations, the Rule of Law and the Charter of Fundamental Rights' (EurActiv, *Timmermans* 2014), whose mandate includes supervising and coordinating the activities of DG Justice and DG Migration & Home (Carrera & Guild 2014b: 11), and presumably (trying to) keep the subordinate Commissioners[112] on a short leash. It is too soon to assess how Timmermans, a Social Democrat, fulfills his role on the Commission stage.

Ultimately, the Strategic AFSJ Guidelines for 2015-2020 signal a turning point away from hectic growth towards greater attention to quality and coherence (Wagner 2014a: 473). Institutionally speaking, the Commission emerged from the Post-Stockholm policy process as the winner, insofar as it has relatively free rein to pursue the goals articulated in its Justice Agenda 2020 (2014), bearing in mind the priorities articulated by the European Council in the Strategic AFSJ Guidelines for 2015-2020. Paradoxically, however, reforms under Commission President Juncker have slowed the legislative process to a crawl.

4.3 Conclusions

This chapter has documented key EU policy statements about the civil justice field, with reference to basic features of the EU's institutional landscape. I have tried to emphasize general themes, rather than the details of policy proposals, deferring that discussion to Chapter 5 below. It has been necessary here to identify some details about EU interventions into the civil justice field, however, in order to illustrate the dynamics of the policy field. Finally, this chapter has advanced some preliminary arguments about the significance of the Europeanization of civil justice, by exploring linkages between EUstitia and larger themes about governance, judicialization, and legitimacy in the European Union. These (and other) arguments are developed further in Chapter 5 and in subpart II.3 below.

Endnotes to Chapter 4

1. This term was first used by (then) French President Valery Giscard d'Estaing in the 1970s, notably in a European Council meeting in December 1975, as well as in a well-publicized television speech in December 1977 (http://www.ena.lu), both of which involved efforts to coordinate responses to terrorism (Plachta & van Ballegooij 2005: 17). While Giscard d'Estaing's concern in the 1970s was with criminal rather than civil justice (Barbe 2007), the term also crops up occasionally in pre-Amsterdam discussions of the Brussels Convention (e.g., Saggio 1991).

2. The EU's first five-year (multiannual) program (2000-2004) has been followed by a succession of five-year programs (2005-2009, 2010-2014, 2015-2020). Their content, as it impacts on the civil justice subfield, is examined later in this chapter. Each of the first three programs was named after the city in which the summit meeting of the European Council was held. Thus, the first five-year program was agreed in Tampere, Finland, during the first Finnish Presidency of the European Council, and became known as the Tampere Milestones. The second five-year program was called the Hague Programme, and the third the Stockholm Programme, since they were settled during Dutch and Swedish Presidencies, respectively. Controversy arose over the continuing relevance of multi-year programming in the AFSJ field during the negotiations leading up to the fourth program (e.g., Carrera & Guild 2012; Parkes 2009), which was agreed by the European Council in June 2014. The new Strategic Guidelines for the AFSJ 2015-2020 are discussed in subsection 4.2.3.2.6 below.

3. Developments in other AFSJ subfields have followed different trajectories and logics since 1999, but are beyond the scope of this dissertation. However, they were also set in motion by Amsterdam and Tampere, which suggests an additional reason for subjecting these historical events to close scrutiny.

15. This was discussed at length in subpart II.2 of Part II above.

16. The European Parliament also uses this term on occasion. For example, the EP Committee on Legal Affairs (JURI) organized an Interparliamentary "Workshop on Civil Justice" for EU and Member State parliamentarians in November 2010 to discuss "How to facilitate the life of European families and citizens?"

17. Hartnell (2002 & 2015).

18. The 1997 Lisbon (or Reform) Treaty contains a large number of the provisions had appeared in the ill-fated 2004 Constitutional Treaty, including those pertaining to civil justice.

19. Analysis of the Court's jurisprudence in the civil justice field is beyond the scope of this dissertation.

20. Chapter 5 (section 5.2) below examines the individual measures that have been erected on this foundation.

21. Article 65 of the EC Treaty, which was added by the 1997 Amsterdam Treaty, states:
"Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market, shall include:
(a) improving and simplifying:
- the system for cross-border service of judicial and extrajudicial documents,
- cooperation in the taking of evidence,
- the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;
(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States."

22. Article 81 of the TFEU states:
"1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of 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 of 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. ... "

23. One might argue that proof of necessity is implied by the doctrine of subsidiarity, which limits EU legislative activity across the board, and that this constraint was strengthened by the Lisbon Treaty, which created a procedure by which national parliaments can intervene in the EU's legislative process by raising a 'yellow card' if a sufficient number of them want to challenge the EU's competence to act. The principle of subsidiarity provides that the "Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level." Article 5(3) TFEU; see also Article 69 TFEU. This new procedure has resulted in three 'yellow cards' as of 2018: (i) the 'Monti II' proposal to establish EU-level rules on labor unrest and the right to strike; (ii) the 2013 proposal to establish a European public prosecutor's office (Franssen 2013); and (iii) the 2016 proposal to review the posting of workers directive. The Commission withdrew the Monti II proposal in late 2012, albeit without conceding that the proposal violated the subsidiarity principle, which prompted optimism that the 'yellow card' procedure would in time function as an effective constraint against EU over-exuberance (Brady 2013, citing examples of pre-emptive modification of Commission proposals in order to avoid 'yellow card' challenges). This example notwithstanding, the 'yellow card' procedure is weak, and the subsidiarity constraint on EU legislative activity remains weak in practice (*see* Teffer 2014). Both the 2013 proposal to establish a European public prosecutor's office (EPPO) and the 2016 proposal to review the posting of workers directive attest to this weakness. In regard to the EPPO proposal, the Commission concluded that it complied with the principle of subsidiarity, and refused to withdraw or amend it, though it announced its intention to "take due account of the reasoned opinions of the national Parliaments" during the legislative process (Commission Response to EPPO Yellow Card 2013: 13). Similarly, the Commission concluded that the proposal to review the posting of workers directive complied with the subsidiarity principle and decided to maintain it (Commission Response to Posting of Workers Yellow Card 2016).

24. This statement has the greatest impact on the Commission, which is the EU institution that traditionally had the exclusive right of legislative initiative. Its rights are no longer exclusive, but still, the Commission plays a dominant role as the originator of legislation.

25. The following discussion focuses on official EU usage, rather than academic usage (subsection 4.1.1 above).

26. Ideally, this analysis would compare changing English terminology to changes (if any) in other official EU languages. This is impractical, in view of the fact that the EU has 24 official working languages, most of which I cannot read.

27. The Amsterdam Treaty's goal of creating an 'Area of Freedom, Security and Justice' (AFSJ) represents a substantial upgrade of the previously existing situation under the Maastricht Treaty, which merely provided for intergovernmental cooperation in 'Justice and Home Affairs' (JHA or JLS, the latter being the usual French acronym) in the Third Pillar.

28. Irish author Barrett used the label 'European Legal Space' in 1997, but by 2001 had dialed back to 'European Judicial Space' (Barrett 2001). Belgian author Weyembergh (2000) uses 'European Legal Area' when writing in English, but has used labels reminiscent of Giscard d'Estaing's terminology – such as such as '*L'Espace Pénal Européen*' – when writing in French (De Kerchove & Weyembergh 2002). See also Barbe 2007 (*L'espace judiciare européen*).

29. For example, the term 'European judicial area' is found in the 1998 Vienna Presidency Conclusions at ¶ 84.

30. First Funding Framework Proposal (2001: ¶ 1.2, Explanatory Memorandum).

31. The title of the Second Funding Framework is 'Decision 1149/2007/EC of 11 July 2007 establishing for the period 2007-2013 *the Specific Programme Civil Justice as part of the General Programme Fundamental Rights and Justice*'(emphasis added).

32. The idea to create the European Day of Civil Justice emerged at a conference ("Towards Better Access to Justice") in October 2002, which was jointly organized by the EU Commission and the Council of Europe. It was further discussed at the inaugural meetings of two new justice institutions, the European Judicial Network in Civil and Criminal Matters (an EU institution, held in Brussels in December 2002), on the one hand, and the Commission for the Efficiency of Justice (CEPEJ, a Council of Europe institution, held in Strasbourg in February 2003), on the other. Subsequently, the EU Commissioner for Justice and Home Affairs at the time (Antonio Vitorino) endorsed the idea (European Day of Civil Justice Press Release 2003), and a formal decision to launch the European Day of Civil Justice was made by the Ministers' Deputies of the Council of Europe on 5 June 2003. CEPEJ drafted an Organisational Charter for the European Day of Civil Justice, which was formally approved by the Council of Europe's Committee of Ministers in February 2004. The organization of the European Day of Civil Justice, which has been held in late October each year since 2003, is a joint effort of the Council of Europe and the EU.

33. The EU is the newcomer to the civil justice field, compared to the Council of Europe. While best known for its activities in the human rights field, and more recently, the constitutional law field (through the work of its 'Venice Commission'), the Council of Europe – which pre-dates the EU, having been founded in 1949 – has also been active in the preparation of more than 100 conventions addressing a wide variety of private and public law issues, including some civil justice issues (see subsection 2.2.1 in Chapter 2 above).

34. But not in the bulk of academic discourse, as noted in subsection 4.1.1 above, which tends to track disciplinary boundaries rather than policy domains. Some leading European scholars have, however, embraced 'civil justice' in recent years (e.g., Hess, Bergström & Storskrubb 2016).

35. Under the Juncker Commission (since late 2014), the Directorate-General has been renamed DG Justice and Consumers, but is still abbreviated DG-JUST.

36. This is one of the key strategies identified by the Commission for the 'Justice and fundamental rights' policy subfield. European Commission, *available at* https://ec.europa.eu/info/strategy/justice-and-fundamental-rights_en (visited 8 March 2018). To be sure, the term 'European Union area of justice' has not been newly minted, but rather is anchored in the Amsterdam Treaty and the Tampere Milestones. The point here is that this very broad term was largely ignored for over a decade, and has only recently displaced 'European Judicial Area' in Commission usage.

37. On 1 November 2014, the Juncker Commission replaced the Barroso II Commission, which has resulted in a great deal of administrative restructuring within the Commission.

38. This visual representation tracks the conceptual structure of the Second Funding Framework (2007).

39. The European Council approved the overall Multiannual Financial Framework for 2014-2020 on 7-8 February 2013. Justice- and rights-related issues fall under the general heading "Security and Citizenship" and appear to have been slighted in the budget. Funding shall be directed towards "a diversified range of programmes targeted to security and citizens where cooperation at Union level offers value added. This includes in particular actions in

relation to asylum and migration and initiatives in the areas of external borders and internal security as well as measures in the field of justice. Particular emphasis will be given to insular societies who face disproportional migration challenges. Actions within this Heading also support efforts to promote citizen participation in the European Union, including through culture, linguistic diversity and the creative sector. Further more, it covers measures to enhance public health and consumer protection. Simplification of programmes will ensure a more efficient and effective future implementation of actions in this area." European Council Conclusions (Multiannual Funding Framework), EUCO 37/13 (8 February 2013).

40. Article 3(2) of the EU Treaty states: "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime."

41. Article 82(1)(c) of the TFEU adds the same responsibility in the criminal justice field.

42. The official name of the Amsterdam Treaty is the 'Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts." As this name indicates, the Amsterdam Treaty did not *replace* the existing foundational treaties, but merely amended them.

43. Article 14(2) states that the Amsterdam Treaty "shall enter into force on the first day of the second month following that in which the instrument of ratification is deposited by the last signatory State to fulfil that formality."

44. The Vienna Action Plan was, in turn, built on the foundations of an earlier 'draft' Commission document, the AFSJ Communication (July 1998).

45. The Vienna Action Plan was drawn up by the Commission and the Council in response to the call made by the European Council at its meeting in Cardiff in June 1998. The Vienna Action Plan, which was ultimately approved by the Vienna European Council on 11 December 1998, is a document that aims to ascertain how best to implement the Amsterdam Treaty's provisions on the AFSJ.

46. The Amsterdam Treaty placed Article 65 on judicial cooperation in civil matters in Title IV of the EC Treaty, which encompasses "Visas, Asylum, Immigration and *other Policies related to Free Movement of Persons*" (emphasis added). The Lisbon Treaty moved Article 81 into Title V of the TFEU, which encompasses the Area of Freedom, Security and Justice.

47. The Commission's views were shaped in part by the Report on Cost of Judicial Barriers for Consumers, which was prepared by the *Zentrum für Europäische Rechtspolitik* (ZERP) at the University of Bremen (1995).

48. Moreover, national procedures are not only "opaque and costly to varying degrees," but they "also vary in their degree of effectiveness" (Commission Communication on Judgments, 1998: ¶ 6).

49. In its Communication on Judgments, the Commission emphasized the "extreme importance" of measures "to eliminate obstacles to the smooth working of civil rulings . . . for European integration and for the efficiency of the internal market in particular" (1998: ¶ 13).

50. Vienna Action Plan (1998: ¶ I.16). For later elaborations, see, e.g.: Tampere Milestones (1999: ¶ 5) ("Judgements and decisions should be respected and enforced throughout the Union, while safeguarding the basic legal certainty of people and economic operators."); First Funding Framework Proposal (2002: ¶ 1.2) ("important . . . that legal certainty is provided to individuals and business").

51. In this regard, the Commission Communication on Judgments (1998) notes that disparities tend to "weight the scales in favour of litigants who have access to a very efficient recovery procedure and against those at the other extreme who have no such option and have to rely on the 'normal' procedures – which are generally synonymous with much higher costs and lengthy delays" (id. at ¶ 38) (noting the availability in some Member States of special procedures to handle small claims). The "equality of armaments" formulation is derived from the jurisprudence of

the European Court of Human Rights, where "equality of arms" is a significant dimension of "fair trial" under Article 6 of the ECHR. See generally Wąsek-Wiaderek (2000).

52. The goal of bringing Europe closer to the people has deep roots that reach back to the introduction of EU citizenship in the 1992 Maastricht Treaty. For all practical purposes, however, it was the 1998 Cardiff Presidency Conclusions that laid the rhetorical cornerstone for what followed in the civil justice and other AFSJ policy subfields.

53. It is important to note here that the June 1998 meeting of the European Council in Cardiff did not specifically mention civil justice in its survey of AFSJ policy subfields; rather, that meeting was concerned with crime, fraud, drugs racism and xenophobia (Cardiff Presidency Conclusions 1998: ¶¶ I.37 - I.43. This reflects the fact that the United Kingdom, under whose Presidency the Cardiff European Summit was convened, had opted out of the civil justice dimension of the AFSJ at the time of the Amsterdam Treaty.

54. According to Article 15(1) of the EU Treaty, the "European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof," but "shall not exercise legislative functions."

55. Notably, the Commission's 1998 Vienna Action Plan and the European Parliament's 1999 Resolution.

56. Chapter 8 in Part III below traces the process leading to the Tampere Presidency Conclusions.

57. Tampere Milestones (1999: Introduction, ¶ 2). The Tampere European Council was devoted to the entirety of the Area of Freedom Security and Justice, which it framed as consisting of four parts: first, a common EU asylum and migration policy; second, a genuine European area of justice; third, a Unionwide fight against crime; and fourth, stronger external action (Tampere Milestones 1999: headings A-D). This dissertation focuses on the second, justice-related component of the AFSJ.

58. "The European Council invites the Council and the Commission to prepare new procedural legislation in cross-border cases, in particular on those elements which are instrumental to smooth judicial co-operation and to enhanced access to law, e.g. provisional measures, taking of evidence, orders for money payment and time limits" (Tampere Milestones 1999: ¶ 38). "As regards substantive law, an overall study is requested on the need to approximate Member States' legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings. ..." (id. at ¶ 39).

59. Within the narrow confines of private international law, the term 'recognition' of judgments has its own specialized meaning, and is usually paired with the equally specialized term 'enforcement.' In other words, the Tampere Milestones surgically removed the term 'recognition' from its traditional legal context and grafted it onto the EU legal terminology developed by the CJEU.

60. To a limited extent, this was pent up demand, notably in connection with the ongoing process of revising the Brussels I framework. For the most part, however, the ensuing legislative output, which is surveyed in Chapter 5 (section 5.2 below), was an artifact of the plan laid out in Tampere.

61. I refer here to the legislative procedures and related measures contained in the EC Treaty/TFEU (First Pillar of the EU).

62. These documents are too many and too detailed to examine closely. Rather, the analysis here emphasizes path-changing innovations and paradigm shifts.

63. The Tampere European Council "invited" the Commission to prepare a semi-annual "scoreboard" to "keep under constant review progress made towards implementing the necessary measures and meeting the deadlines" that had been established (Eighth Scoreboard 2003: ¶ 1). The Commission dutifully produced its first Scoreboard in March 2000, its second in November 2000, then two per year during the remainder of the period covered by the

Tampere Milestones, or a total of eight between 2000 and 2003. This enormous task not only helped to provide transparency and keep the EU on track, but also created an opportunity for the Commission to engage in further creative elaboration of the civil justice subfield. The scoreboards provide a window into the 'boiler-room' of the civil justice field. Scoreboarding, as a form of tracking progress towards goals articulated in a five-year plan, continued on an annual basis between 2005 and 2007 under the successor to the Tampere Milestones for the period (i.e., the Hague Program).

64. The EU budget, by contrast, is an annual spending program that is adopted within this framework, and usually falls below the ceilings established in the MFF.

65. Commission's First Funding Framework Proposal (2001); First Funding Framework (2002) (adopted by the Council); Commission's Second Funding Framework Proposal (2005); Second Funding Framework (2007) (adopted by the Council and the European Parliament); Commission's Third Funding Framework Proposal (2011); Multiannual Financial Framework for 2014-2020; Rights, Equality and Citizenship Program for 2014-2020 (adopted by the Council and the European Parliament); Justice Program for 2014-2020 (ditto).

66. According to the Explanatory Memorandum that accompanies the First Funding Framework Proposal (2001), Article 2 "lists the specific objectives of the framework for activities. The first objective is the cornerstone ..., with its direct connection to the policy of judicial cooperation in civil matters. The second objective is essential in providing the necessary basis for judicial cooperation, that is, mutual knowledge of legal systems. The third objective reflects the need to ensure the sound implementation and monitoring of Community instruments in this area. ... The fourth objective reflects a priority of the Tampere conclusions, to ensure that progress in establishing an area of freedom and security is accessible and made known to the public" (¶ 3.1).

67. This reference to "civil law" in ¶1(d)) is echoed in the Sixth Scoreboard (2002: ¶ 3.3), which notes the goal of eliminating "obstacles created by disparities *in law* and procedures") (emphasis added).

68. It bears mention here that the EU has no legislative competence over matters of property law, nor over matters of family law or matters relating to succession or wills. It is interesting in this regard to note, however, that the Commission invokes the findings of the December 2003 Eurobarometer poll, which revealed that "[n]ine citizens out of 10 advocate judicial cooperation in civil matters, in particular family matters ..." (Tampere Assessment 2004: 3).

69. Along similar lines, the Commission also suggests that it "might prove useful to facilitate mutual recognition in new fields such as the civil status of individuals, family or civil relations between individuals (partnerships) or paternity" (Tampere Assessment 2004: ¶ 2.7).

70. The reference to "minimum procedural standards" sounds anodyne, but the issues affected are related to what is called 'due process' in the United States, that is, fundamental rights having constitutional status. In Europe, these issues implicate not only national constitutions, but also 'fair trial' provisions found in the EU Charter and in the European Convention on Human Rights. These are, in other words, highly sensitive issues, and many an international treaty negotiation – such as at the Hague Conference on Private International Law – has stumbled over them.

71. Technically speaking, the Hague Program is Annex I to the Dutch Presidency Conclusions (2004).

72. Recall that the Treaty establishing a Constitution for Europe failed, because Dutch and French voters opposed it in referenda held in mid-2005, thereby preventing their respective governments from ratifying it. From this debacle emerged, eventually, the 2007 'Reform' or Lisbon Treaty.

73. Details of the mutual recognition component of the EU's civil justice project are explored in Chapter 5 (subsection 5.2.1.1) below.

74. In particular, the Hague Program calls for further procedural efforts in regard to small claims, alternative dispute resolution, and the so-called European Order for Payment (EOP) (2004: 12).

75. The key point is that the EU moves beyond the original framework, which focuses on judicial decisions, and moves towards considering any and all documents issuing from a Member State that might affect an individual's legal status (e.g., marriage, adoption, divorce, capacity, etc.), which represents a big step into the core of private law – an arena that is still reserved almost entirely to the Member States. Further details are provided in Chapter 5 (section 5.2) below.

76. These developments are elaborated in Chapter 5 (subsection 5.2.2) below.

77. "An EU component should be systematically included in the training of judicial authorities. The Commission is invited to prepare as soon as possible a proposal aimed at creating, from the existing structures, an effective European training network for judicial authorities for both civil and criminal matters ... " (Hague Program 2004: ¶ III.3.2). In addition, the Hague Program aims to enhance cooperation by requiring Member States to "designate liaison judges or other competent authorities based in their own country," and invites the Commission to "organise EU workshops on the application of EU law and promote cooperation between members of the legal professions (such as bailiffs and notaries public) with a view to establishing best practice" (id. at ¶ III.3.4.3).

78. More concretely, the plan was to adopt a "Common Frame of Reference (CFR), to be used as a toolbox to improve coherence and quality of EU legislation, ... in 2009 at the latest" (Hague Program Priorities 2005: ¶2.3(9)).

79. The effect is that of the children's song 'There's a Hole in the Bottom of the Sea,' in which each iteration adds something new and repeats what came before. Thus, by the end of the song, there's a fleck on the speck on the flea on the tail on the frog on the bump on the log in the hole in the bottom of the sea.

80. The Commission's report was supported by extensive studies, including the Hague Implementation Scoreboard (2009) and the Hague Extended Evaluation Report (2009).

81. See also Stockholm Program (2009: ¶ 3, p. 12) ("The European judicial area must ... allow citizens to assert their rights anywhere in the Union by significantly raising overall awareness of rights and by facilitating their access to justice.").

82. See also EP Resolution on Stockholm Program (2009: ¶ P), which notes that "mutual trust also depends on an ongoing valuation of the effectiveness and results of the various national systems, conducted at both the national and the European levels." In this context, both the Commission and the EP expressly invoke the work of the Council of Europe's 'Commission for the Efficiency of Justice' (CEPEJ) (Commission Priorities for Stockholm Program 2009: ¶ 2.3; EP Resolution on Stockholm Program 2009: ¶ P).

83. Nor did the Commission's 2010 Stockholm Action Plan take up the EP's proposal to include university curricula as a means of developing European legal culture.

84. The European Parliament has been 'Lisbonized' since 2009, which means its institutional powers in the AFSJ have been ratcheted up. See, e.g., Carrera, Hernanz & Parkin (2013: 11) (Lisbon Treaty "effectively formalises the role of the LIBE Committee [EP Committee Responsible for Civil Liberties, Justice and Home Affairs] as an 'AFSJ decision-maker' ...").

85. The European Council approved the MFF in February 2013. Formal adoption of the MFF also required the approval of the European Parliament and the Council of the EU, which were forthcoming in November and December 2013, respectively.

86. See, e.g., Commission Annual Growth Survey (2013: 2) (emphasizing the need to "lay the foundations for future growth and competitiveness that will be smart, sustainable and inclusive. In order to continue with the necessary reforms, the EU needs to be able to show that our policies are working, that they will deliver results over time and that they will be implemented fairly in terms of the impact on our societies. ... Recognising that our economies are closely intertwined, the EU is now reshaping its economic governance to ensure better policy responses to current and future challenges.").

87. Signs of this shift were already visible in the Stockholm Program, with its attention to the "economic benefits" of civil justice cooperation, and were fleshed out in the Commission's 2010 Stockholm Action Plan (¶ 4), which stressed that the "European judicial area benefits all Union policies, supporting their development and successful implementation. In particular, it should be put at the service of citizens and businesses so as to support economic activity in the single market, ensuring a high level of consumer protection."

88. Also crammed under the 'Security and Citizenship' heading are public health, consumer protection, culture, youth, information, and dialogue with citizens.

89. These two programs have the formal status of legislation, since both are regulations adopted by the European Parliament and the Council according to the ordinary legislative procedure. They were adopted in the nick of time – on 28 December 2013 – given that the effective date of the new MFF was 1 January 2014.

90. Judicial training and related developments are analyzed in detail in Chapter 5 (subsection 5.2.2) below.

91. This final formulation is slightly broader than the language initially proposed in the Commission's Third Funding Framework Proposal - *Justice* (2011: Article 2): which encompassed "judges, prosecutors, advocates, solicitors, notaries, court officers, bailiffs, court interpreters and other professionals associated with the judiciary." The final language in the Justice Program for 2014-2020 prefers general conceptual language – "and court officers, as well as other legal practitioners associated with the judiciary" – to the simple list contained in the Third Funding Framework Proposal - *Justice*, and also substitutes the generic term 'lawyer' for the more particular terms 'advocate' and 'solicitor.'

92. For example, the Second Funding Framework (2007), which largely reflected Hague Program (2005-2009) priorities, also extended into most of the period covered by the Stockholm Program (2010-2014).

93. Wagner (2014a: 470) notes many of the Stockholm Program goals that had not been achieved by 2014, such as measures related to online dispute resolution, mediation in family matters, conflict of law rules for security interests and for company law, and minimum procedural standards.

94. Article 17 of the Treaty on European Union lays out the procedure for Commission elections. In a nutshell, the European Council proposed Jean-Claude Juncker as the next President of the Commission at its June 2014 meeting, taking account of the results of the May EP elections, and the EP then elected him (by an absolute majority) to the office. Next, President-elect Juncker put together a team of Commissioners (in collaboration with the Council of the EU), and proposed significant reorganization of the Commission and existing portfolios – including those pertaining to civil justice and other AFSJ matters (see Carrera & Guild 2014b) – in the process. In October 2014, the proposed Commissioners appeared for questioning before the Parliamentary committee that corresponds to the portfolio for which the person was nominated, then the EP approved the Juncker Commission *as a whole*. The European Council then voted (by qualified majority) to appoint the new President and his team to office for a five-year term, which commenced on 1 November 2014.

95. Wagner (2014a: 469-70) observes that both the Hague and Stockholm Programs involved lengthy, difficult, and strength-sapping negotiations, and argues that an extremely strong political will would have been required to find consensus on AFSJ matters, in view of the different priorities and interests of the Member States, and the fact that none of the Member States occupying the presidency during the relevant periods were keen to take on this challenge.

96. This provision was added in 2009, pursuant to the Lisbon Treaty.

97. Formally, the European Parliament has no role in the policy-formulation process under Article 68 TEU, in contrast to its important role as co-legislator with the Council (under the ordinary legislative procedure) in all civil justice matters except family law. This has been criticized (see, e.g., Wagner 2014a: 471).

98. Viviane Reding of Luxembourg served three terms as a member of the European Commission, which culminated in her serving as EU Commissioner for Justice, Fundamental Rights and Citizenship (and Commission Vice-President) in the second Barroso Commission (February 2010 - July 2014). Prior to this position, she had served as Commissioner for Education and Culture (1999-2004), during which term she established *inter alia* the Erasmus Mundus program. In the first Barroso Commission, Reding served as Commissioner for Information Society and Media (2004-2010), during which term she pushed through popular legislation to cap mobile roaming charges. She is an ambitious politician who had hoped to become the nominee of her party for the post of Commission President after Barroso stepped down in 2014. Failing that, she was elected to the European Parliament in mid-2014, and was succeeded as Commissioner by Martine Reicherts, also from Luxembourg, in July 2014.

99. *Assises de la Justice* Press Release (2013).

100. The Commission offers the following interpretation of the results shown in Appendix E: "While only 22% of respondents think that national justice systems should be an exclusive matter for Member States, *two thirds of the rest think that the functioning of national judicial systems is a matter of Common European concern* because of the existence of cross-border cases, to ensure that EU law can be upheld effectively throughout the Union, or if there are serious problems in the functioning of a national judicial system." *Assises de la Justice* Press Release (2013: 4) (emphasis added). The Commission's claim that 2/3 of respondents support the idea that "the functioning of national judicial systems is a matter of Common European concern" is dubious. This level of support can only be reached by characterizing responses that"tend to agree" that the functioning of a national judicial system is exclusively a matter for Member States" as supporting the converse, i.e. that it *is* a matter of common European concern.

101. The Justice Scoreboard appears destined to be an annual event. The 2014 Justice Scoreboard was released in mid-March 2014. Unlike the scoreboards used by the Commission after 1999, which tracked progress made by the EU towards the goals articulated in the Tampere Milestones, the new Justice Scoreboard turns the Commission's withering gaze on the national legal systems in the Member States.

102. As a result of the 2013 Justice Scoreboard, the Council of the EU made recommendations to ten Member States – Bulgaria, Hungary, Italy, Latvia, Malta, Poland, Romania, Slovenia, Slovakia, and Spain – to improve the independence, quality, and/or efficiency of their justice system or to further strengthen the judiciary (Justice Scoreboard 2014: 5, fn. 21). See also Council Recommendations in 2013 O.J. C 217, volume 56 (30 July 2013).

103. In addition, according to informal conversations at Harvard Law School in September 2013 with high-level representatives of the Council of Europe, some Council of Europe (CoE) personnel were outraged that the EU – in particular, DG Justice – has appropriated the work (i.e., role, methodology, and findings) of the CoE's Commission on the Efficiency of Justice (CEPEJ), which both the Commission and the European Parliament had recognized as the key player in the "quality of justice" arena in connection with the EU's own Stockholm Program. The Commission's 2013 Justice Scoreboard (2013: 3) does acknowledge CEPEJ's contribution to the EU report.

104. Reflecting the sensitivities of some of the relatively new (i.e., post-Communist) Member States, the EP Resolution on 2013 Justice Scoreboard states that "any comparison national justice systems, especially in relation to their previous situation, must be based on objective criteria and on evidence which is objectively compiled, compared and analysed; points out the importance of assessing the functioning of justice systems as a whole, without separating them from the social, historical and economic situation of the Member States or from the constitutional traditions that they stem from; stresses the importance of treating Member States impartially, thus ensuring equality of treatment between all Member States when assessing their justice systems" (¶ 4). In order to avoid blind-siding Member States in the future, the EP "calls on the Commission to discuss the proposed method at an early date, in a transparent procedure involving the Member States" (¶ 5), and "points out that benchmarks must be set before information on national justice systems is gathered in order to develop a common understanding of methodology and indicators" (¶ 6).

105. The EP Resolution on 2013 Justice Scoreboard "takes note of the EU Justice Scoreboard with great interest; calls on the Commission to take this exercise forward in accordance with the Treaties and in consultation with the Member States, while bearing in mind the need to avoid unnecessary duplication of work with other bodies" (id. at ¶

1); and "underlines the role of the CEPEJ in gathering and presenting the relevant data at both national and regional level; considers that the EU institutions should seek to cooperate with the CEPEJ, as it provides an excellent basis for the exchange of best practices, and duplication needs to be avoided" (id. at ¶ 19).

106. The Commission's Justice Agenda 2020 is accompanied by the 2014 Justice Scoreboard, which carries forward the exercise begun in 2013, as well as another ambitious document, the 2014 Rule of Law Framework, which proposes an approach to situations – such as the current one in Hungary – where "the mechanisms established at national level to secure the rule of law cease to operate effectively" (id. at 5).

107. In this sense, the Commission was anticipating the rule of law problems that have reached crisis proportions in some of the newer Member States from Central/Eastern Europe.

108. In particular, the EP Resolution on Stockholm Program Review (2014: ¶ 40) calls upon the Commission "to work effectively towards the establishment of an International Judgments Convention," along the lines of the failed effort in the 1990s to achieve a global treaty in the framework of the Hague Conference on Private International Law.

109. For a highly critical view see Carrera & Guild (2014a: 2) (arguing that the 2014 Strategic Guidelines aim to "limit and prevent the emergence of plural and competing policy agendas and strategic programmes by the next European Commission and European Parliament" and to "sideline the EU Charter of Fundamental Rights and rule of law in the wider EU AFSJ policy landscape"). To be sure, their criticisms are aimed more at the more controversial AFSJ subfields, such as migration and criminal law, rather than at civil justice.

110. For Wagner (2014: 471), the consolidation mandate appears to be the most important one. "The period of actionism, during which one legal instrument after another was rapidly pulled out of thin air, is over." ("Die Zeit des Aktionismus, in der mit hoher Geschwindigkeit ein Rechtsinstrument nach dem anderen aus dem Boden 'gestampft' worden ist, soll vorbei sein."). Wagner welcomes the general re-orientation towards less speed, fewer new legal instruments, and greater coherence in the civil justice field, but criticizes the Commission Justice Agenda 2020 as vague (id. at 472).

111. Article 67(1) of the TFEU (as amended by the Lisbon Treaty in 2009) states: "The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States."

112. DG Justice is under the stewardship of Věra Jourová (Commissioner for Justice, Consumers and Gender Equality), while DG Migration & Home is under the stewardship of Dimitris Avramoupolos (Commissioner for Migration, Home Affairs, and Citizenship).

Chapter 5: The EU's Civil Justice Policy Field since 1999: Content and Context

This chapter provides a current map of the EU's civil justice policy field that is both detailed and contextualized.[1] Since 1999, when the Amsterdam Treaty communitarized "judicial cooperation in civil matters" and the European Council laid out a five-year plan at its Tampere Summit, the EU's efforts to create a "genuine area of justice" (Tampere Milestones 1999: ¶¶ I.3.5 & I.3.7) have been rapid and dramatic. The AFSJ field was "transformed ... into a huge 'building site' " (Weyembergh 2000). The scope and pace of development has been so dramatic that even experts in the affected fields were initially caught by surprise.[2] Around twenty substantial – and in some cases highly ambitious and controversial – legislative and other civil justice measures have been adopted, and more are in the pipeline.[3] Some of these measures, which permeate the legal infrastructure upon which the EU's legal order is built, surpass even the broadest reading of the formal Treaty language on "judicial cooperation" (Chapter 4 above).

Together, Amsterdam (1997) and Tampere (1999) breached – but did not demolish – the crumbling wall of national legal sovereignty, and unleashed a deluge of legal and other institutional measures in the civil justice field.[4] However, the movement towards harmonization in this field has not been "a triumphal parade: it looks more like a [conquest], house by house, of the fortified town of national self-determination" (Biavati 2001: 90). At the end of the first decade, a prominent UK solicitor and scholar in the field greeted Brussels' latest effort to upend centuries of legal tradition by asking, tongue in cheek, "When will we ever be allowed to rest?" (Dickinson 2009; see also Stadler 2004). The rapid pace continued until the end of the second Barroso Commission in late 2014, and although it has slowed since then, it has by no means come to a standstill. The following discussion, which focuses on what has been accomplished to date, lends considerable support to the exhausted expert's comment on the dynamic transformations that have occurred.[5]

The developments documented in this chapter have dramatically altered – and have the potential to further transform – Europe's legal order.[6] The three subfields that make up the EU's composite civil justice field – civil procedure (broadly understood), the administration of justice, and the conflict of laws (choice of law) – have historically been lodged in, and compromise core features of national legal sovereignty. They reflect local culture, legal philosophy, and the trajectory of national history, and tend to vary in significant ways from one country to another.[7] Marx (1842) observed that trial procedure is the "way of life of the law, the manifestation of its inner life."[8] Some comparative scholars go so far as to claim that "legal procedure is the purest (perhaps the defining) expression of legal traditions" (Balas et al. 2009: 139, quoting Damaška 1986 and Zweigert & Kötz 1998). However, the EU's three civil justice subfields do not have the same history or meaning, nor do they vary to the same degree.[9] For this reason, any assessment of the EU's emerging civil justice field requires attention to each of its three component parts. At the same time, however, Europeanization must also be viewed holistically, in regard to their role in the larger framework of the EU's evolving legal order.[10]

A holistic grasp of EUstitia's significance is hamstrung by lack of consensus on the nature of the EU's legal order. Indeed, this remains a highly contested issue in the study of European integration. Dickson (2008) evaluates three possible models for grasping its peculiarity – (i) EU law is a "distinct legal system"; (ii) EU law is "part of Member States' legal systems"; or (iii) there is "one big legal system" in the EU – and finds all three models lacking.[11] In the end, Dickson argues convincingly that the EU warrants, at the very least, the label 'legal system' in

fundamental jurisprudential terms, notwithstanding the fact that the question of the autonomy of EU law vis-à-vis the national legal systems is a matter on which many disagree.[12] Dickson's detente offers a convenient path through the morass, as does the insight that neither the EU nor its Member States are wholly autonomous, in behavioral terms, since influence flows both ways. The EU legal order, as Wilhelmsson puts it, "lacks roots in a legal culture but at the same time ... is functionally integrated into national legal cultures" (1999: 439). The crucial point, for present purposes, is that both EU and national legal systems lay theoretical claim to autonomy vis-à-vis the other, while simultaneously accepting that they are part of – and thus subject to – the larger international legal order.[13]

The organization of this chapter proceeds as follows. Section 5.1 addresses some preliminary issues, with the aim of facilitating the analysis that follows. Section 5.2 then maps each subfield of the EU's civil justice field, and explores the significance of these developments by providing a set of interpretive frameworks for understanding the broader implications of the EU's moves to 'domesticate' international procedure and the conflict of laws, civil procedure, and the administration of justice. Section 5.3 concludes the by exploring the transformative potential of the Europeanization of civil justice.

Even nearly two decades after communitarization of the field in 1999, there has been no wholesale harmonization of civil justice laws in the EU. Rather, the EU's manifold and (increasingly) intrusive activities in the civil justice field *displace* national activities, but only to some extent.[14] In the language of constitutional federalism, the EU has not completely occupied (or pre-empted) the civil justice field. Rather, the AFSJ is – in the EU's constitutional terminology – a field of "shared competence" (TFEU art. 4(2)(j)), and not one in which the EU has exclusive authority to legislate.[15] Similarly, EU activities in the AFSJ field largely *supplement* civil justice initiatives originating in other international and regional fora, but do not displace them entirely, at least not as a matter of law.[16] These qualifications, while necessary to avoid *overstating* the significance of Europeanized civil justice, simultaneously run the risk of *understating* it. This chapter navigates between these twin perils.

5.1 Preliminary Matters

5.1.1 Conceptual Framework

This chapter aims to illustrate the expansion as well as the dynamism of the field. The first step is to compare two Venn diagrams, the first of which (Figure 2.1 in Chapter 2 above) depicts conceptual categories in the civil justice field as they existed in the 1997 Amsterdam Treaty, and the second (Figure 5.1, below), as altered a decade later by the 2007 Lisbon Treaty.

[INSERT FIGURE 5.1 ABOUT HERE]

Figure 5.1

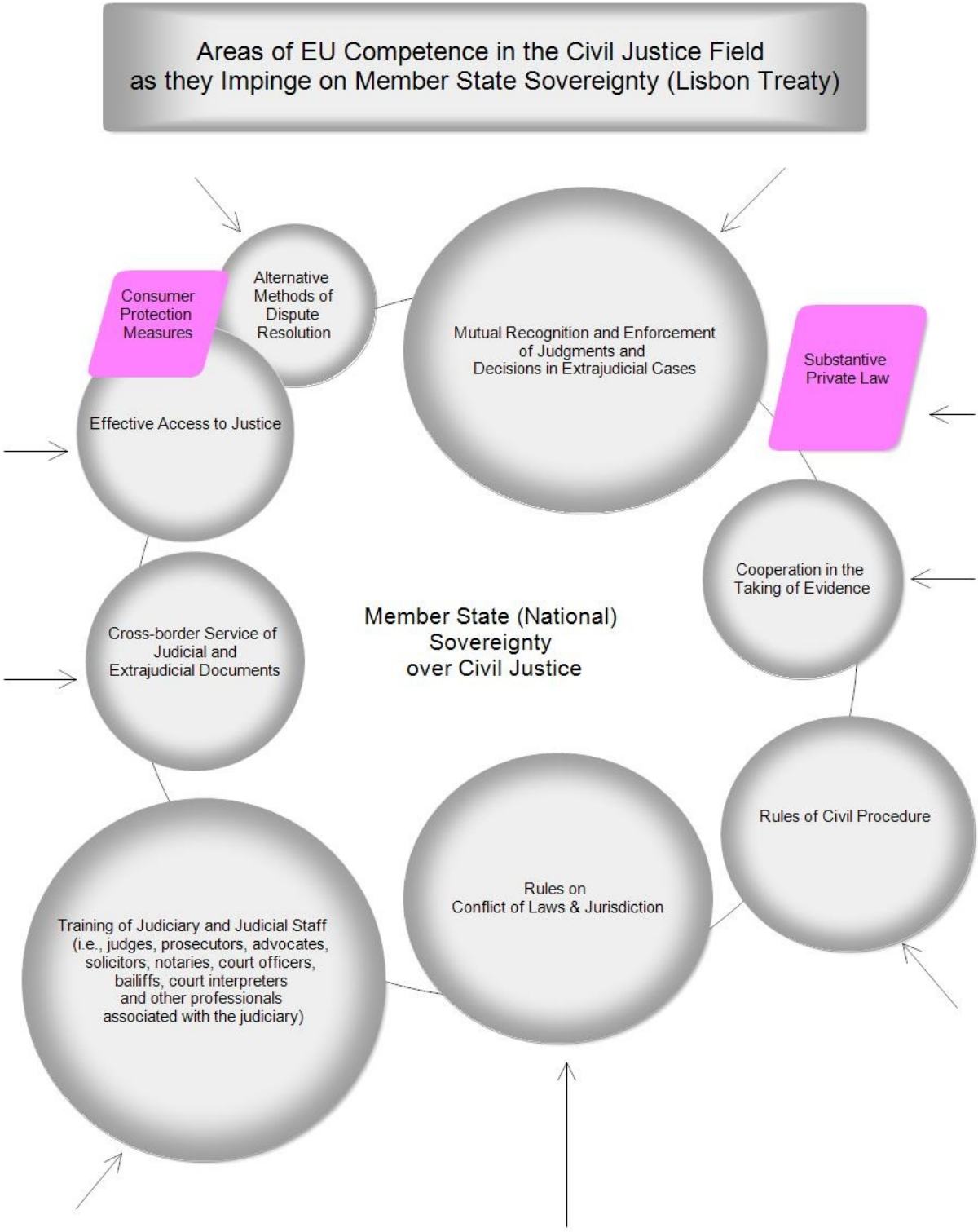

Areas of EU Competence in the Civil Justice Field
as they Impinge on Member State Sovereignty (Lisbon Treaty)
Alternative Methods of Dispute Resolution
Consumer Protection Measures
Mutual Recognition and Enforcement of Judgments and Decisions in Extrajudicial Cases
Substantive Private Law
Effective Access to Justice
Cooperation in the Taking of Evidence
Cross-border Service of Judicial and Extrajudicial Documents
Member State (National) Sovereignty over Civil Justice
Rules of Civil Procedure
Rules on Conflict of Laws & Jurisdiction
Training of Judiciary and Judicial Staff (i.e., judges, prosecutors, advocates, solicitors, notaries, court officers, bailiffs, court interpreters and other professionals associated with the judiciary)

Figure 2.1 (in Chapter 2 above, at page 25 above) depicts the EU's civil justice field under the Amsterdam Treaty. At that incipient stage of its development, "judicial cooperation in civil matters" comprised *private international law* – both its narrow (i.e., choice of law) and broad (i.e., international or transnational civil procedure) meanings. It also included a broad general reference to *civil procedure*, along with one dimension of the *administration of justice*, namely access to justice.[17] *Substantive law*, on the other hand – the private law of contract, tort, family law, etc. – was not formally part of the civil justice field at all.

Figure 5.1 depicts the EU's civil justice under the more recent Lisbon Treaty. This Venn diagram disaggregates the conceptual legal categories and shows each component of the EU's civil justice field separately. The first thing to notice is the expanded *number* of civil justice subfields in which the EU became active between 1999 and 2009. Second, the *size* of each policy subfield depicted in Figure 5.1 gives a rough sense of how developed it is, either in terms of the quantity of measures adopted or their comprehensiveness. Finally, Figure 5.1 suggests the *extent* to which EU measures occupy a given policy subfield, that is, how deeply the EU has moved into realms previously occupied by the Member States. In this regard, Figure 5.1 illustrates that the degree to which EU law displaces national law varies from one civil justice subfield to another.

The terms 'civil justice' and 'EUstitita' as used here include all types of measure listed in Article 81 of the TFEU, as well as some that are not explicitly mentioned in the Treaty but are nevertheless formally part of, or at least institutionally linked to the growth of the AFSJ. These measures are bundled, and subsequently discussed, according to the following schema:

- **Procedural Law** [18]
  - Jurisdiction and Mutual Recognition and Enforcement of Judgments and Decisions in Extrajudicial Cases (TFEU art. 81(2) (a) &(c))[19]
  - International Judicial Assistance:
    - Cross-border Service of Judicial and Extrajudicial Documents (TFEU art. 81(2)(b))
    - Cooperation in the Taking of Evidence (TFEU art. 81(2)(d))
  - 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) (TFEU art. 81(2)(f))

- **Institutional Measures: The Administration of Justice**
  - Judicial Network & E-Justice
  - Support for the Training of the Judiciary and Judicial Staff (TFEU art. 81(2)(h))
  - Effective Access to Justice (TFEU art. 81(2)(e))
  - Alternative Methods of Dispute Settlement (TFEU art. 81(2)(g))

- **Conflict of Laws**
  - Choice of Law Rules (TFEU art. 81(2)(c))

5.1.2 Key Features of the EU Legal Order

Developments in the EU's civil justice field implicate the EU's politico-legal order in a number of ways, which are explored in section 5.2 below. A quick overview of the organization of the EU's administrative and judicial branches, the role of procedure in the EU construction,

and the nature of legal pluralism in the EU will facilitate the discussion below.[20]

The organization of administrative and judicial authority in the EU is predominantly decentralized, with the result that most EU law enforcement[21] is carried out by the Member States' own administrative and judicial apparatus (Barents 1992: 64-5). The Commission has noted that EU law "has traditionally left it up to the Member States to determine how their authorities and courts operate, even though they are heavily involved in the process of applying Community law. There is no European law-enforcement area but rather a juxtaposition of national systems each configured as an autonomous body of civil procedure. Their respective bodies of law are the fruit of their respective historical backgrounds and vary widely in consequence."[22]

In practical terms, this means that Member State courts are EU courts of general jurisdiction (Maher 1994), which have – as organs of their respective Member State – the "duty and the power to apply all rules of [Union] law that may be relevant to the cases coming before [them]" (Temple Lang 2007: 1532).[23] National judges are "part of the Community judiciary and might be considered the Community's *juges de droit commun*," according to a former Dutch member of the Court of Justice (Kapteyn 1997: 181). National courts are thus the primary judicial arenas in which individuals, companies and others can seek to vindicate rights (or raise defenses) based on EU law.[24] This fact alone suggests, but by no means exhausts the key role of procedural law in the enforcement of EU law.

Procedural rules[25] *constitute* legal order in the EU in two fundamental ways. First, the EU's 'reference for a preliminary ruling' procedure is the pre-eminent[26] characteristic of the EU legal order, in the context of litigation involving EU norms. This procedure links national courts with the EU's Court of Justice in a judicial dialogue that drives the evolution of the EU legal order, insofar it *empowers* national tribunals – and under certain circumstances *obliges* them – to refer questions about the validity or interpretation of EU law that arise in cases pending before them to the Court of Justice in Luxembourg for an authoritative ruling, as a means to ensure legal uniformity across the EU.[27] This procedural mechanism is so central to the EU legal order that the Court relied on it to justify the revolutionary 1962 *van Gend en Loos* ruling, which held that provisions of the EEC Treaty – unlike traditional international law – created rights that could be enforced by private parties in legal proceedings before a national tribunal.[28] The Court reasoned that the mere existence of the preliminary reference procedure implies the existence of a supranational right that is capable of being invoked before a national court.

The second way in which procedural law constitutes the EU legal order is the 'division of labor' between EU and national law in cases involving EU norms[29] that are litigated in Member State tribunals.[30] Traditionally, EU law was said to govern *substantive* EU legal issues,[31] such as whether a rule of EU primary law (i.e., treaty) or secondary law (e.g., legislation) has been violated, whereas national courts were 'autonomous' when it came to providing the *procedures* and *remedies* for enforcing those rights and duties derived from EU law.[32] As previously noted,[33] this traditional 'doctrine of national procedural autonomy' has eroded under pressure from the Court. However, the tension between the EU and its Member States across the substance-procedure frontier remains a key battleground "for the protection of rights, the effectiveness of [EU] law and the search for justice" (Douglas-Scott 2002: 312). This tension is unlikely to diminish in the future, given that the EU plays an increasingly important role in establishing procedures and other civil justice rules that will affect not only EU claims and defenses, but those arising under Member State law as well. Member States retain a shrinking, but nonetheless viable

governance claim over the conduct of civil proceedings in their courts and other tribunals.

A third major characteristic of the EU legal order is legal pluralism.[34] From an anthropological perspective, most modern states consist of "parallel and often contradictory regulations ... based on different types of legitimation: international law, state law, religious law, customary law and forms of self-regulation."[35] Like these states, the EU is characterized by "coexisting normative orders that challenge state-led law making" (Chowdhury & Wessel 2012: 348).[36] However, the EU is peculiar in two respects. First, the anthropologists' list of legal sources must be supplemented by the addition of binding *supranational* sources, such as EU secondary law and case law. And second, like other federal arrangements, the EU legal order lays claim to a quasi-constitutional normative primacy, or supremacy over the laws of its constituent Member States.[37] These peculiarities aside, the EU can be seen as part of a long line of overlapping, interacting, and occasionally conflicting normative orders in Europe that can be traced back over millennia (Hartnell 2015). Tension exists in the EU between legal diversity and legal unity – such as in the field of private law – and debates are heated between proponents of greater convergence or systemic coherence, on the one hand, and those who are willing to tolerate fragmentation in order to preserve legal diversity, on the other.[38] Some EU civil justice measures, as explained below, are mechanisms for managing this complex legal pluralism.

5.2 A Micro-Level View of the Topography of the EU's 'Genuine European Area of Justice' (European Judicial Area)[39]

The EU's accomplishments in (not quite) two decades since the Amsterdam Treaty entered into force in 1999 have dramatically altered the legal landscape. EU action began, but did not end with articulating the overarching goals and logics driving the civil justice field, namely, access to justice, mutual recognition, and greater convergence in civil law (Tampere Milestones 1999). Once the Amsterdam Treaty entered into force, civil justice issues – which for generations had been the province of Member State diplomats and their legal experts – landed in the laps (at first) of a small handful of EU bureaucrats. After some initial difficulties marshaling the expertise needed to handle the new tasks assigned to them, the EU institutions rose to the challenge posed by their new responsibilities in the field of civil justice, and proposed a wide array of measures, of which many were subsequently adopted. By now, the EU "has adopted an impressive acquis covering a number of issues connected to the everyday lives of citizens and companies," and is currently "the most advanced system of mutual recognition, civil and administrative cooperation and unified choice of law in the world" (European Policy Centre 2013: 6).[40]

My aims in this section are two-fold. First, I provide a micro-level view of Europeanized civil justice (EUstitia) measures that have been considered or adopted since communitarization of the field pursuant to the Amsterdam Treaty. My analysis focuses on major themes, rather than on details of the potentially bewildering array of civil justice measures. The expansive growth of the field has not continued unabated, in view of the "new start" proclaimed by incoming Commission President Juncker at the end of 2014. In pursuit of his goal of making a "political priority of lightening the regulatory load," Juncker embraced the "principle of political discontinuity," and set out to "clear the decks" of backlogged legislative proposals that were not integral to the new Commission's priorities (Juncker Commission Work Program for 2015: 3-4). Civil justice is not evident among the ten priorities articulated by the Juncker Commission, nor are civil justice measures among the newly announced initiatives (id. at Annex I). However, the

fact that the Commission's 'hit list' of legislative proposals to be withdrawn (id. at Annex II) includes *no* civil justice measures suggests that the Commission was not particularly concerned about curbing legislative activity in this field. That the civil justice policy field does not have a target pinned to its back comes as no surprise, given that the Commission's twin aims – addressing citizens' needs and seeking to cut red tape and remove regulatory burdens on business – are in close alignment with the civil justice agenda.

Second, this section assesses the actual and potential significance of the changes that have been introduced in the EU's civil justice field. In this respect, my contribution does not provide a comprehensive analysis of the law in action but rather explores the broader implications of replacing national of civil justice issues with EU governance. These developments should not be ignored because they are 'merely' procedural. They matter to European integration in particular, but also to transnational governance more generally.

The Commission remains a key driver of policy innovation in the field, given its central role in EU legislative processes, but the European Parliament (EP) (as co-legislator) has become increasingly powerful in the civil justice arena, alongside the Council (as co-legislator). However, the Member States themselves continue to play an unusually active role in this field, not least through their use of the enhanced cooperation procedure[41] to address civil justice issues.

5.2.1 Procedural Law and the Politics of Procedure

The EU has already taken a wide range of measures in regard to the "arcane"[42] matter of procedural law. The Amsterdam Treaty directed the EU's attention from the outset toward multiple facets of procedural law: (a) recognition and enforcement of decisions, (b) rules of jurisdiction, and (c) rules of civil procedure (EC Treaty art. 65), all of which have become the subject of legislative measures, as detailed below. Indeed, the first three legislative measures that the EU adopted in the newly communitarized civil justice field were all addressed to traditional 'infrastructural' problems of 'international' (cross-border) procedure. While these issues remain on the agenda, recent developments target a more particular set of internal market concerns that affect the interests of citizens and business. The political dynamics in this subfield are driven by the EU's push to implement the 'mutual recognition' principle in the civil justice field, and the resulting pressure to establish minimum procedural guarantees.

5.2.1.1 Jurisdiction and Beyond: Extending 'Mutual Recognition' into the Civil Justice Arena

The EU's new civil justice legislative program began with "improving and simplifying ... the recognition and enforcement of decisions in civil and commercial cases" (EC Treaty art. 65(a))[43] and "promoting the compatibility of the rules ... of jurisdiction" (EC Treaty art. 65(b)).[44] However, the procedural subfield is animated by aspirations that reach far beyond the infrastructural goal of making the existing mechanisms for coordinating Member State legal systems more efficient. Rather, the AFSJ harnesses the systemic coordination function of procedural law to the overarching goals of establishing the "principle of mutual recognition" as the "cornerstone of judicial co-operation in both civil and criminal matters," and thereby facilitating "the judicial protection of individual rights" (Tampere Milestones, ¶VI. 33). The EU's movement towards these goals has progressed in stages across a broad front that encompasses civil and commercial relations, ranging from the intimate arena of family life to an array of measures aimed at facilitating debt collection throughout the EU.

These developments provide an apt starting point for this survey of the EU's emerging civil justice landscape, for five reasons. First, this procedural category nicely illustrates the hybrid form that EU law is taking, as it merges 'domestic' civil procedure with 'international' procedure, and reconceptualizes itself as 'cross-border' within the EU's increasingly federal legal framework.[45] Second, the EU's legislative efforts in the civil justice field are most comprehensive and advanced today in connection with precisely these measures. Third, they illustrate the emerging holistic effect of the incremental changes being made in the civil justice field. Fourth, these developments unleash a dynamic that is pushing deeper integration in the civil justice field. And fifth, the mutual recognition paradigm offers a vivid illustration of the institutional dynamics that have characterized the civil justice field since communitarization in 1999. This last point requires further elaboration.

The first major post-Tampere policy statement that emerged from Brussels was the Draft Mutual Recognition Program (Appendix F),[46] which aimed to realize Tampere's stated goal of extending the mutual recognition principle into the administration of justice (Tampere Milestones 1999: ¶ 33). Although this Program was, formally speaking, a 'draft' that never gained legal force,[47] it nevertheless became the lodestar that guided the first generation of civil justice legislation, and has continued to orient action in the civil justice field. As Appendix F illustrates, the Mutual Recognition Program embodies an ambitious vision for implementing the principle of mutual recognition in four areas corresponding to the core of private law governing human relations,[48] and lays out an exceedingly complex, multi-stage approach to achieving various 'degrees' of mutual recognition in each area.[49] The breadth and depth of the Program was startling in its time, and attests to the far-reaching vision of the legal experts already on task within the EU bureaucracy during the early years after communitarization.

5.2.1.1.1 Jurisdiction and Regimes for the Recognition and Enforcement of Civil and Commercial Judgments: Brussels I

The Amsterdam Treaty made it possible to substitute binding EU legislation for the 1968 Brussels Convention, the treaty that formerly governed the affected issues – namely, court jurisdiction in civil and commercial matters, plus recognition and enforcement of the resulting judgments – among Member States. The Brussels Convention was already in the process of being reviewed and amended when the Amsterdam Treaty came into force and upset the apple cart in mid-1999 (Commission Communication on Judgments 1998). After a failed effort to fast-track adoption of the new law (Proposal to Adopt Brussels Convention 1998), the Commission initiated a process that revised the pre-existing treaty and 'reformatted' it as EU legislation in 2000, which resulted in the so-called Brussels I Regulation (2000) (Beaumont 2002). The switch from multilateral treaty to EU legislation as a mode of governance streamlines the decision-making process, insofar as qualified majority (rather than unanimous) voting rules apply under the EU's 'ordinary legislative procedure.' Despite this major innovation, the civil justice policy field remains a complex one.

This complexity has numerous sources. Indeed, the civil justice field is characterized by "differentiated integration" (Adler-Nissen 2009: 63), which results from three separate causes. First, three Member States – Denmark, Ireland, and the United Kingdom – secured permanent derogations from the asylum, immigration and civil justice provisions in Title IV of the Amsterdam Treaty, which has resulted in uneven coverage and occasionally perplexing efforts to bridge the resulting legal gaps.[50] Second, one sensitive arena of civil justice policy-making –

family law – remains subject to unanimity requirements, which makes it particularly difficult to reach agreement on common rules. And third, the switch from multilateral treaty-making to EU legislative procedure does not render the legal issues at stake any simpler or less controversial, as the lengthy process of replacing the 2000 version of the Brussels I Regulation attests.[51]

While both the 2000 and 2012 (Recast) versions of the Brussels I Regulation regulate the same package of issues – jurisdiction and judgments – the reformed legislation embodies significant "structural and conceptual changes" (Baumgartner 2014: 188, 191-93), and these illustrate some of the larger trends underway. The 'Brussels system' provides the core "matrix" of EU procedural law (Brussels I Recast Regulation Proposal 2010: 3), from which position it bridges both the past and future of EUstitia. In terms of future orientation, the Brussels I Recast Regulation (2012) exemplifies the growing trend to view the EU's civil justice arena holistically, and to encourage legal coherence by defining a "hermeneutic circle" of EU measures (Garcimartín Alférez 2008: § I-62) that must be interpreted in a manner that is consistent with other core legislation in the field.[52]

More backward-looking, on the other hand, is the continuing tendency to dovetail EU legislation with the national legal orders and seek only partial harmonization of an issue area, leaving some crucial issues to be covered by the (non-uniform) domestic laws of the Member States. For example, Brussels I contains an obligatory list of jurisdictional rules that must be applied in certain cases,[53] but these rules only partially displace the Member State's own jurisdictional rules, which apply otherwise. The Commission's Brussels I Recast Regulation Proposal (2010) would have abolished the subsidiary role of Member State rules of jurisdiction and displaced them entirely by uniform EU rules, but this radical proposal was rejected. Another significant linkage to the past is the continuing preservation of the Member States' 'public policy defense' to the enforcement of a judgement from the court of another Member State, which is a residual bastion of national sovereignty. Here, too, the Commission's 2010 proposal would have gone all the way and eliminated this defense, in order to facilitate the movement of court judgments – in concrete terms, their enforcement – throughout the EU. The Member States were not, however, prepared to guarantee automatic enforcement, and refused to relinquish their ability to block enforcement of judgments in cases that *they deem* appropriate.[54]

The Commission's radical 2010 proposals triggered fierce debates, although one commentator suggested that its effort to "further integration by treating judgments from other member-state courts more like domestic judgments and less like foreign ones" would be anticlimactic in practical terms (Baumgartner 2014: 193). Ultimately, the changes actually introduced by the Brussels I Recast Regulation are "modest, compared to the Commission's original political intentions" (Domej 2014: 550). The EU "legislator chose incremental change" instead of a "great leap forward" (id.). The Brussels I Recast Regulation did, however, achieve one major innovation, namely abolition of the traditional *exequatur* (i.e., declaration of enforceability) requirement,[55] which is examined in greater detail in subsection 5.2.1.1.3 below.

While the Brussels I regime is generally considered to be a successful example of regional regulation of civil justice, it has a number of limitations beyond those already noted above. First, the scope of the Brussels I Regulation (and the Recast) is limited to garden-variety civil and commercial matters, with the result that many common types of cross-border cases – such as those related to family relationships, bankruptcy, and wills and succession (i.e., the administration of decedents' estates) – are not covered. And second, the traditional 'Brussels package,' which consists of rules of jurisdiction plus rules relating to the recognition and

enforcement of judgments, is narrow and fails to address other issues that also inevitably arise in connection with particular types of civil litigation. The EU has gradually addressed these limitations, as the following subsections show.

5.2.1.1.2 Measures Affecting Family Life: Brussels II bis and Beyond

Among the first pieces of procedural legislation adopted after the Amsterdam Treaty entered into force in May 1999 was the Brussels II Regulation (2000), which extended and adapted the Brussels I system into the arena of family law[56] and provided a framework for cases involving "matrimonial matters" and "parental responsibility" (e.g., dissolution of marital ties, visiting rights, and other child welfare issues).[57] In order to better serve the needs of "international families,"[58] the Commission reviewed the operation of the EU legislation (Brussels II bis Report 2014), and conducted a public consultation, as a prelude to revising – in EU parlance, 'recasting' – the Regulation.[59]

One of the many family law topics that fall outside the scope of the Brussels II bis Regulation, which is the 'master' regulatory framework for family law, is maintenance, i.e., the obligation to provide financial support that arises "from a family relationship, parentage, marriage or affinity" (Maintenance Regulation 2008: art. 1(1)). The Maintenance Regulation adopted by the EU in 2008 nicely illustrates how the EU is trying to overcome two major limitations (noted above) of the traditional 'Brussels system.' First, it extends the scope of issues covered by creating a special set of rules to govern a particular legal problem. And second, the Maintenance Regulation provides a holistic package of rules to govern this problem, by combining the standard 'Brussels' package – jurisdiction and judgments – with uniform conflict-of-law rules to guide the court that has jurisdiction over the case in determining which country's laws it should apply to decide the case.[60]

The EU has also turned its attention to property rights in the family law context. With regard to the *living*, a regulation was adopted that extends the basic Brussels II bis framework, but in the form of the Maintenance Regulation's extended 'package' (i.e., common rules on jurisdiction + judgments + conflict-of-laws) to property rights affecting two types of "international couples":[61] married couples (Matrimonial Property Proposal 2011) and registered partners (Registered Partnership Proposal 2011). The 2016 Marital Property Regulation purports to leave the underlying institutions of marriages and partnerships unaffected, insofar as they continue to be defined by the national laws of the Member States. Since agreement could not be reached within the EU's regular legislative framework, the Marital Property Regulation was adopted using the enhanced cooperation procedure.

With regard to the *deceased*, the fact that some 12.3 million Europeans currently live in an EU country that is *not* their home country results in nearly half a million cross-border inheritance cases every year (Deville 2014). The 2012 Succession Regulation – 'Brussels IV' – takes the 'extended package' format seen in the 2008 Maintenance Regulation[62] one step further. It not only provides common rules for jurisdiction, recognition and enforcement of judgments, and conflict of laws on wills and successions (i.e., decedents' estates) but also creates a European Certificate of Succession. This certificate is a standard form that can be used by heirs, legatees, executors and administrators to prove their legal status and exercise their rights, such as those pertaining to property, in other Member States, without added formality.

Finally, two recent measures have been adopted that extend mutual recognition into new contexts that affect family (as well as other) situations: the Civil Protection Measures Regulation

(2013), and the Public Documents Regulation (2016). First, the Civil Protection Measures Regulation (2013) implements the mutual recognition principle in regard to civil protection measures taken in one Member State to protect a person's physical or psychological integrity, such as a restraining order. Second, the Public Documents Regulation (2016) aims to promote "the free movement of citizens and businesses" and cut bureaucratic red tape by implementing mutual recognition in regard to official government documents (Documents and Civil Status Green Paper 2010). This Regulation aims to simplify the often complex, time-consuming, and costly formalities required to authenticate documents, particularly those required to prove status. In regard to *individuals*, it simplifies administrative formalities related to cross-border acceptance of public documents, such as those relating to birth, death, name, marriage or registered partnership, parenthood, adoption, nationality or residence. In regard to *businesses*, it covers documents related to the legal status and representation of companies. Finally, it also covers real estate documents and intellectual property rights, which can benefit individuals as well as businesses.

5.2.1.1.3 *Mutual Recognition 2.0: Abolishing Exequatur*

From the very beginning, the Commission had its sights set on ways to simplify the complex procedures involved in recognizing and enforcing judgments rendered by the court of one Member State in another Member State.[63] These procedures involved "intermediate steps" entailing approval of the judgment by the court in the Member State asked to enforce the judgment, which resulted in delays and imposed additional costs (Tampere Milestones 1999: ¶ 34). Already in 1999, the European Council laid out a detailed road map for incremental movement towards this goal – while simultaneously "respecting the fundamental legal principles of Member States" – and asked the Commission to prepare a detailed program for implementing the principle of mutual recognition in regard to judgments (Tampere Milestones 1999: ¶¶ 34 & 37). The designated means to this end were not limited to elimination of intermediate proceedings,[64] but also included eliminating grounds for refusal of enforcement[65] and "setting ... minimum standards on specific aspects of civil procedural law," where appropriate (id.). The elimination of "intermediate steps" is indeed radical, given that the Commission Communication on Judgments (1998: 6) considered that "full abolition ... is inconceivable, if only because of the wide procedural divergences between Member States as regards enforcement" (see Kramer 2011: 634-5).

The Commission hastened to present its Mutual Recognition Program (2001) (Appendix F), which gives a sense of how gold has been spun from the straw of "judicial cooperation in civil matters" within a short time frame. The Mutual Recognition Program neatly embodies the twin tendencies to'deepen' and 'widen' European integration in a given domain. It proposes to 'deepen' integration by incrementally stripping away the Member States' ability to raise barriers to judgments issued by courts in other Member States, and to 'widen' integration by spreading horizontally through a policy domain. It bears repeating that the EU had no – and outside the narrow confines of the civil justice arena, still has no – general legislative competence over family law,[66] property rights for married or unmarried couples, or wills and successions.

This vision has come to pass in recent years. The first step towards abolishing interim procedures – *exequatur* or registration – was the creation of the European Enforcement Order (EEO) for Uncontested Claims (2004) (EEO Regulation). The creation of the EEO, which is a "passport" for enforcement of a civil or commercial judgment in other Member States, is "one of

the most important steps" taken in the civil justice arena (Biavati 2009: 75-7).[67] It has a dual nature: first, it creates an entirely new procedure at EU-level that parties can use as an alternative to procedures that exist under national law; and second, it takes bold steps toward implementing the mutual recognition principle. As to the latter, the EEO Regulation specifies minimum procedural standards that must be met by the court in the Member State that renders the judgment (European Enforcement Order for Uncontested Claims 2004: art. 12-17), if the EEO certificate ("passport") is to issue.[68] A judgment that satisfies these requirements "shall be enforced under the same conditions as a judgment handed down in the Member State of enforcement" (id. at art. 20(1)).[69]

The constellation of measures found in the EEO Regulation – that is, the combination of an entirely new EU-level procedure and a certificate (or "passport") that is issued by the rendering court if the EU's minimum procedural requirements have been satisfied – has been replicated in a number of later measures addressed to particular types of case. First, the European Order for Payment (EOP) Regulation (2006) extended this legislative approach to uncontested pecuniary claims. Second, the Small Claims Regulation (2007) extended it to claims below € 2,000. (Each of these measures is discussed further below.) And third, the Maintenance Regulation (2008) (discussed above) extends it into the family law field. In contrast, the Brussels I Recast Regulation (2012) (discussed above) does not create a new procedure as such, though it does abolish *exequatur* for civil and commercial claims that fall within its scope.

Two points bear mention in closing. First, the creation of new EU-level procedures for certain types of cases, such as the ones described above, serves dual aims. The Regulations adopted by the EU not only aim to enhance the enforceability of judgments, and thereby implement the mutual recognition principle in the civil justice arena, but also serve to increase access to justice on the part of individual and business claimants alike. Second, while the abolition of *exequatur* is significant, the heated rhetoric surrounding it should be taken with a grain of salt. At least in some cases, it "sounds like a bolder move than it really is" (Baumgartner 2014: 193). In connection with the Brussels I Recast Regulation (2012) (discussed above), the Member States retain significant defenses to automatic enforcement of judgments from courts of other Member States, even absent the "intermediate step" of the *exequatur* or registration procedure.

5.2.1.2 Measures Related to Debt Enforcement

5.2.1.2.1 Insolvency Proceedings

The backbone of the EU's efforts to provide an adequate legal framework for cross-border insolvencies, which affect nearly 50,000 companies a year (Commission Insolvency Memo 2014), is the Insolvency Regulation (2000), which was one of the first to be adopted after the Amsterdam Treaty came into force in 1999. This Regulation, which applies to individuals as well as businesses, applies whenever a debtor has assets or creditors in more than one Member State. The nature of the Insolvency Regulation is fundamentally different from the narrow and extended mutual recognition regimes discussed above. The Insolvency Regulation established a coordinated procedure among Member States, in which a main procedure is opened where the debtor's activities are centered, and secondary proceedings in all other Member States where the debtor has assets. The Regulation provided rules for coordinating these proceedings, as well as conflict of laws rules. As such, it constituted a step towards cross-border case management.

After a decade in force, the Commission commenced a review process, which resulted in

the Proposal to Amend Insolvency Regulation (2012). The Insolvency Recast Regulation (2015) modernizes the original Insolvency Regulation by shifting emphasis away from liquidation and making it easier to restructure a business in a cross-border context. The goal is to "facilitate a fresh start" by establishing a " 'rescue and recovery' culture for viable businesses" (Commission Insolvency Memo 2014).

Meanwhile, the Commission seized the moment and presented an additional innovative proposal aimed at implementing a "new approach to business failure and insolvency" (Commission Communication on Insolvency 2012). The Communication highlighted differences between national insolvency laws that "may hamper the establishment of an efficient internal market," and called for creating a "level playing field in these areas" in order to establish greater business confidence, improve access to credit, and encourage investment (Commission Recommendation on Business Failure and Insolvency 2014: preamble, ¶ 8). In view of the fact that several Member States were in the process of reviewing their national insolvency laws, the Commission followed up with a Recommendation that encouraged Member States to reduce "divergences and inefficiencies which hamper the early restructuring of viable companies in financial difficulties," as a way to establish "coherence in these and any future such national initiatives in order to strengthen the functioning of the internal market" (id. at ¶¶ 10-11). The (non-binding) Recommendation establishes minimum standards on preventative restructuring frameworks and the discharge of debts of bankrupt entrepreneurs (id. at art. I.3), which it "invites" the Member States to implement (id. at art. V.34).[70]

While the effect of the Commission's Recommendation remains open,[71] it is worth noting that this call for voluntary harmonization appears to be in line with emerging developments on the ground. Cadiet (2014:14) has identified a form of spontaneous procedural convergence resulting from the activities of the legal staff involved in transnational insolvency procedures – notably law firms, administrators and liquidators – who have created protocols (standard contracts) for coordinating national procedures. These protocols have "been sanctioned by the relevant courts," and go beyond the "duty to cooperate and communicate information" that the Insolvency Regulation prescribes.

5.2.1.2.2 Other Measures to Facilitate Debt Collection

The EU has undertaken two additional measures aimed at facilitating debt collection. The Transparency of Debtors' Assets Green Paper (2006) is a soft-law measure, by which the Commission recommended that Member States implement a variety of measures that would enable creditors to obtain prompt access to information about debtors' assets. More dramatic is the European Account Preservation Order (EAPO) Regulation (2014), which created a new uniform European procedure allowing for the prompt preservation of funds held in debtors' bank accounts. Once an EAPO has been issued in one Member State, the debtor may not transfer or withdraw funds from its bank accounts in other Member States. While the debtor can challenge the EAPO, it is generally easier for a creditor to obtain such an order than for a debtor to challenge one. As with other innovative EU procedures in the civil justice arena, the European Account Preservation Order (EAPO) Regulation creates an EU procedure that is an *alternative* to the procedures available under Member State laws on attachment and garnishment, and does not formally displace them.[72]

5.2.1.3 International Judicial Assistance: Service of Process and Taking Evidence in Cross-Border Litigation

The EU moved quickly after the Amsterdam Treaty came into force in 1999 to adopt new regulations on two significant arenas of international judicial cooperation (or 'assistance' as it has traditionally been known): service (or transmission) of documents and taking evidence in cross-border litigation. Both Regulations overlap with international treaties that bound some (but not all) of the EU's then-Member States: the Hague Service of Documents Convention (1965)[73] and the Hague Evidence Convention (1970).[74] Service of documents and taking evidence were among the earliest priorities flagged by the EU as "aspects of procedural law on which common minimum standards are ... necessary" (Tampere Milestones 1999: ¶ 37; Mutual Recognition Program 2001). These technical procedures, which differ significantly among Member States, are key to ensuring that the essential requirements of 'due process'[75] – among them, the opportunity to defend oneself in court ('rights of defense') – are observed in cross-border litigation. Indeed, the Commission has observed that the fate of the mutual recognition principle in the civil justice arena depends on "mutual trust in the legal procedures of other Member States," which presupposes that the "parties' procedural rights are protected" (*Assises* Discussion Paper on Civil Justice 2013: 2-3).

The Service of Documents Regulation (2000) was rather quickly overhauled by the Service of Documents Recast Regulation (2007). However, cross-border transmission of court documents, particularly at the commencement of judicial proceedings, remains a dynamic and controversial topic. The need to ensure minimum due process standards across the EU gains urgency as the movement of judgments is further liberalized, such as by the abolition of *exequatur*. The Commission issued a report in 2013 which assessed experience under the 2007 Recast Regulation, and opened a debate on future reforms (Report on Service of Documents Regulation 2013). This 2013 Report noted that the "increasing judicial integration" within the EU has exposed the "limits of the current text" and the more urgent need for "minimum standards" (id. at 16).[76]

For its part, the EU's Evidence Regulation (2001) is less controversial. The Commission issued a report in 2007 assessing the state of play, noting that it was generally satisfactory, if underused (Report on Evidence Regulation 2007). The Report urged Member States to disseminate information about the available procedures and encourage their use, along with the greater use of modern communications technology, in particular videoconferencing, which is being integrated into the EU's e-Justice portal (id. at 7). The European Parliament responded by adopting the EP Evidence Resolution (2009) – which is part-scathing attack on the Commission for dropping the ball in the civil justice arena,[77] and part-ringing endorsement of the Commission's proposals to improve the taking of evidence in cross-border litigation – to which the Commission responded by enumerating its good intentions (Commission Follow-up to EP).

The Commission Work Program for 2018 (2017: Annex II) announces the Commission's intention to revise both the Service of Documents Regulation and the Taking Evidence Regulation, in order to modernize them and bring them into line with new technologies, with proposals expected in 2018.

5.2.1.4 Others

The variety of procedural measures surveyed above does not exhaust the EU's agenda in the procedural field. The Amsterdam Treaty called for "eliminating obstacles to the good

functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States (EC Treaty art. 65(c)).[78] The European Council in Tampere identified a number of types of legislation that might be adopted (beyond the specific types of measure already discussed), such as provisional measures and time limits (Tampere Milestones 1999: ¶ I.11.38). One such measure under consideration arises in the context of road traffic accidents, where the time period for filing claims for compensation differs across Member States. In this context, the Commission has announced its intention to harmonize the rules on limitation periods "so that victims do not risk losing their right to compensation for procedural reasons" (Communication on Victims' Rights 2011: 2). The Commission initiated a consultation on this issue in 2012, and the EP submitted a report in 2016, but legislation has not yet been proposed.

While not strictly limited to civil justice issues, the Commission is at work on a "New Deal for Consumers" (Commission Work Program for 2018: 7), which includes a variety of measures aimed at enhancing judicial enforcement as well as out-of-court redress of consumer rights (Future Action in EU Consumer Law 2017). While these reforms are carried out under the EU's internal market (rather than the civil justice) treaty basis, there is some overlap in terms of procedural focus, and the work is carried out within the same Commission Directorate-General.

The paucity of current examples notwithstanding, the residual category of civil procedure is amorphous and open-ended in nature, thus it is not unreasonable to suppose that EU developments in this arena are still in their infancy.

5.2.1.5 Conclusions

The EU's move into the area of procedural law has significant effects on the European legal order, even beyond the specifics already discussed. It is not enough to state that these developments cut deeply into residual Member State sovereignty, and do so in legal fields that are most fundamental to the integrity of the national legal orders. EUstitia measures undermine precisely those traditional techniques used by states to vindicate their fundamental interests in the administration of justice. Member States retain some – albeit ever-diminishing – power to invoke national policy preferences in lieu of European ones. This section offers four further perspectives on the broader political implications of these developments.

First, the EU's embrace of the mutual recognition paradigm in regard to judgments has triggered a crisis of trust throughout the EU. For example, imagine a German court that is asked to enforce a judgment for damages against a German company rendered by a court in one of the Member States that the Commission has targeted for judicial corruption. The tenor of the EU's civil justice regime is to compel 'full credit' of that judgment in a setting where 'faith' in the integrity of the court that rendered the judgment is lacking. This crisis of faith is driving EU efforts to achieve further harmonization of procedural law.[79] As the Commission says, one way to reinforce mutual trust is "through procedural law integration" (*Assises* Discussion Paper on Civil Justice 2013: 2-3) of the sort seen in the EEO Regulation of 2004 and its progeny. This pressure simultaneously entails efforts to raise the bar, EU-wide, in order to ensure that "parties' procedural rights are protected" (id.). Schröder (2014) argues that there should be a "(larger) core of harmonized European procedural law" in the future, "some sort of common ground (*Leitbild*) amongst the Member States in procedural issues" against which "national procedural laws can be measured. Once such common ground is sufficiently established, national procedural laws can be measured against this standard, and the more a national law or rule departs from the common

ground, the more it is put under pressure for justification."[80] As Schröder's argument suggests, the trend is toward further erosion of national legal orders, despite the EU's professed desire to protect national legal cultures. This appears to be borne out by the EP's push to establish "common minimum standards of civil procedure" within the EU (EP Resolution on Common Minimum Standards of Civil Procedure 2017).

Second, these developments are part of the ongoing "seachange" in Europe towards the privatization of enforcement (Tulibacka 2009: 1530; see also Kelemen 2011).[81] The abolition of "interim steps" for the enforcement of judgments, for example, "expresses the trend already observed in the privatization of the coordination between State justice systems," where "public *ex ante* control" by the enforcing court by means of the *exequatur* or registration procedure "disappears to the benefit of an *ex post* control initiated by parties" (Cadiet 2014: 9). While this trend has been led by the Court of Justice, it has found an amiable counterpart in the Commission's efforts to ensure that the different components of the European legal order mesh smoothly.

Third, these developments matter because litigation itself matters beyond the resolution of particular legal disputes. As argued in subsection 4.2.4.3 in Chapter 4 above, developments in the civil justice arena are related to broader concerns about the legitimacy of EU governance. Moreover, by increasing the efficiency of available procedures and promoting access to justice, EU civil justice developments have the potential to make existing substantive rights more potent, as U.S. experience suggests.[82] Finally, while EU competence in the civil justice arena is formally limited to matters of procedure, the administration of justice, and the conflict of laws, it would be foolish not to expect these developments to have far-reaching impact on the content of *substantive* EU law as well. There is enormous potential for the Court of Justice to spin substantive 'gold' when interpreting procedural EU legislation. As Lenaerts & Stapper (2014) demonstrate, it is not always possible for the Court to stay on the procedural side of the line, given the overarching command to interpret EU law – including the legislative measures surveyed here – so as to achieve the larger (teleological) goals of European integration. The Court has a long-standing propensity to interpret terms found in EU legislation "autonomously" and give them a particular meaning within the context of the EU legal order, which does not always leave room for the particularities of national law (id. at 254).[83]

Fourth, the developments in the EU's civil justice field constitute major steps towards legal federalization. The effect of implementing the mutual recognition principle in regard to judgments is a good example of how civil justice measures 'domesticate' or internalize something that was previously 'foreign' or the subject of international relations. As Cadiet puts it, foreign judgments inside the EU "are less and less foreign and more and more domestic because of the abolition of *exequatur*"; they are "somehow naturalized" (Cadiet 2014: 9).

How far the EU will go along the civil justice road is a matter of great debate and is sure to occupy legal specialists for years to come. One author predicts that the "logical endpoint of this development is likely to be the displacement of all member-state law applicable to transnational cases, no matter what the type of proceeding" (Baumgartner 2014: 193). Another author, by contrast, takes a more cautious view and argues that the sky is not the limit for developments in EU procedural law (Domej 2014: 548 ("die Bäume des europaischen Zivilprozessrechts [wachsen] nicht in den Himmel").

This survey of developments in the civil justice field (broadly conceived) has documented the many ways in which EU activity in this arena has chipped away at national sovereignty, even

while endeavoring to respect the national legal traditions of the Member States. The larger question that animates this dissertation is not, why did the EU "take" this field of competence away from the Member States, but rather, why the Member States gave it up in 1997. Part III of this dissertation takes up this question.

5.2.2 Institutional Measures affecting the Administration of Justice: Fostering Access to Justice and European Legal Culture

The EU's activities in the civil justice field include multiple measures addressed to institutional dimensions of the rule of law. These developments are consistent with broader calls for justice reformers to accord "as much priority" to the "institutional vehicles for the effectuating of the rule of law" – given their "critical role" – as "the rules themselves" (Chodosh 2005: 65). Already at an early stage, the EU's Economic and Social Committee urged the Commission to place greater emphasis on standardizing "legal institutions" when building the AFSJ (ESC Opinion on European Judicial Area 2001, ¶ 1.4.13). This section surveys key EU measures in the field before turning to an examination of their importance.

Given the immediate context from which plans to build a "genuine European area of justice" emerged – namely, the elite cooperation that emerged in the 1990s under the EU's Third Pillar[84] – it comes as no surprise that cooperation remains a key strategy in the civil justice field, nor that some of the measures aimed at institutionalizing civil justice in the EU relate specifically to legal professionals, among them judges and lawyers. However, the EU's civil justice strategy attends to the perceived needs of the consumers of civil justice as well, and emphasizes the need for measures that enhance access to justice.

5.2.2.1 Creation of Judicial Network

Initially, the EU's institutional strategy focused on establishing a *horizontal* network among a wide array of judicial actors in the Member States.[85] The European Judicial Network in Civil and Commercial Matters (EJN Decision – Civil) was created in 2001,[86] and extends an innovation from the criminal to the civil justice field.[87] The EJN-Civil, which describes itself as flexible and non-bureaucratic, regularly brings together some or all of more than 500 designated "national contact points"[88] to "exchange information and experience" with each other, as well as with the Commission, which serves as the EJN's secretariat. One key reform introduced in 2010 was to open up this network to (designated) professional associations representing legal practitioners in the Member States (Simões de Almeida 2009). Meetings devoted to general or special topics have been held since 2002, and members have ongoing access to one another via a closed virtual community (CIRCA).

The EJN provides a platform for discussing a wide range of topics, including but not limited to the "practical and legal problems encountered by the Member States in the course of judicial cooperation" (EJN Decision – Civil 2001: art. 10). Dallara & Amato (2012: 2) argue that "what circulates" among members of the emergent judicial networks in Europe includes "opinions, best practices and reports related to shared values and elements of rhetoric, judicial procedural standards and models of professional excellence, ... [and] crucial aspects of the judicial system organization and functioning such as the judge status and role or the guarantees of judicial independence."

The EJN-Civil is designed to serve two distinctly articulated, but ultimately intertwined goals: first, to improve judicial cooperation by networking the authorities of the Member States

in a uniform manner throughout the EU (EJN Decision - Civil 2001: art. 3(1)(a)), and second, to simplify the life of Europe's citizens by giving them easier access to justice in a Member State other than their own (id., preamble, ¶ 9). More concretely, the EJN-Civil aims to remove practical barriers that arise in the context of cross-border cases, as a means of improving the implementation of relevant EU laws and international treaties, and making life easier for everyone involved.[89] The EJN-Civil also aims to facilitate cross-border civil justice by disseminating information to the public and the legal community.[90] Yet these are clearly not the only goals that the EJN aims to serve, or is likely to achieve.

Frequent meetings of Member State and Commission officials, occurring within the framework of the EJN-Civil, will establish personal relationships among participants, which in turn tend to "increase mutual trust," which is the *sine qua non* of the EU's mutual recognition system (de Claes & de Visser 2012: 108; see also Weller 2015). Cooperation and mutual trust, in other words, are "closely and dialectically connected" (Cadiet 2014: 15). Moreover, these networks serve as fora for deliberation between courts from different orders "under conditions of mutual respect and open conversation," and thus prepare the ground in which a "pluralist conception" of the European legal order might flourish (de Claes & de Visser 2012: 113). These "horizontal techniques of direct coordination between" a growing number of "protagonists of the judicial system" in connection with their "procedural duties governing dispute resolution" constitute a "new dimension" of the European project, and manifest the "rise of a more general cooperative model of dispute resolution" (Cadiet 2014: 4). Judicial networks – including the EJN-Civil – thus contribute toward the development of a European judicial culture and provide the "necessary infrastructure for a functioning multilevel legal order," a place where the "inevitably fragmented transnational community" might be overcome (Benvenuti 2014: 5). As such, judicial networks have two dimensions: an "ascending dimension," which refers to their impact on the development of European legal norms, and a "descending dimension," which refers to their effect of Europeanizing the national judicial cultures (Benvenuti 2014: 5, 14-15).

These effects of judicial networking are furthered by parallel efforts that involve training judges, lawyers, and other members of the legal staff.

5.2.2.2 Judicial and Other Training

The booming efforts to provide coordinated EU-level training for judges and other members of the legal staff is related, but parallel to the development of judicial networks noted above. Training was overlooked in the Treaty of Amsterdam and in Tampere, and has only recently come into its own as a field of EU endeavor. The first impetus came from Member States themselves, who established the European Judicial Training Network (EJTN) outside formal EU structures in 2000.[91] The French Government – then serving a rotating term in the Presidency – simultaneously asked the Council of the EU to take a decision establishing a European judicial training network (French Judicial Training Network Initiative 2001). No such Council action was immediately forthcoming, but still the EJTN commenced operations and currently "represents the interests of over 120,000 European judges, prosecutors and judicial trainers across Europe" (EJTN Website).

While the goal of taking on professional training received general support,[92] the Council proceeded cautiously. The First Council Conclusions on European Judicial Training expressed broad support for the EJTN, but declined to adopt a binding act that would establish a "more permanent structure for judicial training at the European level." The Council Resolution on

Judicial Training (2008) went further, however, and stated that Member States "should adhere" to the EU guidelines "when organising training for judges, prosecutors and judicial staff (such as assistants, law-clerks and registrars), without prejudice to judicial independence or different judicial organisations in the European Union." One reason for delay in bringing training into the EU's bailiwick was the failure of the Constitutional Treaty, which included provisions establishing judicial training in civil and criminal matters as a base of EU competence.[93] As it happened, the EU did not gain formal competence over "training of the judiciary and judicial staff" until the Lisbon Treaty entered into force at the end of 2009 (TFEU art. 81(2)(h)). Since then, the topic of judicial training has received a great deal of attention from EU institutions, notably the European Parliament,[94] the Commission,[95] and the Council,[96] and more recently, from scholars (Piana et al., eds, 2013). After more than a decade, ideas that remained marginalized as reaching too deeply into sensitive national prerogatives have been fully endorsed, and the EU's institutional apparatus is geared up to push this agenda forward.

A second reason for the delay in bringing professional training in from the cold is the boldness of the idea, or at least the rhetoric that has accompanied these proposals from the beginning, in conjunction with the overall sensitivity of the interests at stake (e.g., judicial independence and national legal culture). Both the 2000 French Judicial Training Network Initiative[97] and the 2001 EJTN Bordeaux Charter articulated visions of the European legal order that were radical in their time. Uncontroversial was the assertion that "mutual understanding and trust" are key to promoting judicial cooperation, indeed, are the "sine qua non for the success of the European judicial area" (French Judicial Training Network Initiative 2000: preamble, paras. 2-3). More chilling to some at the time, was the claim that European judicial training would not only contribute to the effectiveness of current laws and facilitate the implementation of new measures but would also help to "create a genuine European judicial culture (id. at ¶ 3(1)).[98] For its part, the Charter takes this vision a step further by noting that "the organisation of regular training for members of the judiciary" establishes the basis from which "a common European judicial culture and identity can progressively emerge" (EJTN Bordeaux Charter 2001: preamble, ¶ 6). Thus, the EJTN, like the EJN-Civil, is premised on the belief that professional contacts and the formation of personal relationships will contribute to the erosion of cultural and other differences among members of the judiciary, and foster the emergence of a new European legal identity. These notions have become commonplace today, and training will help forge a strong link between mutual trust and the constitution of a European legal culture which "rests on a sense of belonging to a single area shared by practitioners of justice in the Member States" (Commission Communication on Judicial Training 2006: 3).[99]

While initially aimed at judges (as well as, in the criminal sphere, at prosecutors who are in some countries members of the judiciary), the training mandate has expanded. The first extension was to legal practitioners,[100] with the aim of fostering mutual knowledge of legal and judicial systems as a way to facilitate cooperation in the area of civil law between Member States. Measures affecting legal professionals remained controversial, however, as indicated by cautious language in various EU measures. For example, the Commission Communication on Judicial Training (2006: 4) declared that the EU "has no grounds for interfering in the organisation of national training systems, which reflect the Member States' legal and judicial traditions," while simultaneously noting that "strengthening mutual confidence entails developing training sufficiently and devoting sufficient resources to it." Similarly, the Council Resolution on Judicial Training (2008: para. 18, p. 2) has noted that it is

> essential that other legal professions, such as lawyers, receive adequate training in the field of European law. However, in the majority of Member States these professions are themselves responsible for organising their training. It seems therefore appropriate not to include them in the scope of this resolution. This should however not preclude that national authorities and the European Union support, also financially, the training of these other legal professions in the field of European law, it being understood that the independence of these legal professions should not be jeopardized.

The reluctance of the early years has been largely overcome, as noted earlier, and the scope of EU training activities now extends to "judiciary and judicial staff" (TFEU art. 81(2)(h)), which has been defined to include "judges, prosecutors and court officers, as well as other legal practitioners associated with the judiciary, such as lawyers, notaries, bailiffs, probation officers, mediators and court interpreters" (Justice Program for 2014-2020, preamble, para. 4). Moreover, judicial training can also involve "different actors, such as Member States' legal, judicial and administrative authorities, academic institutions, national bodies responsible for judicial training, European-level training organisations or networks, or networks of court coordinators of Union law," as well as other bodies "pursuing a general European interest in the field of training of the judiciary" (Justice Program for 2014-2020, preamble, para. 6).

5.2.2.3 Access to Justice: Legal Aid and Beyond

Access to justice has come to be regarded as the overarching goal of the EU's civil justice program. It has long enjoyed the status of a fundamental right under the European Convention on Human Rights[101] and also, since 2009, under the EU's own justiciable Charter of Fundamental Rights. Although it was not explicitly mentioned in the Amsterdam Treaty, "better access to justice" quickly rose to a position of prominence on the EU's civil justice agenda (Tampere Milestones 1999: section V). A decade later, the Lisbon Treaty exalted access to justice as *the* overarching goal of the justice component of the AFSJ, the end to which other means should lead.[102] "The Union shall *facilitate access to justice, in particular* through the principle of mutual recognition of judicial and extrajudicial decisions in civil matter" (TFEU art. 67(4), emphasis added). In the civil justice arena, the TFEU provides – also since the end of 2009 – that civil justice measures shall include "*effective* access to justice" (TFEU art. 81(2)(e), emphasis added),[103] which implies "quality throughout the whole justice chain" (2014 Justice Scoreboard: 16). Access to justice must thus be understood abstractly, as a dimension of the rule of law.

However, access to justice must also be understood concretely, as a set of procedural measures that affect the opportunity to pursue claims in a judicial fora. The nature of measures designed to improve access to justice in the EU is diverse, and the concept itself has expanded over time. Still, the vision spelled out at the 1999 Tampere summit was already very detailed and includes measures aimed at making the justice arena more transparent,[104] at simplifying the paperwork involved in cross-border litigation,[105] at establishing procedures to facilitate cross-border litigation, promote extra-judicial dispute resolution, and ensure adequate legal aid,[106] and even at creating private rights of action, such as compensation for victims of crime.[107]

The wide array of measures envisioned in Tampere have been largely achieved, at least 'on the books.' The EU has adopted hard-law measures that aim to simplify, expedite and reduce the costs of debt collection cases involving uncontested pecuniary claims (European Order for Payment Regulation 2006)[108] and claims below € 2,000 (Small Claims Regulation 2007). These

unique EU procedures offer alternatives to procedures otherwise available in the national courts. Other EU legislation establishes minimum common rules throughout the EU, such as the Legal Aid Directive (2003),[109] the Compensation to Crime Victims Directive (2004), and the Mediation Directive (2008). The EU's most recent wave of access-to-justice legislation focuses specifically on the dispute-resolution needs of consumers, and establishes an EU-level system for online dispute resolution (Consumer ODR Regulation 2013), as well as minimum standards for alternative dispute resolution across the EU (Consumer ADR Directive 2013). These latest developments – along with the "New Deal for Consumers" noted above in subsection 5.2.1.4 – illustrate the growing convergence between civil justice and consumer protection policies in the EU.[110]

Last but not least, the volatile issue of collective redress has entered the civil justice policy arena.[111] After an enormous amount of preparatory work,[112] the Commission issued its Recommendation on Collective Redress - Injunctive and Compensatory Mechanisms in 2013.[113] The Recommendation is a soft law measure, in which the Commission calls upon the Member States to engage in voluntary harmonization of a series of collective procedures and remedies, in lieu of mandatory harmonization. Hodges is skeptical that the Recommendation is indeed the "long-awaited breakthrough in obtaining collective redress by consumers, and hence in affecting behaviour by business," and whether it is likely to succeed in "expanding key goals" or in "preventing abuse" (2014: 67-8). For its part, DG-Justice website in 2017 stated innocuously that the Commission "will continue further works on an EU framework on collective redress, following up the full range of previous Commission work on collective redress." The Commission Report on Collective Redress (2018) assesses the state of play, focusing on developments in national legislation since the 2013 Recommendation, which had "somewhat limited" legislative impact (id. at 2). This issue is likely to remain on the EU's agenda for a generation to come.

5.2.2.4 Conclusions

The networking, training, and access to justice measures summarized above provide a startling picture of the EU's civil justice landscape that is gradually coming into focus. The Europeanization of the administration of justice is a many-headed hydra. At the most basic level, it comprises a set of mundane techniques for coping with the EU's decentralized legal order. As such, these measures embody, but also surpass the initial aims of making it easier for people in Europe to vindicate their rights throughout the EU. The push to foster European legal culture and identity, which is the sub-text that runs through many of these developments, has potential effects that extend beyond the stated goal of improving enforcement of EU law. Viewed holistically, these developments have far-reaching implications for the "conceptualization of the European legal order as a composite legal order" (de Claes & de Visser 2012 : 101). Innovative efforts to build networks, strengthen interpersonal relations among legal professionals, and foster European legal culture have both the aim and the potential to transform the European system of civil justice into a more comprehensive, coherent, and effective whole.

The transformative potential of these developments is greater than the sum of its (technocratic) parts. To understand this potential, we must consider what Benvenuti (2014: 5, 14-15) calls "descending" and "ascending" dimensions, that is, how they affect the national judicial/legal cultures, on the one hand, and how they affect the development of European legal norms and legal order, on the other. With regard to the former, these developments create

opportunities and pressures toward convergence, or 'spontaneous' harmonization from below. With regard to the latter, they open up channels for (further) judicialization of politics in the EU. These dimensions are dynamically interrelated.

Descending Dimension: By fostering European judicial networks and training for a wide array of national legal elites, the EU's civil justice project not only moves the EU towards an increasingly unified system for the administration of justice but also lays the foundation for generating profound changes in the normative order itself.[114] The emphasis on fostering European legal culture and on (re)socializing an ever larger universe of national legal elites, sets the stage for spontaneous harmonization from below and supports the emergence of a common law of Europe (*ius commune*). These institutional developments have the potential to "fundamentally change" the traditional role of judges and parties in civil proceedings, insofar as they "significantly encroach upon the court structure or affect structural concerns within the national court systems" (Storskrubb 2008: 231-2, 238-9), and thereby to smooth the rough edges of cultural difference (Hartnell 2002: 131). Member State legal elites operating under increasingly aligned procedural as well as substantive rules, and in an increasingly explicit European legal culture, may be further co-opted to the task of European integration. More concretely, judges and lawyers may become more prone to consider European common law as a source of legal norms and to develop pan-European (in lieu of local) notions of public policy (e.g., van Houtte 2002; Škerl 2011; see also Hess & Pfeiffer 2011).[115]

That these developments can affect how judges fulfill their tasks can be illustrated by a Nordic example. When fulfilling their role as 'juges de droit commun' (judges of EU common law), judges must not only apply European law, but must often also decide whether it is compatible with provisions of national law. Pauliine Koskelo, who served as President of the Finnish Supreme Court from 2005 until 2015, and since 2015 as a member of the European Court of Human Rights, has argued that courts are "often ill-prepared for this task," due to their "national perspective and the quantity of [EU] law provisions. In lieu of top-down harmonization, she "proposed 'judicial cooperation with recourse to case law across borders' as a potential remedy, pointing out that *this had been practiced by the Nordic countries for some time and had automatically led to an increasing legal convergence between them*" (quoted in Salomon 2007, emphasis added). Thus, spontaneous harmonization can result from 'sharing' case law in the regional setting.[116] In such ways, the EU's civil justice project has the potential to erode the legal terrain of the Member States and generate fresh soil in which a common European legal order might flourish. By gradually transforming Member State courts into European common ground,[117] EUstitia may help the *ius commune* and European fundamental rights to take root.

Ascending Dimension: Some of the EU's civil justice innovations – particularly those related to access to justice – establish conditions that aim, and have the potential to foster litigation, and thereby to encourage further litigation-driven integration (or judicialization). By structuring the judicial (and administrative) arenas in which parties can claim their rights (and assert defenses) under EU law, procedural and remedial rules can create significant incentives or barriers to litigation in Member States courts. The measures that aim at improving access to justice (including but not limited to legal aid for the resource-poor) will allow a wider range of litigants to mobilize their rights under EU law. Since the arena of civil justice is a public forum where values as well as norms are in play, enhanced access to civil justice may deepen integration by bringing a greater diversity of values into play.

There is an historical nexus between litigation and European integration. The EU's civil justice project enhances the capacity of Member State courts to participate in generating European governance through the process of judicialization. Private dispute resolution enables social and economic actors to play a role in the development of European norms, and thus to participate (albeit indirectly) in European governance. Integration emerges from the dynamic process of judicialization, which links the micro-level strategic behavior of individual actors to the development of the macro-level normative structure (Stone Sweet 2004). In the words of Schepel and Blankenburg (2001: 13), the "people's Europe" is constructed through law. Civil litigation in Member State courts provides an opportunity for citizens to interact with the European legal order, as well as for people and organizations to play an active role in developing Community law and policy. As European society becomes increasingly juridified, "judges will be called upon more and more to uphold not just the law, but moral standards, legitimate expectations, fairness" (id. at 9). Through this process, the social interaction in Member State courts will both reflect and affect the identity of European citizens and firms, which new institutional theory predicts will feed back into the political process.[118] In this sense, EUstitia aims at nothing less than transforming the judicial arenas where European citizens' claims are resolved, and where European identity and citizenship can be constructed. The EU's civil justice agenda thus extends the insights of neo-institutional analysts, who showed how transnational business activity drove European integration by means of traders' demand for rules. The Europeanization of civil justice takes this to the next level, by considering the needs and demands of ordinary citizens and drawing them into this institutional setting. (Whether it will succeed is another matter.) In this view, Member State courts can be seen as spaces in which social, economic, and political forces interact, both in the pursuit of private justice and in the process of developing rules that can govern other social spaces.

5.2.3 The Transformation of the Conflict of Laws

Private international law (PIL), in the narrow sense, constitutes a mechanism for managing horizontal legal relations among EU Member States.[119] The modest language of the Amsterdam Treaty,[120] which calls upon the EU to "promote the compatibility of the rules applicable in the Member States concerning the conflict of laws ..." (TFEU art. 81(2)(c)), belies the nature of the legislation that has been adopted, which comes close to making a clean sweep and displacing relevant national laws.

5.2.3.1 Survey of EU Measures Adopted

As was the case in regard to rules on jurisdiction and on judgments in civil and commercial cases,[121] EU Member States started down the road towards forging common choice of law rules long before the Amsterdam Treaty transferred competence over these issues from Member States to Brussels. Some Member States agreed on common choice of law rules for *contract* under the 1980 Rome Convention on the Law Applicable to Contracts. Modernizing this treaty was designated as a "priority action" in the Vienna Action Plan (1998), but the 1999 Tampere summit did not pick up this suggestion, or otherwise make conflict of laws a priority.[122] However, the Hague Program (2004) noted the importance of achieving agreement on rules to govern contractual as well as non-contractual disputes, and called for adoption of measures that were already under discussion at the time. The Stockholm Program (2009: ¶ 3.3.2) called upon the Commission to "continue the work on common conflict-of-law rules, where necessary," and

requested specific attention to the question whether "common rules determining the law applicable to matters of company law, rules on insolvency for banks and transfer of claims could be devised" (id. ¶ 3.4.2). The issue got no special mention, however, in the Strategic AFSJ Guidelines for 2015-2020.

Despite the rather low degree of policy focus or rhetoric, large steps have been taken, and continue to be discussed, to unify conflict of laws rules in Europe. Yet despite the anodyne appearance, the EU's efforts to displace national laws have triggered some of the biggest controversies in the civil justice arena. The following examples provide some evidence for Meeusen's (2004: 79) claim that private international law "is no bleak, neutral and coordinating subdiscipline regulating international flows of trade and persons, but a bundle of norms which materialize national ... policies."

The unification of choice of law rules for contractual matters provides a neat illustration. After lengthy discussions, the pre-existing Rome Convention (1980) was modernized and converted into EU legislation, in the form of the Rome I Regulation (2008).[123] What may appear a technocratic matter of routine, was anything but, and triggered an explosive academic debate in France. A professor from the University of Paris (Sorbonne) penned an open letter to the President of France, which was published in a leading French law journal and signed by 40 other prominent professors (Heuzé - Letter to the President of France 2006). The gist of the letter was to attack the institutions of the EU – in particular the Commission and the European Court of Justice – for *abuse of power* of such magnitude as to violate the fundamental principles of democracy and rule of law. Those authors characterized the Rome I Regulation as an offensive intrigue by the Commission that aimed to foist the country-of-origin principle[124] on the Member States.[125] Within a month, another 77 French law professors had responded vociferously to Professor Heuzé's "dramatic, apocalyptic and totally disproportionate" letter (Response to Heuzé's Letter to the President of France 2007), which prompted yet another lengthy letter from Professor Heuzé, not to mention a larger debate about whether French legal academia was in crisis (Ciaudo 2007). The problem posed by the country-of-origin principle in the context of contract law entails a similar tension – albeit less overtly political than the tension raised by the Bolkenstein Directive on services – between party autonomy, on the one hand, and the power of Member States to limit party autonomy by adopting protective regulation that 'trumps' the parties' choice of law, on the other.[126] The final compromise embodied in the Rome I Regulation is a mixed bag: some, but not all of the Commission's far-reaching proposed changes were accepted, others not.[127] Plenty of controversies arose, including many linked to the nature, if any, of the limits to be imposed on party autonomy,[128] including specific 'overriding' (or 'mandatory') provisions of national law which parties may not avoid by 'contracting around' them. The Rome I Regulation appears to limit the effect of such national laws, thus giving national sovereignty another 'trim' (if not exactly a 'haircut').[129] Ultimately, the Rome I Regulation has been criticized as both a "big step forward" and a missed opportunity (Garcimartín Alférez 2008: I-79).

Second up, after contract, was the challenge to achieve common PIL (i.e., conflict of laws) rules for non-contractual cases, such as those involving liability in tort/delict or unjust enrichment.[130] Unlike contract, European nations had not previously succeeded in reaching agreement on common choice of law rules to govern such issues, despite numerous attempts.[131] Tort law, which "serves the dual purposes of compensation and deterrence," is particularly controversial, since it "implicates twin state interests in loss allocation and conduct regulation" (Kaminsky 2010: 83). Despite these difficulties, EU Member States reached agreement on

common choice of law rules in 2007. The general approach adopted is that the law of the place where harm/injury occurs shall govern, rather than the law of the place of the conduct giving rise to that harm. As such, the EU scheme is one in which the "compensation function ... dominates," rather than an approach oriented towards punishing fault-based conduct (Rome II Proposal 2003: 7).[132] The Rome II Regulation, like the Rome I Regulation, has universal application. Unlike the Rome I Regulation, however, Rome II does not constrain Member State ability to invoke overriding or mandatory provisions of national law (art. 16), nor does it force a Member State court to apply the law of another country where doing so would be "manifestly incompatible with the public policy (ordre public) of the forum" (art. 26). As such, the Rome II Regulation tolerates a higher degree of Member State diversity than does the Rome I Regulation.

The third arena in which the EU has sought to reach agreement on common rules to govern the conflict of laws is family law, starting with the law applicable to divorce and legal separation (Rome III Proposal 2006). The diversity of Member State positions on this controversial topic,[133] combined with the need for unanimity to legislate on civil justice matters in the area of family law (TFEU art. 81(3)), quickly led to the failure of this legislative proposal in 2008.[134] However, a subset of Member States was not to be deterred and forged ahead to agree on common rules, making the first-ever use of the EU's 'enhanced cooperation' procedure, which allows a minimum of nine Member States to "make use of" EU institutions when it has become clear that "the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole" (TEU art. 20). Ten Member States elected to go forward,[135] and the Council adopted the Rome III Regulation Implementing Enhanced Cooperation in 2010.[136] Among its many innovations, the Rome III Regulation unifies the rules to be applied by courts to determine what law shall govern divorce and legal separation, and introduces party autonomy into divorce law (Carruthers 2012; Kruger 2012; Torga 2012).

Further efforts to unify conflict-of-laws rules in the family law area have been undertaken, some with greater success than in regard to divorce. Notably, the EU adopted the Maintenance Regulation in 2008, which applies to obligations to pay maintenance (i.e., financial support) "arising from a family relationship, parentage, marriage or affinity" (art. 1(1)). Currently, proposals are pending that would establish common conflict-of-laws rules pertaining to property rights for international couples.[137] In addition, as noted above (in subsection 5.2.1.1.2), the Marital Property Regulation – which also applies to registered partnerships – was adopted using the enhanced cooperation procedure in 2016. This regulation leaves the underlying institutions of marriages and partnerships to be defined by the national laws of the Member States. The EU also agreed on choice of law rules to govern successions (i.e., succession to the estate of a deceased person) and wills in the 2012 Succession Regulation, which some call 'Rome IV.'

Finally, a number of other conflict-of-laws measures are waiting in the wings. At this stage, the Stockholm Program's call for choice of law rules to govern companies has not been designated a priority in the AFSJ Strategic Guidelines for 2014-2020, to the dismay of some (e.g., Wagner 2014a). The Commission proposed far-reaching conflict-of-laws rules to govern the property law aspects of assignment of claims – that is, whether a contract of assignment between two persons can affect the rights of a third party – which would entail a further step into the (formerly tabu) field of property law (Commission Proposal – Applicable Law for Assignment of Claims 2018).

Meanwhile, academic (as well as parliamentary) interest has turned of late to questions

relating to consolidation and codification, such as whether there is a need for a 'Rome 0' Regulation (e.g., Wagner 2014b) or a 'Brussels 0' Regulation, which would bring together the general principles that cut across the various conflict-of-laws measures on the books, or for a Private International Law Code (e.g., Kramer 2012b).

5.2.3.2 Conclusions

This section offers broader perspectives on the significance of the EU's displacement of national conflict-of-laws rules in most core areas of private law. As the brief survey of adopted measures suggests, the conflict of laws "inevitably" involves a "conflict of values" (Kaminsky 2010: 70). These EU measures constitute "dramatic [steps] in the federalization" of the European legal order (Symeonides 2008: 174-5). The unification of large portions of choice of law rules governing contract, non-contractual obligations, divorce, maintenance, successions, and potentially other property law issues, displaces a great deal of national law. The keys to understanding the significance of this displacement are the historical role of conflict of laws and their relationship to the tension between diversity and uniformity of *substantive* law. The conflict of laws arises from legal diversity in a community of states.

Conflict of laws problems arise with increasing frequency, "by virtue of the unprecedented mobility of our times ...; in this era of 'globalization' ..., the effects of broken promises, defective goods, traffic accidents and marital squabbles are no longer confined to the territory of one particular state or nation" (Juenger 1999: 1). Absent uniform law, issues that arise in border-crossing transactions or relationships must be governed by the domestic laws of one or another state. Such laws "are usually made with domestic exigencies in mind" and may or may not be appropriate for governing inter-state/inter-national legal relationships (Juenger 1999: 2-3).[138] Given diversity, there is no certainty which law will ultimately govern a relationship, or that the outcome of a case will be the same, wherever it happens to be brought. This uncertainty leads to unpredictability, which makes it difficult for parties to know what their rights are, and imposes additional costs on the process of ascertaining their rights. Conflict-of-laws rules are a way to "reduce the risk that the outcome of an adjudication can depend merely on the forum in which it is adjudicated" (Hazard 1998: 495). But they are more than just a means toward eradicating "the evil of forum shopping" by achieving "decisional harmony" (Juenger 1999: 6-7).[139]

Yet conflict-of-laws rules are not solely concerned with the needs of private parties; they serve public ends as well, and in that respect serve a core function in the "law of international coexistence" (de Boer 2010: 11). They are a tool for allocating regulatory power among different legal orders, "managing regulatory arbitrage" (Riles 2014) or, more concretely, deciding which country's law will have its say in the context of a particular case. In international cases, it boils down to the decision by the court (or arbitral tribunal) before which a case is pending whether to apply its own law or the law of another country to the issues in that case.[140] The judge's (or arbitrator's) power to make this decision is particularly sensitive in a world where a high degree of tension exists between economic liberalism and socially-minded regulation (Hatzimihail 2006: 16). As such, conflict-of-laws rules are "essential in a social system constituted from more than one political regime" (Hazard 1998: 496), a crucial tool for managing legal pluralism.

Centralization of this allocative function via unification of conflict-of-laws rules is a step that makes the EU more federal than the United States, where "state-by-state choice-of-law rules" result in a "chaotic and decentralized system" (O'Hara & Ribstein 2008 & 2009).[141] Unified conflict-of-laws rules not only remove the authority to establish the criteria for making

these regulatory allocations but also limit (more or less) the ability of Member States to prefer at least some of their own national policies over the policies of other states whose laws may be deemed the governing law under the Rome I, II, III and IV Regulations. Conflict-of-law rules have traditionally served as one of the main vehicles by which national/local public policy concerns could be vindicated in the context of cross-border litigation. In practical terms, these rules are the lynchpin of legal sovereignty among states, since they allow the courts of each country to determine when to assert itself vis-à-vis another sovereign in the context of litigation, and when to yield. By 'domesticating' (or federalizing) one of the key tools of Member State sovereignty under international law, the EU has tinkered with historically sacrosanct rules that define and maintain boundaries between different legal systems. As such, the EU's move into the conflict of laws field constitutes a real constraint on national sovereignty.

Europeanization of choice of law is also significant because of the relationship of these rules to the tension between diversity and uniformity of *substantive* private law.[142] Conflict-of-laws rules play a key role in the debates between proponents of greater legal convergence or systemic coherence,[143] on the one hand, and those who are willing to tolerate fragmentation in order to preserve legal diversity,[144] on the other. The more legal convergence, the less need for such rules, and vice versa. The fact that the EU has largely federalized choice of law rules might be seen to imply a commitment to private law diversity or pluralism,[145] insofar as conflict of laws provides a rough substitute for uniform substantive laws.[146] This view is consistent with recent EU policy statements about the need to respect the diversity of national legal systems and cultures. The crucial point is that there is a nexus between the EU's halting movement towards harmonization of substantive private law, on the one hand, and the rapid evolution of the private international law dimension of the EU's civil justice agenda, on the other.

5.3 Conclusions

Despite the slowed pace of developments since the Juncker Commission took office in November 2014, communitarized civil justice is a moving target with many heads (i.e., 28 Member States in addition to the EU institutions themselves). The exercise of mapping civil justice measures that have been taken or proposed is just a preliminary step towards understanding their impact in practice. Questions remain about both intended and unintended consequences of the changes that have been introduced since the Amsterdam Treaty entered into force in May 1999. Scholars brave enough to face the challenge (e.g., Beaumont et al. 2017) face enormous practical challenges.

II.3 Conclusions to Part II

Viewed as a whole, the rhetoric and practice of "judicial cooperation in civil matters" surveyed in Chapters 4 and 5 above reveal that civil justice is expected to play a role in transcending the EU's humble origins as a mere market and constructing an "ever closer union" (Preamble, TFEU). The lofty rhetoric and ambitious legislative agenda suggest that EUstitia is more than the sum of its many parts. It remains to be seen whether, and if so to what extent the 2014 backlash – in the form of the European Council's Strategic AFSJ Guidelines for 2015-2020 – affects the hitherto widening spiral of developments in the civil justice field. While no legal scholar "could underestimate the importance" of developments in the EU's burgeoning civil justice field (Biavati 2001: 92), their implications have gone largely unnoticed outside the legal realm of legal doctrinal expertise.[147] From the earliest days after communitarization by the Amsterdam Treaty, "judicial cooperation in civil matters" has been framed as a "fundamental stage in the creation of a European judicial area" (Vienna Action Plan 1998: ¶ I.16), which has been linked, in turn, to overarching political as well as pragmatic goals.

II.3.1 EUstitia as a Mode of Governance

EUstitia stakes out a "new political field" for Europeanization, which not only empowers EU institutions but also imposes on them a duty to realize the European judicial area as a "new step in the integration process." (Heß 2002: 4-5). Many of the steps that have been taken (or proposed) thus far to create the "genuine area of justice" in the field of civil law are of a highly technical nature, and address themselves to concrete procedural problems arising from the diversity of the Member State legal systems that are bound together into the Union. However, EU action in the field is increasingly directed towards institutional aspects of the administration of justice itself, as well as towards normative convergence of procedural (and, to a lesser extent, substantive) law, both of which have potentially far-reaching consequences.

Yet even if EUstitia consisted of only technocratic rules aimed at making the wheels of justice turn more smoothly, it would be a mistake to overlook them. The apparent "distinctions between constitutional, public, and private law are only matters of degree" (Shapiro 1964: 34-5). Technocratic tinkering in procedural fields can influence outcomes in particular cases, alter the sheer availability of justice within the EU, and spur the development of substantive EU law.[148] Like other "shifts in organization and jurisdiction," these procedural changes "are never simply technical," but are "almost invariably vehicles for policy change" insofar as they imply a "shift in who gets what," which is the "basic question of politics" (id. at 37). The "distinction between process and substance is notoriously slippery" (Brest 1981), particularly in the EU (e.g., Lenaerts & Gutman 2004; Brand 2014).

By entering the civil justice field, the EU has given rise to a new hybrid legal form in the context of transnational governance. EUstitia 'domesticates' at the regional level rules that formerly had the character of 'national' rules governing 'international' relations among sovereign states. As Heß (2002: 5) puts it, the EU is creating a "European Transnational Procedural Law," which constitutes a "distinct … new procedural type between national and international civil procedure law." In this regard, the EU appears to be 'more federal' than the United States, where many of the issues being Europeanized remain a matter of state prerogative under the U.S. Constitution.

Lastly, civil justice developments reveal a growing awareness in Europe that litigation is a complex form of governance (Shapiro & Stone Sweet 2002b: 294). The Commission's

influential Governance White Paper (2001) did not explicitly treat litigation as a mode of governance, but it did cross-reference themes that have become part and parcel of the rhetoric surrounding civil justice. For example, the Governance White Paper called upon "national lawyers and courts" to become "more familiar with [EU] law, and assume responsibility in ensuring the consistent protection of rights granted by the Treaty and by European legislation" (id. at 25). Like the Governance White Paper, which was a tool-kit designed to narrow the EU's legitimacy gap (Höreth 2001), the EU's civil justice project is not limited to the perennial concern with ensuring adequate enforcement of EU law, but has also been yoked to the enormous tasks of putting meat on the bare bones of EU citizenship, which the 1992 Maastricht Treaty grafted onto the corpus of European legal heritage, and enhancing the legitimacy of EU governance.

From today's standpoint, it is clear that the EU views civil justice as a vital dimension of European governance and citizenship, and a key strategy for addressing its contemporary governance challenges. As will be seen in Part III (Chapters 6, 7, and 8) below, however, these lofty conceptions were largely absent from the process that led to the Europeanization of the civil justice field in the 1990s.

II.3.2 EUstitia as a Channel toward further Judicialization of European Politics

There is an historical nexus between litigation and European integration (Cichowski 2001; Stone Sweet 2000 & 2004). Member State courts have played a vital role in creating and maintaining the EU's legal order (Alter 1996 & 2001; de Búrca & Weiler 2001; Burley & Mattli 1993; Stone Sweet 2004; Weiler 1991 & 1994). Yet the themes of constitutionalization and judicial dialogue, on the one hand, and improving the enforcement of EU law, on the other, do not exhaust the role of dispute resolution in European integration, in general, or of the Member State courts, in particular. The study of judicial politics in Europe therefore cannot be limited to understanding the role of national courts as enforcers of EU law, or interlocutors for the Court of Justice. Lower courts are not inherently less political; indeed, they "collectively make a great deal more law than the [highest constitutional court, and some of them] make considerably more policy in particular areas than do the courts above them" (Shapiro 1964: 34).[149] Recent scholarship extends the study of judicial politics by attending to the growing role of lawyers, courts and litigation in regulatory and administrative processes across Europe (Kagan 2007; Kelemen 2011: 5).

The EU's civil justice project conceptualizes Member State courts as key drivers of integration and aims to strengthen their capacity to participate in European governance through the process of judicialization. Unlike early neo-functional accounts of European integration, which emphasized the role of Brussels and new supranational institutions as the locus of transnational governance (Haas 1958), neoinstitutional institutional theory broadens our range of vision to take in virtually all arenas where actors interact and produce collective governance. This perspective draws attention to European arenas where "firms, governments, and organizations comprised of citizens from European societies construct new local orders," and shuns studying political processes in "isolation from the larger social and economic processes in which they are embedded" (Fligstein 2000: 26-28). Member State courts are such 'glocal' arenas where transnational governance is generated from the interaction of social, economic, and political forces interact in the pursuit of private justice.[150] The judicialization dynamic links the micro-level strategic behavior of individual actors to the development of the macro-level

normative structure (Stone Sweet 2000: 196), or what Gerstenberg (2002: 191) calls "an increasingly common chain of precedent." EUstitia is thus consistent with the polyarchical vision, in which the judiciary is seen "not … standing in an aloof place in the political order, … opposed to society, but rather as part of a continuum on which other governance arrangements are also placed" (id. at 184).

II.3.3 EUstitia as a Lynchpin of Legitimacy in the EU

The EU's "genuine area of justice," according to an early formulation, aims to ensure to "each European citizen security for themselves and their property and the respect of individual freedoms and fundamental rights" (Avignon Declaration 1998).[151] The invocation of positive integration goals such as these, together with the explicit incorporation of private citizens into the governance narrative surrounding the emerging civil justice field, reveal that EUstitia is envisioned as part of a strategy for alleviating the EU's problematic legitimacy.

The legitimacy of EU governance was not much of an issue in the era of "tacit consent," when integration was seen as an affair of elites who could rely on a docile public to support their decisions uncritically (Harlow 2002: 343). That era passed with the 1980s and yielded to a chronic "condition of 'forced reflection' about the justification for political authority" (Beetham & Lord 1998: 124; see also Obradovic 1996; Scharpf 1999a; Lindseth 1999 & 2001). The EU is "not a constitutionally constructed polity," but has been "assembled piecemeal" over the course of more than half a century, upon the substrate of preexisting liberal democratic states (Hooghe & Marks 2001: 40). For this reason, democratic representation is lodged first and foremost in the Member States. This "disconnect from direct democracy is to a large extent hardwired into systems of supranational governance" (Grabbe & Lehne 2015: 5). However, representative democracy does exist at the EU level and has grown stronger in recent decades. The European legislative process involves a modest measure of direct representation of EU citizens, via the European Parliament, and a substantial measure of indirect representation in the Council of the EU,[152] via the ministers of elected Member State governments who populate the Council.[153] Still, the EU's own weak representative dimension has prompted persistent calls for more democratic accountability. Still, the EU's own weak representative dimension has prompted persistent calls for more democratic accountability (e.g., Grabbe & Lehne 2015).[154]

One major response to the crisis of legitimacy was the Commission's Governance White Paper (2001: 8), which called for reforming "how the EU uses the powers given by its citizens." The White Paper aimed to overcome "disenchantment" by rendering policy-making "more inclusive and accountable," and by "connecting the EU more closely to its citizens" (id.). Its participatory vision of democracy envisioned an increasing role for civil society (Harlow 2002: 5; Armstrong 2002).[155] From this perspective, "everyone, or at least potentially everyone, is ... seen as a participant" in the governance process (Shapiro 2001: 369). The White Paper itself emphasizes regulatory processes as sites of new governance and pays little heed to the role of courts, beyond their traditional role as implementers of Community law. Rather, it is EUstitia – the "genuine area of justice" – that links the judicial context to concerns about citizenship and legitimacy.

Although not explicitly recognized as part of the EU's governance overhaul, EUstitia is equally dedicated to the goals of connecting Europe with its citizens and getting "more people and organizations involved in shaping and delivering EU policy" (Governance White Paper 2001: 3). It aims to make the benefits of European integration "more tangible to the populations

of the member states" (Bellamy & Warleigh 2001: 3), and thus to build legitimacy by rendering EU citizenship ever more relevant. By increasing access to justice and enhancing the capacity of Member State courts to participate in the development of European norms, the EU's civil justice project seeks to smooth one avenue by which social and economic actors can participate in European governance. Civil litigation in Member State courts provides a forum close to home where citizens can invoke their rights, interact with the European legal order, and play an active (albeit indirect) role in developing EU law and policy. Indeed, in their 2015 assessment of democratic legitimacy in the EU, Grabbe and Lehne (2015:1-2) argue that one key strategy for rebuilding trust with citizens is for the EU to "[p]rovide more ways for citizens to have their grievances addressed at the EU level. The protection of individuals' rights at the EU level has become much stronger in recent years, but the public is largely unaware of these efforts and sees rights as mainly applying to minorities. The EU should widen access to justice and ensure more consistent protection of fundamental rights—and better explain these opportunities to citizens."

Participation – whether in litigation, or in regulatory or political processes – can generate a sense of belonging and authorship, and thus has an "identity-forging constructivist dimension" (Gerstenberg 2002: at 183).[156] Litigation – even if adversary – is a social process that has the potential to shape the identity of European citizens and firms, and feeds into the political process by pushing normative development (Fligstein 2000: 37-40; Stone Sweet 2000). EUstitia contributes to the development of European "society by establishing bases for interaction and access points" for affecting outcomes (Stone Sweet & Sandholtz 1998: 11). In contrast to the neofunctionalist view of European integration, which linked integration to a transfer of actors' "loyalties, expectations and political activities" from nation-states to EU institutions (Haas 1958: 16), EUstitia imagines the possibility of boot-strapping loyalty to the EU political order from interactions in national courts. Grabbe and Lehne (2015: 5) argue that trust could be (re)built through "incremental changes, however small" that "enhance the benefits of European integration as experienced by ordinary people" and respond to citizens' needs.[157]

The EU's emerging "genuine European area of justice" aims to be a system "based on the principles of transparency and democratic control" (Tampere Milestones 1999: ¶ I.8), where "people can approach courts and authorities in any Member State as easily as in their own" (id. at ¶ I.3.5). The Tampere Milestones clearly envision civil justice as a public good that bears upon the legitimacy of EU governance. While far less likely to command headlines than the other components of the AFSJ, civil justice is the day-to-day business of law and constitutes a core feature of the lives of ordinary citizens, interest groups, and commercial enterprises in democratic society.[158] EUstitia's bottom-up approach has the potential to affect virtually all civil litigation in Member State courts.[159] This expands the reach of EU law, given that many more cases make their way to local courts of first instance, than end up before the EU's own courts or the Member State's constitutional or other high courts. Moreover, by implicating areas of private law that were previously relatively untouched by EU law – such as torts, contracts, family law, property, succession, and civil rights – EUstitia is on course to engage a much larger population than those persons who have been affected by movement towards Eurolegalism in other regulatory arenas (Kelemen 2011). The scope of civil justice is broad enough to touch everyone, at least potentially. EUstitia's potential impact is not limited to the traditional 'beneficiaries' of EU law, that is, economic actors and persons who exercise their free movement rights to live, work, or study in another Member State.

Drawing litigants into the process of articulating norms in Member State courts goes

hand-in-hand with giving citizens a greater personal rights-based stake in Europe. In this sense, the EU's civil justice project offers a set of predominantly procedural means towards some profoundly substantive ends. It is a dual strategy that aims, first, to build loyalty to the increasingly proceduralized Europeanized legal order (Black 2000 & 2001), and second, to "gradually 'bootstrap' [the EU] to legitimacy" by generating an increasingly common chain of precedent (Gerstenberg 2002: 191).[160] Normative convergence can be expected over time to affect the interests of more people, and in more profound ways: first, because civil justice implicates an increasingly broad swathe of private law that intimately affects peoples' lives; and second, because "judges will be called upon more and more to uphold not just the law, but moral standards, legitimate expectations, fairness" as European society becomes increasingly juridified (Schepel & Blankenburg 2001: 10). This is especially likely since 2009, when the Lisbon Treaty incorporated the Charter of Fundamental Rights into the EU's treaty structure and accorded that extensive catalog of rights the status of justiciable primary EU law.[161] If the "people's Europe" is being constructed through law, as Schepel and Blankenburg have argued (id. at 9), then EUstitia aims for nothing less than to transform the judicial arenas where European citizens' claims are resolved and thereby to render EU citizenship relevant by making the benefits of European integration "more tangible to the populations of the member states" (Bellamy & Warleigh 2001: 3).

EUstitia is not only the bedrock upon which the internal market is established but also a key strategy for legitimating European governance through enhanced emphasis on European citizenship, rights, and justice. Whether this strategy succeeds, is an entirely different question, and one that calls for sustained empirical study. The apparent severance of citizenship and justice in the course of the 2014 reorganization by the incoming Juncker Commission raises the question of the future institutional commitment to citizenship. Yet at the same time, justice itself appears to have gained status as a meta-narrative of European integration in academic circles (e.g., Douglas-Scott 2013 & 2013), along with the topic of civil justice itself (e.g., Andrews 2013). Moreover, the creation of a 'super-Commissioner' (Timmermans) for 'Better Regulation, Inter-Institutional Relations, Rule of Law and Charter of Fundamental Rights' whose role includes guiding the work of both DG Justice and DG Migration and Home Affairs (to which citizenship issues have been transferred) can hardly be read as a demotion of justice issues, but rather appears an institutional embodiment of their overarching nature.

Endnotes to Chapter 5 and II.3

1. Chapter 5 picks up the thread of Chapter 3 above, which mapped the civil justice field up to the time when the changes introduced by the Amsterdam Treaty entered into force.

2. For example, a well-informed Dutch expert (van Erp 2001) observed that the "changes . . . follow one another so rapidly that it sometimes takes even specialists by surprise as to which legal areas can be 'Europeanised' – I need only refer to the recent regulations in the area of private international law."

3. Developments in other AFSJ subfields have followed different trajectories and logics since 1999, and are in any case beyond the scope of this dissertation. However, they too were set in motion by Amsterdam and Tampere, which suggests an additional reason for subjecting these historical events to close scrutiny.

4. My empirical investigations of Amsterdam and Tampere in Part III of this dissertation rest on the claim the manic development of the EU's civil justice field was triggered by the two turning points, which were anticipated in Chapter 3 above, and which are explored in greater detail here.

5. Chapters 6, 7, and 8 in Part III of this dissertation investigate the period leading up to the turning points which enabled the transformations that are mapped here in Chapter 5.

6. There has been a great deal of criticism of the results of this process, which is beyond the scope of this dissertation. Lindblom (1997: 15-16) admired the boldness of the ambition but not the "annoying unevenness" of the execution.

7. The Commission Communication on Judgments (1998: ¶ 32) notes the "the deep-rooted situation of procedural law in national traditions," and explores the diverse procedural rules found in Member States (e.g., those pertaining to enforcement of judgments, availability of provisional and protective measures, and procedures for handling small claims). See also Juenger (1997: 33) (" [C]ertain 'core' elements of procedural law are bound to resist harmonization."); Kerameus (1997: 926-29). Other scholars, conversely, argue that "some of the major differences that for a long time have set the various systems of civil procedure in the world apart from each other are disappearing" (van Rhee & Verkerk 2006: 131-2). For further discussions of the convergence thesis, see Cappelletti (1989); Markesinis (1994: 30); Mattei (1997: 204); and Allemeersch & Vandensande (2012). For empirical studies designed to test the convergence thesis, see Djankov et al. (2003) (higher formalism in civil law countries linked to slower proceedings and lower perceived fairness, honesty and consistency); Balas et al. (2009: 149, 152) ("The evidence shows that, at least in the area of legal procedures governing the adjudication of simple disputes, there has been no convergence among different legal families during 1950-2000. The differences among [legal] families existed in 1950, and have widened by 2000. .... Moreover, for small disputes, this evidence ... strongly rejects the view that globalization is quickly eroding the effect of legal origin on legal procedure."). These studies are based on a "formalism index" that purports to measure "the extent of deviation from [Shapiro's] neighbour model" of dispute resolution (id. at 141).

8. "[D]er Prozeß ist ... die Lebensart des Gesetzes, also die Erscheinung seines innern Lebens."

9. Some scholars see fewer impediments standing in the way of common European conflict of laws rules, given the greater perceived similarities in European private international law. Bernd von Hoffman (1998: 14-15), for example, has argued that "a common conceptual framework exists" in Europe (including the UK) – a *ius commune* – because European private international law (particularly conflicts theory) was predominantly judge-made, unlike Continental private substantive law, which was "affected by the nationalization of private law by way of codification." Compare Forsyth (2005) (UK perspective).

10. I use the terms 'legal system' and 'legal order' interchangeably when speaking about EU law and Member State law, as most authors do. I reserve the term 'European legal order' to refer more broadly to the entire pluralistic legal landscape in Europe, including not only EU and national law, but also the Council of Europe legal regime.

11. More precisely, she asks "whether there is an EU legal system distinct from and in addition to the national legal systems of EU Member States, or whether it is better to conceive of EU law merely as an aspect of Member States' legal systems, or indeed whether we should think of there being but a single EU legal system of which Member States' 'national legal systems' are in some sense sub-systems" (Dickson 2008: 1).

12. In EU legal discourse, the term 'autonomy' refers to the question of ultimate authority. See, e.g., Barber (2006); Besson (2004); Dickson (2008); Kumm (2005); MacCormick (1996 & 1999b); Maduro (2007); Richmond (1997); Walker (2002).

13. Curtin & Dekker (2002: 65) explain that the "autonomy of the legal system of the Union concerns the legal systems of the member states and not the international legal order. On the contrary, the international legal order not only provides for the validity of the legal sub-systems, but also co-ordinates the relations between them. ... [The] principle of ... supremacy of Union law over national law does not follow as such from the validity relations between the two systems, because in that respect the systems are equal. The supremacy is based on a priority rule laid down in the overarching legal order."

14. Figure 5.1, which is located in section 5.1 below, illustrates that the degree of displacement varies from subfield to subfield, and even from issue to issue within a given subfield.

15. According to Article 2(2) of the TFEU, "[w]hen the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence." To put it more plainly, the Member States lose their competence – i.e., their power to take decisions – when the EU regulates, but can regain it if the EU withdraws from a field. On the constitutional doctrine of pre-emption in EU law, see Schütze (2015: chapters 3 and 4).

16. As a matter of fact, however, the EU measures might turn out to be more effective than measures adopted outside the EU legal framework, given the extensive powers of the EU's institutional apparatus, the compelling nature of EU law, and the dynamics of legislation in the civil justice field, but this question is beyond the scope of the present inquiry.

17. These legal concepts are defined in Chapter 2, and illustrated with greater specificity in section 5.2 below.

18. My conceptual framework aims to simplify this discussion about EUstitia by abandoning the traditional legal category of 'private international law.' Instead, I merge the elements of what I called elsewhere (see Chapter 2 above) the 'broad meaning' of private international law (i.e., rules about jurisdiction, the recognition and enforcement of judgments, and international judicial assistance) into the more general category of civil procedure. This conceptual merger is justified by legislative developments in the EU, elaborated in subsection 5.2.1 below, which have largely eroded this distinction.

19. I bundle these two sets of issues, even though the TFEU does not, because this reflects how the issues are treated in legislative measures, such as the Brussels I and Brussels II Regulations (subsection 5.2.1.1 below).

20. The discussion here supplements and expands the discussion in subsection 3.2.2 of Chapter 3 above.

21. I use 'enforcement' in the broadest sense, to include application and interpretation of EU law, mindful that the "sharp contrast between direct and indirect enforcement of European law has long been discarded by scholars. Indeed, in many sectors the execution of EU norms occurs through forms of cooperation between national and European administrations" (De Lucia 2012: 43). I avoid the term 'implementation' of EU law here, because that term – while often used as a synonym for 'enforcement' – is best used to denote the transposition of EU directives into Member State law.

22. Commission Communication on Judgments (1998: Introduction, at ¶ 3); see also Biavati (2001: 87); McKendrick (2000).

23. The duty of loyal cooperation is the cornerstone of "a large body of case law" from which emerged "several profoundly important constitutional principles of Community law: the duty of national courts to give effective protection to rights given by Community law, the duty to give direct effect to directives against the State, the duty to interpret national law so as to be compatible with Community law, and the right to judicial review" (Temple Lang 2007: 1483; see also Temple Lang 1986). What was formerly called the "duty of loyal cooperation" was reformulated as the "principle of sincere cooperation" by the 2007 Lisbon Treaty:

> Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

EU Treaty art. 4(3) (ex EC Treaty art. 10, ex EEC Treaty art. 5). See generally Skouris (2009), Klamert (2014).

24. Similarly, individuals and companies may find themselves raising EU law issues in proceedings before national administrative authorities. Direct access to the EU's own courts is limited, both by case type and by the nature of the party who may bring a direct action to them. In general, only Member States and EU institutions can bring direct actions to the EU courts, though in rare cases, it is also possible for an individual or corporate plaintiff to do so. See Ankersmit 2012a.

25. The legal systems of both the EU and its various Member States generate procedural rules that interact in the context of civil litigation.

26. Until recently, it was also unique to the EU. However, Hong Kong's post-handover constitution contains a provision modeled on the EU's preliminary reference procedure (Chan 2013).

27. TFEU art. 267 (ex EEC Treaty art. 177). See Barents (1992); Broberg (2009); Lenz (1994); Stone Sweet (2000); Weiler (1987, 1991 & 1994). It is not always obvious when "a decision on the question is necessary" to enable the Member State court or tribunal to give judgment in the case before it, and controversies have arisen over this issue. The TFEU allows Member State courts some discretion, but insists that the "court or tribunal shall bring the matter before the Court [of Justice]" when "any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law" (TFEU art. 267). However, the Court of Justice provided some guidelines in the *CILFIT* case, where it stated that: "a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with the obligation to bring the matter before the Court of Justice, unless is has established that [a] the question raised is irrelevant or [b] that the Community provision in question has already been interpreted by the Court or [c] that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt" (*CILFIT*, at ¶ 21). Still, controversies occasionally arise. More recent case law has established that a Member State can be held liable to an injured party in damages for wrongful acts of its judiciary, including failure to comply with Article 267 of the TFEU (*Köbler*, at ¶ 36).

28. To be sure, this is not the only peg that the Court hung its hat on. However, the key language in that decision left no doubt about the implications of this procedural rule: "In addition the task assigned to the Court of Justice under Article 177 [of the EEC Treaty, now TFEU art. 267], the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals. The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not on ly member states but also their nationals. Independently of the legislation of member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal

heritage" (*van Gend en Loos*). This has come to be known as the doctrine of 'direct effect.'

29. EU law can be used as a sword or as a shield. In other words, in appropriate cases, a party can base a claim on a rule of EU law, or can invoke a rule of EU law as a defense to a claim made by another party to a lawsuit. For example, a private party can challenge a national health and safety regulation, on the basis that it violates the EU treaty rules guaranteeing free movement of goods or services. Conversely, a private party who has been charged with violation of a national criminal law can raise as a defense that its conduct was compelled by a rule of EU law.

30. For simplicity's sake, the discussion here focuses on judicial rather than administrative proceedings, but some of what is asserted about courts is also true of administrative tribunals. There is a large body of literature on administrative law and policy in the EU. See, e.g., Hofmann, Rowe & Türk (2011), De Lucia (2014).

31. By the same token, claims based on national law are governed by the applicable *substantive* national law, whether that of the forum Member State or of some other country. However, the pervasive effect of EU law is so strong that Member State tribunals are obliged to interpret national law in a manner that renders it consistent with EU law, pursuant to the 'indirect effect' doctrine and the 'doctrine of consistent interpretation' (e.g., Schütze 2011).

32. In general, a national court applies its *own* rules of jurisdiction, procedure, and choice of law to a dispute that comes before it, but may apply the *substantive* rules of another state (in a federal system like the USA) or country to decide the issues that arise in that case. A court "will under no circumstances adjudicate cases according to foreign civil procedure rules" (van Rhee & Verkerk 2006: 120-1). The peculiar function of choice of law rules is to instruct a court which body (or bodies) of substantive law govern the issue(s) arising in a particular case. Within federal legal orders, such as the USA, choice of law rules govern the 'horizontal' relations among equal sovereign states, whereas the question whether a principle of federal law displaces a state law is a 'vertical' question of a constitutional nature.

33. See subsection 3.2.2 of Chapter 3 above.

34. Consideration of the voluminous and contested literature on legal and normative pluralism in the EU is beyond the scope of this chapter. See, e.g., Avbelj (2006); Barber (2006); Besson (2009); Borowski (2011); Douglas-Scott (2012); Huomo-Kettunen (2013); MacCormick (1999a); Maduro (2007); Shaw (1999); Tuori & Sankari (2010). For an analysis of legal pluralism in the European *private law* sphere, see Michaels (2013).

35. Research Programme of the Project Group Legal Pluralism (2000-2012), *Max Planck Institute for Social Anthropology*, *available at* http://www.eth.mpg.de/cms/en/research/d3/pglp/. To the anthropologists who coined the term, 'legal pluralism' implies the co-existence of two or more legal systems in a particular geographical space or social field, commonly as a result of religion, migration, conquest or colonialism (Merry 1988: 869-70). "Classic legal pluralism" thus involves "analysis of the intersections of indigenous and European law" (id. at 872). Since the late 1970s, however, the term has been increasingly applied outside this traditional context and used as a tool for analyzing contemporary advanced industrial countries, which includes debates over the nature of the EU legal order (e.g., MacCormick 1999; Walker 2002; Barber 2006; Letto-Vanamo 2013a; Smits 2012), and globalization more generally (e.g., Teubner 1997; Berman 2007; Snyder 2010). In regard to this contemporary usage, Merry (1988: 869) argues that "given a sufficiently broad definition of the term legal system, virtually every society is legally plural, whether or not it has a colonial past." See also Berman (2007); Tamanaha (2008: 1) ("Legal pluralism is everywhere.").

36. Chowdhury and Wessel (2012: 349) note that legal pluralism, such as seen in the EU, encompasses not only a "multiplicity of norms functioning in the absence of a meta-norm," but also a set of "complex overlapping institutional norm production authorities." See Stephenson (2013) (reviewing 20 years of scholarship on multilevel governance in the EU and other settings).

37. In this respect, EU law operates in a manner similar to federal law, with the caveat that the EU's authority is derived from treaty sources rather than from a national constitution. The EU's theoretical autonomy is contested by Member State claims that the EU's authority ultimately depends on their acquiescence or agreement. See generally Schütze (2015: chapters 1 and 2).

38. These debates, which are crucial to understanding the significance of Europeanizing the conflict of laws, are explored further in subsection 5.2.3 below.

39. The analysis in this chapter includes developments through March 2018.

40. There is a large and growing body of criticism of EU developments in the civil justice field, which is beyond the scope of this dissertation.

41. The enhanced cooperation procedure, which is anchored in Article 20 of the EU Treaty, is a treaty-based mechanism by which a subset of Member States may pursue closer integration among themselves, even when no legislation has (or can be) forthcoming at EU level. In other words, primary EU law has now embraced that which was once viewed as abominable, namely a 'multi-speed Europe' characterized by'variable geometry' in which some but not all Member States were bound by the same body of rules. The first and third uses of the enhanced cooperation procedure pertain to family law matters in the civil justice subfield of the AFSJ, where unanimous voting requirements made it impossible to adopt ordinary EU legislation.

42. Commission Communication on Judgments (1998: ¶ 6) (rules of "procedure are already substantially arcane in the purely national context they [sic] are even more so in the cross-border context").

43. The current treaty language calls upon the EU to "adopt measures ... aimed at *ensuring*: (a) the *mutual* recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases" (TFEU art. 81(2)(a), emphasis added).

44. This formulation has not changed, except that Article 81(2) of the TFEU now calls upon the EU institutions to ensure achievement of the stated goal, rather than just to "promote compatibility of the rules."

45. To state this proposition differently, EUstitia erases the boundaries between domestic procedural law and the field traditionally known as 'private international law.' According to Cadiet (2014: 6), the "traditional lines" are being challenged "due to a rising osmosis between the internal and the external dimensions, the domestic and the international levels."

46. The Mutual Recognition Program (2001) was put forward by the Commission and approved by the Council in November 2000.

47. No final version was published, and subsequent Commission documents cite the November 2000 draft, which was published in the Official Journal in 2001, as authoritative.

48. Namely: civil and commercial judgments in contract, tort, commercial law, etc.; family law; property relationships after the dissolution of marriage or the separation of unmarried couples; and wills and successions. Mutual Recognition Program (2001: Proposals A-D).

49. Mutual Recognition Program (2001: ¶¶ II.B.1-3). The Program states that "[p]rogress should be made in stages, without any precise deadlines ...," and that a "stage is begun when the previous one has ended" (id. at Part III).

50. "Whereas the British and Irish managed to secure a 'have the cake and eat it' approach with the possibility of opting out and then back into AFSJ matters, the Danes have been more drastic in – what seems at first sight – saying no to the entire project" (Herlin-Karnell 2013: 97). Adler-Nissen (2009: 64) explains that "the UK and Ireland have an opt-in arrangement while Denmark has a full opt-out." Thus, for example, the Brussels I Regulation of 2000 bound all Member States (including Ireland and the United Kingdom, which had elected to participate in that particular piece of legislation), but did not bind Denmark, which continued to be governed by the pre-existing Brussels Convention. To bridge that gap, Denmark and the EC concluded a treaty in 2005 in which Denmark agreed to apply the provisions of the Brussels I Recast Regulation (Denmark-EC Agreement on Brussels I Regulation). The terms of that treaty were later extended to apply the provisions of the Brussels I Recast Regulation to Denmark as well (Denmark-EC Agreement on Brussels I Regulation Recast). Denmark held a referendum in December 2015 on

the question whether to convert the opt-out arrangement into an arrangement similar to the one held by Ireland and the UK, which would allow Denmark to opt into EU measures on a case-by-case basis. However, 53% of Danish voters rejected this proposal (Milne 2015).

51. In 2009, the Commission commenced a process that led to lengthy public consultation and substantial amendment of that law (Commission Report on Brussels I Regulation). The Brussels I Recast Regulation was adopted in December 2012, and entered into force in January 2015.

52. Baumgartner (2014: 192) observes that the EU's civil justice legislation and case law are part of "an integrated system and an integrated interpretation that can be increasingly difficult for outsiders to understand." Moreover, following its teleological tradition of judicial interpretation, the Court of Justice bases its opinions not just on the positive law, but also considers the political goals that have been articulated in the field, such as access to justice and mutual trust (see, ,e.g., the *Hypoteční Banka* and *Turner* cases).

53. The crucial scope condition for general application of the Brussels I Regulation (as well as the Brussels I Recast Regulation) is the fact that the defendant in a given lawsuit has its domicile in a Member State of the EU. And yet, the crucial definition of 'domicile' was left up to the varying national legal orders.

54. In addition to retaining the public policy defense, Member States can *inter alia* refuse to enforce a judgment when the defendant did not have adequate opportunity to defend itself in the proceedings that resulted in the judgment, due to lack of proper notice (Brussels I Recast Regulation 2012: arts. 41(2) & 45). This exception points to the importance of service of documents, which is discussed in subsection 5.2.1.3 below.

55. The Brussels I Recast Regulation abolishes the formal requirement of a declaration of enforceability, but this does not constitute automatic recognition of the judgment from one Member State in another Member State, since the decision can still be reviewed by the court in the Member State that has been asked to recognize and enforce it.

56. Civil justice legislation in the family law field is subject to the EU's "special legislative procedure," which entails unanimous voting (TFEU art. 81(3)). The Council could, however, unanimously decide to apply the "ordinary legislative procedure" to some areas of family law that have cross-border implications, by invoking the so-called *passerelle* clause that would allow an end run, as it were, around unanimity requirements. The Commission's *Assises* Discussion Paper on Civil Justice (2013: 4) urged the Member States to consider making more "effective use of the *passerelle* or a more frequent recourse to enhanced cooperation" in order to speed progress on family law.

57. The rather hastily adopted Brussels II Regulation was replaced in 2003 by the Brussels II bis Regulation.

58. The Commission has estimated that of the "approximately 122 million marriages in the Union, around 16 million (13%) have a cross-border dimension" (Brussels II bis Report 2014: 4).

59. Results from the public consultation are *available at* https://ec.europa.eu/eusurvey/publication/BXLIIA (visited 12 March 2018).

60. The conflict of laws are examined in greater detail in subsection 5.2.3 below.

61. See Communication of Property Rights for International Couples (2011). This communication revamped the approach that was set forth in the earlier Green Paper on Conflicts in Matrimonial Property Regimes (2006).

62. Biavati (2009) points to the first use of this technique in the Brussels II bis Regulation ("visiting enforcement order").

63. Recognition means giving *res judicata* effect to the issues that were litigated in the Member State that rendered the judgment. (*Res judicata* means that the matter has already been judged.) This effect is automatic (e.g., under Article 36(1) of the Brussels I Recast Regulation), subject to a few exceptions (enumerated in Article 45). Enforcement of a judgment of a foreign court, on the other hand, traditionally requires an extra step, which consists

of obtaining a declaration of enforceability (*exequatur*) in civil law jurisdictions or registering the foreign judgment in common law jurisdictions. According to Baumgartner (2014: 191-2), this procedure is "usually granted as a matter of course," but appeal and challenge are possible. As a matter of fact, this happens only in 1% to 5% of cases (id.).

64. The Tampere Milestones designated a number of specific types of claims for which these simplifications should be introduced, namely small consumer or commercial claims, and certain judgments in the field of family litigation pertaining to maintenance claims and visiting rights (Tampere Milestones 1999: ¶ 34).

65. The grounds for refusing recognition or enforcement under the Brussels I Recast Regulation (2012: arts. 45 & 46) are the same, and include: (1) violation of public policy (ordre public) of the Member State that is being asked to give effect to the foreign judgment; and (2) defective service of documents on the defendant in cases where the judgment was rendered in default of appearance by the defendant (i.e., where there was some 'due process' defect in the proceedings that led to the judgment, such that the defendant was unable to mount a defense).

66. However, family reunification issues have been addressed in connection with free movement of workers.

67. "A judgment which has been certified as a European Enforcement Order in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition." European Enforcement Order (EEO) for Uncontested Claims Regulation (2004: art. 5).

68. In this context, it is important to note that these minimum standards do not oblige the Member States to adapt their procedural rules to the minimum standards established by EU law, but rather that meeting these standards is the prerequisite to obtaining the EEO certificate (see Kramer 2011: 634-5).

69. While some grounds for refusing enforcement remain, they are much more limited than the reasons noted above. Specifically, they do not include defenses based on the public policy (ordre public) of the enforcing Member State. European Order for Enforcement (EEO) for Uncontested Claims Regulation (2004: art. 21).

70. A detailed comparative study was carried out at the Commission's instigation by a research team based at Leeds University (McCormack, Keay & Brown 2017).

71. McCormack, Keay & Brown (2017) examine the Commission's Recommendation in depth (Chapter 6).

72. However, Baumgartner (2014: 193) observes that these "special procedural rules nibble away at" and "reduce the scope of" the EU's own Brussels I Regulation.

73. The Hague Service of Documents Convention (1965) bound fourteen of the EU's then-Member States.

74. The Hague Evidence Convention (1965) bound eleven of the EU's then-Member States. Unlike the Service Regulation and the Brussels I and II Regulations, however, the Evidence Regulation was based on a German initiative, rather than an earlier convention that had been prepared under EU auspices. (German Proposal on Taking Evidence 2000).

75. Biavati (2009: 9) refers, in a related but different EU context, to the need to ensure the "correct application of the great principles of the due process of law," which are part of EU law by virtue of being "recognized by art. 6 of the [European Convention on Human Rights] and art. 47 of the [EU's Charter of Fundamental Rights]."

76. Cadiet (2014: 16) explains that "the service of documents is a crucial element whose good functioning supposes a fair cooperation between courts and parties. The current state of play is not satisfactory due to divergences between Member States on important issues such as the circumstances under which documents are to be served, by whom such service should or could take place, which documents may be served and so on."

77. The main reason for the 2009 spanking was the Commission's late report assessing the Hague Program (2004), which was a prerequisite to the adoption of the Stockholm Program (2009).

78. The text has been slightly amended; it now calls for "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" (TFEU art. 81(2)(f), emphasis added).

79. The Court of Justice is increasingly faced with cases that arise from lack of mutual trust among European courts, albeit largely in contexts other than the civil justice arena. To note just one example, the *Celmer* case presents the CJEU with the question whether Ireland must surrender Mr. Celmer for trial in Poland, when there are doubts about whether he could receive a fair trial there "due to the alleged lack of independence of the judiciary resulting from recent changes to the Polish judicial system" (Bárd & van Ballegooij 2018).

80. This trend resonates with European historical experience surrounding the *ius commune* (Hartnell 2015).

81. Tulibacka argues that private enforcement of EU law "now has the potential of truly complementing public enforcement" (2009: 1531).

82. This is not unprecedented. In the United States, for example, tort law was transformed by the spread of procedural innovations, such as class actions and lawyer-driven pre-trial discovery, which were introduced by the Federal Rules of Civil Procedure and later imitated by the states. Similarly, laxer rules of standing to sue and the availability of civil injunctions fostered use of courts for institutional reform litigation and other efforts to change public policy via litigation.

83. "[Der Gerichtshof strebt] gründsätzlich eine unionsrechtlich autonome Auslegung [an], die für nationale Besonderheiten nicht immer Raum lässt... ."

84. In fact, professional legal networks – particularly those involving judicial cooperation – have always been a key element in European integration (Vauchez 2001: 10), and can be easily traced back much further. Although Vauchez focuses on the criminal side of the judicial profession, he also offers valuable insights for the study of the civil and commercial side of the professions.

85. The aim here is not to provide a comprehensive overview of the types of networks currently active in the EU, but merely to note those that have been created within the EU itself. In particular, the growing number of networks that have been set up by judicial actors themselves are beyond the scope of this chapter. See, e.g., de Claes & de Visser (2012: 106-12); Dallara (2012: 21-25); Magrassi (2011).

86. After an evaluation process (see EJN Evaluation 2005), the EJN-Civil was and modified in 2009 (Decision Amending EJN).

87. The European Judicial Network for criminal matters (EJN Decision - Criminal 1998) was created pursuant to the Council's 28 April 1997 Action Plan to Combat Organised Crime.

88. As of 2013, the ENJ-Civil consisted of 503 members, among them 113 "contact points" designated by Member States, the central authorities designated for coordination functions by relevant EU, national, or international law instruments; liaison magistrates responsible for cooperation in civil and commercial matters; and any other judicial or administrative authorities responsible for judicial cooperation designated by a Member State (European Judicial Network in Civil and Commercial Matters (EJN-Civil) 2014). Denmark does not participate in the EJN-Civil.

89. Thus, according to de Claes & de Visser (2012: 111), participating in networks "is not so much a matter of choice but of necessity to make sure judges are still able to get the job done properly in a changing environment. The internationalized nature of litigation makes knowledge about other legal systems a prerequisite to being able to dispense justice in an individual case. These considerations take on an extra dimension within the EU, with its quest to establish a truly internal market and the ever-expanding reach of EU rules. Judges dealing with commercial law,

administrative law, consumer law and increasingly also civil and criminal law need to cooperate with out-of-state counterparts simply to make principles such as mutual recognition work."

90. In 2003, the EJN-Civil established a multi-lingual internet site for European citizens – the 'European Judicial Atlas' – which aimed to provide user-friendly access to information about virtually every aspect of the Member States' legal systems, along with pertinent multilingual forms, in accordance with the EJN Decision-Civil (2001). The EU's entire e-Justice Portal – the EU's "electronic one-stop-shop in the area of justice" – is undergoing substantial revision in 2018. The E-Justice Portal aims to achieve greater synergies by bringing together all the resources available to citizens, businesses, legal professionals and judges (Simões de Almeida 2009). See generally de Claes & de Visser 2012: 107 & 110 (re: the use of information and sophisticated IT facilities).

91. Member State authorities responsible for judicial training adopted a Charter in Bordeaux in October 2000. The Bordeaux meeting involved criminal law judges and prosecutors, but the EJTN that later emerged includes civil law judges as well. Thus, the EJTN does not institutionally separate civil from criminal law judges, as the European Judicial Networks do. See EJTN Website.

92. For example, the Laeken European Council (December 2001) called for "a European network to encourage the training of magistrates to be set up swiftly; this will help develop trust between those involved in judicial cooperation" (Laeken Presidency Conclusions 2001). Subsequently, the 2004 Hague Program called upon the EU to provide financial support for the EJTN. Financial support was indeed provided, albeit on an ad hoc basis until 2007, when the EU established an operating budget for the EJTN. For its part, the Commission prepared the 2002 Working Paper on Judicial Training and the 2006 Commission Communication on Judicial Training. Judicial Training was also mentioned on occasion in specific pieces of civil justice legislation, such as the Brussels II bis Regulation (2003) on matrimonial matters and parental responsibility.

93. In its Communication on Judicial Training (2006: 2), the Commission boldly asserted that the "adoption of the Amsterdam Treaty with its reference to the new objective of creating an 'area of freedom, security and justice' means that judicial training is a new task for the Union."

94. See First EP Resolution on Judicial Training (2010); Second EP Resolution on Judicial Training (2012).

95. See Commission Report on Judicial Training (2011); Commission Proposal on Judicial Training (2011). A pattern of annual reports by the Commission has recently emerged (e.g., Third Report on Judicial Training 2014).

96. See Council Conclusions on European Judicial Training (2011); Council Conclusions on Legal Training (2014).

97. In concrete terms, the French Judicial Training Network (2000) called for launching a network of training establishments for Member State judiciaries, in order to "foster consistency and efficiency in the training activities carried out by the members of the judiciary of the Member States." Among the joint activities that should take place within the framework of the EJTN are: language training, the organization of training programs and exchanges involving members of the profession, the dissemination of good practices, and the training of trainers.

98. One of my interviewees reported that some Member States were concerned about the French proposal to establish an elaborate governance structure for the EJTN, and for this reason moved quickly to designate the ERA (Academy of European Law) in Trier (Germany) as the de facto secretariat for the EJTN.

99. More recently, the Justice Program for 2014-2020 (2013) has proclaimed that judicial training is "central to building mutual trust and improves cooperation between judicial authorities and practitioners in the various Member States," and that it "should be seen as an essential element in promoting a genuine European judicial culture" (preamble, para. 5).

100. In fact, the Council adopted the first Grotius-Civil program providing incentives and exchanges for legal practitioners in 1996, under the Third Pillar arrangements prior to the Amsterdam Treaty, for the period 1996-2000 (Grotius-Civil Program 1996). This Program was later extended for an additional period. The program provided

funding for training, exchange and work-experience programs, for the organization of meetings, studies and research, and for the distribution of information.

101. The European Court of Human Rights ruled in *Airie v. Ireland* (1979) that the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights requires that governments provide legal aid to the poor in civil cases (Kelemen 2011: 65).

102. Before the Juncker Commission took office, access to justice was seen as "an essential right, one of the founding principles of European democracies enshrined in the constitutional traditions common to all European Union Member States" (DG-Justice Website, http://ec.europa.eu/justice/effective-justice/index_en.htm (accessed 6 July 2014). This language vanished from the website of DG-Justice after the Juncker Commission took office in late 2014. The new website of DG-Justice reduces "access to justice" to a practical issue (https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/civil-justice/access-justice_en) (accessed 14 March 2018).

103. The term 'effective justice' came to have a particular meaning under Commissioner Reding during the second Barroso Commission. It connoted the Commission's growing interest in the quality of justice in each Member State and the bench-marking process that has emerged. "Shortcomings in the national justice systems are ... not only a problem for a particular Member State, but can affect the functioning of the Single Market itself and, more generally, the whole EU legal system which is based on mutual trust" (DG-Justice Website, http://ec.europa.eu/justice/effective-justice/index_en.htm) (accessed 6 July 2014). See, e.g., the 2013 and 2014 Justice Scoreboards. According to a later version of the DG-Justice Wesbite, "effective justice" – oriented towards national legal systems which are "crucial for upholding the values upon which the EU is founded" as well as for "safeguarding the rule of law" – is a core policy goal (https://ec.europa.eu/info/strategy/justice-and-fundamental-rights_en) (accessed 14 March 2018).

104. Tampere Milestones (1999: ¶ 29): "In order to facilitate access to justice the European Council invites the Commission, in co-operation with other relevant fora, such as the Council of Europe, to launch an information campaign and to publish appropriate 'user guides' on judicial co-operation within the Union and on the legal systems of the Member States. It also calls for the establishment of an easily accessible information system to be maintained and up-dated by a network of competent national authorities." The Judicial Atlas and e-Justice websites were discussed above in connection with the European Judicial Network. The European Day of Justice, an annual event established in 2003, also serves these aims (Hartnell 2002: 104-5).

105. Tampere Milestones (1999: ¶ 31): "Common minimum standards should be set for multilingual forms or documents to be used in cross-border court cases throughout the Union. Such documents or forms should then be accepted mutually as valid documents in all legal proceedings in the Union."

106. Tampere Milestones (1999: ¶ 30): "The European Council invites the Council, on the basis of proposals by the Commission, to establish minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union as well as special common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims, as well as maintenance claims, and on uncontested claims. Alternative, extra-judicial procedures should also be created by Member States."

107. Tampere Milestones (1999: ¶32): "[M]inimum standards should be drawn up on the protection of the victims of crime, in particular on crime victims' access to justice and on their rights to compensation for damages, including legal costs. In addition, national programmes should be set up to finance measures, public and non-governmental, for assistance to and protection of victims."

108. The European Order for Payment is based on the principle of mutual recognition, thus an order secured from a national court in one Member State circulates and can be enforced freely throughout the entire EU. Under the e-CODEX pilot project (http://www.e-codex.eu/pilots/european-order-for-payment.html), all necessary filings can be made via a secure electronic forum that links all national filing systems.

109. The EU, like the European Court of Human Rights before it, has "pressed ... member states to strengthen their legal aid systems," but at the same time has increasingly promoted the goal of "encouraging private forms of litigation finance" (Kelemen 2011: 64). For an analysis of the shortcomings of the Legal Aid Directive, see Kelemen (id. at 65-66) ("Ultimately, ... the EU's effort to strengthen national legal aid systems is likely to prove one of its least significant access-to-justice initiatives. ... The heyday of legal aid is past.").

110. Although both 2013 measures were adopted as 'internal market' rather than as 'civil justice' measures, in terms of their treaty basis, they were prepared under the spreading wings of DG-Justice. For a critical analysis of the new legislation and potential unintended consequences, see Ross (2014).

111. For the "convoluted" institutional history of EU (and in particular, Commission) efforts to address collective redress issues, see Hodges (2014). This is an issue that affects not only specific fields of EU law, such as consumer protection, competition, data protection, financial services, environmental, and other types of protective regulation, but also the enforcement and effectiveness of EU law more generally.

112. See especially Public Consultation on Collective Redress (2011); EP Resolution on Collective Redress (2012a). The British Institute of International and Comparative Law (BIICL) has gathered many of the vast resources on its website, *available at* https://www.collectiveredress.org/collective-redress/ (accessed 14 March 2018).

113. The Recommendation was bundled with the Commission's Collective Redress Communication (2013) and with the Proposed Competition Law Damages Directive (2013).

114. Similar effects can also occur in regard to procedural law. Van Rhee & Verkerk (2006: 124-6) have demonstrated that the fundamental right to "fair trial" found in Article 6 of the European Convention on Human Rights has had a "harmonising effect on the systems of civil procedure in Europe" by influencing the development of fundamental principles of justice.

115. The emergence of European notions of public policy is particularly crucial in the civil justice arena, since 'public policy' has historically served as the 'national exception' or loophole that enabled local courts to uphold national interests over those of other states, or of the international legal system more generally.

116. At the same conference, then Vice-President of the European Parliament Diana Wallis was asked "whether the differences between Europe's legal traditions constituted a limit to European legal integration" (Salomon 2007). She replied, "We all come from different backgrounds. I come from a Common Law legal tradition in which I was educated and practiced as a lawyer and I am proud of that. That does not mean, however, that I feel this tradition is threatened by Europe. Europe provides a vehicle to celebrate the difference between our legal cultures and *use them to assist one another*" (id., emphasis added). Diana Wallis served as Member of the European Parliament from 1999 until 2012, and was elected President of the European Law Institute (ELI) in 2013.

117. I am indebted to Sjef van Erp for this notion.

118. The argument based on new institutional analysis is developed further in subpart II.3. below.

119. Rules of this nature play a similar coordination role among sovereign states in the context of international relations and in some federal states (e.g., the United States)

120. This language remains unchanged even after amendments introduced by the 2007 Lisbon Treaty.

121. Brussels Convention (1968).

122. For an insider's perspective, see Wilderspin (2008).

123. See Rome I Green Paper (2003); Kuipers (2009); Wilderspin (2008).

124. The country-of-origin principle was already a hot-button issue at the time, owing to its association with the Bolkenstein Directive on services, which had triggered fears of a regulatory 'race to the bottom' and social dumping. The Bolkenstein Directive tried (unsuccessfully) to implement the country-of-origin principle in connection with creating a single market in services. The concern at the time was that implementation of the country-of-origin principle would speed up deregulation and undermine protective legislation in some Member States to protect workers' rights. Moreover, it was criticized as pitting workers in different parts of the EU against one another (i.e., the 'Polish plumber' or 'social dumping' problem). The Bolkenstein Directive was so unpopular in France that some believe it is one reason why the French rejected the Constitutional Treaty. The services directive ultimately passed in 2006, but only after the country-of-origin provisions were removed.

125. "Ce texte constitue la dernière en date, et la plus radicale, des offensives menées par la Commission en faveur de la loi du pays d'origine" (Heuzé - Letter to the President of France 2006).

126. Debates were not uncommon over this issue under the Rome Convention as well, in the guise of debates over 'mandatory' provisions of national law and under what circumstances parties could avoid them by choosing the law to govern their contract. See, e.g., Magnus & Mankowski (2003).

127. The Rome I Regulation has universal application, which is to say it provides rules that bind Member State courts in all contract cases; its effects are not restricted to intra-EU cross-border cases (Wilderspin 2008: 262-3). This strong displacement of national law, in the context of a debate over whether the EU exceeded the competence provided by (then) Article 65 of the EC Treaty (now TFEU art. 81) is another reason behind the heated controversy that erupted in French academic circles. Wilderspin, who worked on civil justice issues at DG Justice, publicly stated his view on whether the Rome I Convention was *ultra vires*: "The fact that the rules will be applied by a court in [an EU] Member State may of itself represent a sufficient link with the internal market ..." (Wilderspin 2008: 263).

128. Special protective regimes exist for contracts involving consumers, carriage of goods, employment, and insurance, and the Rome I Regulation contains special rules for them. See Wilderspin (2008: 267-71).

129. Thus, article 9(1) of the Rome I Regulation defines "overriding mandatory provisions" as those "regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation." While this definition appears rather broad to the naked eye, it constrains national sovereignty in three ways, when contrasted to the traditional notion that each nation had sole authority to define its own policy priorities. First, the term "crucial" sets a high bar. Second, nailing down a definition that is limited to "public interests" – which connotes "ordo-political rules" (*Eingriffsnormen*) per Garcimartín Alférez (2008: I-77) – may "cast doubt upon the fate of such rules enacted to preserve private interests, for example those of weaker parties such as consumers or workers" (Wilderspin 2008: 272). Third, the existence of a definition in EU legislation renders it justiciable by the Court of Justice, and thus no longer leaves it to the Member States to define their national interests and how to achieve them. However, the justiciability of overriding provisions of national law was already established by the Court of Justice in *Arblade* (1999), which established that the Court may examine whether such national rules impede the free movement of goods or services.

130. Among the many issues that fall under the category 'tort/delict' are product liability, liability for environmental damage, unfair competition, infringement of intellectual property rights, and industrial accidents (Rome II Regulation 2007: chapter 2). Injuries to the right of privacy or personality are excluded from the scope of the Rome II Regulation (art. I(2)(g)), but this issue is to be studied by the Commission with a view to future inclusion (art. 30(2)).

131. The Council of Europe never produced a comprehensive treaty instrument on choice of law for non-contractual obligations. The Hague Conference abandoned its effort in 1967, concluding that the "extreme diversity of tort law and the range of conflict-of-laws approaches" prevented agreement at that time. Similarly, the EC made a first attempt as early as 1967 but abandoned the effort in 1978 (Kaminsky 2010: 63-64). See generally Nadelmann (1976); Symeonides (2008).

132. For a critical analysis of the Rome II Regulation, see Symeonides (2008) (arguing that Rome II is a missed opportunity, insofar as it fails to bring EU standards into alignment with modern laws adopted by numerous EU Member States, notably Belgium, England, Germany, and the Netherlands).

133. Substantive law differs widely among Member States, ranging from a ban on divorce (Malta, at that time) to countries where no actual grounds for divorce are required (e.g., Finland and Sweden) (Fiorini 2008b: 179). One author argued that this legislation "would have had probably the greatest transformation on English family law for a century" (Hodson 2008: 177).

134. The Rome III Regulation was opposed by Ireland, Sweden, and the UK, among others (Hodson 2010a). For a critical analysis, see Fiorini (2008b).

135. Bulgaria, Greece, Spain, France, Italy, Luxembourg, Hungary, Austria, Romania and Slovenia (Rome III - Proposal for Enhanced Cooperation 2010). See generally Hodson (2010b).

136. Fourteen countries initially elected to participate in the Rome III Regulation: Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia. Lithuania elected to participate as of 2014, Greece as of 2015, and Estonia as of 2018.

137. Communication on Property Rights for International Couples (2011). The original proposal on property rights was the Green Paper on Conflicts in Matrimonial Property Regimes (2006).

138. Indeed, the "basic problem with traditional private international law is that it relies on domestic rules to resolve problems that are international in nature" (Juenger 1999: 21).

139. This is the core of Savigny's 1849 idea that each legal relationship has a seat and that it would be possible to assure "a uniform result irrespective of where a dispute is litigated" by linking each relationship to the appropriate seat by means of a connecting factor (Juenger 1999: 7). "To attain the goal of 'decisional harmony' would require each and every state to adopt identical choice-of-law rules, which was indeed what Savigny had optimistically predicted" (id. at 8).

140. Natural and legal persons who act "in the shadow of the law" must make some prediction about whether they believe that a given law will ever be applied to them, before they decided whether or not to adapt their conduct to it. Ultimately, however, it is up to a judge (or arbitrator) to decide whether to apply a particular law to a case, or whether to respect the parties' effort to choose the law by which they want to be governed.

141. O'Hara and Ribstein (2008 & 2009) argue in regard to the conflict of laws that the decentralized federalism found in the United States offers advantages over the centralized system that has emerged in the EU, since the USA has sparked a type of law market that helps constrain inefficient state regulatory efforts.

142. Here I am referring to private law in the traditional sense used in civil law countries, and am not referring primarily to "economic law" (Buxbaum 2009), although the categories do overlap, particularly in the EU context. The original EEC Treaty did not foresee a single body of European private law to govern fundamental matters such as contract, tort, property, or family law. It did, however, expressly contemplate some harmonization in the field of company law, and included a general provision that allowed for "approximation" (harmonization) of laws, where doing so would "directly affect the establishment or functioning of the common market." The process of harmonizing company law began already in the 1960s (Grundmann 2004; Stein 1972). This general harmonization tool was too unwieldy to eliminate all obstacles to the free movement of goods, persons, services and capital, as became apparent by the mid-1980s. The Commission's 1985 White Paper drew attention to the "costs of non-Europe" (Cecchini Report 1998). The White Paper was followed in short order by the first major revision of the founding treaties – the 1986 Single European Act (SEA) – which jump-started the stagnated European integration process and spurred a push to complete the internal market before the end of 1992. Harmonization of private law was at most a minor theme in the debates leading to this tectonic shift, though one can find contemporaneous references that characterize the existence of divergent legal rules as a barrier to trade. In this view, the "legal differences and the uncertainty

amongst traders" constitute costs of non-Europe (Basedow 1998: 28), and an "Internal Market sooner or later needs for its proper functioning unified or at least harmonized rules of private law" (Drobnig 1996: 20). See also Buxbaum (2009: 63) ("[M]uch national law ... must move up one step").

143. See, e.g., Kötz (1998).

144. Hay, Lando & Rotunda (1985: 161) argued a generation ago that "integration does not require uniformization. Variation in the laws of the different jurisdictions is not only inevitable but to some extent also desirable." Harlow (2002: 340) provides a more recent and impassioned "counter-argument for diversity and legal pluralism within the EU."

145. Vanessa Mak (2013) has published an interesting paper along these lines. This is a perennial discussion in EU legal circles.

146. In some cases, the EU takes the process one step further. For example, the EU's e-commerce directive's use of the country-of-origin principle "replaces far-reaching substantive harmonization as well as the detailed elaboration of choice-of-law rules" (Meeusen 2004: 85).

147. For early explorations of the significance of these developments, see Basedow (2000); Remien (2001); Hartnell (2002: 117-38); and Heß (2002). For more recent explorations, see Storskrubb (2008); Tulibacka (2009); Kelemen (2011); Kramer (2012a); Van Den Eeckhout (2013); Vernadaki (2013). With the exception of Kelemen, all authors cited are legal scholars.

148. As an aside, two basic pathways for spinning the 'gold' of substantive law from the 'straw' of technical procedural rules of the sort that make up much of EUstitia come to mind. First, when interpreting EU civil justice legislation, such as rules relating to mutual recognition or choice of law concepts, a court called upon to demarcate the scope of an EU regulation might offer a *definition* of a private law concept, such as one arising in the context of family law. The EU legislator has taken pains to erect a barrier between procedural rules and more basic questions of civil (i.e., private) law, but this is a difficult boundary to maintain, and it is easy to imagine that a Member State court or the CJEU might cross the line into substance. See, e.g., Brand (2014: 371) (analyzing the overlap or confluence between private international law rules in the EU and substantive law). Second, cases arising under civil justice legislation could trigger fundamental questions about *supplementary or unwritten sources of EU law*, i.e., the burgeoning body of fundamental rights and other general principles of EU law. While the formal relationship between the CJEU and the European Court of Human Rights in Strasbourg (ECtHR) remains contested, it is difficult to imagine that the CJEU would relinquish the opportunity to develop its own body of jurisprudence relating to fundamental rights and general principles as they relate *inter alia* to civil justice. Lenaerts & Gutman (2004: 7) have observed that "the 'hard core' of European 'federal common law' ... appears ... particularly within the fields of European private law: judicial lawmaking stemming from various areas of Community law in which the Court of Justice is confronted with adjudicating a dispute at the heart of which is a term, a concept or a rule derived from a provision of the Treaties ... or of a Community measure ... for which the Community legislator *has not* yet been given competence under the Treaties."

149. While the quoted author was writing from the perspective of a common law system, the statement is arguably correct in the EU context as well, where national courts in the Member States are de facto European courts as well, and have opportunities to participate in normative development through dialogue with the CJEU that they may not have within the narrower confines of their national legal order.

150. Vauchez (2007b: 3) argues that "legal and judicial areas" are more than the "mere surface of the heavy social processes that shape European integration," and insists that they are "actually one of the essential spaces where the government of Europe is being produced." As such, the European legal field occupies a critical position in an EU "polity deprived of a State" that can "organize in a stable and perennial way the relationship and the mediation between social interests" (id. at 16).

151. The Avignon Declaration (1998) was issued at the conclusion of a seminar on the criminal judiciary, which was held in Avignon during a French Presidency. It is not an official EU document, but is frequently quoted by EU institutions, including the EP and the Justice and Home Affairs Council.

152. The Commission has referred to the phenomenon of indirect representation as the EU's "double democratic mandate" (Governance White Paper 2001: 8).

153. Most recently, the Lisbon Treaty – sometimes called the "Treaty of Parliaments" – defined an enhanced role for *national* parliaments in the EU legislative process and created new safeguards to ensure that the subsidiarity doctrine is observed (EU Treaty art. 12; Lisbon Treaty: Protocols 1 & 2).

154. Grabbe & Lehne (2015: 1) have called the EU's "dwindling democratic legitimacy ... an acute political challenge" and observed that support for the EU is dwindling even in countries where support was previously strong.

155. This has been embodied in Article 10 of the EU Treaty, and is spelled out in Article 11 of the EU Treaty, which was added by the Lisbon Treaty in 2009.

156. "European identity is never far from the institutionalized forms taken by the EU, since "[i]nstitution and identity are in constant historical reciprocal determination" (Burgess 2002: 480).

157. "Politicians and institutions should become more emotionally intelligent about how they engage citizens – not just by showing that they sympathize, but by making incremental changes, however small, that enhance the benefits of European integration as experienced by ordinary people. If voters truly felt that politicians took them seriously, their confidence in the system would rise. They need to feel their voice is heard on issues they care about and to see personal and individual benefits from European integration" (Grabbe & Lehne 2015: 5).

158. Criminal justice is part of the AFSJ, but it remained an intergovernmental (i.e., Third Pillar) field – hence, largely in the hands of the Member States – until the Lisbon Treaty entered into force at the end of 2009.

159. In fact, EUstitia's reach is even broader, since it also encompasses measures aimed at encouraging the use of 'alternative dispute resolution' (ADR) mechanisms as a substitute for civil litigation, especially by consumers.

160. This twin strategy is not historically unique to the EU. The governance techniques of legal pluralism, civil procedure and the administration of justice in Europe date back to the Roman Empire (Hartnell 2015).

161. The key constitutional battleground for years to come will be the question when the Charter applies. Article 51(1) of the Charter defines its scope in this way: "The provisions of this Charter are addressed to the Institutions, bodies and agencies of the Union ... and *to the Member States only when they are implementing Union law*. ..." (emphasis added). For an authoritative early analysis, see Rosas (2012). For a compelling analysis of case law, see van Bockel & Wattel (2013). For an early pronouncement on the issue, see the *Siragusa* case.

III. CASE STUDIES: FROM "JUDICIAL COOPERATION IN CIVIL MATTERS" TO INSTITUTIONALIZED CIVIL JUSTICE IN THE EUROPEAN UNION

III.1 Overview of Part III

The rapid transformation of the EU's civil justice field since 1999, which was documented in Chapter 5 above, results from a set of decisions made by EU Member States in the 1990s. The first of these decisions was the transfer of legislative competence over the policy field by Member States to the EU. This decision came as a great surprise to many experts in the affected legal fields at the time, and was controversial, albeit only after the fact. There was no public debate on the matter at the time the key decision was taken, though discussions occurred in elite circles in national capitals and in Brussels. The second transformative decision was the articulation of a detailed, visionary five-year plan to develop the newly Europeanized field, which followed on the heels of the first decision. The transfer of legislative competence, which was accomplished by the 1997 Amsterdam Treaty's 'communitarization' of civil justice issues, is the *necessary* condition that has enabled the process of Europeanizing civil justice since that treaty entered into force in 1999. The second decision – the 1999 Tampere Conclusions or 'Milestones' – was the programmatic motor that set the EU institutions and Member States into a frenzy of motion that only began to slow down 15 years later.

This dissertation aims to explain these two decisions, with the goal of casting new light on the mechanisms of European integration and deepening our understanding of the ways in which "elected and nonelected government officers, nongovernmental organizations, political parties, interest groups, policy entrepreneurs, 'epistemic communities,' and 'networks' " perform as "relevant actors in the decision-making processes that produce government action" (Shapiro 2001: 369). As argued in Chapter 9 below, the key actors in the events studied were unelected government officials – in the guise of national and European civil servants – who served as policy entrepreneurs,[1] along with a small number of other legal experts working in the affected legal fields. As the three chapters in this Section III show, virtually no role was played by nongovernmental organizations, political parties, or interest groups.

My dissertation undertakes to look inside the 'black box' of intergovernmental decision-making in the European Union, where democratic transparency and pluralism have largely failed to penetrate, and to illuminate some of the ways in which legal expertise operates in such settings. As explained more fully below, negotiations among EU Member State governments are notoriously difficult to investigate, because of diplomatic secrecy norms[2] and the "desire not to reveal in public who won and who lost" (Bailer 2004: 100). Curtin (2009: 244) explains that the "diplomatic origins of international relations may help explain the innate drive towards secrecy of EU executive power," which she labels the EU's "authoritarian temptation."

Chapters 6 and 7 examine the extended treaty revision process that led to the adoption of the Amsterdam Treaty in 1997, which introduced substantial changes to the EU's foundational 'constitutional' treaties.[3] Among other revisions, the Amsterdam Treaty articulated a new integration goal – namely, the establishment of an "area of freedom, security and justice" (AFSJ) – which is anchored in the overarching EU Treaty.[4] This broad task was operationalized by adding a new Title IV on "Visas, Asylum, Immigration and *Other Policies Related to Free Movement of Persons*"[5] (emphasis added) to the nuts-and-bolts Treaty Establishing the European Community (EC Treaty). Although not explicitly mentioned in Title IV's heading, civil justice –

under the rubric "judicial cooperation in civil matters"[6] – comprises one piece of this composite AFSJ policy field, insofar as it is linked to free movement of persons. The primary aim of Chapters 6 and 7 is to show how competence over civil justice issues came to be transferred from Member States to the EU. Chapter 6 establishes the framework for treaty revision, while Chapter 7 focuses more narrowly on substantive issues, and in particular on the position of civil justice in the process that culminated with agreement on the terms of the Amsterdam Treaty in June 1997. Chapter 8 picks up the thread from 1997 until the Tampere Summit in October 1999, where the EU's five-year plan for developing the AFSJ – including the civil justice field – was approved by the European Council, i.e., the Heads of State and Government of the Member States.

The case studies presented in the following three chapters are based on evidence gathered through interviews, as well as library and archival research. Each chapter entails close attention to preference formation and process-tracing, as a means of navigating the "ambiguous political space" (Sbragia 2000: 221) that is the European Union.

Chapter 6: Communitarizing "Judicial Cooperation in Civil Matters": Historical Predecessors, Political Context, and Institutional Framework for the 1996 Intergovernmental Conference

My primary aim in this and the following chapter is to explain the Member States' decision to transfer core dimensions of civil justice[7] to the EU. In practical terms, this entails tracing the origins of Article 65 of the EC Treaty, which provides a rough legislative road map for measures to be adopted in the civil justice field.[8] However, given that 'communitarization'[9] of civil justice is part of the larger AFSJ package of developments, the part cannot be adequately explained without sufficient attention to the whole. Indeed, the emergence of civil justice as an EU field cannot be grasped without understanding the relationship between civil justice and other AFSJ sub-fields, such as asylum and immigration, criminal (penal) law, and efforts to come to grips with drugs, terrorism, and other problems that arise when people cross increasingly open internal borders in ever-growing numbers. To some degree, developments in these *other* AFSJ subfields contribute causally to the Europeanization of civil justice.

Like all major events in European integration since the founding of the three original Communities in the post-war context, the Amsterdam Treaty must also be approached historically, with an eye to preceding rounds of treaty revisions that set the stage for its innovations, as well as institutionally, through close examination of the EU and national structures and actors that were involved in the processes of preference formation, drafting and negotiation. The remainder of this chapter addresses these issues. Detailed analysis of substantive discussions in the late 1990s is found in Chapter 7.

6.1 Historical Roots: Developments Prior to 1986

Despite the surprise that greeted its appearance in 1997, Article 65 of the EC Treaty did not come out of thin air but rather is rooted in institutional structures and practices that had emerged in Europe over several years. While this history is not destiny, it does provide the essential framework for assessing the dramatic change in the late 1990s, when Member States relinquished a significant measure of their traditional control over civil justice issues and transferred regulatory responsibility to the EU. The Amsterdam Treaty's turn towards communitarization presupposes an understanding of how Member States previously dealt with such issues,[10] both internally (in terms of domestic aspects of legislation and the administration of justice) and externally (in terms of international dimensions, namely treaty-making power).

This chapter examines the process that led to deeper European integration on matters of civil justice, but also sketches the development of the EU's *criminal* justice field. There are three reasons for including some discussion of criminal justice issues here. First, civil and criminal justice are two sides of the same coin, in institutional terms, and developed in tandem, albeit quite differently. These differences will help to shed light on the causal mechanisms operating in the civil justice field. Integration in both justice fields followed parallel and occasionally overlapping paths, but also diverged along the way towards deeper integration. Similarities aside, the explanations for deeper integration in the civil and criminal justice fields *differ* in theoretically significant ways that are related to the nature of actors involved, the institutional constraints they faced, political salience, and the role of exogenous forces. Second, my interviewees frequently mentioned criminal as well as civil justice in the same breath, which means it would be artificial and incomplete to excise criminal justice entirely from my effort to

trace the process that resulted in the communitarization of civil justice. Ultimately, the *symbiosis* between the civil and criminal justice cases is essential to my explanation. And third, the question of European integration in the criminal justice field has been studied systematically, unlike civil justice, which has attracted scant interest among scholars of European integration. If nothing else, the existing literature on criminal justice provides a source of theoretical explanations that must be taken into consideration in the effort to explain developments in the civil justice field.

6.1.1 Antecedents: Civil Justice

Intra-EU cooperation in regard to civil justice issues was anchored, albeit uneasily, in the 1957 Treaty of Rome that established the European Economic Community (EEC Treaty). The original six Member States committed themselves to "enter into negotiations with each other, so far as necessary," to simplify formalities governing reciprocal recognition and enforcement of judgments among themselves, but – paradoxically – to do so *outside* the institutional framework established for European integration as such (EEC Treaty art. 220). *Why* the Six chose this awkward solution is not definitively known. One possible reason is that three of the original six Member States – the Benelux countries – were simultaneously engaged in the process of establishing the Benelux Economic Union among themselves, which provided a framework for closer integration among them (including on civil justice matters), so long as it did not conflict with their commitments under the EEC Treaty (subsection 2.2.2 in Chapter 2 above). A second possible explanation for the origins of Article 220 EEC Treaty is that all six original Member States were members of the Hague Conference on Private International Law (Hague Conference) and thus already active participants in the work of an international organization that was dedicated to drafting multilateral treaties on some key civil justice issues.[11] Yet the fact that the Six were already working toward common solutions to civil justice problems in other multilateral fora can at best only partially explain why Article 220 was included in the EEC's founding treaty. If these matters were being dealt with adequately elsewhere, there was no need to mention them in the EEC Treaty at all. A third possible explanation for the half-hearted approach to civil justice issues taken by Article 220 is that it reflects the optimism of the original six Member States that the EEC would prove to be more ambitious over time, and possibly more effective, than the 19th century Hague Conference had been until the 1950s.

The history of the first four decades of European integration reveals slow, but nearly constant efforts to address civil justice issues, commencing shortly after the EEC came into being in January 1958. The Commission of the (then) EEC – despite having no formal institutional role whatsoever in regard to the matter – invited the Member States to commence negotiations on jurisdiction and judgments on 22 October 1959, noting that "a true internal market between the six States will be achieved only if adequate legal protection can be secured" (Jenard Report 1979: 3). Negotiations on such a treaty commenced in 1960, pursuant to a decision by the Committee of Permanent Representatives (Coreper)[12] to set up an expert committee composed of high-ranking civil servants from the six Member States, predominantly judges and civil servants from ministries of justice and foreign affairs. Only one member of the committee – a member of the Belgian delegation who was an attorney and law professor – came from outside government circles. The expert committee also included delegates from the Commission of the EEC, as well as observers from the two international organizations dealing with civil justice matters, namely Benelux[13] and the Hague Conference. The chairman, Arthur Bülow of Germany, was a senior

official (ultimately State Secretary) from the Federal Ministry of Justice, who was later awarded an honorary professor title. The rapporteur of the expert committee, Paul Jenard of Belgium, was Director in the Belgian Ministry for Foreign Affairs. The work of the expert committee was successful, and – after more than sixteen meetings spread over a six-year period – produced a treaty on jurisdiction and the enforcement of judgments in civil and commercial matters (the Brussels Convention), which was agreed in 1966 and entered into force (after ratification by all six Member States) in 1968.

By way of justification for the Brussels Convention, Jenard's official report states that the "fact that the [EEC Treaty] requires the Member States to resolve this problem shows that it is important" (Jenard Report 1979: 3). This bootstrap argument reveals two key dynamics of European integration: First, it illustrates an occasional tendency to take liberties with treaty language. In fact, Article 220 of the EEC Treaty does *not* require Member States to resolve this problem, rather it entails a commitment to "enter into negotiations ... so far as necessary," without establishing any necessity as such. In the context of the Brussels Convention, a simple assertion about the importance of the topic apparently sufficed to satisfy the 'necessity' requirement laid down by Article 220, in a situation where all six Member States were willing to proceed.[14] Second, this statement points up the importance of getting an issue written into the EU's foundational treaties. Once ensconced there, regulatory work can begin, assuming the 'necessity' (or other threshold jurisdictional) requirement can be met and the institutional players are amenable.

In 1967, shortly after agreement had been reached on the text of the Brussels Convention, Belgium proposed – on behalf of all three Benelux countries – that the Member States might next attempt to unify private international law (i.e., conflict of laws) for contract and other areas of private law, taking as a model the draft Benelux uniform law (North 1993: 29).[15] The (then) six EEC Member States once again agreed to do so, and convened an expert committee in 1969, despite the fact that Article 220 of the EEC Treaty provided *no* explicit foundation for this project (id. at 29-30). The view among Member State representatives at that time was nevertheless "unanimous ... that the proposed harmonization, without being specifically connected with the provisions of Article 220 of the EEC Treaty, would be a *natural* sequel to the Convention on jurisdiction and enforcement of judgments" (Giuliano/Lagarde Report 1980: 5) (emphasis added).

The drafting of the 1980 Rome Convention on applicable law (i.e., choice of law) offers valuable insights into the institutional landscape of the EEC at the time. The process summarized here is long and convoluted, but relevant to my study for two reasons. First, it illustrates the complexity of the process for making European law on civil justice issues *prior to* the changes introduced by the 1997 Amsterdam Treaty, and thus suggests one reason why some actors in the civil justice arena might have come to favor comunitarization, which greatly simplifies the regulatory process. And second, it introduces the institutional major actors in the EU at the time. The remainder of this chapter, together with Chapter 7, will demonstrate the extent to which the players and the institutional landscape have (or have not) changed over time.

The first meeting of the expert committee in 1969 was chaired by T. Vogelaar of the Netherlands, who was Director-General of Internal Market and Approximation of Legislation at the Directorate-General (DG) for Internal Market and Industrial Affairs.[16] The first task of the expert group was to assess *whether* it was advisable to work towards unification of conflict of laws, and if so, in which fields. Despite German reluctance to proceed, stemming from

"hesitation ... in professional and business circles" (Giuliani/Lagarde Report 1980: 5), the experts gave the project a green light. Next, the Commission approached the Member States and asked them to authorize the work. In January 1970, Coreper (i.e., the national diplomats representing the Member States in Brussels) authorized the drafting of a treaty (id.), and the work began.

The expert committee that negotiated the applicable law treaty – which came to be known as the Rome Convention – was considerably larger than the one that produced the earlier Brussels Convention. It included around ten representatives from academia, in addition to the judges and ministry officials. To some degree, the larger size was a function of the larger number of experts from two major Brussels-based institutional players: the Commission (13) and the Council Secretariat (4). The larger size also reflected the addition of three new Member States in 1971 (Denmark, Ireland and the United Kingdom), which brought the total up to nine. The addition of these countries also helps to explain why it took so long – ten years – to reach agreement on a treaty text. The legal systems of the new Member States – in particular those of the common law countries – differed substantially from those of the original six Member States.

The expert committee for drafting the Rome Convention, under the chairmanship of the Belgian civil servant (Paul Jenard), met approximately thirty times, with meetings lasting from two to five days (Giuliano/Lagarde Report 1980: 6-7).[17] The issues proved so intractable that a decision was made in 1978 to narrow the scope of the treaty to just contractual obligations,[18] which cleared the way for final agreement on a draft text (February 1979).

The work of the large expert group convened to unify conflict of laws was carried out "under the auspices of the Commission" of the EEC (Giuliano/Lagarde Report 1980: 48), despite the fact that the Commission had no formal role to play in the process of working out a treaty among Member States on a matter that technically fell outside the scope of EEC competence.[19] This fact notwithstanding, "all the negotiations ... were conducted ... with the assistance of [the] officials and staff" of the Commission (North 1993: 31). The Commission issued an opinion on the draft in March 1979, in which it welcomed the treaty text and expressed its conditional support for the adoption by the Member States (Commission Opinion on Rome Convention 1980).[20] However, the Commission conditioned its support for the Convention on Member States' willingness to negotiate a protocol that would confer jurisdiction on the Court of Justice to provide uniform interpretation of the Convention. To put some muscle behind this condition, the Commission asserted that it would seek to *legislate* on the issue if the Member States did not heed its wishes (id. at para. V),[21] that is, to treat the issue as a matter of European (i.e., 'federal') rather than Member State (i.e., 'state') prerogative.

Once the expert group reached agreement on a final draft of the treaty text nearly a decade later (in June 1979), the text was forwarded (in July 1979) to the President of the Council of the EEC.[22] The function of the Presidency is to chair Council meetings,[23] determine its agenda, set work programs, and facilitate dialogue at Council meetings and with other EU institutions.[24] Consistent with these functions, the Irish Presidency in 1979 – aided by the General Secretariat of the Council (GSC, better known as the Council Secretariat), which is a permanent bureaucracy in Brussels that exists to serve the rotating Presidency – fielded comments on the draft from Member State governments. Next, Coreper set up an *ad hoc* working party on private international law (January 1980), which was tasked with finalizing agreement on the Convention text, in view of comments made by both the Member States and the Commission (Giuliano/Lagarde Report 1980: 7). Two meetings under the chairmanship of A. Brancaccio from the Italian Ministry of Justice resolved some (but not all) outstanding issues, so the baton was

passed up the institutional ladder to the diplomats in Coreper, who "gradually brought agreement within sight" (id. at 7). Next, the matter was put before a special meeting of the EEC Justice Council (i.e., Ministers of Justice of the nine Member States) in Rome on 19 June 1980. This meeting succeed in resolving the open questions, at which point the Italian Minister of Justice, Tommaso Morlino, "recorded the agreement of the Representatives of the Governments of the Member States, meeting within the Council" (id. at 8) in his capacity as President-in-Office of the Council. At this point, the "plenipotentiaries of the Member States meeting within the Council" signed the Convention in June 1980 (id.). However, the Rome Convention on the law applicable to contractual obligations did not enter into force until 1991 – more than ten years after agreement was reached on the text and nearly twenty-five years after work began in 1967 – when the minimum number of Member States had ratified it.[25]

These two EEC treaties – the 1968 Brussels Convention and the 1980 Rome Convention – are among the most successful efforts in history to provide binding multilateral rules to address core civil justice problems among nations.[26] That the process of making these treaties was lengthy and time-consuming attests to the complexity of both the issues themselves and the institutional landscape from which they emerged. The slow pace also suggests a lack of urgency or political salience, coupled with the patience and long-range perspective of legal elites, beginning with those in Benelux countries, who have slowly but steadily pushed this agenda forward in the context of post-war European integration since the 1950s.

In terms of integration dynamics in the EU, these two examples lay the foundation for an understanding that the key actors are, to a large extent, *institutions* rather than individuals. A comparison of the expert committees that prepared the Brussels and Rome Conventions reveals not only that more *people* were drawn into the process (i.e., larger delegations from the Member States and institutional actors), but also more *institutional actors* as such (i.e., more Commission sub-divisions, plus the addition of the Council Secretariat). However, it is also possible to identify certain individuals who were 'repeat players' in the process and surmise that at least some of them were 'true believers' who pursued the project of European harmonization out of personal conviction. In the drafting of the Brussels and Rome Conventions, for example, there were six persons who participated in both expert committees: In addition to the Belgian Jenard, who played a key role in the drafting of both treaties, there was a second 'repeat player' from Belgium (Raymond Van der Elst, a professor from the University of Brussels), one from Luxembourg (Alphonse Huss, who was Procureur General d'Etat, i.e., Attorney General), as well as one each from the observer organizations – Benelux (Martha Weser, also a professor from the University of Brussels) and the Hague Conference (Mathijs H. van Hoogstraaten, who was Secretary-General at the time) – and one from the EEC Commission (Wilfried Hauschild). While my research has not delved into the views of these participants, the role of the Commission official is well known.

Wilfried Hauschild, who occupied the position of Head of Division in the Directorate-General of Internal Market and Industrial affairs at the time, is the man who famously said to Danish law professor Ole Lando in 1974, over dinner in Copenhagen, that "We need a European Code of Obligations. Somebody should start drafting such a Code." (Lando 1997: 103; see also Section 2.2.5 in Chapter 2 above). Lando was "enthused" (id. at 104), and set off "to be the 'somebody' " (id.). Lando's early efforts to secure funding from the EEC Commission to support work along these lines were unsuccessful. Indeed, he has reported that the Commission officials – among them Dr. Hauschild himself, acting in his official capacity when Lando approached his

department for funding – viewed him as "a dreamer" and told him that "Europe is not ripe for such an enterprise" (id. at 104). In this context, Lando came to understand that Hauschild had been speaking in "in a private capacity" at the dinner where they had met (id.), but persisted in his quest. He gathered a group of like-minded scholars and practitioners and continued to seek funding. By 1980, Lando had founded the Commission on European Contract Law (popularly known as the 'Lando Commission'), which was a private initiative with no official mandate, either from the EEC or Member State governments. In 1982, the Lando Commission secured modest funding to support its work from the Legal Service of the European Commission, which at the time was under the leadership of Claus-Dieter Ehlermann,[27] who had been at the University of Michigan with Ole Lando and Eric Stein in 1955 (Hesselink 2001: 8; Nottage 2004: 173). The work of the Lando Commission ultimately produced the Restatement-like Principles for European Contract Law (PECL) between 1995 and 2003. One of the questions that I investigate in this dissertation is whether any Hauschild- or Lando-like supporters or norm entrepreneurs helped to bring about the communitarization of civil justice in 1997.

The last major feature of the early EEC institutional landscape worth noting is the relative absence of the European Parliament (EP, or 'Assembly' as it was formerly known). The EP played no role in the process of drafting either the Brussels or Rome Conventions. Indeed, prior to the first direct EP election in June 1979 – coincidentally the same month in which the expert committee completed its draft text of the Rome Convention – the European Parliament was made up of parliamentary appointees from the Member States. This is not to say that national parliamentarians had no role whatsoever, but merely that their role, if any, was according to national laws and practices related to the drafting and conclusion of international treaties. Moreover, one characteristic of European integration is that the EP occasionally becomes active in regard to issues on which it has no formal institutional role. For example, the EP adopted resolutions in 1989 and 1994 expressing support for work aimed at codifying private law.

6.1.2 Antecedents: Criminal Justice and the EU's 'Internal Security Field'

Unlike civil justice, the EU's founding treaties provided no basis whatsoever for cooperation in the internal security field (Bigo 1994), understood narrowly here as encompassing issues related to law enforcement and policing.[28] No formal mention was made of such issues prior to the 1986 Single European Act (see subsection 6.2.1 below). Yet this did not prevent Member States from cooperating to address particular challenges, on an ad hoc basis, during the years before the policy field was brought, piecemeal, into the EU's fold (see section 6.2 below). This subsection traces the earliest efforts of EU Member States to address such issues jointly.

From the beginning of post-war European integration, the six Member States that founded the European Communities also belonged to the Strasbourg-based Council of Europe, a wholly separate international organization, which was established in 1949 (see section 2.2.1 in Chapter 2 above). The Council of Europe began working on a variety of criminal law issues, including extradition and mutual assistance in criminal matters, as early as the late 1950s.[29] The work of the Council of Europe provided an important ongoing forum for discussing such issues – albeit one which also included a wide range of non-EU Member States – and was limited to traditional international law methods, namely, the drafting of international treaties which members could subsequently ratify at will. Despite extensive ongoing efforts in the Council of Europe, the original six EU Member States[30] developed an appetite for intra-EEC cooperation. Two sets of problems emerged in the late 1960s that created conditions favoring such

cooperation: drug trade and terrorism. According to a senior official in the Luxembourg Ministry of Justice at the time (Elsen Interview), there was "nothing international in our field" when he joined the Ministry in 1967, "nothing for police cooperation." But "then came these difficult years with ... new types of crime, and new challenges" (id.).

Drug trade picked up in the late 1960s, with the growing popularity of Icelandic (*Loftleiðir*) Airlines' low-cost flights (the "Hippie Express") from North America to Luxembourg. "The Americans came and they brought in what we did not have at that time: synthetic drugs, and they were often on their way to Afghanistan to buy hashish" (Elsen Interview). "Drugs was the first area where there was cooperation" on European police cooperation, and "we organized many courses with the Americans together for our police" (id.). The original six Member States set up an *ad hoc* group in 1971, on the initiative of French President Pompidou (1969-1974) at a time when France held the rotating Presidency of the Council, to discuss various drug-related issues, such as trafficking, treatment, and even harmonization of legislation (id.). The Pompidou Group was "outside the treaty, something intergovernmental" and was "really outside of [EEC] competence" (id.).[31]

The second issue that moved the original six EU Member States to ramp up their intergovernmental cooperation on matters falling outside the scope of treaty competence was terrorism, which was a problem in some Member States. The term was initially used in connection with violent left-wing movements, such as Italy's Red Brigade and Germany's Red Army Faction, both of which were founded in 1970, and later in connection with other forms of international terrorism, such as those associated with radical Palestinian movements (e.g., the Black September Organization, also founded in 1970, which was responsible for the 1972 attack on Israeli athletes at the Munich Olympics, and the Popular Front for the Liberation of Palestine, which kicked off a wave of skyjackings when it tried to hijack four planes on the same day in September 1970). The ad hoc Trevi Group[32] was established in 1976, pursuant to a proposal made by UK Foreign Secretary James Callaghan (Bunyan 1993: 1) at a summit meeting chaired by Italian Prime Minister Aldo Moro[33] (1974-1976) at the end of the Italian Presidency in December 1975. Like the Pompidou Group before it, the Trevi Group resulted from a high-level political decision by the heads of state and government of the then (six) Member States that they should "work together" on an intergovernmental basis, "even though there was no legal basis in the treaties" (Elsen Interview).

The first ministerial meeting of the Trevi Group took place in Luxembourg in 1976, when that country held the rotating Presidency of the Council, and consisted of "ministers of the interior, mainly," who met on an ad hoc basis, outside the treaty framework, without the Commission (id.). Charles Elsen, from the Luxembourg Ministry of Justice, was "very involved" insofar as he chaired the groups that prepared for that first ministerial meeting of the Trevi Group in 1976 (id.).[34] "Not very much is known about the outcome of the work" that was done by the Trevi Group, given the sensitive nature of its remit. "So there's a sort of mystery. The impression is that the aim of this work was mainly coordination, nothing normative. Nothing in terms of harmonization ... but for instance how was it handled, hijacking. How are you doing it? Are you negotiating or are you trying to use force? At that time also, all over Europe, they started putting in place special units, G9 Gruppe in Germany, in France, etc. So this type of question" (id.). Beyond discussing 'best practices', the Trevi Group of Ministers, whose work was characterized by secrecy, met twice a year, and occasionally issued declarations and initiated action programs (Benyon 1994: 498). The work of the Trevi Group "continued, continued, continued" (Elsen

Interview) until the 1992 Maastricht Treaty, when the issues that had been handled on an ad hoc basis in the Trevi Group 'came in from the cold' of ad hoc intergovernmentalism and were moved into the EU's treaty structure (see section 6.2.2 below).

The term 'ad hoc' hardly does justice to the nature of interactions that evolved between the 1970s, when the Pompidou and Trevi Groups were established, and the 1990s, when the matters they had dealt with were formalized within the EU treaty structure. The framework for regular ongoing interactions among high level Member State government officials and civil servants in the 'internal security' field was partly established by the EU's practice of holding two high-level political summits each year, at the conclusion of each rotating Member State's stint as President of the Council, and partly by occasional meetings of the ministers whose portfolios were affected – primarily Ministers of the Interior, but in some cases also Ministers of Justice – and their staffs. Under the ad hoc intergovernmental arrangements in place prior to the 1992 Maastricht Treaty, there was no European-level secretariat to organize meetings. Thus, every Presidency organized its secretariat, and responsible civil servants, such as Charles Elsen in the Luxembourg Ministry of Justice, were called upon "to organize the staff, the meetings in Luxembourg ... , the meeting of the ministers here, and so on" (id.). Thus, Mr. Elsen explains, "I was close to being the drug czar in Luxembourg, also the terrorism czar. But that's not the language we use. ... I was once invited to the American embassy with people in the drugs field, and my title there was Drugs Czar of Luxembourg" (id.).

6.1.3 Successes and Failures

Efforts to craft unique EU solutions to civil justice problems produced a few successes and a few failures prior to communitarization by the 1997 Amsterdam Treaty. As detailed in section 6.1.1 above, the Member States achieved considerable success in harmonizing 'internal' (or intra-EU) rules governing jurisdiction and judgments under the Brussels Convention (1968),[35] and to a lesser extent, conflict of laws for contractual obligations under the Rome Convention (1980). The Brussels and Rome Conventions were treated, subsequent to their ratification by Member States as binding treaties under international law, 'as if' they were EU legal instruments and were integrated into the European legal order insofar as questions about their interpretation could be submitted to the European Court of Justice. As such, these treaties were hybrids, born as creatures of international law, but living – insofar as their interpretation was concerned – as creatures of European law. In regard to both of these sets of civil justice challenges, the EU enjoyed considerably more success than its institutional counterpart (and competitor) at the global level, the Hague Conference.[36]

On the other hand, the EU also experienced failures, during the period prior to the Amsterdam Treaty, on some civil justice matters for which global solutions (under the aegis of the United Nations as well as the Hague Convention) and pan-European solutions (under the aegis of the Council of Europe) enjoyed greater success, measured in terms of wider commitments to binding norms. In concrete terms, the EU hammered out two conventions in the 1980s that aimed to harmonize intra-EU rules to ensure "free movement of documents"[37] and to establish better procedures for the recovery of child support payments.[38] However, neither of these EU conventions was ratified by a sufficient number of Member States, and thus neither entered into force. According to a senior-level EU Council Secretariat official, the EU's achievements in the civil justice field prior to Amsterdam amounted to mere "peanuts" (Interview #41), both in comparison to civil justice achievements by global or pan-European

organizations, and to EU achievements in the *criminal* justice field.

This assessment is apt, but only when the standard for judging progress is *normative*, that is, when integration is measured solely in terms of harmonized rules. As already noted (see subsection 6.1.2 above), a degree of harmonization was achieved on numerous criminal law issues, insofar as the EU Member States ratified treaties that had been drafted under the Council of Europe banner, but the level of harmonization was uneven. Moreover, normative harmonization by means of ratifying Council of Europe treaties did not make a substantial contribution toward institution-building within the EU itself, since interpretations of these treaties was not a matter for the European Court of Justice.

If one takes *institution-building* as the measure of integration, however, it becomes apparent that important strides were achieved in the field of criminal justice and police cooperation during that period, perhaps even more important than were achieved in the civil justice field. The establishment and routinization of cooperation in the Pompidou and Trevi Groups knit national ministers in the affected policy fields closer together, along with national civil servants, in a collaborative enterprise that existed parallel to but formally outside EU treaty structures. While ministers come and go, members of the civil service often remain in place and move up the bureaucratic ladder. As such, emphasis must be placed on the existence of civil servants like Charles Elsen of Luxembourg or Gilles de Kerchove of Belgium, who developed special expertise not just in the affected policy fields but also in the practice of collaboration with counterparts in other EU Member States. Such experts remain key players in the field, in some instances (discussed further below), and may over time serve in multiple roles.

The process of building networks of civil servants and other experts also existed in the civil justice field but was less institutionalized than in the internal security field. There was no formal multi-tier coordination structure for civil justice matters, as existed in the internal security field. Rather, in the civil justice field, ad hoc expert groups were constituted for the particular purpose of drafting a treaty for adoption by Member States. As the examples of the Brussels and Rome Conventions (see section 6.1.1. above) show, there was some overlapping membership in the composition of these groups. This is hardly surprising, given the technical nature of the civil justice matters that came under consideration as well as the small number of national experts in these arcane legal fields.

The ad hoc system of coordination for internal security matters was heavily criticized by civil libertarians in regard to the "secrecy and lack of parliamentary and public accountability of the groups' activities" (Benyon 1994: 509; EP Civil Liberties and Internal Affairs Committee Report 1992). Such critiques of ad hoc intergovernmentalism – particularly in regard to internal security issues – became part of the ongoing malaise captured by the phrase 'democratic deficit' that emerged in the late 1970s. This critique of European governance remained in the air throughout the 1980s, even after the first direct elections to the European Parliament in 1979 remedied one key dimension of the perceived deficit. In the specific context of the Pompidou and Trevi Groups, some suggested that they "were not legitimate structures for policy-making" (Benyon 1994: 509). (In contrast, ad hoc intergovernmental cooperation on civil justice issues was not subjected to similar scrutiny or criticism.) Indeed, the 'democratic deficit' remained on the table well into (and beyond) the 1990s, during successive rounds of revamping the EU's treaty-based constitutional structure.

6.2 Remodeling the EU's Treaty Structures: Forerunners to the 1997 Treaty of Amsterdam

Unlike a constitutional moment when a new political entity is formed, the 1997 Treaty of Amsterdam is one in a series of major macro-institutional steps along the road towards post-war integration in Europe.[39] It must therefore be examined against the backdrop of its immediate forerunners, the 1986 Single European Act (SEA) and the 1992 Maastricht Treaty on European Union (TEU), particularly as they affected civil justice matters. Like the Treaty of Amsterdam, which is examined in Chapter 8 below, these two prior agreements also served as constitutional revisions to the EU's treaty foundations. The SEA and Maastricht/TEU illustrate the (unprecedented) evolution from ad hoc political cooperation, in the form of regular meetings of groups composed of government officials and experts, to a routinized, institutionalized form of cooperation, albeit one that stopped short of full integration, insofar as it did not provide a separate treaty basis for developing EU policy in the justice or internal security fields, which are intimately tied to national sovereign prerogatives and (in some cases) matters of high politics. As such, the 1986 Single European Act and the 1992 Maastricht Treaty on European Union constitute formal agreements to talk about justice issues, but now under the eaves of the EU's roof, rather than wholly outside the perimeter of its constitutional walls, as had been the case.

6.2.1 The 1986 Single European Act[40]

The 1986 revision to the EU treaties – the Single European Act (SEA) – was the first formal step at the European level towards bringing civil justice, criminal justice, and police cooperation into the EU. It was, however, a tentative step. The SEA formally institutionalized *foreign policy cooperation* among Member States – called European Political Co-operation (EPC) – which had commenced on an ad hoc basis in 1970 (Nuttall 1992). Invoking the "procedures ... and the practices" that had been "established among the Member States" over time, the Single European Act (art. 1) placed EPC on an intergovernmental footing parallel to – albeit largely separate from – the supranational Community (then still called the EEC) and its institutions.[41] EPC formalized cooperation by establishing a Political Committee, which consisted of senior officials from Member State Foreign Ministries, who met monthly, as well as numerous expert Working Groups, who also met regularly. The Political Committee was responsible for managing the day-to-day business of EPC, acting as a clearinghouse for routine decisions, and preparing topics for ministerial discussions in regular monthly meetings (EPC Report 1988: 6), while the Working Groups focused on the content of particular projects under consideration. EPC foresaw around 15-20 Working Groups in all, whose role entailed "regular meetings at expert level – on average each Group meets two or three times per Presidency" (EPC Report 1988: 6), or four to six times per calendar year. The European Commission, which was "fully associated with EPC" and "represented at all EPC meetings" (EPC Report 1988: 7), supplemented the work of the Member State actors on the Political Committee and in the Working Groups.

The SEA included a Political Declaration by the Governments of the Member States on the Free Movement of Persons, which took the crucial conceptual step of linking the justice policy field to the Single Market (Kaunert 2011: 45). In that Declaration, Member States agreed to cooperate to "promote the free movement of persons," in particular as regards "the entry, movement and residence of nationals of third countries," as well as "in the combating of terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques." This 1986

Declaration, with its short list of topics, embodies the first map of the emerging policy field that later came together in the 1997 Amsterdam Treaty as a consolidated policy field: the Area of Freedom, Security and Justice (AFSJ). The focus in 1986 was on the emerging *internal security* regime, namely *immigration*, which was a hot topic in the wake of the 1985 Schengen Agreement,[42] in which five of the (then) ten Member States[43] proposed the gradual abolition of border checks at their common borders, along with the *criminal justice* and *police cooperation* issues that were already under discussion in the Pompidou and Trevi Groups.[44]

By contrast, the Single European Act made no explicit mention of cooperation in the field of *civil justice*. Yet despite the lack of any treaty basis for doing so, the Member States established an intergovernmental Working Party on "judicial cooperation in civil matters" in 1986, which met on the "fringes of the scope of activities by the [EU's] own institutions" (French Ministry of Justice Website). This Working Party was composed of Member State representatives, who consisted predominantly of civil servants and other experts drawn mainly from academia. Given the highly specialized nature of the subject matter of this Working Party's mandate and the relatively small number of experts in the field, it is not surprising that the people involved tended to be the same as those who represented their Member States in negotiations on similar issues at the Hague Conference on Private International Law, as well as on the committees that had drafted the Brussels and Rome Conventions (Interview #58; see also subsection 6.1.1. above).

Over the course of the next few years, the Working Party produced three treaties addressing civil aspects of judicial cooperation, namely (1) the 1987 Legalisation Convention;[45] (2) the 1988 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention); and (3) the 1990 Convention on the Simplification of Procedures for the Recovery of Maintenance Payments (in the field of family law). Yet despite considerable efforts invested in drafting these treaties, only one of them – the 1988 Lugano Convention, which extended the EEC's own Brussels Convention framework to a handful of other European countries – obtained sufficient ratifications to enter into force. The other two – the Legalisation and Maintenance Conventions, which would have bound only the EEC countries themselves – never entered into force for lack of ratification. As such, the efforts of the Working Party produced little in the way of hard law.

6.2.2 The 1992 Maastricht Treaty on European Union

The 1986 Single European Act was followed in quick succession by the ambitious and controversial 1992 Maastricht Treaty on European Union (Maastricht Treaty),[46] which introduced profound changes to the constitutional structure of the EU, as well as to the position of justice policy and police cooperation within it. These institutional changes were short-lived, insofar as they were revamped five years later by the 1997 Amsterdam Treaty (see Chapter 8 below). The 1992 Maastricht Treaty was thus merely an interim step, but one that served as a "decisive gate opener" (Monar 2012) for the developments that followed.

Like the 1986 Single European Act (SEA) before it, the 1992 Maastricht Treaty revised and expanded the pre-existing 1957 Treaty of Rome that had created the European Economic Community (EEC).[47] Unlike the SEA, Maastricht did not stop at that, but also went on to alter the architecture of European integration more fundamentally. Civil justice, along with criminal justice and police cooperation, were among the policy fields affected. At the level of principle, the Maastricht Treaty identified "close cooperation on justice and home affairs" (EU Treaty art.

B) as one objective of "ever closer union among the peoples of Europe" (EU Treaty art. A). Justice issues were latecomers to the ambitious agenda in Maastricht, with civil justice issues bringing up the rear, behind the more salient internal security issues (including criminal justice and police cooperation) (Corbett 1993: 27-9). In more practical terms, the Maastricht Treaty introduced a wide range of constitutional changes, which are conventionally illustrated by the iconic image (Figure 3.1 in Chapter 3 above) that depicts a "Greek temple with three pillars joined together by a roof, the whole of which is the European Union" (Guild 1998: 65; see also de Witte 1998).

First, the Maastricht Treaty folded the three pre-existing European Communities[48] into a single European Community (EC) and placed them in what came to be known as the First Pillar. The First Pillar was the *supranational* realm, in which Member States granted power to EU institutions to legislate over matters within the scope of delegated competences, and the Court of Justice could exercise the full range of powers defined in the EC Treaty (i.e., the 1957 Treaty of Rome, as revised and renamed). Second, Maastricht expanded and upgraded European Political Cooperation (EPC), which had been introduced by the 1986 Single European Act, by formally institutionalizing cooperation in two policy realms: the Second Pillar (Common Foreign and Security Policy, or CFSP) and the Third Pillar (Justice and Home Affairs, JHA).[49] The Second and Third Pillars were largely *intergovernmental*, which implies a formal extension of EU activity into these (already emerging) policy fields, albeit on a basis that was far more limited than the 'Community method' available for taking decisions or adopting legislation within the *supranational* First Pillar.[50] Still, the creation of the Third Pillar shows that Member States "acknowledged the need for an intergovernmental approach to problems and issues that [could] no longer be countered merely at national level" (den Boer 1996: 1). Finally, Maastricht added a second foundational treaty alongside the pre-existing EC Treaty, called the Treaty on European Union (EU Treaty). The EU Treaty, which laid down a number of general principles, can be visualized as the overarching 'roof' that covers all of the EU's policy realms (or pillars). The new term 'European Union' (EU) added by the Maastricht (TEU) Treaty encompasses all these dimensions of the European construction.

6.2.2.1 Life in the Third Pillar: Institutional Implications

The organizational structure of the Third Pillar (Justice and Home Affairs, or JHA) "represents a convergence of the previously existing working groups and structures" (den Boer 1996: 1). As such, the 1992 Maastricht Treaty crystallized into institutional structure the practices that had emerged for cooperation in these fields (Guild 1998: 65-6; Weyembergh 2000), but also pushed the development of those policy subfields and altered the institutional landscape. The JHA policy field that emerged from the Maastricht Treaty entailed a limited mandate for EU activities in nine enumerated policy subfields – denoted as "matters of common interest" – which were linked to the overarching goal of ensuring the free movement of persons. Civil justice (under its formal rubric "judicial cooperation in civil matters") was one of the nine, while the other eight pertained to internal security issues.[51] In all nine subfields, the Member States committed to "inform and consult one another within the Council [of the EU] with a view to coordinating their action," and to "establish collaboration between the relevant departments of their administrations" (EU Treaty art. K.3(1)). These procedures led to increasingly regular contacts among experts, civil servants and politicians in various national ministries and EU institutions across an expanding number of policy subfields.

Operational authority in the Third Pillar remained largely in Member State hands, consistent with its intergovernmental nature. EU action in the Third Pillar was limited to three types of *non-legislative*[52] common action: joint positions,[53] joint actions,[54] and conventions or treaties (EU Treaty art. K.3(2)).[55] Another characteristic of intergovernmental decision-making is that most Third Pillar decisions by the Council of Ministers required unanimity,[56] in contrast to decision-making in the supranational First Pillar, where qualified majority voting was gradually becoming the norm. In contrast, however, the Maastricht Treaty departed from traditional intergovernmental approaches by establishing a limited, but significant role for some of the EU's institutions. This fact renders the Third Pillar something of a hybrid and prevents its characterization as a wholly intergovernmental field of policy coordination.

This hybridity is best illustrated by the position of the Commission in the Third Pillar. Unlike the supranational First Pillar, where the right of legislative initiative has traditionally been vested in the Commission, the Maastricht Treaty left the right of initiative in regard to Third Pillar measures predominantly in Member States' hands. At the same time, however, Maastricht deemed the Commission to be "fully associated with the work" of the Third Pillar (EU Treaty art. K.4(2)) and granted it a parallel right of initiative in some of the policy fields (including civil justice) (see, e.g., Uçarer 2001: 2).[57] The Commission's agency[58] in the Third Pillar was constrained, however, by the institutional arrangements that were "hastily agreed upon during the Maastricht debates" (Uçarer 2001: 1 & Table I), insofar as the "powers entrusted to the Commission were tentative and the policy instruments at [its] disposal were new and vague" (id. at 5). I argue in Chapter 7 below that the Commission made the most of its awkward position and punched above its formal institutional weight in terms of influencing the trajectory of the emerging civil justice policy field.

The Commission's position in the Third Pillar was also weak in terms of its institutional resources, that is, its "institutional capacities as an organizational unit" (Uçarer 2001: 1). Because JHA was not (yet) a full-fledged policy field where the EU could adopt legislation (as it could in regard to First Pillar issues), no Directorate-General (DG) could be set up in the Commission to deal with JHA issues. Rather, during the early 1990s, the Council Secretariat – which had served as the coordinator for Member State activities under European Political Cooperation (EPC), including those in the JHA policy field since the 1980s – remained the dominant Brussels-based institutional actor in the JHA field. This fact notwithstanding, the Commission had been assigned a new (albeit awkward) role in the Third Pillar, and it moved quickly to put staff in place to deal with JHA issues. As had been the case with EPC after the 1986 Single European Act, "administrative and management changes were made to match expanding policy commitments" (Lewis & Spence 2010: 106).

The Commission's incipient JHA bureaucracy coalesced around Sir Adrian Fortescue († 2004), who began his career in the British diplomatic service in the 1960s but soon found himself in Brussels – first on secondment to the European Commission (1972-1975), again in 1982, and ultimately from 1985 until his retirement in 2003 (Shelley 2001). Fortescue left the British foreign service in 1985 and joined the European Commission full-time as head of cabinet to British conservative politician Lord Cockfield, who was Vice-President of the Commission at that time. Despite his Tory party affiliation, Lord Cockfield was the European Commissioner who was charged with creating Europe's single market in the 1980s, and who "oversaw the strategy and drove through the legislation to implement it" (Fortescue Obituary #1 2004), thus earning Margaret Thatcher's scorn for "going native" in Brussels (Shelley 2001).[59] When Lord

Cockfield left the Commission at the end of the First Delors Commission in 1989, Fortescue took up a series of positions[60] inside the Secretariat General of the EU *Commission* (as distinct from the Secretariat General of the *Council*),[61] where he was "one of only three working in a tiny unit ... , charged with drafting the EU's fledgling justice and anti-crime plans" (Shelley 2001). Fortescue was reportedly asked, as early as 1989, to reflect on broader implications of removing internal frontiers to free movement of persons in the EU (Lewis & Spence 2010: 85). By 1995, this "tiny unit" had morphed into the largely autonomous Task Force for Justice and Home Affairs, with around 20 members, and Fortescue at its head (id. at 106).[62] It is noteworthy that the work in the new JHA policy area was located in the Secretariat General of the Commission, which is the "nerve center" and the "funnel through which proposals pass" (id.).[63] The Task Force was later replaced by a full-fledged Commission Directorate General (DG) in 1999, when the Amsterdam Treaty entered into force, and Fortescue stayed on to become its Director General. Fortescue was thus a British diplomat (with no law degree) who was among the first wave of British 'fonctionaires' (i.e., EU civil servants) in Brussels, and one who – despite his own close Tory ties – not only occupied a key position in the creation of the EU's internal market as a member of Lord Cockfield's staff in the 1980s but also went on to play a central role in his own right in the creation of the EU's Area of Freedom, Security and Justice in the 1990s.

The other two key EU institutions also made small inroads in the early 1990s vis-à-vis Third Pillar issues. The Maastricht Treaty accorded some responsibility to the *European Parliament* (EP), though its role in the Third Pillar was marginal, compared to its steadily growing role in the First Pillar legislative process.[64] In particular, the EP had the right to be informed about Third Pillar activities by both the Commission and the Presidency, to consult with the Presidency on Third Pillar issues,[65] and to ask questions of, and make recommendations to the Council (EU Treaty art. K.6). In practice, however, the Parliament was generally informed after the fact (Fiorini 2008a: 972) and played virtually no role in the decision-making process, its role largely limited to producing reports on its own initiative (Bunyan 2013: 2). As for the *Court of Justice*, the Maastricht Treaty stated that jurisdiction could be granted to interpret the provisions of any treaty that might emerge from Third Pillar cooperation (EU Treaty art. K.3(2)),[66] but did not mandate it.[67]

Decision-making in Maastricht's Third Pillar was far from simple, even though it was relatively unencumbered by involvement of the EP or the Commission, in contrast to First Pillar legislative procedures. This fact notwithstanding, the Third Pillar's intergovernmental governance structure was extraordinarily cumbersome. Article K4 of the EU Treaty called for the establishment of a *Coordinating Committee for Third Pillar* issues (the 'K4 Committee'). From its inception, the K4 Committee – which consisted of one high-ranking representative from each Member State – "met about once a month" and had a secretariat in Brussels (Benyon 1994: 509). The K4 Committee was charged with coordinating work under the Third Pillar, preparing opinions for the Council (either at the Council's request or on its own initiative), and otherwise contributing to the preparation of the Council's discussions. Insofar as the K4 Committee was intended to operate "without prejudice to" the role of the Committee of Permanent Representatives (Coreper) and the Council Secretariat in intergovernmental decision-making,[68] it followed "the standard procedure" and channeled its "advice and reports" through Coreper to the Council of Minister (id.). As such, the K4 Committee was similar in both composition and function to the Political Committee under European Political Cooperation (SEA Treaty), with the exception that the Commission also was represented.

Also like EPC, expert Working Groups were established in the Third Pillar to deal with particular issues. Under Maastricht, the pre-existing structures – such as the Trevi Group and the Working Groups – were "subsumed into the new structure, based around the K4 Committee" (Benyon 1994: 498). Yet decision-making in the Third Pillar was more cumbersome than it had been in the EPC, insofar as it required measures to be adopted unanimously at *each* of four or more[69] different institutional levels. Starting at the bottom level, these consisted of the Working Groups of the K4 Committee (i.e., expert committees dealing with particular issues); the K4 Committee itself; Coreper (i.e., the Committee of Permanent Representatives of the Member States); and the Justice and Home Affairs Council (see Figure 6.1).[70]

Figure 6.1[71]

Levels of Decision-Making (Structures) in the EU's Third Pillar (Maastricht Treaty)

Council of EU Justice and Interior Ministers (JHA Council)

Committee of Permanent Representatives (Coreper)

Coordinating Committee (K4 Committee)

Steering Groups:

Immigration & Asylum	*Security, Police & Customs Cooperation*	*Judicial Cooperation*
Working Groups	**Working Groups**	**Working Groups**

The new Third Pillar governance structures introduced "a more coherent approach to cooperation" (Benyon 1994: 498), and were also meant to enhance the "transparency of decision-making" (den Boer 1996: 1). However, these procedures also made the policy-making process more unwieldy, insofar as they replaced final national decision-making in the Member State capitals by centralized decision-making at the Coreper and JHA Council levels. Introducing "more bureaucracy and more levels of decision-making" turned the "rate of progress into a relatively slow one" (id.). Moreover, the "double lock" (O'Keeffe 1995: 898) that resulted from unanimous voting procedures in the Council, combined with tough ratification procedures in each Member State, effectively prevented "an acceptable rate of progress of justice and home affairs cooperation" (den Boer 1996: 3). Dissatisfaction with these institutional arrangements was one driver of reform in the 1990s (see subsection 7.1.1. in Chapter 7 below).

Despite some institutional improvements, the landscape of activities related to police cooperation and the fight against crime in the Third Pillar was "unclear and confusing," cluttered by a "complex, interconnected lattice of groups, associations and networks which ... promote cooperation in different specialist fields of law enforcement" (Benyon 1994: 497-8).[72] In contrast, the institutional landscape in regard to civil justice was less convoluted, owing to the narrower range of issues, the technical nature of the issues involved, and the smaller number of experts and political actors directly involved. Still, all was not rosy in the civil justice subfield, where there

was considerable disagreement over the scope of "judicial cooperation" in civil matters under the First Pillar (Drobnig 2000: 192).[73]

Overall, the institutional changes introduced by Maastricht deepened, but also altered the nature of interactions among persons working in the affected justice and internal security policy fields. There was no real rupture in the practices that had emerged over time, though some new procedures and policy tools were added to supplement the old stand-by method of international treaties. And while some new institutional players were added to the field, there was also a considerable degree of stability, by virtue of the fact that some of the key players – both in the national ministries and expert delegations, but also inside the EU institutions – remained in the field, albeit sometimes in different positions. In 1994, for example, Charles Elsen from Luxembourg moved from one key position, inside the Luxembourg Ministry of Justice, to an even more powerful one, as Director General of the Council General Secretariat.

6.2.2.2 Judicial Cooperation in Civil Matters under Maastricht[74]

The civil justice regime established by the Maastricht Treaty held sway for five and a half years, between November 1993 (when the 1992 Maastricht Treaty entered into force) and May 1999 (when the 1997 Amsterdam Treaty entered into force). During this period, efforts were made to "draw up conventions" which the JHA Council would then "recommend to the Member States for adoption in accordance with their respective constitutional requirements," as provided in Article K.3(C) of the EU Treaty. As such, work carried out in the Third Pillar was similar to the work that had been performed by the EPC Working Party (discussed in subsection 6.1.1 above) under the EU's prior treaty regime. In terms of outcomes, the highest achievement in the field of civil justice under Maastricht's Third Pillar was the drafting and conclusion of two treaties that never entered into force, since neither obtained the necessary number of ratifications, namely (1) the 1997 Convention on the Simplification of the Transfer of Judicial and Extrajudicial Documents in Civil and Commercial Matters, and (2) the 1997 Convention on Jurisdiction, Recognition and Enforcement of Decisions in Matrimonial Matters (Brussels II). In this regard, achievements on civil justice issues were no better than under the earlier Single European Act, despite major changes in the formal status and competence of the EU in the field. However, Maastricht did lead to enhanced dialogue and cooperation among Member States, insofar as it called upon them to coordinate the positions they would take in international negotiations at the Hague Conference on Private International Law and discuss ongoing civil justice topics of common interest that were not yet ripe for agreement on final texts.[75]

Overall, the 1992 Maastricht Treaty portended, but did not yet effectuate much overt change in the civil justice field. It made only a "partial transfer of incomplete competence" in the fields comprising the Third Pillar (Guild 1998: 87), which turned out in the end to be "rather ineffective" (Basedow 2000: 691). If crassly measured in terms of output in the civil justice field, the 1992 Maastricht Treaty was less successful than the 1986 Single European Act that preceded it, insofar as the SEA produced one successful civil justice treaty – the Lugano Convention – in addition to the two that never entered into force. Yet this would be too harsh a judgment, in two respects. First, while the Brussels II Convention never entered into force, it did provide a foundation for the family law legislation that came along some years later (see Chapter 5 above). And second, the creation of the Third Pillar by the 1992 Maastricht Treaty established a firm basis for expanding common activities in regard to civil justice issues, and laid the cornerstone for the dramatic Europeanization of law- and policy-making that was unleashed when the 1997

Amsterdam Treaty 'communitarized' civil justice policy-making. Thus, despite the shortcomings of the intergovernmental Third Pillar approach, Maastricht marks the definitive departure from the original model, embodied in Article 220 of the Rome/EEC Treaty, which exhorted Member States to address civil justice matters on their own time and outside the EU's formal institutional architecture.

6.2.3 Conclusions

A "new dynamic integration process" began in the 1980s (Brok 1997: 1), which was characterized by commitment to completion of the internal market, economic and monetary union, and increasing focus on the need for political as well as economic integration. By the 1990s, the EU faced new challenges created by the changing political conditions within the EU and at its borders, on top of the persistent controversies that had been unleashed at Maastricht and deep dissatisfaction with the operation of the Third Pillar arrangement for justice issues (among others). These conditions, which are explored further in subsection 6.3.2 below, set the tone for the next round of revisions to the EU treaties in the 1990s. The following section traces the first phase of the process that led to the 1997 decision to transfer civil justice issues from the intergovernmental Third Pillar into the supranational First Pillar, with the result that EU institutions gained power to legislate within the scope of this expansive policy arena.

6.3 The Road to the 1997 Treaty of Amsterdam: Political Context and the EU's Institutional Framework for Treaty Revision

6.3.1 Introduction

The 1992 Maastricht Treaty "acknowledged its own imperfection" (Brok 1997: 2) by providing that a "conference of representatives of the governments of the Member States shall be convened in 1996 to examine those provisions of this Treaty for which revision is provided, in accordance with the objectives" set forth in Articles A[76] and B of the EU Treaty (EU Treaty art. N). The short list of objectives articulated in Article B of the EU Treaty includes the development of "close cooperation in justice and home affairs."[77] Thus, EU Member States had already agreed in 1992 that they would evaluate the experience in the new Third Pillar policy fields (among them civil and criminal justice and police cooperation) when they returned to the drawing table in 1996 to consider the extent to which the "policies and forms of cooperation introduced by [the Maastricht] Treaty may need to be revised" in order to ensure the "effectiveness of the mechanisms and the institutions" of the EU (EU Treaty art. B). The fact that the Member States in 1992 not only contemplated but actually scheduled the "legally binding" (Brok 1997: 3) subsequent review and possible revision of the treaties, simplifies the challenge of explaining the Amsterdam Treaty considerably.[78] Insofar as the event was scheduled well in advance, I need not explain why the Member States decided to review and revise the treaties in 1996,[79] but can focus more narrowly on the structure of the process, preference formation, and bargaining that generated the text of the Amsterdam Treaty.

The Amsterdam Treaty was adopted by the heads of state and government of the EU Member States – acting in their capacity as the European Council – in Amsterdam on 16-17 June 1997, towards the end of the Dutch Presidency.[80] This act constituted, in formal terms, the successful conclusion of the Intergovernmental Conference (IGC) which was indeed convened in 1996, as prescribed by the 1992 Maastricht Treaty.[81] The Amsterdam Treaty entailed many changes to the EU's basic treaty (hence constitutional) structure (see section 3.3 of Chapter 3

above), among them the decision to 'communitarize' civil justice by moving it from Maastricht's intergovernmental Third Pillar to the supranational First Pillar. As such, the outcomes of IGCs are "super-systemic" or "history-making" decisions that "alter the Union's legislative procedures, rebalance the powers of [EU] institutions, [and] change the EU's remit" (Peterson 1995: 72; see also Bache 1998: 26-7).

Yet the peak event in June 1997 was merely the culmination of a "lengthy process of treaty review, reform and revision" (Christiansen & Jørgensen 1999: 2).[82] Those authors argue convincingly that it is a mistake to place undue emphasis on a single event, such as the Amsterdam summit, and urge scholars instead to study the entire process, to "re-direct analytical attention away from the political limelight and into the 'valleys' – the periods between" the EU's numerous IGC summits, in order to "identify more authoritatively where, and how, and by whom, fundamental decisions about treaty reform have been taken" (id. at 2-3). Attending to the "intermediate phase" between summits[83] (id. at 11) avoids the trap of assuming that the Member State representatives came "to the conference table each with their set of 'national interests,' and that the 'final outcome' was ... the compromise or lowest common denominator between these," rather than the result of a heavily structured and path-dependent process (id. at 3). My case study shows that *both* the 'pre-negotiation' phase *and* the actual events in and around the Amsterdam summit are essential to explain the communitarization of civil justice.

The remainder of this chapter, together with Chapter 7 below, traces the 'pre-negotiation' stage (Mazzucelli 1998: 2) that led up to the June 1997 summit meeting of the European Council in Amsterdam, as well as the negotiations among high-level politicians that took place in and around the summit itself. Table 6.1 contains a time line of key events. Subsection 6.3.2 provides a quick snapshot of political conditions in the mid-1990s, in order to identify key challenges facing the EU at that time. Subsection 6.3.3 then introduces the Reflection Group, which began the process of identifying issues for the Amsterdam agenda, while subsection 6.3.4 provides an overview of the institutional framework for the treaty revision process.

[TABLE 6.1 ABOUT HERE]

Table 6.1
Chronology of Key Events Leading to the 1997 Amsterdam Treaty

1 November 1993	Maastricht Treaty of European Union enters into force
10-11 December 1993	European Council summit in Brussels (Belgian Presidency) (JHA Action Plan emphasizes free movement of persons/security of citizens; judicial cooperation for extradition and organized crime, but no mention of civil justice; Annex III re: institutional reform in context of enlargement calls upon IGC to consider questions of the number of members of the Commission & the weighting of votes of the Member States in the Council; the IGC will also "consider measures deemed necessary to facilitate the work of the Institutions and guarantee their effective operation")
24-25 June 1994	European Council summit in Corfu (Greek Presidency) (agreed to establish Reflection Group in 1995)
25 June 1994	Accession Treaties signed with Austria, Finland, Norway, and Sweden
17-19 October 1994	Helsinki Conference: Principles of Justice and the Law of the European Union
9-10 December 1994	European Council summit in Essen (German Presidency)
1 January 1995	Austria, Finland and Sweden become members of the EU
4 May 1995	European Parliament Report on TEU & IGC
10 May 1995	European Commission Report on the Operation of the TEU
17 May 1997	European Parliament Resolution on the Functioning of the TEU
2 June 1995	Reflection Group begins its work in Messina, Italy (Chairman: Carlos Westendorp)
26-27 June 1995	European Council summit in Cannes (French Presidency) (asks Reflection Group to focus on five priorities, including the need to "provide a better response to modern demands as regards internal security, and the *fields of justice and home affairs* more generally")
5 December 1995	Reflection Group Report
15-16 December 1995	European Council summit in Madrid (Spanish Presidency) (calls

	for IGC to be opened in 1996)
28 February 1996	Commission Report on Political Union & Enlargement
29 March 1996	Opening of Intergovernmental Conference (IGC) in Taormina (Italian Presidency)
21-22 June 1996	European Council summit in Florence (Italian Presidency) (sets time frame for concluding IGC by mid-1997)
18 September 1996	Commission Proposal on Communitarization of JHA Provisions
24 September 1996	ICG Representatives meet in Ireland
11 November 1996	Irish Presidency AFSJ Note and Draft Treaty Provisions
5 December 1996	Dublin II Draft
13-14 December 1996	European Council summit in Dublin (Irish Presidency)
8 February 1997	Finnish Communitarization Proposal: Realizing Individual Rights
10 March 1997	Helsinki Seminar on the Third Pillar of the EU Justice
21-22 April 1997	IGC Representatives Meeting on Civil Justice
30 May 1997	Consolidated Draft Treaty
4 June 1997	Dutch Presidency submitted final consolidated Draft Treaty to IGC Representatives Group
16-17 June 1997	European Council summit in Amsterdam (Dutch Presidency)

6.3.2 Political Context

The political context from which the Amsterdam Treaty emerged reveals some of the forces that pushed the EU's reform process in the 1990s. The 'external' environment was rife with fallout from the fall of the Berlin Wall in 1989 and the collapse of the Soviet Union in 1991.[84] Those events unleashed massive social and political restructuring in Europe and altered the security environment, with new risks stemming from war in the Balkans and the break-up of Yugoslavia (1992-1995), as well as from massive migration of people towards the EU's territory (van den Broek 1997: 8-9). There had been "warnings since at least 1990 of an imminent 'flood' of immigrants from the east and south [of Europe]," and the "fear of an influx of immigrants and associated crime" was seen as posing a "fundamental threat to social and political stability within the Union" (Benyon 1994: 501). Increased migration across the EU's external borders, in combination with the ongoing removal of 'internal' EU barriers to free movement of persons,

unleashed rising concerns about internal security. EU countries – "faced with the biggest challenge ever in the field of internationally organised criminality" – must "struggle together against this plague," according to one influential observer (Lipsius 1995: 236).[85] By the mid-1990s, immigration had "displaced terrorism and drug trafficking as the principal 'internal security threat' perceived by the countries of the EU" (Benyon 1994: 502). It seems reasonable to speculate, in this light, that Third Pillar issues would have made their way onto the agenda for the Amsterdam Treaty, even if the Maastricht Treaty (EU Treaty art. N) had not already placed them there by pre-arrangement.

The end of the Cold War brought further challenges related to EU enlargement. By the mid-1990s, eight Central/East European countries had submitted formal membership applications.[86] This situation triggered a "desire to strengthen and consolidate national and regional values" and to redress the "lack of a feeling of European identity," according to Elmar Brok (1997: 3-4), a member of the European Parliament (EP) who was a key player in the 1996 Intergovernmental Conference that prepared the Amsterdam Treaty. Moreover, in practical terms, the impending enlargement was a daunting task for the (then) 15 Member States, who were still coming to grips with the 1995 enlargement that had brought Austria, Finland and Sweden on board. The prospect of adding eight or more new EU members so soon after the latest enlargement was overwhelming, not least because the EU's antiquated institutional framework had been designed for a Community of six countries (Brok 1997: 6; see also Dehousse 2001: 45). Thus, one of the main tasks to be addressed was how to adapt the EU in view of the looming 'big bang' enlargement from 15 to 25 Member States (in 2004, then to 27 in 2007, and 28 in 2013) (Lipsius 1995: 253). As one insider noted, "the negotiation of Amsterdam was full of hidden fears" (Dehousse 2001: 48).

Since debate over the question *whether* to admit the post-Communist countries was more or less tabu at the time, concerns were channeled into the more pragmatic 'deepening versus widening' controversy.[87] This was in part a discussion about timing, that is, whether to enlarge first, then sort out the institutional implications, or to reform EU institutional structures first, then enlarge (Brok 1997: 17-21).[88] However, it was also a debate about the nature of the 'deepening' to be sought. The overarching question of whether the EU should become more or less centralized or federal (id. at 19) animated the myriad discussions about legislative procedure and weighting of Member State votes, the size of the Commission, and so on. Debates over institutional reform were also linked to doubts about the EU's continuing relevance after the Cold War,[89] on the one hand, and the desire to "show clearly that the EU is an indispensable instrument for the successful solution of problems" going forward, on the other (id. at 3).

The treaty revision process in the mid-1990s not only occurred at a time of vast change, but also at a time of malaise. The economic context was "bad ... because of the high level of unemployment" (Lipsius 1995: 238), but also uncertain because the process of Economic and Monetary Union (leading to the introduction of the Euro) was just getting started. The treaty revision process also took place in a "bad psychological context," because it came on the heels of the divisive and exhausting Maastricht Treaty (id.; see also Cotta 1997). Maastricht had brought the EU's legitimacy crisis[90] to a head and resulted in a "steadily growing emotional distance" on the part of Europe's "alienated" citizens in regard to European integration (Brok 1997: 3). The EU was "found to be too technocratic and complex," a labyrinth of "institutions and decision-making procedures whose functioning and interaction is barely comprehensible, even for experts" (id.). Thus, the second major task at hand in the mid-1990s was to "win over the full and

wholehearted support of the citizens of the Union" (Lipsius 1995: 253), and the way to do that, it was believed, was for the upcoming IGC to make "efficiency, transparency and democracy its priorities," given that "capacity to act is an indispensable factor in the legitimacy" of the EU's institutions (Brok: 1997: 3).

Despite the many challenges facing the EU in the mid-1990s, it is not at all certain that the EU Member States would have undertaken a new treaty reform process at that time, had no binding schedule already been put in place by the earlier Maastricht Treaty. "[U]nlike the objective of a Single Market, which gave momentum to the Single European Act, and Economic and Monetary Union which drove Maastricht, there was, this time, no shared agenda and no mobilising force behind the exercise" (Weiler 1997: 310). There was, as well, a "conspicuous lack of leadership" (id.). For these reasons, the 1996 Intergovernmental Conference has been called the IGC "which never should have started" (id.). It did start on schedule, however. And given that it did, it is unsurprising that "improving the efficiency of co-operation in the fields of justice and home affairs" turned out to be an important dimension of the process, since Third Pillar issues bore on virtually all the major political challenges facing the EU at the time (Lipsius 1995: 249), and since the Third Pillar had come under heavy criticism from many quarters (see subsection 7.1.1. of Chapter 7 below). The dominant concerns, time and time again, were asylum and migration, as well as police cooperation and other issues in the criminal justice sector. Civil justice issues were rarely mentioned, which raises the question of how they got on the agenda in the first place and ended up becoming part of final agreement in Amsterdam.

6.3.3 Post-Maastricht: The Reflection Group

After a long and difficult ratification process, the Maastricht Treaty entered into force in November 1993, nearly two years after the Member State representatives had agreed on its terms. The Greek Presidency during the first half of 1994 wasted no time in starting the ball rolling towards the next round of treaty revisions. After preliminary discussions in Ioannina (March 1994), the Member States formally agreed at the Corfu summit in June 1994 to establish a 'Reflection Group' in 1995 in anticipation of the 1996 IGC (Corfu Presidency Conclusions 1994: IV). The European Council at Corfu instructed the Reflection Group to "examine and elaborate ideas relating to the provisions of the [Maastricht] Treaty on European Union for which a revision is foreseen and other possible improvements in a spirit of democracy and openness" (id.), among them Third Pillar issues.[91] It was expected that the areas of discussion in the Group would be as "large, diverse and multiple as all the participants wish," in order to avoid adopting a "precise agenda which would risk being a nonstarter" (Lipsius 1995: 243).

The Reflection Group established in June 1995 was placed under Spanish leadership, in the person of Chairman Carlos Westendorp, since Spain would hold the EU's rotating Presidency during the second half of 1995. The Group was composed of representatives of the Foreign Affairs Ministers from each Member State and of the President of the Commission, as well as two members of the European Parliament,[92] for a total of 18 persons.[93] The Corfu European Council had also instructed the Reflection Group to exchange views with the "other institutions and organs" of the EU, and invited those stakeholders to provide input to the Group in the form of preliminary reports on the functioning of the treaties (id.).[94] As such, the establishment of the Reflection Group was seen as an indication that the 1996 ICG "would be unlike the 1991 conference" that produced the vilified Maastricht Treaty, since it would entail broader participation and greater transparency (Brok 1997: 2). That said, and despite the avowed goal of

bolstering the EU's democratic legitimacy, it is noteworthy that no formal role is foreseen in the process for civil society. Indeed, civil society was not a point of reference in EU treaties or reports in that era (e.g., Richter 1997: 37).[95]

Overall, the Reflection Group's mandate was not to "negotiate but to draw up an inventory of what [Chairman] Westendorp ... called 'real problems' as opposed to 'imaginary problems' to be tackled at the IGC. The exercise should result in a 'report mentioning that on such and such an issue, there is a majority that believe one thing, and that one member state believes another' " (*Agence Europe* 1995a; see also Miller & Ware 1995). At the start of its work in early June 1995, Chairman Westendorp sent a letter containing a laundry list of suggested topics for discussion to Reflection Group members (*Agence Europe* 1995b; Miller, Dodd & Watson 1995: 2). These were:

- *Principles and Objectives*, addressing macro-level issues such as how to "reinforce peace, freedom, internal and external security and solidarity between Europeans"; the need for "greater democracy, greater efficiency and greater transparency"; how to involve the public in the development of the Union; the EU's Common Foreign and Security Policy; flexibility and coherence; the need for a Constitution or Charter of Fundamental Rights; and whether to abolish the pillar structure.
- *EU Institutional System*, particularly issues concerning the balance among different institutions; the need for reforms in the context of enlargement to include countries from Central and Eastern Europe; institutional balance; the context for enlargement; and how to reinforce democracy, efficiency and transparency.
- *The Citizen and the Union*, notably how to develop the concept of European citizenship that had been introduced by the Maastricht Treaty; fundamental rights; and the *scope of action in third pillar* (emphasis added).
- *External and Security Policy*, including how to strengthen the EU's position as an external actor (legal personality), and particular matters related to defense policy.
- *Instruments*: including the type and hierarchy of EU legal instruments, subsidiarity, and budgetary matters.

Chairman Westendorp made no specific reference to justice policy at the outset, but did raise the Third Pillar question under the citizenship heading. Next, he established a schedule that entailed twice-monthly meetings in the period leading up to the Madrid summit meeting of the European Council (15-16 December 1995), including two meetings (in September and October) on citizenship.

Shortly after the Reflection Group was established, the European Council – meeting in Cannes on 26-27 June 1995 – asked the Reflection Group to focus its thoughts "on [five] priorities to enable the Union to respond to its citizens' expectations," third among them the need to "provide a better response to modern demands as regards internal security, and the *fields of justice and home affairs* more generally" (Cannes Presidency Conclusions 1995: V, pp. 9-10). The final report submitted by the Reflection Group is examined in subsection 7.1.3 of Chapter 7 below.

6.3.4 The Intergovernmental Conference (IGC) and Key Institutional Actors

After the European Council approved the Reflection Group Report at its Madrid summit in December 1995, the baton was passed to the Italian Presidency in January 1996. This section provides an overview of the Intergovernmental Conference (IGC), which was established during

the Italian Presidency in March 1996, and introduces the key EU institutional actors and their roles in the IGC.

6.3.4.1 The Intergovernmental Conference

Despite controversy over whether to convene a new Intergovernmental Conference in 1996 (Dinan 1999: 169; Grünhage 2001: 10), the ICG was formally launched during the Italian Presidency at the Turin summit (29 March 1996), just three months after the European Council had decided to do so at its Madrid summit in December 1995. The IGC's role was to deliberate, and then determine by common accord the amendments to be made to the Treaties. Initially, no timetable was set for concluding the IGC, so work got off to a slow start once the machinery was up and running.

The IGC operated across four institutional levels, according to the framework that had been decided during the Madrid European Council:

- The *European Council* was the supreme decision-making body, consisting of heads of state and government, whose role it was to take key political decisions and, in particular, decide which amendments to make to the EU's treaties;
- The *Foreign Ministers* of the Member States, who met monthly throughout the IGC, made few important decisions (none of which affected civil justice or other Third Pillar issues), but ensured the "unity and coherence of the negotiations" (Grünhage 2001: 17);
- The *ICG Representatives Group* was the pivot of the IGC process; it consisted of "an effective mix of politicians and technicians of different characters and backgrounds"[96] representing the Foreign Ministers of each Member State, half (i.e., eight) of whom had also served as members of the Reflection Group, as well as a representative of the President of the Commission (McDonagh 1998: 45-6). The Representatives Group met almost weekly throughout the IGC to "prepare the ground for the ministerial discussion" (Italian Presidency Note on IGC 1996) and is widely acknowledged as having done the "bulk of the IGC work" (Grünhage 2001: 17);[97]
- *Working Groups* could be set up on an ad hoc basis, but few actually were; the most significant was the *Friends of the Presidency Group*, which was created in 1997 and chaired by Dutch law professor Jaap de Zwaan, whose role was to clean up the legal texts in anticipation of the Amsterdam summit meeting.

The Italian Presidency[98] decided to organize discussions in the IGC around three broad topics: citizenship, institutional reform, and external action (Grünhage 2001: 18). The *citizenship* basket of issues lumped Justice and Home Affairs together with a range of other issues that included human rights, democratic values, employment, and the environment. For each session, the Presidency prepared a small number of documents (called *fiches*) listing options for each topic, upon which delegates commented in so-called *tours de table*, then later summarized the discussions and drew up possible compromises (Schmuck 1996: 16, cited in Grünhage 2001: 18).

6.3.4.2 The Role of the Presidency of the Council of the EU

The Reflection Group and Intergovernmental Conference (IGC) were the key processes in the pre-negotiation phase of the Amsterdam Treaty. However, as noted in subsection 6.3.4.1 above, the rotating Presidency of the EU also plays a crucial role in the treaty revision process, since it determines which Member State is in the driver's seat during any given six-month period. In normal times, the Presidency's role is to set the agenda for and chair the meetings of the

Council of the EU,[99] while the Commission – by virtue of its role of initiative – is the institutional driver of the EU's legislative process. An IGC, however, is a *diplomatic* process, not a *legislative* one. In this context, the Presidency takes on the additional role of guiding the treaty revision process for the benefit of the European Council (i.e., the heads of state and government of the Member States), which is the EU institution that decides on revisions to the EU's founding treaties (Grünhage 2001: 18). Thus, the rotating Presidency steers the IGC by preparing papers, reports and proposals for discussion by the different groups that constitute the IGC process.

6.3.4.3 The General Secretariat of the Council (GSC)

Another key actor in the treaty revision process that produced the Amsterdam Treaty was the General Secretariat of the Council of the EU (GSC), which was led at the time by a German diplomat, Jürgen Trumpf, who served as the Secretary-General of the GSC. In normal times, the formal role of the General Secretariat is to assist and coordinate the work of the Council and the European Council; support the rotating Presidency in negotiations; prepare draft agendas, reports, notes and minutes of meetings at all levels; and provide logistical support in regard to the practical organization of meetings. The General Secretariat also supports the work of Coreper and of other Council committees and working parties. As such, the GSC is intimately involved with legislative and ongoing governance processes in the EU. It serves as the institutional memory of the Council and keeper of the Council's archives.

In extraordinary times, such as during the 1996/97 Intergovernmental Conference, the General Secretariat plays similar roles in the treaty-revision context. Thus, in formal terms, the GSC was charged with providing "secretarial support" for both the Reflection Group and the IGC. Yet this anodyne function belies the power and interests of the GSC, which were especially strong in regard to the fate of the Third Pillar. The General Secretariat was deeply invested in the negotiations over the fate of justice and home affairs issues, since it had become unusually powerful in the JHA field during the intergovernmental heyday under the Third Pillar, when it was in the middle of virtually all activities undertaken in the field. In fact, the position of the GSC was somewhat paradoxical. On the one hand, the General Secretariat would be an institutional loser if the effort to communitarize JHA fields were successful, because the Commission and European Parliament would gain ground at its expense, with the switch from intergovernmental (Third Pillar) to supranational (First Pillar) decision-making and legislative procedures. On the other hand, however, key JHA experts within the GSC were long-term and deeply committed supporters of further integration in Third Pillar fields, among them Luxembourger Charles Elsen, who – as a civil servant in the Luxemburg Ministry of Justice since the 1970s – had been one of the founders of intergovernmental cooperation in regard to police, criminal justice, terrorism, drugs, and the like, and Belgian (law professor) Gilles de Kerchove, another long-term player in the JHA field who had worked tirelessly to deepen European integration in these fields. The man who came to be the civil justice expert in the General Secretariat, Fernando Rui Paulino Pereira (from Portugal), had been involved in justice matters in the CGS "from the beginning ... in 1989" (Paulino Pereira Interview). These (and other) legal experts working in particular policy fields came over time to occupy key roles within that EU institution charged with representing Member State interests – the Council, including its General Secretariat. If the Council and the GSC sit at the fulcrum of Member State institutional activity within the EU, then these men (among others) handle the levers used to move things and further agendas behind the curtain of the national sovereignties they are bound to represent.

In the 1996/97 IGC, the General Secretariat worked closely with the newly established Commission Task Force (subsection 6.3.4.5 below) to articulate pro-integration positions, in particular through drafting reports and text for inclusion in the Amsterdam Treaty, but also through setting agendas for the meetings within the IGC process. The power of the GSC tends to be a function of the strength of the Presidency at a particular time, which in turn is linked to the experience, size, and inclinations of the Member State in the rotating Presidency. The 1997 Dutch Presidency was strong, not least because the country was a founding member of the EU and had learned from its prior experience, notably in connection with the Maastricht Treaty. In contrast, the GSC was unusually assertive during the 1999 Finnish Presidency, which was Finland's first term in the Presidency after joining the EU in 1995 (see Chapter 8 below).

6.3.4.4 The European Parliament

The role of the European Parliament (EP) was "not only legally weak but also politically weak" in the treaty-revision process, and it "had difficulties in defining its institutional projects" (Dehousse 2001: 48). Despite having been praised for its role in the 1995 Reflection Group (Grünhage 2001: 15), the EP's right to participate in the 'warm up' round in 1995 did not translate into a right to formal participation in the 1996/97 IGC. While numerous Member States supported the EP's bid for 'permanent observer' status – notably, the Benelux countries, Germany and Italy – this was ultimately blocked by France and the UK (Petite 1997: 23; Grünhage 2001: 16). A compromise was worked out by the Foreign Ministers of the Member States, meeting shortly before the formal opening of the IGC in March 1996, according to which the EP would be "closely associated" with the IGC, meaning that it would be regularly briefed in detail on the progress of the discussions and could give its point of view (Grünhage 2001: 16).

Ultimately, the EP did make a lasting contribution to the Amsterdam Treaty, even though it was not itself a key player in the IGC. Notably, the idea of the 'European legal area' – particularly as worked out in the LIBE Committee Report (European Parliament 1995c), discussed in section 7.1 of Chapter 7 below – found its way into the Amsterdam Treaty. The EP thus served as a generator (or at least a consolidator) of ideas, some of which were picked up by other actors whose institutional role allowed them to carry the ideas forward.

6.3.4.5 The Commission and the Commission Task Force

Unlike the EP, which was largely sidelined from the 1996/97 Intergovernmental Conference, the Commission participated fully in the process, as provided in the Maastricht Treaty (EU Treaty art. N). Its role in the IGC, however, was "less than obvious" (Petite 1998a: S73), not least because the Commission was not one of the actors who would sign the Amsterdam Treaty. That prerogative rested solely in the hands of the Member States, whose heads of state or government would sign in their capacity as the European Council (id.). Despite its proclaimed intention to "speak for the general interest" (Commission Report on the Operation of the TEU 1995: 2), this awkward institutional position raised "strategic problems as to the position that the Commission should represent" (id. at S74). These problems were compounded by the fact that the Santer Commission, which was in office during the 1996/97 IGC, was "much weaker than the Delors Commission [had been] in the Maastricht [Treaty] negotiations" (Dehousse 2001: 48), when the Commission was among those pressing for further communitarization during that earlier IGC (Lewis & Spence 2010: 89).

In contrast to earlier IGCs which produced breakthrough treaty innovations, the 1996/97

IGC has been criticized for having "no shared agenda and no mobilising force behind the exercise" (Weiler 1997: 310).[100] Moreover, according to Weiler (id.), there was a "conspicuous lack of leadership" from the Commission," which "as a whole was devoid of ideas, ideals and visions," despite the presence of a "very professional IGC Task Force."[101] Michel Petite, the Director of the Commission Secretariat General at the time, understandably takes a different position. In his view, the Commission's strategy was not to seek "utopia" or serve as an "honest broker," but rather to strive for the "highest possible realistic line" in the 1997/97 IGC (Petite 1998a: S75). In other words, the Commission's strategy – particularly as embodied in its 1995 Report on the Operation of the TEU and its 1996 Report on Political Union & Enlargement,[102] was "not aiming at identifying a 'least common denominator' among the Member States, but at trying systematically to raise the outcome of the conference above what would be comfortably acceptable" (Petite 1998a: S75). The outcomes achieved in Amsterdam, as shown below, accord more with Petite's pragmatic approach than with Weiler's ambitious one.

Last but not least was a small Task Force on Justice and Home Affairs, which had been operating inside the Commission since the early days of the Third Pillar. The Task Force was headed by Adrian Fortescue from the UK (subsection 6.2.2.1 above), who worked closely with Charles Elsen from Luxembourg, who was serving as Director General in the *Council* General Secretariat at that time (Bunyan 2013: 2). Fortescue's Task Force played an important role in the treaty revision process, not least because of its instrumental role in producing an important Commission proposal that was presented in 1996 during the course of the IGC (section 7.1 of Chapter 7 below), as well as in the development of the Tampere Milestones (Chapter 8 below).

6.4 Conclusions

This chapter has provided the background for the 1997 Treaty of Amsterdam, which is examined further in Chapter 7 below. Key aims here have been to outline the procedures, identify key actors, and elaborate the context for the treaty-revision process which led to the communitarization of civil justice issues. While a few references have been made to the substantive issues that were on the table, these are examined more closely in Chapter 7 below, along with the negotiations in Amsterdam.

Endnotes to III.1 and Chapter 6

1. For a careful analysis of "regulatory entrepreneurs" in the Commission, see Stout 2004.

2. See, e.g., Duquet & Wouters (2015: 11-12 & 14-15). While the EU has improved transparency in recent years, its approach resembles that found in many of its Member States, where a general right of access is recognized, but limited in practice by a diplomatic exception which shields documents according to age (often for 30 years or more) and sensitivity.

3. For the sake of simplicity, I refer to the EU in the text, when in fact it was the EU's predecessors – the European Economic Community (EEC) and the European Community (EC) that were in place at the time. The EU is the legal successor to the EC that preceded it, according to the 2007 Lisbon Treaty.

4. The Amsterdam Treaty revisions to the EU's foundational treaties included two additions to the Treaty on European Union (EU Treaty). First, the Preamble was broadened by the addition of the goal "to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice, in accordance with the provisions of this Treaty." And second, the list of EU "objectives" was correspondingly expanded to include "[maintaining] and [developing] the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime" (EU Treaty art. 2).

5. Briefly, Title IV of the EC Treaty consisted of nine articles. The first (art. 61) contained a laundry list of the types of measures that were envisioned, including those in the civil justice field. The next set of articles (arts. 62-64) contained provisions related to visas, asylum, refugees, and immigration. Article 65 elaborated measures to be adopted in regard to "judicial cooperation in civil matters." Article 66 pertained to administrative cooperation. Article 67 addressed legislative procedures to be followed in these newly added policy fields, while article 68 set out details regarding the role of the Court of Justice in these fields. Finally, article 69 carved out exceptions for Denmark, the United Kingdom, and Ireland, which were detailed in special protocols to the treaty.

6. "In order to establish progressively an area of freedom, security and justice, the Council shall adopt: ... measures in the field of judicial cooperation in civil matters as provided for in Article 65" (EC Treaty art. 61(c)).

7. Recall that 'civil justice' refers to aspects of procedural law, conflict of laws and the administration of justice, but does not imply wholesale transfer of *substantive* private law from Member States to the EU.

8. This treaty provision is analyzed in depth in Chapter 3 above, while Chapter 5 provides a detailed overview of the measures that have been adopted since 1999 in the wake of the 1997 Amsterdam Treaty.

9. Recall that 'communitarization' refers to a quasi-constitutional transfer of legislative jurisdiction ('competence') from Member States to the EU. 'Quasi-constitutional' implies that the significance of this transfer is *de facto* of a constitutional nature within the EU, although the changes are *de jure* changes to international treaties among the EU's (now 28) Member States.

10. This chapter draws from and builds on the detailed historical analyses laid out in chapters 2 and 3 above.

11. Indeed, the Member States "consulted with one another and frequently took common positions in international organizations in connection with private international law matters from the 1970s on" (Fiorini 2008a: 970).

12. Coreper is a standing institution in Brussels that is made up of the Member States' ambassadors to the EU ('Permanent Representatives'), namely heads and deputy heads of 'mission' (TFEU art. 240). Coreper basically meets outside the public eye to discuss measures that are to come before the Council, which is the body through which Member States cast their votes on legislative and other matters to be decided within the EU's purview. In essence, Coreper vets measures and works out pre-agreement, wherever possible, on matters that require formal votes.

13. The Benelux representative, Martha Weser, was also a professor. On her role see Michaels (2007: 38-9).

14. It is rarely so easy for the Commission to carry its burden of proof to establish the necessity of a regulatory measure that it wishes to propose. As was noted in section 3.4 of Chapter 3 above, the rigorous 'necessity' prerequisite to EU legislation was ultimately deleted from Article 65 of the EC Treaty when it was revised (and renumbered as Article 81 TFEU) by the 2007 Lisbon Treaty.

15. It bears mention here that the proposal was for a much more ambitious form of legal harmonization than had been achieved within the Benelux institutional framework. Benelux's model law approach simply involved a text that signatories were encouraged to adopt as part of their national legislation. The unification model proposed for the EEC, in contrast, would have involved a uniform treaty text that would become binding upon all State Parties once ratification formalities were completed. See Nadelmann 1970 & 1976.

16. A Directorate-General (or 'DG') is a subdivision of the EU's massive executive body, the Commission. Most DGs are defined according to substantive policy fields, such as agriculture, competition law, transport, or the internal market.

17. As Nadelmann (1977: 55) points out – in a different but related context – this kind of work poses substantial "manpower and financial problems" that put "a considerable burden on governmental machinery," in part because of the "type of work involved ... Familiarity with domestic and foreign law being necessary, heavy reliance on assistance from outside the Administration is unavoidable. The chores include selection of experts, supervision of the work, preparation and coverage of international meetings, evaluation of results."

18. The expert committee "decided to limit the present Convention to contracts alone and to begin negotiations for a second Convention, on non-contractual obligations, after the first had been worked out" (Giuliano/Lagarde Report 1980: 7; see also North 1993: 31-3).

19. The original Treaty of Rome provided no explicit role for the Commission in external relations. Article 133 of that Treaty, which established the legal basis for the EEC's 'common commercial policy,' allowed the EEC to "negotiate, conclude and implement trade agreements with other countries of the world." Article 133 provided no explicit role for Commission involvement in the process, but it had authority to "initiate and execute decisions for its Member States in international trade negotiations," though its proposals first had to be approved by the Council of Ministers (Leal-Arcas 2004: 2). In regard to other external relations, Article 238 of the Treaty of Rome provided that the "Community may conclude with a third State, a union of States or an international organisation agreements establishing an association involving reciprocal rights and obligations, common action and special procedures. These agreements shall be concluded by the Council, acting unanimously after consulting the Assembly [European Parliament]." In this context, as well, the Treaty provided no formal role for the Commission, but later treaty revisions formalized the Commission's role (see EU Treaty arts. 207 & 218).

20. The Commission issued its opinion pursuant to Article 155 of the EEC Treaty, which stated: "In order to ensure the proper functioning and development of the common market, the Commission shall: ... formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or *if the Commission considers it necessary* ..." (emphasis added).

21. "In the absence of such a declaration, the Commission will feel free to propose that the Council adopt a legal instrument based on the EEC Treaty to attain the desired unification of private international law and thereby eliminate the defects mentioned ... above" (Commission Opinion on Rome Convention 1980: para. V.2. at p. 41).

22. The Presidency of the Council refers not to a particular individual, but rather to the Member State that holds the rotating chair of the Council of the EU (formerly EEC Council of Ministers). The Presidency rotates on a six-month basis. Ireland held the Presidency during the second half of 1979, and Italy held it during the first half of 1980.

23. The Council, which is akin to an 'upper house' in EU decision-making, meets in various 'configurations,' depending on the nature of the issues to be decided. Thus, if the matter at hand pertains to the environment, then the Environment Council, composed of representatives from Member State environmental ministries, meets. Similarly, if a civil justice matter is up for discussion, then the Justice and Home Affairs Council meets. In addition to the sectoral Council configurations, there is a General Affairs Council, composed of heads of state, and a Foreign Affairs Council, composed of foreign ministers of the Member States. The Presidency chairs all Council configurations except the Foreign Affairs Council, which is usually chaired by the EU's High Representative of the Union for Foreign Affairs and Security Policy.

24. The role of the Presidency has diminished, particularly since the 2007 Lisbon Treaty entered into force in 2009. However, during the first half-century of European integration, the Presidency played a vital role in defining EU priorities and pushing through agendas. Chapter 8 examines the role of the first Finnish Presidency in 1999, which played an instrumental role in developing the agenda for civil justice and other AFSJ sub-fields.

25. Meanwhile, by 1991, the number of Member States had grown from nine in the 1970s, to twelve after the accession of Greece in 1981, and of Portugal and Spain in 1986. The number of Member States expanded again in 1995, when Austria, Finland, and Sweden acceded. With each enlargement, the new Member States were obliged to sign on to the Rome Convention. Because it was a treaty, however, each new accession also had to be ratified by all existing EU Member States, which entailed substantial delays, with the result that the uniformity to which the Rome Convention aspired was never fully achieved.

26. For the sake of comparison, some of the core issues addressed by the Brussels Convention are covered, in the United States, by the Full Faith and Credit clause found in Article 4 of the U.S. Constitution, as well as by U.S. Supreme Court decisions based on the Due Process clauses found in the Fifth and Fourteenth Amendments to the U.S. Constitution.

27. The Director-General of the Commission Legal Service from 1977 until 1987 was Claus-Dieter Ehlermann, who had been at the University of Michigan with Ole Lando in 1955, the same year in which Eric Stein joined the faculty of the University of Michigan. Ehlermann stated in an informal conversation with me in December 2015 that he agreed to support the project, though he ultimately doubted that it would ever succeed.

28. A more complete picture of the EU's internal security field would include other issues relating to free movement of persons, including asylum, immigration, and control of the EU's external borders.

29. Aside from the Council of Europe's core human rights conventions, cooperation in Strasbourg led to the conclusion of the following treaties during the period until 1990: (1) The European Convention on Extradition, CETS No. 24, was opened for signature on 13 December 1957 and entered into force on 18 April 1960 when three Council of Europe members (but none of the then-EEC Member States) ratified the treaty. Italy was the first Member State to join (in 1963), followed by the Netherlands (in 1969), then by Germany and Luxembourg (in 1977). Of the original six EU Member States, France joined in 1986, and Belgium in 1997. (2) The European Convention on Mutual Assistance in Criminal Matters, CETS No. 30, was opened for signature on 20 April 1959 and entered into force on 12 June 1962. Here, as well, Italy was the first Member State to join (in 1962), followed by France (in 1967), the Netherlands (in 1969), Belgium (in 1975), and finally by Germany and Luxembourg (in 1977). This treaty entailed a commitment to afford other Contracting States the "widest measure of mutual assistance with a view to gathering evidence, hearing witnesses, experts and prosecuted persons." (3) The European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, CETS No. 51, was opened for signature on 30 November 1964 and entered into force on 22 August 1975. The aim of this treaty was to allow offenders to leave the territory of one Contracting State where a sentence was pronounced, and to establish their ordinary residence in another Contracting State under the supervision of its authorities, and entailed a commitment to assist each other in the social rehabilitation of offenders for facilitating their good conduct and the readaptation to social life of persons convicted abroad. Belgium, France and Italy joined in 1975, Luxembourg in 19676, and the Netherlands in 1988, but Germany has never ratified this treaty. (4) The European Convention on the Punishment of Road Traffic Offences, CETS No. 52, was opened for signature on 30 November 1964, and entered into force on 18 July 1972. France was the only one of the original six Member States to join this treaty (in 1972). (5) The European

Convention on the International Validity of Criminal Judgments, CETS No. 170, was opened for signature on 28 May 1970 and entered into force on 26 July 1974. Only two of the original six EU Member States joined this treaty: the Netherlands (in 1988) and Belgium (in 2010). (6) The European Convention on the Transfer of Proceedings in Criminal Matters, CETS No. 73, was opened for signature on 15 May 1972 and entered into force on 30 March 1978. Among the original six EU Member States, only the Netherlands joined the treaty (in 1985). (7) The Additional Protocol to the European Convention on Extradition, CETS No. 86, was opened for signature on 15 October 1975 and entered into force on 20 August 1979. The Netherlands joined this treaty (in 1982), Belgium (in 1998), and Luxembourg (in 2001), but France, Germany and Italy never joined. (8) The European Convention on the Suppression of Terrorism, CETS No. 90, was opened for signature in 27 January 1977 and entered into force on 4 August 1978. This treaty was designed to facilitate the extradition of persons who have committed acts of terrorism. Germany joined this treaty (in 1978), Luxembourg (in 1981), the Netherlands (in 1985), Belgium and Italy (in 1986), and France (in 1987). (9) The Second Additional Protocol to the European Convention on Extradition, CETS No. 98, was opened for signature on 17 March 1978 and entered into force on 5 June 1983. The Netherlands joined this treaty (in 1983), Italy (in 1985), Germany (in 1991), and Belgium (in 1998), but France and Luxembourg never joined. (10) The Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, CETS No. 99, was opened for signature on 17 March 1978 and entered into force on 12 April 1982. The Netherlands joined this treaty (in 1982), followed by Italy (in 1986), France and Germany (in 1991), Luxembourg (in 2000), and Belgium (in 2002). (11) The Convention on the Transfer of Sentenced Persons, CETS No. 112, was opened for signature on 21 March 1983 and entered into force on 1 July 1985. France joined this treaty (in 1985), Luxembourg and the Netherlands (in 1988), Italy (in 1989), Belgium (in 1990), and Germany (in 1992). (12) The European Convention on the Compensation of Victims of Violent Crimes, CETS No. 116, was opened for signature on 24 November 1983 and entered into force on 1 February 1988. Luxembourg and the Netherlands joined this treaty (in 1988), followed by France (in 1990), Germany (in 1997), and Belgium (in 2004). Italy never joined this treaty. (13) The European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches, CETS No.120, was opened for signature on 19 August 1985 and entered into force on 1 November 1985. Italy joined this treaty (in 1986), followed by France (in 1987), Luxembourg (in 1988), the Netherlands (in 1989), Belgium (in 1990), and Germany (in 2005). (14) The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, CETS No. 141, was opened for signature on 8 November 1990 and entered into force on 1 September 1993. The Netherlands joined this treaty (in 1993), followed by Italy (in 1994), France (in 1997), Belgium (in 1998), Germany (in 1999), and Luxembourg (in 2002).

30. Namely, Belgium, France, Germany, Italy, Luxembourg, and the Netherlands. They were joined by Ireland and the UK in 1973, Greece in 1981, and Portugal and Spain in 1986.

31. At some point in time, the United Kingdom – which became a Member State in 1972 but was already involved in negotiating its accession to the EU's predecessor in 1971 – also joined the Pompidou Group. This group remains in existence, but its membership expanded over time to include non-EU Member States (39 as of July 2018). The Pompidou Group, which is formally called the "Co-operation Group to Combat Drug Abuse and Illicit Trafficking in Drugs," was incorporated into the institutional framework of the Council of Europe in 1980.

32. Many have speculated on what the name Trevi means. "There was a lot of confusion, there still is. Most people who write about it say it means Terrorism Repression International Violence. That's not correct. It means simply the name of the Trevi Fountain in Rome, because one, the decision was taken in Rome, and two, [the person who followed] me in the work of the Trevi Group [after the Luxembourg Presidency during the first half of 1976] was a Dutchman named Fontijn [in the Netherlands Presidency during the second half of 1976]. And he had to choose and we had decided in our first meeting to set up a secure network for communications, which were all confidential. It was just to find a name for this network, and he was choosing ... he spoke with me, he told me I will call it Trevi. So that's the story" (Elsen Interview).

33. Prime Minister Moro was subsequently kidnapped and murdered by the Red Brigade in 1978.

34. Trevi's macro-level "Ministerial Group met every six months, hosted by the country holding the European Presidency, and was serviced by the meso-level Group of Senior Officials which prepared the agenda and reports and monitored progress by the micro-level working group" (Benyon 1994: 507). Four Working Groups were established over time to address particular issues (id. at 507-8). In addition, four ad hoc working groups were established,

including a Judicial Co-operation Working Group on Criminal Matters, which was the "forum for the discussion of issues such as extradition, legislation against terrorist funding and fraud, and the mutual recognition of court decisions, such as driving disqualifications" (id. at 508).

35. The EU's success in regard to jurisdiction and judgments also had an 'external' face, namely, the 1988 Lugano Convention, which extended the EU's Brussels framework to a handful of other non-EU countries in Europe.

36. The Hague Conference's Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters entered into force in 1979 and has only been adopted by 5 countries. In connection with conflict of laws, its Convention of 15 June 1955 on the Law Applicable to International Sales of Goods entered into force in 1964, and has only been adopted by 8 (mostly European) countries, while its Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods has not yet entered into force. It would be a gross exaggeration to claim that any of these Hague Conference treaties has succeeded in providing a widely adopted set of rules to govern transnational legal relations.

37. The EU's 1987 Convention Abolishing the Legalisation of Documents in the Member States of the European Communities was not ratified by a sufficient number of Member States and thus never entered into force.. This Convention overlaps with two pre-existing non-EU treaties, one prepared by the Hague Conference (i.e., the 1961 Convention Abolishing the Requirement of Legalisation for Foreign Public Documents), and the other by the Council of Europe (i.e., the 1968 European Convention on the Abolition of Legalisation of Documents Executed by Diplomatic or Consular Officers). As of July 2018, all 28 EU Member States are party to the multilateral Hague Convention on this subject, and 19 are party to the regional Council of Europe Convention.

38. The EU's 1990 Convention on the Simplification of Procedures for the Recovery of Maintenance Payments was not ratified by a sufficient number of Member States for it to enter into force. This field is also characterized by a number of multilateral treaties. As of July 2018, 24 EU Member States are party to the 1956 New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance, and 17 EU Member States are party to the 1973 Hague Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations, which replaced the 1958 Hague Convention concerning the Recognition and Enforcement of Decisions relating to Maintenance Obligations towards Children.

39. "The Member States always meant the process of European Integration to be a gradual, step-by-step process of deepening and strengthening the union of the peoples of Europe" (Brok 1997: 1).

40. The Single European Act was signed in February 1986 and entered into force on 1 July 1987. This topic is also discussed in Chapter 3, subsection 3.2.3 above.

41. Title III of the SEA contains a single provision (Article 30) that lays out principles for co-operation "in the sphere of foreign policy." Unlike the EU's supranational realm, the intergovernmental realm did not provide for legislation or adjudication.

42. Like the Pompidou and Trevi Groups that preceded it, the Schengen Agreement was separate from and legally independent of the EU treaty structure at the time.

43. Namely, Belgium, France, Germany, Luxembourg, and the Netherlands.

44. The EPC Report (1988: 13) mentions "judicial cooperation" as one of the "other areas of cooperation covered by European Political Cooperation." No mention is made of civil or criminal judicial cooperation, and all other examples noted in the EPC Report deal with internal security issues.

45. The 1987 Convention Abolishing the Legalisation of Documents in the Member States of the European Communities aimed to create "free movement of documents" among the Member States by reducing problems surrounding the use of documentary evidence in official proceedings.

46. The 1992 Maastricht Treaty on European Union (TEU) entered into force on 1 November 1993. Technically speaking, the European Union (EU) itself first came into existence on that date. Further details about the Maastricht Treaty can be found in subsection 3.2.3 of Chapter 3 above.

47. These revisions are not directly relevant to my dissertation, but that does not mean they were insignificant. Among other matters, Maastricht introduced the goal of monetary union, which led to the creation of the Euro.

48. The original three communities established in the 1950s were the European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (EURATOM). The ECSC expired in 2002.

49. See generally Bieber & Monar (1995); Denza (2002); Guild (1998); Kuijper (2005); Müller-Graff (1994); Schutte (1994); de Witte (1998).

50. While the precise details of the Community method have evolved over time, the use of the term generally signals a legislative process in which the Commission has the right of initiative, decision-making is shared by the Council and the European Parliament, and most decisions are taken by qualified majority voting (rather than by unanimous voting, which characterizes the intergovernmental realm of decision-making).

51. The other eight policy areas deemed to fall within the scope of Justice and Home Affairs were: asylum policy; rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon; immigration policy and policy regarding nationals of third countries; combating drug addiction; combating fraud on an international scale; judicial cooperation in criminal matters; customs cooperation; and police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol).

52. The Third Pillar contained one exception that foresaw the possibility of adopting *legislative* measures in some JHA fields, among them "judicial cooperation in civil matters," but the Member States never availed themselves of the option created by the so-called 'passerelle' or 'bridge' clause (EU Treaty art. K.9). For further details, see subsection 3.2.3 of Chapter 3 above.

53. A "joint position" defined by the Council requires Member States to "ensure that their national policies conform to the common positions" (EU Treaty art. J.2). While technically non-binding, the legal status of joint positions was ambiguous, insofar as the Maastricht Treaty requires that "[w]ithin international organizations and at international conferences in which they take part, Member States shall defend the common positions adopted" under the Third Pillar (EU Treaty art. K.5). See generally den Boer 1996.

54. A "joint action" decided by the Council "shall lay down the specific scope, the Union's general and specific objectives in carrying out such action, if necessary its duration, and the means, procedures and conditions for its implementation" (EU Treaty art. J.3(1)).

55. While treaties or conventions are binding if properly ratified, the legal status of joint actions and joint positions is unclear. "Although they are technically non-binding, joint positions oblige Member States to defend their common position within international organizations and at international conferences (EU Treaty art. K.5)" (den Boer 1996: 1).

56. Council decisions on JHA matters are normally taken by the Justice and Home Affairs (JHA) Council, which is composed of the justice and home affairs ministers from the EU Member States.

57. Article K.3(2) of the EU Treaty denied the Commission the right of initiative only in regard to judicial cooperation in criminal matters, customs cooperation, and police cooperation.

58. Uçarer (2001:1) argues that the Commission's "agency and autonomy ... hinges on two critical sets of variables (constitutional and institutional) and the degree to which the Commission is constrained or empowered by them." Constitutional powers and restraints are those resulting from the treaty-based constitutional foundations of the EU, as interpreted by the Court of Justice, while the institutional variable refers to the Commission's "institutional capacities as an organizational unit" (id.).

59. Lord Cockfield is not only credited with the push to complete the Single Market for trade in goods, but also with laying the foundations for the single currency (Lewis & Spence 2010: 85).

60. According to Shelley (2001), Fortescue served as chief advisor in the Secretariat General of the Commission (1989-1990); as director in the Secretariat General (1990-1993); as deputy director-general and head of the JHA Task Force (1994-1999); and from late 1999 as Director-General in the Commission's newly established Directorate-General for Justice and Home Affairs (DG JHA or DG JAI or DG X).

61. It is easy to confuse these two institutions. The Council (of the EU) is the body that represents the Member States when it comes to voting on EU legislation and taking other decisions, whereas the Commission is the executive body of the EU, but which also participates in legislation and other policy formulation. In formal terms, the Commission represents the EU's interest, whereas the Council represents the interests of the Member States.

62. Sources conflict in regard to the formal creation of the Task Force. An early Commission website stated that it existed as early as 1992, which date precedes the entry into force of the Maastricht Treaty in November 1993. DG-JHA Website, *available at* http://europa.eu.int/comm/dgs/justice_home/index_en.html (visited 16 May 2003). Other available sources point to 1995 as its commencement date (e.g., Lewis & Spence 2010: 106; Uçarer 2001).

63. JHA matters were added to the portfolio of a Commissioner. In the early years, they were added to the portfolio of Irish Commissioner Pádraig Flynn, former Minister of Justice of Ireland, who served as a member of the EU Commissioner for Social Affairs, Employment, Immigration, Home Affairs and Justice from 1993-1999, but were subsequently transferred to the portfolio of Swedish Commissioner Anita Gradin, who was Commissioner for Immigration, Justice, Home Affairs and Financial Control from 1995-1999. According to Lewis & Spence (2010: 106), Gradin was "responsible for progressively garnering the support of the Member States." According to a member of the Task Force under Gradin, she was a weak Commissioner who did not adequately promote the Commission's institutional interests (Interview #16). As of 2009, an empty picture frame hung on the wall inside the Commission, to which a nameplate bearing her name and term of service was attached, in proximity to a portrait of former Director-General Fortescue.

64. For a detailed examination of the EP's role in bringing about the Maastricht Treaty, see Corbett (1993).

65. For its part, the Presidency is obliged to ensure that the European Parliament's views on such issues are "duly taken into consideration" (EU Treaty art. K.6).

66. This is consistent with the arrangements that had occurred, after the fact, in regard to the earlier Brussels and Rome Conventions.

67. The Court's role was not extended in connection with the Legalisation or Maintenance Conventions prepared by the EU, since neither entered into force.

68. The K4 Committee could be active both within the Third Pillar and possibly also in connection with harmonization under Article 100 EC Treaty (see EC Treaty art. 151).

69. At one point in time, a fifth level was also involved – the Steering Group – but this level was eventually abolished (Fiorini 2008a: 972). Three umbrella Steering Groups were created – Immigration and Asylum; Security, Police and Customs Cooperation; and Judicial Cooperation – and each Steering Group oversaw a number of Working Groups. For example, the Working Groups under the Judicial Cooperation Steering Group were: extradition, international organized crime, criminal law, driving license withdrawal, transfer of trial documents, and

application of the Brussels Convention (den Boer 1996: 1). The numerous Steering Groups reported to the K4 Committee, which was in turn accountable to Coreper and the JHA Council (id.).

70. The Justice and Home Affairs Council (JHA Council) is that configuration of the Council of the European Union (also known as the Consilium, formerly called the Council of Ministers) which is empowered to take decisions regarding JHA issues. It was set up in November 1993, once the Maastricht Treaty entered into force. (Bunyan 2010). The roles of the JHA Council in the Third Pillar included directing the work of expert groups, deciding on work programs, and adopting treaties (under a rule of unanimity), although those treaties still required ratification by each of the Member States before they could enter into effect (EU Treaty, Title VI).

71. Adapted from den Boer (1996:1).

72. Benyon argues further that at the time "the great majority of European police officers, let alone politicians and the public, are unclear and confused" about the "overall picture" in this field (Benyon 1994: 498).

73. The Maastricht Treaty contained an unusual provision (Article K9) which made it possible for Member States to bring some Third Pillar issues into the First Pillar in order to adopt harmonizing legislation by altering the decision-making procedure, without going through the process of revising the treaties (Laursen 2015: 208). This 'bridge' or 'passarelle' clause creates a legislative 'short cut' around the treaties for judicial cooperation in civil matters and other Third Pillar issues, except for judicial cooperation in criminal matters, customs cooperation, and police cooperation. However, no use was made of the pro-integrationist passarelle clause. "Practically and realistically, the unanimous voting procedure makes the chances of using the passerelle provision remote if not impossible" (den Boer 1996: 3). Nevertheless, its presence in the Maastricht Treaty demonstrates that Member States had already contemplated the possibility of legislative action on civil justice (among other) issues nearly a decade before it became possible under the 1997 Amsterdam Treaty.

74. This subsection overlaps partially with the discussion in subsection 3.2.3 of Chapter 3 above.

75. Professor Drobnig (2000: 192) has reported that activities in the Third Pillar emphasized "cross-border civil procedure, especially service of documents in another member state, revision of the Brussels and Lugano Conventions, and elaboration of a Brussels II Convention on matrimonial matters and custody of children. Private international law was also covered, though to a lesser degree, especially the elaboration of a Rome II Convention on the law applicable to extra-contractual obligations and consultations on the stands to be taken at the Hague Conference of Private International Law ... ."

76. Article A of the EU Treaty articulates the overarching political goal of an "ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen" (i.e., subsidiarity).

77. The other overarching objectives articulated in Maastricht were: promoting "economic and social progress" (i.e., completing the internal market and establishing economic and monetary union); asserting the EU's "identity on the international scene" (i.e., through developing the common foreign and security, and eventually also defense policies); and strengthening the "protection of the rights and interests of the nationals of its Member States" (i.e., creating the notion of EU citizenship) (EU Treaty art. B).

78. To be sure, some Member States argued against entering into treaty revision negotiations so soon after the contentious Maastricht Treaty had entered into force. In particular, the UK was in favor of a "cooling off" period (Grünhage 2001: 10). British resistance was perceived in part as a function of domestic politics, since UK elections were on the near horizon, expected for 1996 or 1997. As it happened, the elections were held in May 1997, when Tony Blair's Labour Party swept John Major's Conservative Party out of office.

79. This is not to say that there were no pressures that might have led to another round of treaty revision, even in the absence of Article N of the EU Treaty, to convene an intergovernmental conference in 1996. The political context in which the 1996 Intergovernmental Conference took place is examined in subsection 6.3.2 below.

80. As a matter of fact, the text concluded at that summit meeting was labeled a draft, which subsequently was referred to the lawyers to be cleaned up, and to the translators to be translated. The final version of the Amsterdam Treaty was signed by the Member States in October 1997, after which it was open to the Member States for ratification or accession in accordance with their national constitutional requirements.

81. Whether the Amsterdam Treaty was, indeed, a success, is largely beyond the scope of this inquiry. Despite the innovations it introduced, Amsterdam was perceived at the time as a mouse that tried to roar but only managed to squeak. As Weiler (1997: 309) noted, "even in the Financial Times ... it was not front page news on the day after the Summit." The reasons for the collective yawn that greeted the conclusion of the Amsterdam Treaty were not hard to find: Amsterdam "conspicuously failed to address, let alone resolve, the most pressing items on its official agenda" (Weiler 1997: 309). Yet "lurking in the small print [were] provisions ... which could ... open the way to a more vigorous future" (id. at 309-10). Civil justice, though not listed among Weiler's list of lurking small print, has proved to be one of Amsterdam's lasting contributions, for better or worse.

82. According to Christiansen & Jørgensen (1999: 1), since the 1980s, the process of "treaty reform in the EU – the quintessential intergovernmental task – has become a 'continuous process' rather than a 'succession of relatively rare events' by which Member States occasionally attempt to assert their 'command and control' over the scope, shape and trajectory of European integration."

83. Thus, the Amsterdam Treaty is sandwiched between the 1991 Maastricht Treaty and the 2001 Nice Treaty.

84. Also important during that period, though not of great relevance for the topic under consideration here, were the ongoing Uruguay Round negotiations (1986-1994) that led to the creation of the World Trade Organization.

85. This 1995 article was written by a high-ranking EU civil servant under the pseudonym Justus Lipsius, a Flemish humanist philosopher and the namesake of the EU Council's headquarters in Brussels.

86. Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Romania. With the exception of Bulgaria and Romania, who joined the EU in 2007, these countries were admitted to EU membership as of 1 May 2004.

87. Dehousse (2001: 50) suggests that the "overall conservative approach" taken in Amsterdam reflects the fact that "[m]ost Member States were totally opposed to deep change," which he explains (in Freudian terms) as "repressed refusal of enlargement."

88. To be sure, the 'deepening' debate was not just about timing, but also the substance of the institutional reforms that would be needed, and was thus highly contentious (Brok 1997: 19-21).

89. "The East West conflict, which demonstrated the necessity of close cooperation among the Western European democracies, was once seen by citizens as one of the major raisons d'être for European integration, so this is now seen as an issue in the past by some people" (Brok 1997: 3).

90. To be sure, the EU's 'democratic deficit' had been a topic of discussion for years, in particular in the late 1980s, after the Single European Act. Corbett (1993: 5-6) discusses the push to "include 'political union' i.e. a general strengthening of the Community and, in particular, of foreign policy cooperation" as a counterbalance to the push towards monetary union. A Joint Statement by French President Mitterand and German Chancellor Kohl on 19 April 1990 formally requested that the IGC from which the Maastricht Treaty emerged also address the "objective of strengthening the democratic legitimacy of the Union, rendering its institutions more effective, ensuring unity and coherence of the Community's economic and political action and defining a common foreign and security policy" (id.). This impetus led Spanish Prime Minister Gonzales to back the creation of European citizenship in the Maastricht Treaty (id. at 16). See also Cotta (1997).

91. For the terms of reference for the Reflection Group, see Lipsius (1995: 239).

92. The MEP members of the Reflection Group were Elmar Brok (Germany, European People's Party/CDU) and Elisabeth Guigou (France, Socialist, and subsequently Minister of Justice from 1997-2000).

93. The Reflection Group, led by Spanish Secretary of State for European Affairs Carlos Westendorp, was composed mainly of politicians and diplomats/Foreign Ministry personnel. The Portuguese representative (André Pereira) was a professor of law at the University of Coimbra who had previously been Foreign Minister. The Belgian representative (Franklin Dehousse), on the other hand, was primarily a professor of law who subsequently became a judge on the EU's General Court.

94. The institutions of the EU submitted their reports in 1995, before the Reflection Group took up its work. The contents of these reports, as well as contributions made by the Member States, are examined in section 7.1 of Chapter 7 below.

95. This procedural weakness was not seriously addressed until the 2004 IGC, which prepared the (ill-fated) Treaty Establishing a Constitution for Europe. The so-called Constitutional Treaty never entered into force, because Dutch and French voters rejected it in referendums. On the role of civil society in drafting the Treaty Establishing a Constitution for Europe, see Pollak & Slominski 2004; Lombardo 2007.

96. This group was predominant because of the "complex technical nature of large parts of the negotiations" Grünhage (2001: 17). As explained by a director of the Council Secretariat, "to handle all the technical details of dossiers like Schengen [relating to reducing barriers to internal movement of persons, a Third Pillar issue] is just not possible at the level of ministers or even Heads of State and Government" (id.).

97. According to sources interviewed by Grünhage (2001: 17), around 60-70% of the Amsterdam Treaty was negotiated by the Representatives Group.

98. The Chairman of the IGC during the Italian Presidency was Silvio Fagiolo, an Italian diplomat trained in law.

99. The Council of the EU (or Council of Ministers) is essentially the upper house of the EU legislature, and represents the EU's Member States. The Council is a single institution, but it consists of multiple (at present ten) 'configurations' of government ministers from each Member State, according to the policy area that is under discussion. Thus, the Justice and Home Affairs (JHA) Council – consisting of Ministers of Justice or Ministers of Interior from each Member State – meets to vote on legislation in the JHA policy area, while the Agriculture and Fisheries Council meets to take decisions affecting those policy areas. The votes taken by the Ministers who sit in a particular Council configuration are binding on their national governments.

100. Weiler contrasts the 1996/97 IGC to the two preceding IGCs, in which the "objective of a Single Market, .. gave momentum to the Single European Act, and Economic and Monetary Union ... drove Maastricht" (Weiler 1997: 310).

101. The 1996 IGC Task Force "which worked in liaison with the Commission President, the cabinet of Commissioner Oreja, responsible for institutional affairs, and consulted other *cabinets*, was created to lead preparations and negotiations, while a Steering Group, headed by Commissioner Oreja, issued political orientations" (Dimitrakopoulos & Kassim 2005: 5).

102. The Commission's 1995 Report is examined in subsection 7.1.1.1 of Chapter 7 below, while its 1996 Report is examined in subsection 7.1.4 of Chapter 7.

Chapter 7: Communitarizing "Judicial Cooperation in Civil Matters": Civil Justice in the 1997 Treaty of Amsterdam

Once the Reflection Group mechanism was put in place in 1995 (see subsection 6.3.3 of Chapter 6 above), the EU institutions and Member States geared up to present their views on reforming the Maastricht Treaty. This chapter examines in greater depth the processes that were set in motion at that time, the preferences that were worked out in those processes, and the ultimate decision-making that took place during the June 1997 Amsterdam summit meeting of the European Council. Section 7.1 below traces the process that put communitarization of civil justice on the agenda for the Amsterdam summit, while section 7.2 looks at the Amsterdam summit itself.

My findings show that visionary and pragmatic actors played a significant role in getting communitarization of civil justice onto the Amsterdam agenda. What began as an effort to redress deficiencies in the Third Pillar (subsection 7.1.1 below) evolved into a cornerstone of the EU's new Area of Freedom, Security and Justice (AFSJ). The debates prior to the Amsterdam Treaty reveal that reforming Justice and Home Affairs (JHA) was a major topic on the agenda. Yet within that overarching and complex debate, justice was initially an afterthought, largely subordinate to pressing security concerns. Gradually, however, justice emerged from the shadows and came to play a more prominent role in the deliberations. Throughout the treaty reform process, *civil* justice was nearly invisible, in contrast to its racier counterpart – *criminal* justice (and *police* cooperation) – and lagged, tortoise-like, behind. In the end, however, civil justice made it across the finish line and into the First Pillar in Amsterdam, while the criminal justice and police cooperation 'hares' were left behind in the intergovernmental Third Pillar (section 7.2 below).

My findings reveal that the final decision to communitarize civil justice resulted from the political need to achieve *some* progress towards integration at the Amsterdam summit, combined with the Member States' *inability to agree* on transferring criminal justice and/or police cooperation into the First Pillar. Civil justice was sacrificed on this altar: not controversial enough to raise many hackles, but significant enough to throw onto the scale on the side of achievement. The fact that a low-salience issue like civil justice could eke its way through the complex treaty-revision process and come out on top, despite the lack of strong support for it in the highly politicized political negotiations in Amsterdam, directs attention to the process by which civil justice made its way onto the agenda.

7.1 How Did Civil Justice Get Onto the Agenda for the 1997 Amsterdam Summit?

The first step towards understanding how communitarization of civil justice got onto the agenda for the Amsterdam summit is to examine the perceived problems with the Third Pillar, which had been created by the earlier Maastricht Treaty (subsection 6.2.2 in Chapter 6 above). Once that foundation is in place, I scrutinize the actions and preferences expressed by various actors in the drawn-out treaty revision process, namely the EU institutions and the Member States. Given the intergovernmental nature of the treaty-revision process with its diplomatic overtones, civil society had no formal role to play (subsection 6.3.3 in Chapter 6 above). However, the 1996/97 Intergovernmental Conference (IGC)[1] endeavored to be a more open and transparent treaty-revision process than prior IGCs, in view of the controversies and malaise that had followed in the wake of the immediately preceding (Maastricht) treaty-revision process

(Sverdrup 2000: 259).[2] This aspiration notwithstanding, my research reveals that the role of civil society was virtually nil in the debates that led to the communitarization of civil justice issues. Debates were limited to governmental and EU-institutional settings, which included a few experts, but left many others out. For example, a leading pan-European expert association dedicated to core civil justice issues – the European Group for Private International Law / Groupe européen de droit international privé (GEDIP), in existence since 1991 – was almost entirely out of the loop, much to the frustration of the members I interviewed.[3]

Like any formally constituted IGC, the process created not only an opportunity but also a demand for the expression of policy preferences that might otherwise have remained dormant. As such, the pre-ordained 1996/97 IGC not only opened a window (Kingdon 1984) but also compelled institutional and Member State actors to articulate and put forward ideas embodying their visions of more perfect legal order in the EU. Some of these ideas were already floating around in the "primeval soup" among different persons who might be considered part of a "policy community" (Kingdon 1984: 122-51). The fact that the 1996/97 IGC was pre-ordained (subsection 6.3.2 in Chapter 6 above) raises the possibility that the outcome I seek to explain – the decision to transfer legislative competence over certain civil justice measures – might have been driven more by the structural opportunity and pressure created by the treaty-revision process itself, than by the strength of the ideas or the savvy and resources of the actors involved. The 1996/97 IGC was path-dependent, insofar as it was "structured by past regulations and statements" (Sverdrup 2000: 246). The treaty-revision process itself generated opportunities for innovation.

Given my narrow explanatory aim of showing how Article 65 of the EC Treaty got onto the agenda for the Amsterdam summit, the analysis in the remainder of this section (7.1) focuses on the presence/absence, content, and fate of civil justice as a theme in documents and debates in the period leading up to the June 1997 Amsterdam summit. It bears mention, in this regard, that there was no discrete process relating to civil justice, or even to justice issues as a whole. Rather, these issues were lumped together with a much larger set of institutional reforms, as already noted in Chapter 6 (subsections 6.3.2 and 6.3.3). My effort to trace the trajectory of the civil justice provision entails disentangling it (to the extent possible) from the fate of other Justice and Home Affairs (JHA) issues. In the end, however, this larger context proves to be an essential part of the explanation of how civil justice came to be communitarized (section 7.2 below).

My analysis in the remainder of this section proceeds as follows. First, subsection 7.1.1 picks up the narrative thread in 1995 and summarizes the criticisms of the intergovernmental Third Pillar, particularly as set forth in the reports, opinions, and resolutions submitted to the Reflection Group by the EU Commission and the European Parliament (EP). Next, subsection 7.1.2 examines the opening positions expressed by the Member States. This subsection departs somewhat from the chronological narrative, since Member States submitted their reports when it suited them, and not according to a coordinated timetable. Subsection 7.1.3 returns to the chronological narrative and examines the Reflection Group Report, which was submitted at the end of the Spanish Presidency in December 1995. Subsection 7.1.4 traces developments during the Italian Presidency (January - June 1996), during which the Intergovernmental Conference was formally opened, while subsection 7.1.5 traces developments during the Irish Presidency (July - December 1996), at the end of which the first draft of the treaty was in place. Subsection 7.1.6 examines the role of Finland, which played a special role in both the IGC (examined here in Chapter 7) and the 1999 Tampere summit that worked out the first five-year plan for developing

the Area of Freedom, Security and Justice (examined in Chapter 8 below). Subsection 7.1.7 turns to the Dutch Presidency (January - June 1997), in the lead up to the summit meeting of the European Council in Amsterdam in June 1997, during which the language of what became Article 65 was nearly finalized.

More than twenty years after communitarization, the origin of Article 65 of the EC Treaty (now Article 81 of the TFEU) remains a mystery to many experts in the affected legal fields, and the task of uncovering the story has been difficult. While many legal scholars have written about the communitarization of civil justice, including some who place it in a broader historical perspective, I am aware of only one published report (Kohler 1999, discussed in subsection 7.1.7 below) that provides *any* insight into how it occurred, and even that report is partial and stops short of trying to explain *why* communitarization occurred.[4] These questions are of little concern to traditional legal scholarship.

7.1.1 Opening Positions of the European Commission and the European Parliament (1995)

7.1.1.1 The European Commission

The Commission prepared two comprehensive reports during the treaty revision process: first, the Commission Report on the Operation of the TEU (10 May 1995) for the Reflection Group, and second, the Commission Report on Political Union & Enlargement (1996) for the IGC. Both address problems in the Third Pillar and reveal the Commission's early thinking about how and why to reform the Third Pillar. Early in the 1995 Report on the Operation of the TEU, the Commission expressed its view that the core problems facing the EU – among them organized crime, which "cannot be resisted by forces which are scattered and fragmented" – require "firm action at European level" (id. at 2). The IGC should, in the Commission's view, be guided by two overarching principles, namely that the EU should act effectively, and that it should act democratically (id. at 4). The drive towards greater effectiveness is a key force in regard to Justice and Home Affairs (JHA) issues, as a means to ensure security at home (id. at 5). The Commission's 1995 Report characterizes the aim of enhancing "domestic security" through "ambitious cooperation" in the JHA fields as a "striking manifestation of the [EU's] advance beyond a purely economic vision" (¶ 2). The Commission's core criticism of the Third Pillar was that it is "ineffectual" because the pillar structure rendered the EU institutionally incoherent, the "instruments available are inappropriate," and because of the "cumbersome decision-making process and a complete lack of openness" (i.e., transparency) (id. at 5-6).

With regard to the *democratic principle*, the Commission observed that the citizen's right of free movement within the EU had not yet been achieved due to lack of agreement on the "security measures ... necessary" to make the area without internal frontiers for individuals a reality (¶ 9). The 1995 Report identified a number of democratic deficiencies, among them the lack of "parliamentary control" on JHA matters, particularly where "binding legal instruments" (i.e., legislation) are involved (¶ 30), and weak judicial review of JHA matters (¶¶ 62 & 69). Lack of transparency also was "particularly wanting in [JHA] cooperation, which affects the Union's internal security and closely concerns individual rights" (¶ 93).

With regard to the *effectiveness principle*, the Commission's 1995 Report focused on the EU's "ability to decide and act" (id. at 38-9), and argued that "[m]ore effective cooperation is long overdue," particularly given the "strong desire for cooperation in these areas," as evidenced by "repeated conclusions of European Councils and the sensitivity of public opinion on issues such as immigration or international crime" (¶ 117). The Commission's 1995 Report targeted

two key problems: first, that the "adoption and implementation of conventions is a slow and complicated business"; and second, that the requirement of unanimity in voting is a "major source of paralysis" (¶ 121). Moreover, the JHA operational structures were much too complex, since they extended across five negotiating levels (Council, Coreper, Article K.4 Committee, Steering Groups, and Working Parties; see Figure 6.2 in Chapter 6), rather than just the three found in the usual legislative context in the First Pillar.[5] Another problem noted by the Commission was that JHA – unlike foreign and security policy (i.e., Second Pillar issues) – "requires legal certainty" insofar as it "frequently involves legislative action which ... directly affects individual rights" (¶ 120). Overall, the Commission saw "serious inadequacies" of the JHA provisions, and asserted that "neither the legal instruments provided nor the administrative structures set up appear capable of satisfying the need for coordination in this area" (¶ 172©).

The Commission's 1995 Report tended to equate Justice and Home Affairs with domestic security issues, namely crime and police cooperation, as well as asylum and immigration. Not one of the examples contained in that report pertains to civil justice issues, nor can they be found among the dozens of JHA measures listed in Annex 15. Civil justice is wholly absent, except for bare mention of the existence of the "Steering Group – Judicial Cooperation in Civil/Criminal Matters" as one of the JHA working structures (¶ 124).

In September 1995, Anita Gradin (Sweden), who served as Commissioner for Immigration, Justice, Home Affairs and Financial Control (1995-1999), proposed that six of the nine "matters of common interest" (EU Treaty art. K.1) – notably asylum, migration, narcotics, fraud, *civil law cooperation*, and customs cooperation – should be brought into the First Pillar and thus fully communitarized (Gradin Speech 1995).[6] The Commission believed "from the outset" that conditions were favorable for achieving "major modifications" in the JHA area – in contrast to the area of foreign and security policy – despite the "very sensitive nature of the area and the traditionally rather conservative administrative bodies involved," because "international crime, immigration and asylum policy" were high priorities for all Member States, and because a broad consensus existed that the Third Pillar had "not only been a failure, but a total failure" (Petite 1998a: S81-S82). According to Michel Petite of the Commission Secretariat General, who was Director of the Commission's IGC Task Force from 1995-1997, communitarization appeared to be a "simple" way to resolve a very complex problem, since it would be "easier and cleaner" to move these issues into the "proper and classical Community order" of the First Pillar legislative arena, without bringing about "a revolution" (id. at S83).[7]

The last of the Commission's key policy statements in 1995 also addressed the issue of communitarization (Commission Passarelle Communication 1995). There the Commission reiterated its "clear conviction" that all JHA "areas of common interest" – except judicial cooperation in criminal matters and police cooperation – should be communitarized (id. at ¶ 8),[8] and argued that this should be achieved through treaty revision via the IGC (id. at ¶ 10), rather than via the available (but problematic) *passarelle* (or bridge) procedure laid out in Article K.9 of the EU Treaty, which would only partly remedy the effectiveness and democratic defects of the Third Pillar.

The Commission's role in the 1996/97 IGC and its 1996 Report on Political Union & Enlargement are examined below in subsection 7.1.4.

7.1.1.2 The European Parliament

The European Parliament (EP) had gone on record long before the start of the treaty

revision process in the mid-90s to express its "bewilderment" over, and vehement criticism of the Third Pillar arrangements created by the Maastricht Treaty (European Parliament 1995b: 121). In a highly critical resolution in June 1991, during the process of negotiating the Maastricht Treaty, the EP forcefully expressed its opposition to the intergovernmental arrangements being contemplated and called for a more federal Union (EP Resolution on Intergovernmental Cooperation 1991: Part IV; see also Corbett 1993: 326-8). Shortly before the Maastricht Treaty entered into force in late 1993, the EP spoke again, expressing its regret that the Third Pillar had resulted in a "lack of effective parliamentary and judicial supervision and democratic procedures for decision-making" (id. at ¶ 1), and chiding the European Commission for "giving in too readily to pressure from a number of Member States," which preferred intergovernental arrangements in the JHA area (id. at ¶ 2) as a way to preserve their sovereignty in the affected policy fields.

No formal role was foreseen for the EP in the treaty-revision process that led to the Amsterdam Treaty (EU Treaty art. N). The EP brought pressure to bear, however, and was formally represented by two persons in the 1995 Reflection Group (Grünhage 2001: 12; see also Niemann 2006: 226-8). The European Council at its Corfu summit (June 1994) also invited the EP, along with other EU institutions, to submit its views on the functioning of the Maastricht Treaty to the Reflection Group (subsection 6.3.3 in Chapter 6 above).

The process of reporting the EP's views on the functioning of the Maastricht Treaty (EP Resolution on the Functioning of the TEU 1995d) entailed soliciting opinions from a broad range of EP committees (European Parliament 1995b), along with a handful of expert reports (European Parliament 1995c). Most significant for JHA issues in general, and the fate of civil justice in particular, are the opinions of the JURI Committee (Legal Affairs and Citizens' Rights) (European Parliament 1995b: 50-4) (JURI Committee Opinion) and the LIBE Committee (Civil Liberties and Internal Affairs) (European Parliament 1995b: 120-30) (LIBE Committee Opinion), as well as the LIBE Committee Report prepared by MEP Laurens Jan Brinkhorst, who was a Dutch politician and law professor before becoming a member of the EP (European Parliament 1995c: 30-5).[9] Many of the criticisms of the Third Pillar expressed by the EP paralleled those identified in the 1995 Commission Report on the Functioning of the TEU (discussed above), and are not repeated here. Instead, the following discussion draws attention to notable *differences* in the positions stated by the EP and the Commission in their 1995 reports on the functioning of the Maastricht Treaty.

Both the JURI and the LIBE Committees of the European Parliament assessed the structural weaknesses and operational ineffectiveness of the Third Pillar under the Maastricht Treaty (JURI Committee Opinion, European Parliament 1995b: 50-4, ¶ 8; LIBE Committee Opinion, European Parliament 1995c: 120-30, ¶ I.3). In particular, they articulated concerns about the *legal incoherence* resulting from the fact that a number of JHA policy areas cut across the First and Third Pillars, which "constitutes a serious obstacle in developing a coherent policy and the necessary legislation" and creates the need for a "consistent institutional framework" (JURI Committee Opinion at ¶ 8).[10] This sort of messiness makes legal experts uneasy, not least for practical reasons, since each pillar provides for the use of different decision-making procedures, institutional arrangements, and legal instruments. In line with this concern, the formal EP Resolution on the Functioning of the TEU (1995d: ¶ B.4) urged that the JHA field "should no longer be artificially distinguished from closely-related policies within the full Community domain" (i.e., the First Pillar).

What is most striking about the EP's position on JHA issues is that it articulates a maximalist vision of a European legal system, on the one hand, but cautiously refrains from pushing it forward, on the other. This is the case in regard to the issue of *communitarization*, that is, whether to move Third Pillar issues into the First Pillar – or even to abandon the Third Pillar entirely. The EP came out very early in support of full communitarization of *all* Third Pillar policy subfields. Already in its 1993 Resolution on JHA Cooperation, the EP declared that it had "always firmly believed – and reiterates this belief in this resolution – that matters related to the administration of justice and home affairs should be considered Community matters and be dealt with in the framework of the Union" (European Parliament 1993: ¶ B), and called for all JHA policy subfields to be communitarized and treated like other First Pillar matters (id. at ¶ 3; see also July 1993 Report by MEP Robles Piquer; cited by Niemann 2006: 226). The EP continued to support communitarization of all fields – even criminal justice and police cooperation, which the Commission's 1995 Report on the Operation of the TEU would have left behind in the intergovernmental Third Pillar – in its 1995 opinions and reports for the Reflection Group. Ultimately, however, the LIBE Committee Report balked, because it viewed full incorporation of the Third Pillar into the First Pillar as "probably ... unrealistic," and recommended a more conservative, incremental approach, relying on the *passarelle* (bridge) provision in the Maastricht Treaty (European Parliament 1995c: Part IV, 125, ¶¶ S & T), which put the EP at odds with the Commission's rejection of that option (Commission Passarelle Communication 1995, discussed in subsection 7.1.1.1 above). The LIBE Committee Opinion asserted that full communitarization is "necessary ... to attain" stated objectives, but "not an end in itself ... not an abstract grab for supranational power for reasons of federalist political ideology," noting that there is "no need for a European superstate," and adding that to call for one would be a "contradiction as well as a strategic error in a domain so near to the heart of traditional national sovereignty" (European Parliament 1995b: 124, ¶ N). The LIBE Committee Opinion, like the Report that preceded it, came out in favor of communitarization of all JHA policy subfields, albeit "by another route," such as via the *passarelle* provision (EU Treaty art. K.9) (European Parliament 1995b: 125: ¶¶ S & T). In the end, it was this cautious approach that the EP formally recommended to the Reflection Group. The EP Resolution on the Functioning of the TEU backed away from the strong views expressed by the LIBE and JURI Committees, and merely called for "[d]ecisive progress" in the JHA field via the passarelle mechanism, but not for full communitarization by the IGC (1995d: ¶ I.B.4).

The EP's most interesting contribution to the pre-negotiation debates, and ultimately to the outcome in the Amsterdam Treaty, was the call for creating a *legal area*. As was the case in regard to the overarching question of communitarization, the EP's JURI and LIBE Committees articulated forceful visions, from which the EP itself ultimately backed down in its formal 1995 Resolution. Still, it is worth examining the ideas put forth by the EP committees, since these came to play an important role in the evolving debate over the role of justice in the EU.

The origin of the idea of a European legal area or space is conventionally traced back to French President Giscard d'Estaing, who on multiple occasions in the 1970s called for the creation of an "*espace judiciare Européen*" (Plachta & van Ballegooij 2005: 17). The idea received its first serious consideration in the EP's 1991 Resolution on Intergovernmental Cooperation, in which the EP urged including the goal of establishing common action in the JHA field "as part of the creation of a European legal space that complies with the fundamental principles of European citizenship" (¶ I.10).[11] This idea was fleshed our further during the 1995

pre-negotiation phase leading up to the Amsterdam Treaty, notably in the EP's LIBE Committee Opinion drafted by MEP José Barros Moura (European Parliament 1995b: 120-5), who had entered the EP as a member of the "Communist and Allies" party group in 1986, when Portugal first became a member of the (then) European Communities, but later became affiliated with the Group of the Party of European Socialists.[12] The LIBE Committee Opinion warrants close attention, insofar as it establishes a baseline for some of the key ideas that circulated during the IGC, and because it contains the first – albeit incipient – articulation of a larger vision of the potential role of civil justice in European integration.

The 1995 LIBE Committee Opinion called for the creation of an EU-wide "police and judicial area" as a means to achieve the "chief objective" of JHA cooperation, namely to "guarantee security, fundamental freedoms [i.e., the right to free movement of persons] *and individual rights, including the right to citizenship* ...," since obstacles to "cooperation in the field of justice and police work facilitate crime and other transnational threats to fundamental rights and liberties, in the face of which the national sovereignty of Member States acting in isolation is increasingly powerless" (European Parliament 1995b: 126, ¶ A.1) (emphasis added). Elsewhere, the LIBE Committee reiterated the standard justification for JHA cooperation by pointing to concerns about "crime, the mafia, drugs, international fraud and corruption" and their effect on the "freedom and security of our citizens" (id. at 122, ¶ F), and called for devising "a European criminal law policy, ... in order to dispel the fear among the Community public that they may have to stand by impotently and witness 'large-scale invasions of gangsters' or the 'free movement of criminals' " (id. at 123, ¶ K). Yet the LIBE Committee did not stop there, instead forging ahead and taking the first step towards linking civil justice to the protection of fundamental rights in the EU.

The LIBE Committee Opinion called for the "establishment of a genuine European legal area" (European Parliament 1995b: 130, ¶ B.31), which it described as an "international, democratically scrutinized legal system under which the basic liberties and social rights of the public are protected and fostered, whilst recognizing the responsibility which members of the public and their organizations themselves have for developing and exercising such rights" (id. at 126, ¶ A. 2).[13] The "creation of a European legal area is an essential objective if a genuine European Union is to be created," which is closely linked to the "public's right to freedom and security" and should include, "in the longer term, the 'approximation,' 'harmonization' and 'standardization' of national legislations so as to achieve a genuine European legal area" (id. at 123, ¶ J). Thus, while not yet wholly detached from the concerns with freedom (i.e., free movement of persons) and security, the LIBE Committee linked JHA policies (including civil justice) to a larger vision of a European, rights-based legal system. For its part, the JURI Committee Opinion argued along similar lines, that European citizenship should "be enhanced and go considerably beyond civic and electoral provisions," insofar as "European citizenship implies that the [EU] guarantees the protection of fundamental rights contained in the European Convention of Human Rights and the implementation of common policies in the fields of justice and home affairs" (European Parliament 1995b: 53, ¶ 9).

The 1995 EP Resolution on the Functioning of the TEU fell far short of the maximalist views expressed, in particular by the EP's LIBE Committee, which was active and vocal about its preferences for developing the 'justice' side of European integration. Overall, the 1995 Resolution reveals that the EP's primary concern in the pre-negotiation phase was the need to achieve institutional balance, address democratic deficiencies, and prepare for enlargement

(European Parliament 1995d: ¶¶ B & C). The Resolution called upon the EU to "ensure that its citizens can exercise their rights and freedoms, and to contribute to maintaining the security of the individual" (id. at ¶ A(d)). Civil justice is not mentioned at all, however, and the notion of citizenship is dialed back and focused more narrowly on the need to bolster its substance by developing "special rights linked to EU citizenship," among them the free movement of persons (id. at ¶ I.D.7). Finally, the EP Resolution did not embrace the idea of a legal area along the lines laid out by the LIBE Committee. Rather, it called for creating an "area for cooperation among European peoples" based on regional planning measures, in order to "forge bonds and foster pacific cooperation among the different European countries" by establishing an EU-wide "legal framework to promote cross-border and interregional cooperation." This "area for cooperation" endorsed by the EP was, however, a limited geographical notion, linked to the policy aim of promoting regionalism within the EU, and thus a wholly different "area" from the one envisioned by the LIBE Committee.

For reasons already noted in Chapter 6 (subsections 6.3.3 and 6.3.4 above), the EP's role in the treaty-revision process was weak. Still, the EP proved to be an important source of ideas for the development of European integration in the justice sector, even it if was not the political actor which ultimately picked up the ball and ran with it.

7.1.1.3 Conclusions

Both the Commission and the European Parliament were strong supporters of communitarization of most, if not all Justice and Home Affairs (JHA) issues from an early stage of the treaty revision process. However, careful consideration of their reports reveals that these institutions were primarily concerned with reducing the EU's 'democratic deficit' and improving the effectiveness of European governance, particularly in view of the impending enlargement process. While both institutions referred frequently to internal security concerns, the documents examined above reveal virtually no discussion of an abstract notion of 'justice' – nor, for that matter, any discussion of the content or meaning of civil justice ("judicial cooperation in civil matters") as such – during the initial 1995 'reflection' phase. The only exception is found in the preliminary report and opinions drawn up by two key EP Committees, which forged an early linkage between rights, citizenship, and JHA matters (including civil justice, albeit without any discussion of particulars), and called for the creation of a European legal area.

The invisibility of civil justice issues in the Commission Report and the EP Resolution, Report and Opinions is also reflected in the observations by scholars and civil society activists who wrote about Third Pillar issues at the time (Benyon 1994; Lipsius 1995: 243-55; den Boer 1996; Weyembergh 2000). To be fair, most of the authors who wrote about Third Pillar matters before the Amsterdam Treaty were specialists in criminal law and police cooperation or asylum and migration. The civil justice academic community was virtually absent from debates over the Third Pillar, and focused instead on doctrinal discussions pertaining to particular conventions that were on the drawing board of the EU or the Hague Conference on Private International Law. This does not mean, however, that no one was paying attention to the issue of civil justice. I return to this issue in subsections 7.1.2 and 7.1.6 below, which examine contributions made by particular Member States.

7.1.2 Opening Positions of the Member States

This subsection summarizes the opening positions of the Member States, as they pertain

to JHA matters in general, and civil justice issues in particular, during the opening phase of the treaty negotiation process. The discussion in this subsection departs from the chronological narrative that is otherwise followed in section 7.1 of this chapter, since the Member States articulated and presented their preferences according to a time line that does not fully square with the overarching temporal framework that structured the treaty revision process. In particular, some Member States presented their positions before the Reflection Group wrapped up its work in December 1995 (see subsection 7.1.3 below), while others did so afterwards. In an effort to avoid unnecessary complexity, I collate the Member States' starting positions in Appendix G, without regard to whether they were articulated in 1995 or 1996 and, hence, whether or not they were available to the Reflection Group and thus potentially reflected in its final report. I analyze the information presented in that Appendix in the remainder of this subsection. Further contributions made by particular Member States that played an active role in connection with the decision to communitarize civil justice are examined in later subsections (notably subsection 7.1.6).

It is surprising to read in the conclusions of the EP's JHA Briefing document from early 1996 that "judicial cooperation in civil matters" is among the Third Pillar issues that is "likely to be high on the agenda for cooperation in the fields of justice and home affairs at the 1996 IGC" (European Parliament 1996a: 34), given that civil justice issues were barely mentioned in the Member State statements examined by the compiler of the EP document, much less discussed in any detail. With very few exceptions, civil justice is invisible among the preferences expressed by the Member States around the time the IGC was convened in the first half of 1996.

The exceptions, however, are notable. France and Germany both expressed support for harmonization of Member State legislation in the civil area. A leaked French Government document (20 February 1996) encouraged Member States "to align their civil ... legislation" in the "area of judicial cooperation," while the German Government stated quite openly that the "harmonization of civil ... legislation" was "among the most important [JHA] issues to be addressed" (26 March 1996). However, neither France nor Germany openly advocated communitarization of civil justice issues. Indeed, no Member State openly called for communitarization of "judicial cooperation in civil matters" in the warm-up phase to the IGC, although one Spanish government document (Appendix G) indicated that Spain "would probably vote in favour of moving from unanimity to qualified-majority voting" – that is, at least partial communitarization – for the "harmonization of civil legislation ... if such a proposal were put forward." Finland – a new Member State at the time, having just joined the EU on 1 January 1995 – appears to have given the most thought to the topic of civil justice. The Ministry for Foreign Affairs document (18 September 1995) supported "establishing a system of mutual (legal and administrative) assistance; ... creating a European judicial area; ... [and] ensuring that family law judgments are applied." But not even Finland, with its far-reaching vision of what a Europeanized civil justice field might look like – called for outright communitarization of civil justice (or any other issues) at that early stage of the treaty-revision process.

To be sure, Finland was not alone in calling for the creation of a European judicial area or something along those lines. The Belgian Government note (28 July 1995) mentioned the idea of a "Law and Security Union." The Joint Letter from French President Chirac and German Chancellor Kohl (6 December 1995) took the idea the furthest, by calling for creation of a "common European area in which the free movement of citizens is guaranteed ... a *homogenous area* in which the free movement of persons will have to be underpinned by joint actions,

particularly in the areas of asylum policy, immigration policy and improved cooperation to protect people effectively against the scourges of terrorism, organized international crime and drugs." The joint French-German position is animated by the internal security concern, in contrast to the Finnish position, which contains the germ of the idea of a European legal area that includes civil law as an essential element.

The Member States were entitled to prepare and present papers and proposals as part of the Intergovernmental Conference (IGC) that prepared revisions to the EU treaties.[14] However, a close observer of the IGC has cautioned that the "national propositions generally had much less influence as they were rarely used as a basis for discussion at the IGC" (Grünhage 2001: 18, citing McDonagh 1998: 23). Still, the Reflection Group Report, which is examined in the following subsection (7.1.3), did consider those Member State positions that were submitted to it in time. Member States could, moreover, express their preferences and seek to exert influence over the treaty-negotiation process in myriad ways during the IGC, as revealed in the following subsections, which trace the treaty-revision process chronologically.

7.1.3 The Reflection Group Report (December 1995)

After receiving the Commission's 1995 Report and the EP's 1995 Resolution, along with some Member State contributions (noted in subsection 7.1.2 above), the Reflection Group submitted its final report to the European Council at the Madrid summit in December 1995. The Reflection Group Report grappled with the paradox that more integration was needed in Europe at a time when public support for integration had waned, noting that "[w]e ... need to explain clearly to our citizens why the Union, which is so attractive to others in [Central and Eastern] Europe, remains necessary for us too" (Reflection Group Report 1995: 2). The Maastricht Treaty had begun the process of bringing the EU "closer to its citizens" and seeking to "bring about an area of freedom and of public security" (id. at 3). With this in mind, the Reflection Group urged the IGC to seek results "in three main areas," first among them the goal of "making Europe more relevant to its citizens" (id.). Section I of the Report, which addresses the "citizen and the Union," emphasized the need to promote core European values (i.e., democracy and human rights), greater security, solidarity, employment, protection of the environment, and greater transparency. The Report expressly mentioned the need to promote equality and to condemn xenophobia and racism, and included a long list of urgent concerns related to internal security (i.e., terrorism, drug trafficking, money laundering, exploitation of illegal immigration and other forms of internationally organized crime), as well as immigration, asylum, and the control of external borders (id. at 4-5). Yet the main body of the Report made no mention whatsoever of *justice* – either civil or criminal – beyond the goal of protecting citizens against crime "organized on an international scale" (id. at 4). That said, the Reflection Group Report did contain an Annotated Agenda (Part Two) with detailed suggestions derived from its own deliberations and from the reports submitted to the Group by the EU institutions. It is here that the Third Pillar comes under closer scrutiny.

According to the section of the Annotated Agenda that deals with Third Pillar issues (Part Two(B)), the Reflection Group concluded "unanimously that the magnitude of the challenges is not matched by the results achieved so far in response to them" (Reflection Group Report 1995: Part Two, ¶ 46). A majority of Member States saw the problem not as "lack of political will alone," but rather that some of the treaty provisions added by the Maastricht Treaty were "inadequate and clearly deficient in operation, as stated in the reports by the Commission and the

European Parliament" (id. at ¶ 47). Yet others, mindful of the "political difficulties in giving up national sovereignty in this area," expressed the view that the "lack of progress is not necessarily attributable to the intergovernmental nature of cooperation" (id.). The "great majority" saw three causes for dissatisfaction with the Third Pillar arrangements:

- Failure to define "objectives and ... a timetable for achieving them" in order to consolidate "an area of freedom and security in which there are no internal frontiers and where persons can move freely" (no mention of justice);
- Dissatisfaction with the type of legal instruments available in the Third Pillar (noting in particular that "citizens require legal protection, and therefore, a legislative framework" for matters relating to the security of citizens, and also that the use of conventions involves an "extremely slow approval procedure"); and
- The need for a "true institutional driving mechanism," noting that the existing complex system involving "working structures spread out over five different negotiating levels" impedes decision-making (id. at ¶ 48).

According to the Reflection Group Report, "the large majority" supported improving the objectives and instruments in Third Pillar policy areas, including consideration of partial or full communitarization of Third Pillar matters, but even this majority was of the view that "the field of police and *judicial cooperation, both civil and criminal*, must be developed by means of closer intergovernmental cooperation, at least for a certain period" (id. at ¶ 49).[15] Other Member States, however, were of the view that maintaining the "current separation of 'pillars' is essential in order to respect intergovernmental management of these matters that are so closely linked with national sovereignty" (id. at ¶ 50). Thus, as of late 1995, there was fairly strong support across Member States as well as the key EU institutions for moving *some* Third Pillar issues into the First Pillar, though more for matters relating to movement of persons across borders (asylum, immigration) than for matters of civil or criminal justice. According to den Boer (1996: 4), the picture that emerged from the Reflection Group Report was that "consensus lies predominantly on choosing institutional reform, and that chances to 'communitize' Third Pillar issues seem more remote."

The language in the Reflection Group Report reveals numerous divisions among the Member States and has been said to constitute "more a statement of disagreement than a statement of consensus" (Grünhage 2001: 14, citing Kortenberg 1997: 711). National interests were paramount, and "no national position of importance was conceded in the course of the work of the Reflection Group" (McDonagh 1998: 39). The composition of the Reflection Group proved to be a two-edged sword. On the one hand, it could be "more flexible in the reflection process than diplomats would be in an official negotiation" (Grünhage 2001: 14). Yet on the other hand, the Group consisted of "too many junior members and high officials, who were all too wary of not upsetting their respective political superiors" (id.). In the end, the Reflection Group is seen as having played a "positive role in the preparation of the IGC," but its "importance and effectiveness should not be exaggerated" (id. at 15). Despite calls for "bold political vision," the Reflection Group ultimately "failed to create a consistent and a platform for further discussions" (Sverdrup 2000: 253). The Report "did not reveal a common understanding of the shape of the future European polity, the problems facing the EU, nor of the proposed solutions. In contrast to previous [IGCs], the [Reflection Group] was unable to limit the agenda and to present a set of solutions" (id.).

At its Madrid summit in December 1995, the European Council "welcomed the

Reflection Group's report" and decided that the Intergovernmental Conference should be launched in March 1996, "in order to establish the political and institutional conditions for adapting the European Union to present and future needs, particularly with a view to the next enlargement" (Madrid Presidency Conclusions, introduction).

7.1.4 The Intergovernmental Conference (IGC) During the Italian Presidency (January - June 1996)

The starting point for deliberations in the IGC was the Reflection Group's Report of December 1995, along with items that had already been added to the agenda by the European Council at its summit meetings (subsection 6.3.4.1 in Chapter 6 above).[16] However, the IGC was not bound by the Reflection Group Report (1995) and did not even designate it as an official reference document for the IGC (Grünhage 2001: 14). Thus, at the start of the IGC, virtually every topic was available for discussion, save one: the Member States agreed not to open "Pandora's Box" – i.e., the topic of Economic and Monetary Union (EMU) – during the IGC (id. at 11). Still, the IGC took place in a "turbulent" environment, and EMU "continually overshadowed the IGC," despite efforts to "keep the design and institutions of the EMU out of the discussions" (Sverdrup 2000: 261).

In February 1996, at the request of the Italian Presidency, the Commission presented a Report on Political Union & Enlargement to the IGC. This bold Report, which was prepared with input from the Task Force, went far beyond the narrow proposals embodied in the Reflection Group Report and called for establishing an "area of freedom and security" as an essential component of citizenship in the "People's Europe" (¶ 7), as well as consolidating the "rule of law" (¶ 11), although the Report did not specify what the latter proposal might entail. While the Commission's main concern was with ensuring free movement of persons, with an eye to the "complex problems" of asylum and immigration, crime, drugs and terrorism" (¶ 15), consistent with the ideas expressed in the Joint Letter from French President Chirac and German Chancellor Kohl (6 December 1995) (discussed above in section 7.1.2), the Commission went further and also called for "effective mutual recognition of judgments by national courts" (¶ 16), and urged transferring *all* JHA affairs to the First Pillar, except for judicial cooperation in criminal matters and police cooperation (¶ 18). Communitarization of civil justice is not specifically mentioned, but it clearly falls within the Commission's broad call for communitarization, consistent with the view it had already articulated in the second half of 1995 (see subsection 7.1.1.1 above).

The Commission's positions throughout the IGC were prepared by members of the Commission's small drafting and negotiating team (task force) for the IGC (Interview #4). The team was headed by Michel Petite, who came to this task from his position as a member of (former) Commission President Jacques Delors' personal cabinet, and later served as Director General of the Commission Legal Service. This group coordinated the Commission's position, which entailed consulting and seeking agreement among four actors inside the Commission: the head of cabinet of the Commission president, the Commission General Secretariat, the Commission Legal Service, and the General Director of the material policy area affected, namely Adrian Fortescue, who headed the JHA Task Force (id.). One member of Fortescue's JHA Task Force confirms being involved in these discussions and making "contributions to ensure good drafting of the provisions of the Amsterdam Treaty (Interview #14). The coordination process was "very dynamic," according to the "young expert" on the Commission's IGC team (who was not, however, an expert on civil justice matters) (Interview #4). On any given issue, he consulted

with each of the responsible persons in the Fortescue team, the Legal Service, the General Secretariat, and the President's cabinet; once "we have an agreement among us, I proposed to Mr. Petite, and [said] let's go" (Interview #4). There were always problems, differences of opinion, "but in the end we always reached a result" (id.). While Interviewee #4's understanding of his role was primarily to find workable compromises, he was also in a position to bring creative suggestions to the table, because he "was the only person who worked with everyone in the machinery room" (id.). But despite his high intellectual credentials, he neither claimed 'ownership' of any particular ideas, nor did he remember (or give any appearance of caring) where particular ideas might have originated. That aside, it is fair to assume that strong commitment to achieving and extending the internal market prevailed in the Commission in the 1990s, in view of the fact that both Fortescue and Petite had worked closely together in the 1980s as members of the cabinet of Lord Cockfield, the British Commissioner who played a major role in pushing forward the single/internal market idea.[17]

At the end of its six-month term, the Italian Presidency submitted its Progress Report on the IGC (June 1996) to the Florence summit of the European Council (22-23 June 1996). This Report set out "some draft texts [none related to Third Pillar issues], but progress was limited," and "most parts of the report remained rather vague" (Grünhage 2001: 18), albeit through no fault of the Italian Presidency.[18]

The Italian Presidency Progress Report adopted a more cautious approach than that advocated by the Commission in its 1995 and 1996 Reports. In particular, the Italian Presidency Report does not echo the Commission's broad call for communitarization. Instead, it proposed partial communitarization of *some* JHA issues – visas, asylum, and immigration (¶ VIII.2(a)) – but left other JHA issues (among them civil justice) behind in an institutionally improved "new third pillar" (¶ VIII.2(b). However, the Report did propose some reforms, such as expanding the list of "matters of common interest" in the Third Pillar to include the "approximation [i.e., harmonization] of rules on conflict of laws" (¶ VIII.1), as well as introducing a new type of quasi-legislative legal instrument for the Third Pillar (a "common measure"), which would impose legally binding goals on Member States, but would – like the operation of directives in the First Pillar – leave "national authorities to decide on ways and means" (¶ VIII.3(b)). Finally, the Italian Presidency Progress Report refrained from discussing, much less embracing, the more encompassing notion of an 'area' and clearly delimited the discussion of citizenship (¶ II), which entails extending judicial protection for an expanded catalog of rights, in the discussion of Justice and Home Affairs (¶ VIII). The Report did not discuss any further civil justice issues.

At the end of the Italian Presidency in June 1996, the Florence European Council passed the baton from the Italian to the Irish Presidency (July - December 1996), and gave it a mandate to prepare a draft treaty for the Dublin summit in December 1996 (Florence Presidency Conclusions 1996). The European Council also set the Amsterdam summit meeting in mid-1997 as the date by which the IGC should conclude its work (id.), not least in view of time pressures stemming from national political events in some Member States, among them French parliamentary elections, which had been scheduled for 1998 (see Sverdrup 2000: 263).[19]

7.1.5 The Intergovernmental Conference (IGC) During the Irish Presidency (July - December 1996)

At the start of its work in July 1996, the Irish Presidency issued a note laying out "possible points to be discussed" at the IGC Representatives meeting on 16-17 July 1996 (Irish

Presidency JHA Note 1996). This Note put the question of communitarization squarely on the table and introduced, for the first time, the idea that "[a]ction in the fields of justice and home affairs shall have as its *objective the maintenance and development of the European Union as an area of freedom, security and justice* by promoting close cooperation between Member States, between their judicial and police authorities and between the relevant departments of their administrations, and by developing common policies in order to strengthen the fight against crime and judicial cooperation" (id. ¶ II.1) (emphasis added). This language represents a large step forward, insofar as it joins 'justice' to the notion of the 'area of freedom and security' that had been under discussion for some time. As such, it is the forerunner to the language that was ultimately introduced by the Amsterdam Treaty.[20] My research has not revealed whether this proposal – which has roots in the EP's LIBE Committee Report (European Parliament 1995c) – came from the Irish Presidency, another Member State, the Commission, or the Council Secretariat, which also played a significant drafting role during the Irish Presidency.

The Irish Presidency's starting position was to communitarize only some JHA areas – asylum, external border control (i.e., visas) and immigration – and leave judicial cooperation in civil matters in the Third Pillar (Irish Presidency JHA Note 1996: ¶ II.2(6)), along with judicial cooperation in criminal matters and police cooperation. However, the Irish Presidency did propose to add a new "matter of common interest" on the "approximation of rules on conflict of law and jurisdiction" to the Third Pillar framework (id. ¶ II.2(12)). This proposal represents an extension of the proposal to add conflict of laws, which was already present in the Italian Presidency's June 1996 Progress Report on the IGC, by tacking on the issue of jurisdiction. Numerous legal experts in the civil justice subfield of private international law (Interviews #39, #44, #48, and #50) have strongly criticized this language, which persisted until the late stages of the treaty revision process, as technically "weird" or "wrong," and point to it as proof that the drafting was done by someone who did not know much about this field of law. It is possible, however, that this perception may simply reflect poor translations from original documents into other official EU languages. Finally, the Irish Presidency JHA Note also embraced the need for "institutional improvements" in the Third Pillar and endorsed the call for a new type of Third Pillar legal instrument,[21] which it called a "framework decision" (in lieu of the "common measure" suggested by the Italian Presidency) (¶ II.4).

The IGC Representatives Group met in mid-July 1996 to discuss the proposals contained in the Irish Presidency's JHA Note. Shortly afterwards, a member of the Commission's IGC Task Force (Interview #4) recalls attending a meeting with Michel Petite and Adrian Fortescue (Director-General of the Commission's JHA Task Force) on 31 July 1996, at which they talked about how to carve up the Third Pillar ("discuss with him how to achieve that, what are your experiences, what we can do"). Ongoing intense discussions and drafting continued into August, particularly with Gustaaf Borchardt, who (as Director) was the second ranking official of the JHA Task Force (under Fortescue), and "we arrived at a kind of political compromise early in September" on "how to split" the Third Pillar, and proposed specific treaty language (Interview #4). The Commission representatives, together with Jean-Claude Piris (Director General of the Council Legal Service), informally proposed this compromise to the Irish Presidency (Interview #4).

In mid-September 1996, three institutional actors contributed important proposals, which "formed the basis for discussions at a meeting of the personal representatives on 24 September 1996 (Smith 1999: 187; see also Irish Presidency AFSJ Note ¶ 1). First, the Irish Presidency

presented its Note on Suggested Approach to the JHA, which summarized the state of play after the July meeting of the IGC Representatives Group, at which it had proved impossible to resolve the difficult question of which Third Pillar issues to communitarize. Second, the Council Secretariat prepared a working document on this issue, which was attached as an annex to the Irish Presidency JHA Note.[22] It bears mention here that it is unusual for the Council Secretariat to feed a working paper directly into the highly charged political arena of treaty revisions; normally, Council Secretariat input would first be revised in view of feedback from the Presidency (Smith 1999: 187-8), since the Council Secretariat's formal role is subordinate to the rotating Presidency. The fact that the Council Secretariat's proposals were directly integrated into the Irish Presidency JHA Note is indicative of the extraordinary role played by the Council Secretariat in connection with Third Pillar issues.[23] The third key document released in mid-September was the Commission's Proposal on Communitarization of JHA Provisions (18 September 1996), which made concrete suggestions on how to incorporate Third Pillar issues into the EC Treaty (now TFEU) that governed the EU's First Pillar.

I turn now to the substance of proposals made in these three documents. The Presidency Note, which incorporates the views expressed by the Council Secretariat, calls for developing the "area of freedom, security, justice and the rule of law area of closer co-operation ... ," and for communitarizing some issues related to free movement of persons (principally asylum, immigration, and border control), but *excludes* civil justice issues from the list of those to be communitarized (Irish Presidency Note on Suggested Approach to the JHA 1996: ¶ I, at 2 & ¶ II, at 4). This Note also proposed, however, to expand the Third Pillar's list of areas of "common concern" to include "conflict of laws and jurisdiction," despite the view expressed by some participants at the July meeting of the IGC Representatives that this addition was superfluous (id. at 5). Overall, the Irish Presidency's position on civil justice did not change between July and November 1996.

The Commission's 1996 Proposal on Communitarization of JHA Provisions proposed specific treaty language and was, in contrast, far-reaching. Adrian Fortescue (Director-General of the JHA Task Force) was strongly committed to the notion of the area of freedom, security and justice. According to a member of the Task Force who worked closely with him for years, Fortescue frequently insisted that "you cannot see one without the others," like a "medieval triptych ... one does not make sense without seeing the others" (Interview #16). In the Commission's view, the "area of freedom, security and justice" should include the adoption of "appropriate provisions ... to facilitate the exercise by persons of civil and administrative rights" (Proposal on Communitarization of JHA Provisions 1996: art. I(1)). Moreover, in addition to special treaty provisions dealing with visas, asylum, drugs, economic and financial crime, and customs cooperation, the Commission's Proposal contains the first draft of a treaty provision dealing with civil justice issues. Article F of the Commission's 1996 Proposal states:

> With a view to improving access to justice and providing better protection of individuals rights, the Council shall, where the other provisions of this Treaty do not grant the necessary power to act, adopt provisions aimed at:
> - improving and simplifying the system for serving judicial and extrajudicial documents;
> -improving and simplifying the recognition and enforcement of judgments;
> -approximating the conditions of access to justice; [and]
> -approximating the rules concerning the conflict of laws and of jurisdiction.

There can be no doubt that this Article F is the forerunner to what became Article 65 of

the EC Treaty when the Amsterdam Treaty entered into force.[24] However, the treaty language that was adopted at the Amsterdam summit in June 1997 is considerably narrower than the language proposed by the Commission, in two major respects. First, the Commission proposal set the bar high and articulated the goals of "improving access to justice" and "providing better protection of individual rights." And second, the Commission proposal was not limited to intra-EU, cross-border transactions, but would potentially allow the EU to adopt rules regulating *all* civil litigation in the EU.[25]

The Commission's expansive vision did not gain much traction, however, at least not during the Irish Presidency. The Irish Presidency AFSJ Note (11 November 1996), which was prepared following the 24 September 1996 meeting of the IGC Representatives Group, summarizes the state of play and sets forth draft treaty language. In accordance with the Commission's Proposal, the AFSJ Note reflects unanimity on transferring a handful of JHA issues from the Third to the First Pillar, notably visas, asylum, immigration, and drugs. However, civil justice was not among the JHA policy fields to be communitarized, as of mid-November, with the consequence that no part of the Commission's far-reaching Article F is reflected in the draft treaty provisions set forth in the Irish Presidency AFSJ Note.[26]

Towards the end of its term in office, the Irish Presidency prepared a complete draft treaty, per instructions received from the Florence European Council. Much of the actual drafting was done during a four-day meeting in Kildare, Ireland, with the help of officials from the Council General Secretariat and the Commission (Grünhage 2001: 19). According to a member of the Commission's IGC drafting group (Interview #4), Jean-Claude Piris (Director General of the Council Legal Service) was the lead institutional player on the side of the Council, and not the General Secretariat, though the latter certainly played an important role in shaping the Council's positions, given its substantive expertise in JHA matters. The so-called Dublin II Draft[27] was completed on 5 December 1996, shortly before the meeting of the Foreign Ministers of the EU Member States (held on 6 December 1996), then presented to and discussed at the European Council at its Dublin summit a week later (13-14 December 1996).

As expected – in view of the positions taken in the Irish Presidency AFSJ Note (November 1996) – the Dublin II Draft did *not* call for communitarization of civil justice, nor of criminal justice or police cooperation. Rather, it proposed leaving these issues in the Third Pillar, but would have expanded the scope of "matters of common interest" in the Third Pillar somewhat. Thus, the Dublin II Draft proposed to supplement "judicial cooperation in civil and commercial matters" (art. K.1(6)) by adding the goal of "ensuring consistency in the rules applicable in the Member States on conflicts of law and jurisdiction in civil and commercial matters" (art. K.1(7)). The Dublin II Draft also picked up some of the particular issues that had been flagged by the Commission's Proposal (September 1996), and called for Member States to undertake "common action" pertaining to: "(a) all forms of cooperation between competent ministries and judicial or other authorities of the Member States in relation to the conduct of proceedings and the recognition and enforcement of decisions in civil and commercial cases, including extrajudicial cases, taking account of the development of modern technologies; (b) the approximation of rules on conflicts of law and jurisdiction; [and] (c) the improvement of the conditions for access to justice" (art. K1a(2)).

The Dublin II Draft came to be known as the "outline draft treaty" (Callanan 2007: 227). Some criticized it as being too vague, although it "contained concrete treaty language and possible alternatives," and was thus "already a pretty serious document to work with, reasonably

advanced in many domains" (Grünhage 2001: 19-20). And so the baton was passed to the Netherlands, which assumed the Presidency in January 1997.

Before tracing developments during the Dutch Presidency, I examine the special case of Finland, which not only played an important role during the Dutch Presidency but also in the years immediately following the Amsterdam summit where the decisions were taken to communitarize civil justice and establish the creation of an Area of Freedom, Security and Justice as a new EU objective. Chapter 8 below traces the process of elaborating the first five-year plan for developing the AFSJ, which occurred in the period leading up and during to the first Finnish Presidency (July - December 1999) and culminated in the October 1999 Tampere summit, where that plan was agreed by the European Council (i.e., the Heads of State and Government of the EU Member States).

7.1.6 The Evolving Position and Role of Finland

Finland became a member of the EU on 1 January 1995, along with Austria and Sweden, in the fourth enlargement. This late entry date means that Finland did not participate in the drafting of the Maastricht Treaty, which created the Third Pillar for Justice and Home Affairs issues. Finland was, however, an active participant in the negotiations leading up to the 1997 Amsterdam Treaty, which dismantled part of the Third Pillar and reformed the rest. Both this Chapter 7 and Chapter 8 below show that Finland made important contributions to the communitarization and development of the civil justice component of the AFSJ. This subsection explains how Finland organized its participation in the IGC, introduces the key players, and traces Finland's evolving position on communitarization.

The Finnish negotiating team for the IGC was based in a special EU unit of the Office of the President – Paavo Lipponen (Social Democrat)[28] – led by experienced diplomat Antti Satuli. This team sought input from the Finnish Parliament, as well as from other line ministries. The Ministries of Justice and Interior were the key sources for input relating to Third Pillar issues. My research has focused on the Finnish Ministry of Justice, which has the portfolio for civil and criminal justice issues, but not for other Third Pillar issues (i.e., police cooperation, asylum, immigration, visas, drugs, etc.), for which the Ministry of Interior was responsible. I have interviewed fifteen Finns, of whom ten were personally involved with the events studied in the 1990s – among them the first female Prime Minister of Finland – and five who were not personally involved but are knowledgeable about the JHA field.

The Secretary-General (*kansliapäällikkö*) of the Ministry of Justice at the time, Kirsti Rissanen, was a key mover of the events I seek to explain. By way of introduction, Rissanen is a lawyer who spent about six years in private practice, principally as General Counsel for Marimekko Oy, before starting an academic career. By 1987, she had become the first female law professor at the University of Helsinki, and by 1991, a co-founder of the International Institute of Economic Law (KATTI), which was the first research institute in Finland to focus on European law. Rissanen taught various business and trade law courses, but her academic interests and commitments were broader. She was selected to be Secretary-General of the Ministry of Justice, which is the highest ranking civil servant in the Ministry, at the beginning of 1995, when Finland joined the EU. She was 51 at the time, and the first woman ever to achieve such a high rank in the Finnish civil service (Heino 1995: 1).[29] According to the Minister of Justice who appointed her, Rissanen was the most competent person for the job, and her party affiliation played no role in the decision (Interview Jääteenmäki).[30] Rissanen is, like many Finns, quiet and self-effacing,

but appearances can deceive. In fact, she was a strong force in the treaty-revision process, albeit largely from behind the scenes of the European stage.

Secretary-General Rissanen brought with her to the Ministry of Justice a keen interest in the question of justice, as reflected in her contributions to the book – *Principles of Justice and the Law of the European Union* (Paasivirta & Rissanen 1995) – that emerged from a multidisciplinary seminar held at the University of Helsinki (KATTI) in late October 1994. For a small country on the EU's periphery, this was a high-powered conference, attended by numerous leading professors from European universities, including the elite European University Institute. The conference had a strong orientation towards social justice issues, which is at least partly attributable to the fact that Rissanen's colleague (and the other co-founder of KATTI) was Thomas Wilhelmsson, a pioneer in the analysis of social justice issues in the context of private law. Finland, along with other social democratic Nordic countries (Sweden and Norway) that conducted accession negotiations with the EU in the early 1990s, had feared that national achievements regarding "full employment, equality and solidarity" would be undermined by the EU's "market deregulation and liberalisation of national economies, particularly in the face of the European Central Bank's low inflation, price stability, and restrictive monetary and fiscal policies" (EPRS 2015: 3, 22).[31] These socio-economic concerns are closely linked to the policy positions that Rissanen – and ultimately, Finland – articulated in the context of the treaty-revision process, but do not explain them entirely.

For Rissanen, justice "as a critical ideal" is "undoubtedly ... one of the most driving forces of social change" (Rissanen 1995a: 3). Concern with notions of justice and equity are, moreover, deeply embedded in "Nordic legal scholarship and practice," and anchored in the *Instructions for Judges* that were drafted by reformer, minister and legal scholar Olaus Petri in the 1530s (Rissanen Interview). These Instructions, which emphasize not only the "obligations of the judge, but also the legal protection of the people as well as social and judicial equality" (Finnish MoJ Brochure 1999), are republished each year on the front page of the annual collection of laws in Finland (as well as in Sweden) and remain a keystone of the Nordic legal tradition. Indeed, the Ministry of Justice produced and distributed a special justice-themed brochure during Finland's first EU Presidency in 1999, which reproduces the Instructions for Judges and discusses their contemporary relevance in Nordic legal culture (id., see Appendix H). This view of the role of law in society is deeply embedded in the Nordic tradition: "What are we but people sitting around on stones, dispensing justice to one another?" (Rissanen Interview). Rissanen's statement invokes the image of the Iron Age Nordic stone circles – known as the "court circles" or "judges' stones" – such as the one on Käräjämäki Hill in Finland.

Rissanen's own notion of justice extends beyond a "personal notion" which compels one to "make the world and his or her society more just," and encompasses a communitarian ethical notion built on the "cornerstones of ... mutual understanding and respect" (Rissanen 1995a: 4). According to one Finnish participant at the 1994 Helsinki conference, the discussions about entering the EU in Finland had focused on "payments and ... farm subsidies that we might get as a member state," but "now it is time to start to find some positive content, some positive goals, that we wish to achieve together in the future" (Niiniluoto 1995: 9). Insofar as notions of justice might vary throughout the EU, one conference participant noted that differences in national legal systems or enforcement approaches could be framed as "third-order barriers" to market liberalization, and added that such "cultural differences" are "less obvious, but possibly more malleable" expressions of cultural diversity than, say, language (Daintith 1995: 151-6).

Rissanen herself repeatedly expressed doubts about whether the EU would place adequate emphasis on fairness and justice to satisfy Nordic expectations upon accession (e.g., Heino 1995: 1). In her contribution to the 1994 Helsinki conference, which took place just before Finland joined the EU and she took the administrative reins at the Ministry of Justice, Rissanen called the goal of establishing an "internal market in its own end" an "empty goal as far as social values are concerned" (Rissanen 1995b: 422). At the same time, she regretted the growing "distance between social values and economic and political actions," and noted that the "present political landscape does not seem to offer much help for justice considerations" (id. 425). Rissanen expressed concern that the EU's overemphasis on building a market could lead to failure to pay "special attention ... to the realization of justice," which is crucial, given that EU regulations "have an influence on every aspect of society" (Heino 1995: 1). In her view, it is always "necessary to ask whether the end result can be considered just from the standpoint of its citizens" (id.). In concluding her 1994 remarks, Mrs. Rissanen (1995b: 410) suggested that the "role of the community in questions of justice" – in the sense of "justice in communitarian thinking (equality, the common good, social justice)" – might "deserve greater emphasis in the EU context in the future." Notwithstanding her strongly expressed views, however, Rissanen was not naive about the limits and risks of a rights-based approach – in contrast to political solutions – as a means of defending social equality and other citizens' interests, which can lead to "justice for the powerful" who are "prepared to fight" for their rights in court (id.). "The whole judicial administration has to know its limits: what can be done with judicial means and what cannot. ... On the other hand, we also have to see where it would be possible to build a better society by judicial means" (id.). Rissanen brought her concerns and commitments to social justice and communitarian ethics from academia to government.

Returning to the overarching issue of whether to communitarize Third Pillar (JHA) matters, Finland's position evolved over time. Despite efforts by Finnish Ministry of Justice to push for communitarization of civil justice in the Amsterdam Treaty, the Finnish Government did not support this position during the early stage of the treaty-revision process in 1996. The Grand Committee of the Finnish Parliament went on record in April 1996 in support of the position that civil law cooperation should remain intergovernmental (Interview #42), which position is consistent with the general view that was expressed at the outset of the Irish Presidency in its JHA Note (1996). None of my Finnish interviewees have first-hand knowledge of, or are otherwise aware of the reasons why Finland took this position in 1996, but this is not for lack of effort to uncover the reasons (Interview #42). Finland maintained this position throughout most of the Irish Presidency and only endorsed the Commission's proposal to transfer civil justice cooperation to the First Pillar in late November 1996, at which point the Finnish position departed from the state of play as reflected in the drafts prepared by the Irish Presidency, which would have communitarized some Third Pillar issues, but not civil justice (subsection 7.1.5 above) (Interview #42). Once again, none of my interviewees knows why the Finnish position changed; the available documents from the Government and from Parliament are cursory and devoid of explanation (id.).

Finland went on to play a key role during the Dutch Presidency in the first half of 1997 in regard to civil justice issues, when Mrs. Rissanen kept up pressure to put – and keep – civil justice on the EU's agenda, both during the treaty-revision process that culminated in Amsterdam in June 1997, as well as during the first Finnish Presidency in 1999, when the Tampere program for developing the AFSJ was concluded (Chapter 8).

7.1.7 The Intergovernmental Conference (IGC) During the Dutch Presidency (January - June 1997)

The Dutch Presidency (January - June 1997) picked up where the Irish Presidency had left off, namely with the Dublin II Draft. The Dutch first prepared a detailed interim draft in March 1997, which embodies the results of the first half of the Dutch Presidency's term in office (Dutch Addendum to Dublin II Draft 1997). This was a period of intense focus on Third Pillar issues. In particular, it was during the first half of the Dutch Presidency that the Finnish and French governments submitted their proposals on communitarization, both of which placed particular emphasis on civil justice issues (Finnish Communitarization Proposal: Realizing Individual Rights 1997; French Amendments to Irish Draft 1997), but which also diverged considerably.

France suggested detailed amendments to the justice-related provisions of the Irish Presidency's Dublin II Draft (French Amendments to Irish Draft 1997), which pointed in the opposite direction from that of the Finnish proposal on civil justice issues. The French proposal – in accordance with the position taken in the Dublin II Draft (subsection 7.1.5 above) – would have left civil justice in the Third Pillar, and even watered down the language on cooperation in the Third Pillar. Whereas the Dublin II Draft contemplated the possibility of approximating (i.e., harmonizing) the "rules on conflict of laws and jurisdiction" and improving the "conditions for access to justice," France proposed to delete these two provisions. Instead, it called for (some undefined form of) "action to simplify the transmission of judicial and extrajudicial documents; simplify the taking of evidence between Member States; permit the mutual recognition of companies and legal persons," as well as efforts to "promote the knowledge of the law of the Member States" (French Amendments to Irish Draft 1997: 15). As such, the French position on civil justice would have rolled more back to the Member States.

Finland, on the other hand, pushed for much greater integration on civil justice issues. The Finnish delegate to the IGC Representatives Group presented ("tabled" in European parlance) a draft provision for communitarizing civil justice on 14 February 1997 (Interview #60; see also Kohler 1999: 12). The Finnish proposal, in line with the maximalist views of Rissanen at the Ministry of Justice, envisioned far-reaching Europeanization of the civil justice field. The Finnish proposal, which was drafted by the Secretary-General of the Ministry of Justice and her staff, was unusual in that it reached beyond the underlying logic of free movement of persons, presented civil justice as an overarching issue that should be addressed on its own terms, and linked the EU's emergent area of justice to the right to fair trial embedded in article 6 of the European Convention on Human Rights. The Finnish proposal was based on a "think paper" that had been prepared by Rissanen and her staff at the Finnish Ministry of Justice earlier that month (Finnish Communitarization Proposal: Realizing Individual Rights 1997), which proposed to add a new chapter on access to justice (*Oikeussuoja*) to the EU treaty, with the aim of ensuring that everyone in the EU would have the right to a timely, fair and public trial for the determination of his or her rights and obligations. This Proposal called for full communitarization of civil justice issues and specified that the EU would be able to legislate on choice of law, service of process, and the recognition and enforcement of judgments rendered by other Member State courts, legal aid, and civil procedure.[32] As such, the Finnish proposal went far beyond the position staked out in the Dublin II Draft, both in terms of the role and nature of civil justice in the EU, as well as the scope of civil justice issues that would be fair game for joint action among the Member States. The formal Finnish draft for a new Article F provided:

For the purposes of ensuring judicial protection for individuals in civil matters, the

Council shall adopt the necessary measures in the following areas:
-laws and regulations governing choice of law and jurisdiction
-conditions for access to justice
-forms of cooperation between courts, tribunals and other judicial authorities of the Member States[33]
-recognition and enforcement of judgments and decisions of courts, tribunals and other judicial authorities

According to Secretary-General Rissanen, she was inspired by the Commission's September 1996 Proposal, but recognized that the Commission's Proposal was too ambitious and "did not fly" (Rissanen Interview). It was "too long" and "went too far"; "nobody really wanted to consider that document," and it was "simply put aside" (id.). Rissanen saw a "practical possibility to take a next step towards something which I idealistically think should be the vision for us all," and "picked it up" (id.). "I had a dream of a Europe which would be socially, culturally for everybody," and her yardstick for the success of European integration is "whether it creates more equality in ... social relations, diversity" (id.). It was a "very natural idea for a lawyer" to see the AFSJ as the next developmental step for the EU to take, in order to protect persons from falling through the cracks in legal protection, through the "gaps or holes where people would fall, unless we build bridges between the ... judges and so on from each individual Member State ... When people move freely, there has to be a way to overcome the [institutional] limitations of national competencies" (id.). In the EU "we had a common market, we knew that the common currency is coming, so if you look at any society, what is needed after that is really the proper protection of people who are moving, who are moving freely, and so on. So that's simple" (id.). Rissanen's strategy – as a "pragmatic Finn" (id.) – was to select one element from the Commission's Proposal that she believed could succeed and one which she suspected might otherwise fall by the wayside, given the enormous amount of attention that was being placed on internal security measures relating to visas, asylum, immigration, drugs, and the like, and to throw her weight behind it. "It was not my creation, my part was to understand that this, and only this is now possible, but this is a way ahead. That's all that I brought. It's a political judgment" (Rissanen Interview). From the perspective of a member of the IGC negotiating team, the civil justice issue was "one of the hobby horses" of Justice Secretary Rissanen, "who wanted to improve the access to justice concept. I think that basically she was the only one who spoke about that in the European context" (Interview #10).[34]

Rissanen's commitments to a certain notion of justice were not input directly into the EU's ongoing treaty-revision process, given that she herself was not involved in any of the negotiations that took place (mostly) in Brussels, and ultimately in Amsterdam. Rather, they were channeled and filtered through the institutional arrangements that Finland put in place in the lead-up to the Amsterdam summit in June 1997. She was nonetheless closely connected to the treaty-revision process and had multiple avenues for influence, which she used to push her civil justice agenda from behind the stage in Helsinki. In this, she had support from the highest echelons of the Finnish government, which were keen to achieve a pro-integration outcome in Amsterdam, including in the justice policy field. Antti Satuli at the Foreign Ministry, who was Finland's Permanent Representative (Ambassador) to the EU (1995-2002) and chief negotiator, was "always pro-integration" (Interview #60). Finland's Foreign Minister at the time – Tarja Halonen (1995-2000)[35] – was a member of the Social Democratic Party, and answered to Prime Minister Paavo Lipponen (1993-2005), who was not only a Social Democrat but also a "very

strong politician with a vision of Europe" (Interview #3).[36] Prime Minister Lipponen exerted considerable "political pressure that we should not be too reluctant," and instructed the IGC negotiation team to "show a ... progressive attitude also in the field of justice" (Interview #56). At the time, Finns were "fresh members of the EU and we wanted to make a stamp of our own in the EU, we were quite active, and this government was quite active and visionary in EU policy" (Interview #36). "We wanted to have a high profile, as a master pupil of the EU" (Interview #37), and civil justice was seen by the Ministry of Justice as a field where the experience of Nordic legal cooperation, which is built on strong institutional cooperation, "shows a way that could be good for the EU too" (Rissanen Interview).

Civil justice was also impelled forward by the fact that some in the Finnish government (notably the Ministry of Interior) "said no way in criminal justice," which rendered civil justice "the simplest or easiest" to achieve (Interview #56). According to a member of the negotiating team, Ambassador Satuli took the "political or strategic" position that "you could reach visibly progressive good results [in the civil justice field] without sacrificing too much, ... without making major concessions, compared to other areas like trade policy" (Interview #10). Civil justice was the path that offered the least resistance – not just in Finland, but in numerous other Member States as well, among them Germany and the Netherlands – which created an opening through which a committed civil servant in a national ministry could push for innovations that were in line with her professional and ideological commitments.

While all Finnish ministries affected by European integration were heard in the treaty-revision process, the Ministry of Justice appears to have had unusually good access and participated regularly as part of the "hard core of the negotiating team at the IGC" (Interview #56). As the senior civil servant in the field of justice, Rissanen had multiple avenues of influence. Formally, among the three special working groups that Prime Minister Lipponen put in place for the IGC, she chaired the one on institutional questions. (For this role, she had two assistants, Heidi Kaila and Alexander Stubb, both well-placed and young but already experienced civil servants from the Foreign Ministry.[37]) Of perhaps greater significance, in terms of the civil justice agenda, were Rissanen's hand-on approach to drafting (Interview #56) and her close ties to a number of key persons on (or closely involved in the work of) Finland's small IGC negotiating team. Rissanen had previously hired Antti Peltomäki, a member of the IGC negotiating team, to develop the international dimension of the Ministry of Justice's programs. Mikko Puumalainen worked on Third Pillar (JHA) matters with the Finnish representation in Brussels (Coreper). Another strong link between the Ministry of Justice and the IGC negotiating team was Inga (Pöntynen) Korpinen, a business lawyer whom Secretary-General Rissanen had persuaded to leave private law practice in order to serve as a member of Finland's IGC negotiating team, with special responsibility for JHA matters.

According to one Finnish participant IGC negotiations, Rissanen was "full of ideas, impressive" at a time when "most could not see the importance of civil justice" (Interview #60). For Rissanen, it was clear that it is "not possible to build institutions only for markets, because all social institutions or structures ought to be more complete ... in covering these spheres of life. So people who come to the market also have to have homes somewhere ... something was missing" (Rissanen Interview). Under her lead, the Ministry of Justice researched "which problems Finns have in all areas of practical life when abroad" and looked at issues relating to "access to administration" (Interview #60). Inga Korpinen, who was the key liaison between the Ministry of Justice and the Finnish IGC negotiating team, had first-hand experience with such

problems when working as a private lawyer in Brussels. "I've had some experience of what ... kind of things you may be facing when moving from one country to another in Europe. And ... one of the real concrete ideas – it's so stupid (laughing) – in this is that when I moved to Brussels, I thought it was so odd that when you go and apply for a carte d'identité, you go to the municipality ... to which you move, you go to the officer who is in charge of this, and then they tell you, lady, madame, you need this, this, this and this documents when you apply for it, and then you go back home, ... I came to Finland and I went to an office to try to get all the documents I needed, then I went back to Brussels. Oh no, not that kind of document, another kind. This experience had already given me one idea. One thing that Europe needs is that we ... need from our officials or officers, municipal whatever, when you need a birth certificate, do something ... so that when one country gives you a birth certificate the other country knows that, yes this is a birth certificate given by that country, and I can accept it. But even this did not apply in Europe. This was the first step" (Korpinen Interview). Rissanen's key idea was to address "everyday questions linked to free movement of persons, transnational movement. This is the most evident aspect where you see that union is not complete ... so long as everything is OK, nobody cheats. But once something bad happens, you notice, it's not complete. It's more relevant to get easy cheap access to justice" (Interview #60).

Finally, Finnish preferences were partly shaped by the fact that Finland is a "safe country, we don't have such problems with immigration, crime, drugs. We can afford to put emphasis on justice. Others [in the IGC negotiating team] were more concerned with issues that were important to populations and political careers" (Interview #60). But Rissanen was "very visionary, very pushy with it" (id.), despite resistance from some members of the Finnish team who were more experienced in the "ways of Brussels" and not convinced that they could make her "too academic" ideas fly (Interviews #10 & #56).

The Finnish government did not pay "very much attention" to the Ministry of Justice proposal, which was "one of those, well, reasonable looking proposals" (Rissanen Interview). The proposal did not generate any "intensive domestic debate," because it "did not raise any political ... concerns. It was taken as a very well prepared, formal and legal thing," in spite of Rissanen's view that it was "not just a technical thing. In my understanding it was a question of equal justice" (id.). Despite the important stakes, the Ministry of Justice proposal sailed through proper Finnish government channels with "no fuss" (id.). After receiving the necessary approval by the Ministerial Committee on European Affairs (*EU-ministerivaliokunta*), the proposal landed in the hands of the Foreign Ministry. The Foreign Minister at the time, Tarja Halonen, was "also a very active woman" who formally headed Finland's negotiating team (Interview #60), though other members of the negotiating team reported that the Finnish Ambassador to the EU, Antti Satuli, did much of the negotiating (Interviews #10 & #56). It was, in fact, Satuli who actually introduced the Ministry of Justice proposal in the mid-February 1997 meeting of the IGC Representatives Group, and "very few, even nobody reacted at that moment" (Interview #60). At one point, Satuli "appealed to the Commission and ... asked them for support and showed them that it is originally a Commission proposal" for what became Article 65 (id.).

The Dutch Presidency did not take up the expansive Finnish idea of enlarging the notion of civil justice by linking it to the notion of access to justice, and the Finnish proposal never received an official number to designate it as an IGC document. Still, the Dutch Presidency took the Finnish proposal on board "without major debate" and added civil justice issues to the list of topics to be communitarized, despite the fact that Member States were not yet unanimous on this

point (Second Dutch Presidency AFSJ Note 1997: ¶ B.3).

Meanwhile, the Finnish Ministry of Justice was not content to rest. It convened a "Seminar on the Third Pillar of the European Union" in Helsinki (10 March 1997),[38] which was attended by Member State Ministers of Justice, the Commission, and the General Secretariat of the Council, despite some objections from the Finnish negotiating team that Rissanen's academic approach to the business of EU politics was inappropriate (Interview #10).[39] At that Seminar, Rissanen called for the "transfer of cooperation in civil matters" to the First Pillar, pressing her argument that the "judicial protection of individual rights should be seen as an integral part" of the First Pillar, and urging that "more impetus ought to be given to the respect of rights of people in the Treaty" (Finnish Report on IGC Meeting - Civil Justice 1997: ¶ 2). The Commission representative pointed to the legal cooperation among Nordic countries as a favorable example, noting that it is "lighter and not as bureaucratic as between [EU] Member States" (id.). Discussions during the Helsinki Seminar sprawled a bit, because of the nexus between civil justice matters, on the one hand, and broader questions about the role of fundamental rights in the EU, which impinged on a parallel (but separate) hot controversy over whether the EU should accede to the European Convention on Human Rights and/or articulate its own set of fundamental rights. It is clear from this discussion, however, that some countries (including Denmark and Sweden) remained strongly opposed to communitarization of justice issues, while others (including Germany and the Netherlands) were in favor of communitarization.[40] Among those attending the Helsinki Seminar was Herta Däubler-Gmelin, a German parliamentarian (SPD) who was deeply involved with matters relating to legal reform, having chaired the Legal Committee of the German Bundestag (1980-1983) and, later, the *Rechtspolitik* (legal politics) working group and having also served as *Justiziarin* (chief legal counsel) of the SPD bloc in the Bundestag (1994-1998).[41] From the perspective of the Finnish Ministry of Justice, Däubler-Gmelin was a very supportive ally, as was French Minister of Justice Elisabeth Guigou[42] (Rissanen Interview).

According to an academic source, Rissanen pushed to get "academic people and bureaucrats at the same table" because she "wanted to show that it's not only ... very technical, what ... the bureaucrats are doing, but she wanted to have academic people involved in those discussions" (Interview #37). She was "in that way very clever," because she "understood that we are playing different roles. So ... she had the role [then] to be the head of a ministry of justice. And we have our role to be critical academicians. But she wanted us to discuss with each other, and she has been very active, trying to have common approaches, and common seminars to somehow also show to us which are those problems of real life that we have to notice" (id.). Moreover, Rissanen understood that "very many so-called legal things have to be done, but with other instruments than those concerning European private law harmonization, [substantive] EC law as such. And she always said that it isn't possible to have real cooperation in legal matters when civil servants do not trust each other. And then she told me, I have had some contacts with Justice Ministers in France and Germany and ... we want to go a step further. But we know that we have to somehow be able to work with each other so that ... to have for instance more understanding for, more real cooperation. ... She said we should have within the EU some procedures or some ways or some rules concerning these very practical situations. But we can't have a common understanding on what marriage really is, or what the family is. But somehow we must guarantee that the thing can function, so that we can trust each other, and those procedures. I personally think that this is a very postmodern way to understand justice –

procedures and formalities – because no one speaks anymore about [wanting] to know what is the LAW in a case or JUSTICE. We think it's enough when procedures can guarantee ... legitimacy" (Interview #37).

Shortly after the Helsinki Seminar, the Dutch Presidency presented a new set of draft treaty provisions (Dutch Addendum to Dublin II Draft, 20 March 1997). Article A.1(d) of the Addendum called upon the Council to adopt "measures on judicial civil matters, as provided for in Article F," in order to "establish progressively an area of freedom, security and justice," which is tantamount to communitarization. Article F, which clearly draws its lineage from the Commission's Proposal (September 1996), as well as the Finnish (and possibly also the French) proposals (February 1997), provides:

> Action on *judicial civil matters* shall include:
> - improving and simplifying the system for serving judicial and extrajudicial documents;
> - improving and simplifying the recognition and enforcement of decisions in civil and commercial cases, including extrajudicial cases;
> - approximating rules concerning the conflict of laws and of jurisdiction;
> - approximating rules of civil procedure, in particular rules relating to admissibility of evidence.

The Dutch proposal falls far short of the Finnish ambition to ensure "judicial protection for individuals" and "access to justice," and omits some of the detailed provisions that the Finns had proposed. At the same time, however, the Dutch proposal also goes beyond the Finnish proposal, insofar as it adds the possibility of "approximating [i.e., harmonizing] the rules of civil procedure." It is also noteworthy that the Dutch proposal opts for the overarching label "judicial civil matters," which is less sweeping than what Finland reached for, but also more expansive than the narrow Third Pillar language ("judicial cooperation in civil matters"), which was ultimately adopted in Amsterdam. In sum, the Dutch proposal – like the Commission and Finnish proposals before it – offers an expanded list of issue areas which the EU could regulate and comes out in favor of communitarization.

In April 1997, a new institutional actor appeared on the treaty-revision stage: an IGC Working Group called the Friends (or Amis) of the Presidency, which was tasked with working over draft treaty language in anticipation of the Amsterdam summit, at which national heads of state would be called upon to agree on final treaty language.[43] During the final weeks before the Amsterdam summit (June 1997), the IGC split into two levels: the ambassadors, and the lower-level Friends Group, which prepared text pursuant to the ambassadors' instructions (Interview #60). Thus, once the diplomatic negotiators had agreed on a matter in principle, they delegated the drafting to the lawyers in the Friends Group, which consisted of the "young guys, with knowledge about substance" (id.). Formally speaking, the "Group's task was technical in nature and ... delegates' participation in this technical exercise did not prejudge their Governments' opinion as to the appropriateness" of the outcomes (Dutch Presidency Note on the Friends of the Presidency 1997: ¶ 3). In practical terms, however, it was not always clear where the line was to be drawn (Interview #60), and the Group occasionally referred questions that it perceived as political to the IGC (e.g., Dutch Presidency Note on the Friends of the Presidency 1997: ¶ 8). Yet this group did, in fact, wrestle with "tricky questions" about how to frame the civil justice provisions (id.), along with a great many other provisions. In the end, a number of textual changes introduced by the Friends Group found their way into the Amsterdam Treaty.

The fact that the Friends Group was instructed not to address political issues does not

mean that its work was devoid of strategic considerations. My findings on this issue are not comprehensive, but they do offer some insights into the "Machiavellian" maneuvers (Interview #60) by those entrusted in the late stages of the treaty-revision process with legal drafting. Three participants referred to a "technical legal debate" over whether it would be better to include a specific legal provision permitting the EU to legislate on civil justice measures (including a list of the types of measures to be adopted) or to rely instead on the (already existing) generic internal market provisions to provide the legislative basis for such measures (Interviews #4, #14, and #60). Some legal experts were reluctant to include a specific provision, since they believed that the EU had broader legislative competence under the generic treaty provisions, which empower the EU to adopt internal market legislation, and feared that adding a specific treaty provision would *reduce* the EU's power to act in the civil justice field, rather than *expand* it. In the end, they decided to "close their eyes" and "pretend not to notice" that the real impact of the new treaty provision (i.e., Article 65 of the EC Treaty) was to carve down the EU's competence, and move forward in the hope that a broad interpretation of the new treaty language would eliminate the problem down the road (Interview #60). Adding a list of specific civil justice issues to be addressed was viewed as particularly "risky business," with some urging that it would be better not to be "too explicit" or to "flag too much attention now," but that "eventually they [i.e., the Member States] will have to accept civil justice" (id.).[44] Another example of strategic behavior within the legal drafting circle is a tendency, noted by one participant, to "use economic arguments" relating to free movement principles and the internal market, when in fact the understanding and intention was much broader (i.e., access to justice, citizenship, the idea that free movement of persons is ultimately "linked to everything," meaning every aspect of personal life) (id.).

The Friends Group worked over the Dutch Addendum to the Dublin II Draft, which was presented in March 1997, and revised Article F at its meeting on 8 April 1997 (IGC Secretariat Note re: Civil Justice Agenda 1997). This version of Article F on civil justice differs from previous versions and is nearly identical to the language actually adopted at the Amsterdam summit, which points to the key role played by the legal experts in the Friends Group in drafting the text of what ultimately became Article 65.[45] One notable change is in the opening phrase of the Friends Group's version of Article F, which refers to the "field of judicial cooperation in civil matters ... ," and thus reverts to language used in the Third Pillar. As such, it represents a rejection not only of the sweeping language proposed by the Finns but also a retreat from the less sweeping, but still expansive language proposed by the Dutch Presidency ("judicial civil matters").

The draft prepared by the Friends Group was discussed at a meeting of the IGC Representatives Group on 21-22 April 1997. The Finnish government prepared a detailed protocol on the discussions that took place at that meeting on the issue of civil justice (Finnish Report on IGC Meeting - Civil Justice 1997).[46] For the most part, the meeting was an attempt to clarify the overall positions of the Member States on the issue of communitarization, rather than to focus on textual details. At this stage – just two months before the Amsterdam summit – the Member States were divided, with a slight advantage in favor of communitarization.[47] Austria, Denmark, France, Ireland and the United Kingdom supported leaving civil justice in the Third Pillar, with France emphasizing the close nexus between the civil and criminal justice fields. Belgium, Italy and the Netherlands joined Finland in urging that civil justice issues be moved into the First Pillar (i.e., communitarization). Germany also supported full communitarization.[48]

Sweden's position on communitarization was unclear, though it reserved the right to suggest improvements to the text, if the provision should be included in the First Pillar. Spain's position was also unclear, but it called for consideration of the relationship between the proposals and Article 220 of the EC Treaty. Two Member States, Belgium and Luxembourg**,** raised concerns about the "common action" language that the Friends Group had added at the outset of Article F, although the gist of their objections is ambiguous. Finally, a few Member States also took positions on the issue of what legislative decision-making rules they would favor, if civil justice measures were indeed communitarized.[49]

In the final phase of its term in office, the Dutch Presidency convened a special drafting session in Noordwijk, at which Member State representatives, along with members of the Council Secretariat and Commission Task Force, prepared a consolidated draft treaty in May 1997, shortly before the Amsterdam summit meeting (16-17 June 1997) at which the European Council hammered out the final terms of the Amsterdam Treaty. The Dutch Presidency presented the final Draft Treaty of Amsterdam on 12 June 1997, just days before the summit. Article E of that Draft (which replaced Article F in previous drafts), contained only one significant change vis-à-vis the draft prepared by the Friends of the Presidency Group. That change was found in the opening sentence, which referred to measures "to be taken ... in civil matters *having cross-border implications*" (emphasis added). Limiting EU regulatory competence to cases "having cross-border implications" is a highly significant change, since it would trim the EU's wings by preventing wholesale regulation of civil justice matters. In particular, this language aims to prevent the EU from regulating 'internal' civil justice matters, which remain the competence of the Member States, as well as 'external' matters, which involve non-EU states.[50]

My research has uncovered two quite different stories about the origin of the limiting "cross-border" language that was introduced in May 1997. In most accounts, it was the UK that insisted on introducing this limitation (Kennett 2000: 51, note 105; Interviews #39 & #60). One other source close to the process, however, has suggested that limiting language was introduced at the behest of, and in order to protect the turf of the Hague Conference on Private International Law, which has a long tradition of working towards harmonization of civil justice issues, both among European countries but also (increasingly) on a broader global basis (Interview #58). According to the latter source, someone from the Dutch Ministry of Justice called the Secretary-General of the Hague Conference (Hans van Loon) shortly before the Amsterdam summit and informed him what was in the offing, which prompted him and the head of the Dutch Staatscommissie for Private International Law (Teun Struycken)[51] to request a meeting with the Dutch Secretary of State of Foreign Affairs in charge of European Affairs (Michiel Patijn), in order to discuss how the EU proposal would undermine the multilateral work of the Hague Commission (id.). Some language was drafted "on the corner of the minister's table" that would have protected the work of the Hague Conference by limiting the EU's activities to intra-EU matters (id.). My research has not turned up the text of this proposal, but many experts have noted their disappointment that the limitation to "cross-border" activities does not go far enough to protect the interests of the Hague Conference (Interviews #25, #33, #39, #45, #48, #54, #58, and #66).

Just days before the summit meeting in Amsterdam, the text of Article E in the Dutch Presidency's final draft – which is the immediate forerunner of Article 65 of the EC Treaty – was very close to the language ultimately adopted by the European Council. The precise language was worked out through multiple iterations of intense negotiation and debate, on the basis of broad

proposals put forward by EU institutional actors and a few Member States, by the IGC Negotiating Committee and the small group of persons who were entrusted with the task of preparing a draft treaty text for the European Council's consideration. According to someone responsible for JHA issues in the Commission drafting team, Article 65 is "one of the most carefully drafted articles in the treaty," which took "months and months and months" to draft, because it embodies "not a peace treaty, but a kind of no-fire situation" (in terms of the scope and institutional features of the civil justice policy field) (Interview #4).[52] And yet, despite all the painstaking efforts to draft acceptable treaty language, the text embodied in the Dutch Presidency's consolidated draft of late May 1997 was still just a proposal, since the Member States had not yet reached consensus on whether to communitarize civil justice issues in the first place.

7.2 The Amsterdam Summit (16-17 June 1997)

Despite more than a year of intense discussions over Third Pillar issues, in general, and the issue of communitarization in particular, the question was far from settled on the eve of the Amsterdam Summit. Indeed, agreement on AFSJ issues was not reached until the intense final negotiations in Amsterdam, when the Dutch Presidency "stopped the clock" and forced the summit meeting into overtime until the wee hours of the morning of 18 June 1997, which made it possible to claim that the summit negotiations had finished on time (e.g., Interview #8). First-hand accounts of what actually transpired in Amsterdam are virtually non-existent, given that negotiations between the heads of state and government of the Member States took placed behind closed doors (but see Stubb 2000).

Note-takers are allowed into the negotiation room for a period of time during European Council summits, but must subsequently leave that room and enter a separate room, where they go through their notes with the so-called Antici officials. In the context of an IGC, the Anticis comprise a sequestered group consisting of someone from each Member State's delegation. The Antici officials make notes based on what they hear from the tag-team of note-takers, then transmit their notes to their respective delegations (Interview #10). This system not only preserves confidentiality but also minimizes interference with the deliberations among leading national politicians from each Member State who are meeting at the summit. There is thus, after each summit meeting, a very small handful of persons (beyond the politicians themselves) who have first-hand knowledge of what happened during the negotiations, and they are bound to confidentiality. Still, word gets out, and a number of my interviewees were among the privileged national circles who had access to this information, albeit mostly second- or even third-hand.[53]

The large number of major issues on the table in Amsterdam – among them, enlargement to include Central and East European countries, major institutional reforms on matters such as re-weighting of Member State votes in the Council and the number of Commissioners, defense, and monetary union – means that limited time was available for discussion of each issue. A small issue like civil justice was barely worth detailed mention. Rather, civil justice was one of the 'eggs' in the AFSJ 'basket' that was juggled back and forth until the bitter end of the negotiations. Overall, the European Council made a "massive transfer of powers" from the Member States to the Community on AFSJ matters, and civil justice was one small piece of that package deal (Petite 1998b: section I.2; see also Moravcsik & Nicolaïdis 1999).

Beyond the complexity and sheer quantity of major issues on the table, the Amsterdam summit did not take place in an atmosphere of political stability. Two large Member States at the

time – France and the United Kingdom – had held elections a month before the Amsterdam summit (in May 1997), and both elections resulted in political upsets. In France, Gaullist President Chirac had dissolved Parliament and called for legislative elections, expecting them to strengthen the role of the right. Instead, the result went heavily in favor of the left-wing parties, with the result that Socialist Lionel Jospin became Prime Minister. In the UK, Tony Blair's Labour Party swept John Major's Conservative Party out of office. These political upsets shifted national political priorities suddenly. The changes in France brought strong new socio-economic impulses into the mix, given Socialist Jospin's emphasis on employment and EMU (European Monetary Union). As for the UK, which had steadfastly opposed communitarization of JHA issues throughout the negotiations, it was not at all clear what position the incoming Blair government would take in Amsterdam. These political changes also brought new and inexperienced actors in for the final act of a long and convoluted play (Sverdrup 2000: 262). Overall, the political changes "created uncertainty and turmoil during the final days of the IGC" and "distracted the discussion from the issues on the agenda" (id.).

Final preparations for the Amsterdam summit were characterized by a high degree of internal bickering among the Member States (Hurriyet 1997). The Dutch Presidency convened an informal meeting of EU leaders just weeks before the summit began. The meeting (IGC Conclave) in Noordwijk (NL) on 23 May 1997 gave Member States an opportunity to "sound each other out and gauge the chances of a successful agreement at Amsterdam" (Reuters 1997).[54] During this meeting, German Chancellor Kohl confidently predicted that "there will be a treaty in Amsterdam" (Hurriyet 1997), thus publicly throwing his weight behind the goal of taking positive strides towards further integration, even in the face of (what proved to be) insurmountable disagreements over major questions such as institutional reform.

Chancellor Kohl is reported by numerous sources as having played a key role in shaping the final contours of the AFSJ deal, which included civil justice among the communitarized policy fields. He was, by no means, the only proponent. Two of my sources mention a meeting that took place between fellow conservative politicians and "long-time friends" (Cini 1996: 203) Helmut Kohl and Jacques Santer, the former Prime Minister of Luxembourg (1984-1995), who had left national office to become President of the EU Commission in 1995. My sources could not pinpoint when the meeting took place during the IGC process, but reported the gist of the meeting as they had heard it from inside national and EU institutional sources (Interviews #32 & #39).[55] Santer – then serving as Commission President – was concerned that too little of substance would come out of the Amsterdam meeting, and urged Kohl to push on communitarization, which would provide something for the citizens. Kohl was reportedly in agreement with Santer's basic line of argument, and he subsequently behaved accordingly. Whether Kohl was strongly in favor of civil justice communitarization remains subject to some doubt, despite strong support from the German Federal Ministry of Justice. According to one source, Kohl came out in support of civil justice communitarization when confronted with the impossibility of reaching consensus on communitarization of criminal law and police cooperation (Interview #32). Given that we "must achieve something," the EU should "take civil justice instead" (id.).

This "lesser of two evils" logic is better established in the case of the Dutch government. The Dutch Government was a proponent of communitarization. In particular, Michiel Patijn who led the negotiations, strongly supported bringing the so-called Schengen issues (border control, free movement of persons) into the First Pillar (e.g., Mazzucelli 2003). My sources do not reveal

Patijn's own position on civil justice. However, my research does reveal that officials in the Dutch Ministry of Justice who were responsible for criminal law matters "preferred to stay out of the First Pillar. And they managed to make a deal and say, we will push for the civil law to be put in, whereas maybe the civil law persons had preferred to stay out too, to remain in the First Pillar. It was a ... sort of guerrilla action on the level of civil servants in the ministries. And I think the criminal law people ... were victorious in this battle, ... It's just lower level interests and personal preferences, it had nothing to do with major European policy interests" (Interview #48). One reported source of concern, within the Dutch government, was the notion of "Brussels imposing a policy that it is not in line with the very liberal Dutch policy on drugs" (id.).

Overall, my research shows that communitarization of civil justice was a low priority issue for most Member States, save the Finns, who were staunchly in favor. Other Member States that supported it did so, in some cases, because it was viewed as an acceptable sacrifice in order to keep more sensitive issues relating to criminal law and police cooperation in the Third Pillar, and thus more firmly under Member State thumbs. There is, moreover, a real question whether heads of state had much knowledge about the niceties of civil justice, even if some of them had studied law at some point in their lives. According to one source, a Ministry of Justice official with expert knowledge in the civil justice field, was invited to attend a breakfast meeting with the head of state prior to the negotiations in Amsterdam and asked whether the draft text for the communitarization of civil justice issues was something "we could agree to" (Interview #6). The pro-integration expert, who well understood the far-reaching implications of the change under consideration, refrained from raising the alarm, and simply replied that it did not entail significant changes (id.).

During the final negotiations in Amsterdam, the "agenda shifted" such that "issues which had been central in the initial stages of the conference were discussed in the final minutes, while issues more or less unrelated to the IGC attracted considerable attention during the final hours" (Sverdrup 2000: 253). The Dutch Presidency was "determined to conclude the IGC there and then," and drove summit participants to a hard bargain in what one observer has called "an appalling display of political shortsightedness" (Weiler 1997: 310). The status of civil justice shifted numerous times during the actual negotiations in Amsterdam; one source close to the process stated "we were told it's in, it's out, it's in again" (Interview #10). When the final bell rang, after eighteen hours of negotiations (Sverdrup 2000: 253), civil justice was on the First Pillar side of the equation. In the end, civil justice was little more than "small change" (Interview #8) at the bargaining table, a chit that could be tossed onto the scale on the side of success.

That said, it bears repeating that the final wording of civil justice treaty provisions (including what became Article 65 of the EC Treaty) remained "very controversial until the very end" (Interview #4), and that significant modifications were added in the final round of negotiations. With regard to Article 65, as discussed in detail in subsection 7.1.7 above, the key textual alteration at the final stage was to tighten up the EU's competence to adopt measures in the civil justice field by limiting such action to measures "necessary for the proper functioning of the internal market."[56]

7.3 Conclusions

The Amsterdam Treaty may well deserve the disappointment and scorn that has been heaped upon its head. The 1996/97 Intergovernmental Conference has been called the IGC that "should never have started," as well as the IGC that "should never have ended," since there were

"too many open agenda items to be discussed and negotiated seriously in the ludicrously short time available in the Summit" (Weiler 1997: 310). Michiel Patijn, the Dutchman who chaired the negotiating group under the Dutch Presidency, considered Amsterdam a failure because so many crucial issues were left on the table (Sverdrup 2000). The "unappetising" term used to describe this outcome – the "Amsterdam leftovers" (e.g. Petite 1998b; Shaw 2003: 207; Tatham 2009: 403-4; Weiler 1997) – conveys the "flavour" of the Amsterdam Treaty, which attempted to "eliminate the 'Maastricht leftovers' " that had been left on the table after the preceding treaty-revision process (Mather 2006: 53). These shortcomings aside, the Amsterdam Treaty did take some major steps along the road towards "ever closer Union."

The creation of the Area of Freedom, Security and Justice (AFSJ) – including the decision to communitarize civil justice (among some other JHA fields) – was one of the innovations that slipped through the cracks during that overloaded treaty-revision process. The actual achievements may well have been second- or even third-rank, in terms of their overall salience. Nevertheless, the EU created the AFSJ, and took the first step towards decoupling the AFSJ's broader objectives from the single market's narrower ones, which implied legally that the EU would have to work to obtain these objectives (Kaunert 2011: 52). My research suggests that the 'success' achieved in the AFSJ arena was possible *because* no consensus could be reached on the larger, tougher institutional reform issues that were under discussion in connection with the impending enlargement to take in the post-Communist countries in Central/Eastern Europe. Following the same logic, civil justice could be communitarized *because* no consensus could be reached to communitarize criminal justice and police cooperation. Given this 'lesser-evil' bargaining logic, what matters is that an issue – such as civil justice – manages to wind its way through the pre-IGC reflection and IGC process, that it is filtered out from the many available reports and formally placed on the treaty-reform agenda, and that it stays there long enough to be transformed into a properly (if not perfectly) worded provision of the draft treaty, which is then put before the European Council at its summit. Civil justice was available to the heads of state and government at their summit as a plausible alternative, a compromise candidate – ultimately a pawn that the Member States were all willing to sacrifice in the course of pursuing an overarching strategy, which was – in Amsterdam – to achieve at least *something*, even if it was not possible to resolve all or even the majority of the most pressing issues.

By examining the "valleys" or "intermediate phases" between the "peak" European Council summits (Christiansen & Jørgensen 1999: 2, 11), it is possible to "identify more authoritatively where, and how, and by whom, fundamental decisions about treaty reform have been taken" (id. at 2-3). The IGC was a heavily structured and path-dependent process (id. at 3), during which possible outcomes were culled from a large mass of proposals by multiple actors who performed tasks assigned to them over the course of the treaty-revision process. There was not a single coordinated effort by a group of persons dedicated to the goal of communitarizing civil justice, but rather a highly contingent sequence of events whereby a variety of expert and non-expert persons working inside Member State governments and EU institutions formulated and worked out ideas that were laid before the European Council, and available to them as options during their short and intense bargaining in Amsterdam. It is certainly possible for the European Council to bring new issues and alternatives into negotiations at the culmination of the treaty-revision process. But the outcome that I set out to explain – the decision to transfer competence over civil justice issues from the national to the supranational level – was shaped decisively by the preparatory work done long before the Amsterdam Summit, although not fully

determined by it. The heads of state and government of the Member States could just as well have left civil justice in the Third Pillar with criminal justice and police cooperation. In view of reports given during the final stage of negotiations – civil justice is in, it's out, it's in again, and so on – one might speculate that it was ultimately the exhaustion of the negotiators that decided the matter, like a game of musical chairs (e.g., Mazzucelli 2003: 23). Clearly, however, the final decision to transfer competence over civil justice was related more to an overarching integration logic – the felt need to achieve some tangible results – than to the particular merits of the proposal to communitarize civil justice, which rode the treaty-revision process like a cockleburr, once it had been firmly attached.

In such a context, the effort to identify Member State and EU institutional preferences is particularly challenging. It is clear, for example, that the perceived needs of citizens, particularly in regard to their family life (Interview #8), but also in their economic life, was a strong driver for the Finns in the Ministry of Justice, who made an essential contribution to the communitarization of civil justice. Yet it would be foolish to conclude from this fact that family law concerns were the most important driver of the outcome. Clearly they were important at one crucial step in a long, involved, and heavily contingent process. It could just as easily have been another Member State that also favored greater integration in regard to civil law matters, such as France or Germany, who gave the decisive push on civil justice. In this case, however, it was the Finns who played the crucial role of midwife to an idea that had been in gestation for some time. The outcome can be adequately explained only by teasing out the contributions made by various idea entrepreneurs along the way, in the context of the political pressures that faced the Member States, both during the long treaty-revision process and in its crucial final hours.

My findings reveal that there was no independent civil society involvement in the debates over communitarizing civil justice issues. While I was not able to conduct research in each of the fifteen Member States at the time of the Amsterdam Summit, I spoke with many academics, including leading experts who are active members of GEDIP, which is the professional group organized by such experts in the early 1990s so that they might have more say in how the field developed in the EU. These experts were not systematically consulted during the treaty-revision process, and very few of them had access to the reports or draft language that was being generated inside the IGC. The extent to which they were consulted or even informed depends largely on relationships between these outside experts and the public officials who were involved in the IGC. Some GEDIP members remarked bitterly that they were excluded from the process by their own governments (Interviews #48, # 50, and #58) and only learned what was going on through the good graces of a colleague from another Member State. It appears that the draft treaty language was leaked, at a late stage in the process, to one GEDIP member, who was aghast and promptly shared the information with (similarly stunned) colleagues. Not even the Dutch Staatscommissee for Private International Law, which is an official body constituted by the Dutch government to advise it in connection with such issues, was systematically informed or consulted, except by means of information that was reportedly leaked to the Hague Conference on Private International Law at a very late date.

Chapter 8 below picks up the thread after the Amsterdam Summit and examines the preparations for the October 1999 meeting of the European Council, which put in place a detailed five-year plan for building the AFSJ that had been agreed at Amsterdam and fleshing out the newly communitarized policy fields. Since that summit meeting was to be held in Finland during its first stint in the EU Presidency as a new Member State, the Finns remained pivotal in the

process, which became a tug-of-war between EU institutional actors, who sought to control the process, and Member States – notably the Finnish Presidency – who were formally in charge. As was the case during the IGC, civil society was largely excluded from the process.

Endnotes to Chapter 7

1. For background on the Intergovernmental Conference, see subsection 6.3.4 of Chapter 6 above.

2. Sverdrup (2000: 259-60) provides numerous examples of civil society activism in the context of the 1996/97 treaty-revision process. None of these activities touched upon the civil justice issue, however.

3. GEDIP was founded in 1991 in order to create an "academic and scientific think tank" (GEDIP Website). It is a "closed forum composed of about 30 experts of [sic] the relations between private international law and European law, mainly academics from about 18 European States and also members of international organizations" (id.). According to various expert sources, the founders recognized the need for a pan-European association along the lines of the American Law Institute (e.g., Interviews #39, #44, #48, #50, and #66).

4. One legal dissertation from Germany offers a historical perspective, but merely notes that it "appears that the time was ripe for further development of this field in the Community framework, in which integration potential has remained hidden for decades" ("Es scheint, als ob gerade diese Materie für eine Weiterentwicklung im Gemeinschaftsrahmen reif war, weil über Jahrzehnte Integrationspotentiale verborgen lag.") (Weber 2004: 2).

5. The new structures created by Maastricht were "simply superimposed on those that already existed" (namely, the Trevi and other coordination groups discussed in subsection 6.1.2 in Chapter 6 above), which resulted in a "real duplication of technical work by the working parties and the steering groups, and of arbitration by the K.4 Committee and Coreper" (Commission Report on the Operation of the TEU 1995: ¶ 124). The term "arbitration" used here refers to the process of negotiating and reconciling the texts of legal and other instruments to be adopted.

6. In addition, Commissioner Gradin: (1) demanded a right of initiative for the Commission in the fields of criminal law and police cooperation; (2) supported the EP's call that it should be more systematically involved in JHA affairs; and (3) called for enhancing the role of the Court of Justice in JHA affairs (Gradin Speech 1995).

7. Some Member States had already supported full communitarization of Third Pillar issues in the course of the negotiations that led to the 1991 Maastricht Treaty, but their views had not prevailed at the time. The positions of Member States are examined in subsection 7.1.2 below.

8. The Commission accepted that "police cooperation and judicial cooperation in penal matters are regarded by the Member States as too close to national sovereignty to be transferred in the short term to the Community 'Pillar'" but advocated nevertheless for "greater involvement of the [EU] institutions" in these policy fields (Commission Passarelle Communication 1995: ¶ 8).

9. Laurens Jan Brinkhorst belonged to the D66 party in the Netherlands, which was a radical democratic party that advocated direct democracy. As a member of the European Parliament from 1994-1999, he was affiliated with the European Liberal Democrat and Reform Party (ELDR), which since 2012 has been called the Alliance of Liberals and Democrats for Europe Party (ALDE).

10. The Commission had flagged the issue but did not articulate it well.

11. This is my rough translation from the original French text: "prend acte des objectifs définis pour établir une action commune dans le domaine des affaires intérieures et judiciaires, et demande que cette action soit inscrite dans le cadre de la création d'un espace juridique européen et soit conforme aux principes et aux éléments fondamentaux d'une citoyenneté européenne ..." (EP Resolution on Intergovernmental Cooperation 1991: I.10).

12. The Chairman of the LIBE Committee at the time was António Vittorino from Portugal, who later became Commissioner for Justice and Home Affairs (1999-2004).

13. The Maastricht Treaty had added a provision stating that the EU "shall respect fundamental rights, as guaranteed by the [1950] European Convention for the Protection of Human Rights and Fundamental Freedoms ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law" (EU Treaty art. F(2)). This provision largely codified the position of fundamental rights that had already been worked out in the jurisprudence of the European Court of Justice. It took much longer for the EU to draw up its own Charter of Fundamental Rights, which was "proclaimed" by a political decision on the occasion of the 2000 Nice Treaty but not formally incorporated into the EU's treaty structure until the 2007 Lisbon Treaty.

14. Subsections 7.1.4 and 7.1.5 below trace some of those evolving positions.

15. The ambiguity of most of the written statements surveyed in Appendix G in regard to the issue of communitarization suggests that the Member States clarified their positions on this issue in the course of deliberations within the Reflection Group.

16. Another example of an issue that was added to the IGC's list of items to consider prior to the opening of the IGC was the topic of flexibility (i.e., multi-speed Europe or what came to be known as 'enhanced cooperation') (Stubb 1998). This topic was brought into the debate by French President Chirac and German Chancellor Kohl in a letter dated 6 December 1995 (Grünhage 2001: 11).

17. Adrian Fortescue was *chef de cabinet* to Lord Cockfield, the Commissioner for Internal Market and Services from 1985 until 1989 (Delors I Commission), who was behind the Commission's 1985 White Paper on Completing the Internal Market. Margaret Thatcher, who had sent Lord Cockfield to Brussels to defend British interests against the Commission's French Socialist President, Jacques Delors, refused to reappoint Lord Cockfield to a second term in 1989, since she believed he had "gone native" in Brussels and turned against the policies she had expected him to advocate (Lord Cockfield Obituary 2007). Michel Petite was a member of Lord Cockfield's personal cabinet as well, and the coordinator for the internal market program aimed at removing all internal borders between Member States.

18. Grünhage (2001: 18-19) explains that early progress was impeded by the lack of time pressure, since no end date had been set for the IGC, and it was assumed that negotiations would not end before the UK elections, which were more than a year off.

19. As it turned out, French President Chirac called elections in May 1997, just one month before the Amsterdam meeting of the European Council, and was unexpectedly turned out of office in favor of Socialist Lionel Jospin.

20. The Preamble to the EU Treaty provides that the Member States are "RESOLVED to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice." Article 3(2) of the EU Treaty provides that: "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime." Finally, Article 4(2)(j) of the EU Treaty provides that this policy field is an area of shared competence between the Member States and the EU.

21. The main institutional innovations proposed in the Irish Presidency Note on Suggested Approach to the JHA (1996) were: extending the (shared) right of initiative of the Commission to all areas remaining in the Third Pillar; introducing provisions for majority voting on some topics; extending the role of the European Parliament; considerably extending the scope of judicial review by the Court of Justice jurisdiction in Third Pillar matters; and enhancing the involvement of national parliaments in regard to Third Pillar matters (¶ II.4).

22. I have not been able to obtain a copy of the working paper presented by the General Secretariat of the Council (GSC).

23. According to Callanan (2007: 227), texts prepared during the Irish Presidency were "commonly" drafted "in conjunction with" the General Secretariat of the Council (GSC), while papers drafted by the GSC were as a rule substantially worked over by the Irish Presidency.

24. Peers (2006b: 23) notes that the "first suggested text for what became Title IV was submitted by the Commission in September 1996."

25. Note that the Commission proposal did not yet mention harmonization of rules on civil procedure, as did the final language of Article 65 of the EC Treaty.

26. Despite being overlooked at this stage of the treaty-revision process, the Commission Proposal did end up playing an important role later in the treaty-revision process (see section 7.1.6 below).

27. It is my belief that the drafters used the label "Dublin II" in order to avoid confusion with the 1990 Dublin Convention dealing with asylum issues, which established a system determining which State is responsible for examining an asylum application that is lodged in an EU Member State.

28. Elected chairman of the Social Democratic Party in 1993, Lipponen led his party to electoral victory in 1995, so was in a strong political position in Finland at the time of these events.

29. Women had occupied numerous high-ranking political positions in Finland at this time, but never before had achieved the rank of top civil servant in any ministry (Interview #11). Kirsti Rissanen stepped down from this position in 2007, after twelve years at the helm of the Ministry of Justice.

30. Rissanen was "not involved in politics, I don't know what is [her party affiliation]. I have never asked her. I never asked, we have never discussed it. Because it was not relevant. I remember I met with [her] and she said she did not believe that she would be nominated because she was not a party member. But ... no, it was not relevant" (Jääteenmäki Interview). During one of my own interviews with Rissanen, I asked her directly about her political affiliation. She refused to answer the question, because she considered it irrelevant, and also inappropriate to discuss as a civil servant. One of her closest colleagues at the Ministry of Justice stated emphatically that "I have no idea what political party Kirsti Rissanen supports. NO idea" (Interview #8).

31. Finland was, however, less suspicious of full membership than Sweden, or – for that matter – Norway, which had conducted accession negotiations at the time but ultimately decided against joining (EPRS 2015: 7-8). For a discussion of economic and identity-based factors that propelled Finland towards full EU membership, see id. at 26-30; see also Niiniluoto (1995).

32. This summary is based on my translation from Finnish, which is approximate. Here is the original text in Finnish: "Vapauden, turvallisuuden ja oikeudenmukaisuuden alueen kehittämiseksi ja sen varmistamiseksi että jokaisella on koko unionin alueella oikeus joutuisaan, oikeudenmukaiseen ja julkiseen oikeudenkäyntiin silloin, kun päätetään hänen sellaisista yksityisoikeudellisista oikeuksistaan ja velvollisuuksistaan, joilla on liittymäkohtia eri jäsenvaltioihin sekä niiden täytäntöönpanosta, neuvosto päättää tarkoitukseen soveltuvista toimenpiteistä seuraavissa kysymyksissä:
- lain- ja tuomioistuinvalintasäännöt,
- oikeudenkäyntimenettelyyn liittyvät tiedoksiannot toisessa jäsenmaassa,
- jäsenvaltioiden tuomioistuinten ja oikeusviranomaisten yhteistyön ehdot ja menettelytavat,
- toisessa jäsenvaltiossa annettujen tuomioiden ja muiden kuin tuomioistuinkäsittelyssä annettujen ratkaisujen tunnustaminen ja täytäntööpano,
- kansalaisten kanteen nostamisen ja oikeusturvan saamisen edellytysten parantaminen,
- menettelytapojen luominen tuomioistuinten toimivaltaa koskevien erimielisyyksien välttämiseksi ja ratkaisemiseksi."
Finnish Communitarization Proposal: Realizing Individual Rights (1997).

33. The textual reference to "forms of cooperation between courts, tribunals and other authorities of the Member States" is rooted in Rissanen's experience with Nordic legal cooperation.

34. It is not correct that Rissanen originated the discussion of access to justice, since the Commission had also addressed the topic in its Proposal on Communitarization of JHA Provisions (art. F) (September 1996), as did the Dublin II Draft (December 1996). The quote should probably be limited to the context of ongoing political discussions to which Interviewee #10 was party, rather than a broad assertion about who placed the issue on the agenda in the first place.

35. Tarja Halonen later served as the first female President of Finland (2000-2012).

36. The President of Finland at the time, Martti Ahtisaari (1994-2000), was also a Social Democrat.

37. Kaila served on the Finnish negotiating team in Amsterdam as a notekeeper in the Foreign Ministry, which means she was present in key meetings, and had also worked with the IGC Reflection Group in 1996. After a stint as référendaire at the Court of Justice, Kaila moved on to work for the Government Secretariat for EU Affairs in the Finnish Prime Minister's Office. For his part, Stubb later became a Member of the European Parliament, then Minister for Foreign Affairs, Minister for European Affairs and Foreign Trade, then Prime Minister of Finland.

38. This meeting was a "follow up to a meeting in Stockholm with like-minded countries that was initially started and organized by Germany during its presidency at the end of 1994" (Rissanen Interview). My research has not turned up any documentation or other mention of any such earlier meetings, beyond matters that occurred during the German Presidency in the second half of 1994, and are related to the Tampere European Council (Chapter 8 below).

39. One member of the Finnish negotiating team recalls a meeting chaired by Rissanen, who "wanted the European Council to launch a process, a program, trying to analyze what's the problem in the access of justice in the EU. And I said no way, the European Council is a decision-making body, it's not a university seminar. It has to solve problems, so we have to ... identify problems, and recommend then the solution where they take decisions" (Interview #10).

40. It might seem paradoxical that Denmark and Sweden – two participants in Nordic legal cooperation – would be opposed to civil justice cooperation, at the same time as Secretary-General Rissanen invoked the tradition of Nordic cooperation as a source of her ideas. The answer to this puzzle might be that Denmark was primarily opposed to free movement of persons – indeed, Denmark opted out of all communitarization decisions taken at the Amsterdam summit – whereas Sweden was most opposed to communitarization of criminal justice and police cooperation issues. In other words, the strong opposition to communitarization of those other Third Pillar issues might have slopped over to the discussion of civil justice issues in Helsinki.

41. Däubler-Gmelin went on to serve as German Minister of Justice from 1998 until 2002, which includes the Tampere European Council that is the focus of Chapter 8 below.

42. Records do not show that Guigou attended the Helsinki Seminar. Her term as Minister of Justice did not commence until June 1997.

43. The Dublin European Council (December 1996) had instructed the IGC to "present a significantly simplified version of the Treaties with a view to making them more readable and comprehensible to the Union's citizens" (Dublin Presidency Conclusions, ¶ IV.I.1), and the IGC delegated this task to the Friends Group (Dutch Presidency Note on the Friends of the Presidency 1997: ¶ 1).

44. This danger was ultimately minimized by making the list of civil justice issues mentioned in Article 65 of the EC Treaty illustrative only.

45. The early April 1997 version of what became Article 65 of the EC Treaty provides: "Common action in the field of judicial cooperation in civil matters shall include:

a) Improving and simplifying
   – the system for cross-border serving of judicial and extra judicial documents;
   – cooperation in the taking of evidence;
   – the recognition and enforcement of decisions in civil and commercial cases, including extrajudicial cases;

b) helping to promote the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
c) eliminating obstacles to the good functioning of civil proceedings, if necessary by improving the rules on civil procedure applicable in the Member States"
(IGC Secretariat Note re: Civil Justice Agenda 1997).

46. The discussion in this paragraph is based on my translation from the original Finnish.

47. It bears mention, however, that the decision whether or not to communitarize would be based on unanimity or consensus voting, which renders the "slight advantage" in favor interesting but ultimately irrelevant, except to illuminate the slow process by which some Member States came around to the view that communitarization of civil justice issues might be acceptable, or even desirable.

48. Germany submitted some concrete drafting suggestions to the Presidency. I do not have a copy of this document, nor have any of my interviews revealed details about these suggested alterations.

49. Germany was the only country to go out on a limb and support qualified majority voting using the co-decision procedure. Other Member States that expressed a view were more cautious. Spain called for preserving unanimous voting on civil procedure issues, while Belgium also wanted to preserve unanimity for voting on issues related to enforcement of judgments and civil procedure.

50. Whether this language is sufficient to restrict the EU's regulatory competence is another question entirely. In its *Owusu* judgment, the Court of Justice blew a hole in the barrier that ostensibly separated intra-EU litigation involving two EU parties from 'external' matters (i.e., litigation involving an EU party and a non-EU party). The case raised the question whether a court in the UK could invoke the traditional *forum non conveniens* doctrine in order to avoid hearing a case over which it would have jurisdiction under the Brussels Convention. The Court said no, meaning that the Brussels rules were not limited to intra-EU cases, but also applied to 'external' cases as well, and thus displaced the national rule of *forum non conveniens*.

51. The formal title is Chairman of the Netherlands Standing Government Committee for the Codification of Private International Law. Technically speaking, the legal expert who occupies this position serves simultaneously as the President of the Hague Conference on Private International Law.

52. This perspective from inside the drafting process calls into question the perspective of some academic experts in the field who consider the treaty text sloppy and conclude, from that perception, that it was hastily drafted (Interviews #39, #44, and #50). This discrepancy may be explained by the fact that the key drafters, while highly professional lawyers, were not themselves known for their expertise in the arcane niceties of the civil justice field. It may, on the other hand, reflect the different temporal perceptions among those working inside the institutional framework of the treaty-revision process, for whom nine months represents a long time, and those with experience working on multilateral treaties in the civil justice, which frequently require years of painstaking negotiation and compromise before acceptable solutions are found.

53. My interviewees include first-, second-, and third-hand reports, but in each case, they asked me not to quote them. For this reason, my narrative of what transpired is formulated more generally, and does not pinpoint particular sources.

54. In addition, as discussed above in subsection 7.1.7, drafting work was carried out in Noordwijk as well.

55. Both reports are highly consistent with one another, which enhances their credibility, although neither I nor my sources can point to written sources for the claim.

56. As noted earlier on this same point, I have not been able to verify whether this language was actually added in Amsterdam, or a few months later, when the lawyers and linguists met in September 1997 to clean up the treaty text. It is possible that the limitation was requested by a Member State during the actual negotiations – presumably the

UK, which numerous sources have pegged as the source of the language limiting the scope of Article 65 – but that the actual language was not added until the subsequent meeting in September 1997.

Chapter 8: The 1999 Tampere Council: Blueprinting the EU's Civil Justice Field

At the Special European Council summit meeting held in Tampere, Finland, on 15-16 October 1999, the heads of state and government of the EU met to conclude a detailed five-year plan for developing the Area of Freedom, Security and Justice (AFSJ). The AFSJ came into being in May 1999, pursuant to the 1997 Amsterdam Treaty. The decision to devote a high-level summit meeting to a single policy area signals the perceived importance of AFSJ issues for the future trajectory of the EU. The Tampere European Council was unusual, insofar as the EU's highest political body rarely devotes a meeting to a single and highly specialized topic. Rather, this body normally issues broad policy statements on a wide range of topics, in the form of Presidency Conclusions, at the close of each summit. The Tampere summit, by contrast, issued a detailed, 62-point document laying out concrete policy objectives – known informally as the 'Tampere Milestones' – and called upon the EU "Council and the Commission, in close co-operation with the European Parliament, to promote the full and immediate implementation of the Treaty of Amsterdam on the basis of the Vienna Action Plan[1] and of the ... political guidelines and concrete objectives agreed here in Tampere" (Tampere Milestones 1999: ¶ 9). These Tampere Milestones were marching orders, which set the EU institutions in motion in pursuit of an ambitious set of goals.

The politicians who met and took decisions in Tampere were heads of state and government – presidents and prime ministers – but not themselves experts in the various AFSJ policy sub-fields. This fact, together with the detailed nature of the program agreed in Tampere, prompted one participant – then Prime Minister of Luxembourg Jean-Claude Juncker – to criticize the "superficial way that very complex legal matters were discussed during the summit" (Freudenberg 1999).[2] National justice and interior (home affairs) ministers, whose portfolios were under discussion, were not themselves formally invited to the summit meeting, and those who did attend were excluded from the meeting room where decisions were taken. This situation led Juncker to observe that heads of state and government were called upon to take decisions on technical policy matters on which "they could not even express such an opinion in their own cabinets" (id.).[3] The high politics nature of European Council summit meetings and the decision-makers' lack of expertise on the topics under discussion, together with the short amount of time available for the summit meeting itself – a mere two days – compel close attention to the process of preparing the summit for decision by national leaders.

This chapter traces the process by which the Tampere Milestones were formulated for the AFSJ, with special attention to the civil justice subfield, insofar as it is possible to disentangle it from the broader processes underway. Section 8.1 establishes a framework for analysis by identifying key temporal markers and actors in the process, while section 8.2 sketches the shifting institutional landscape during the period between the end of the Dutch Presidency (June 1997) and the beginning of the Finnish Presidency (July 1999). Section 8.3 traces preparations during the Luxembourgish, British, Austrian, and German Presidencies, which spanned this interim period. During this time, Member States were engaged in the process of ratifying the Amsterdam Treaty, but also began formulating their preferences for developing the AFSJ. Section 8.4 examines preliminary preparations by the Finnish Presidency during the German Presidency (January-June 1999). Section 8.5 then turns to the term of the Finnish Presidency itself, which commenced on 1 July 1999, examining key events during this period, as well as

Member State preferences. Section 8.6 turns to the drama of drafting the Tampere Milestones, during which the Finns wrestled with the Council Secretariat for control over the process, and culminates with the two-day Tampere summit itself. As during the Amsterdam treaty-revision process (Chapter 7), the Finnish Ministry of Justice played an important role, both by preventing civil justice issues from being shunted aside by more salient security concerns, and by pushing the discussion beyond a narrow vision of the civil justice arena. Finally, Section 8.7 draws together the threads of my findings and offers conclusions about the institutional dynamics and role of legal elites in drawing up the first five-year plan for developing the AFSJ. Figure 8.1 provides a time line of key events in 1999.

[FIGURE 8.1 ABOUT HERE]

Figure 8.1

1999 Finnish Presidency Time Line – Preparations for Tampere European Council

January 1	Start of German Presidency
January 14	EP Resolution on JHA Progress in 1998
March 18	Joint Letter from German & Finnish Presidencies from Gerhard Schröder (German Bundeskanzler) & Paavo Lipponen (Finnish Prime Minister)
March 24-25	Interparliamentary Conference on Freedom, Security and Justice
April	First *tour de capitals*
April 13	EP Resolution on the Vienna Action Plan/AFSJ
May 1	Treaty of Amsterdam enters into force
June 30	End of German Presidency
July 1	Start of Finnish Presidency
September 3	Joint Letter from Finnish Ministries of Justice and Interior
September 13	Finnish MoJ Report "Creation of a European Area of Justice: Access to Justice in the European Union"
September 15	General Affairs Council (Foreign Ministers of Member States)
September 16-17	Informal Meeting of JHA Council in Turku (Finland)
September 29 - October 7	Second *tour de capitals*
October 4	Formal Meeting of JHA Council in Luxembourg
October 15-16	Tampere European Council

8.1 The Interim Period (1997-1999)

What happened between the Amsterdam summit in June 1997, when the Member States successfully concluded the Intergovernmental Conference (IGC) and agreed on a draft text of the Amsterdam Treaty – including the provision transferring competence over civil justice issues to the EU[4] – and May 1999, when the Amsterdam Treaty entered into force, just five months before

the Tampere summit?

The Amsterdam summit was followed by a routine lag period, corresponding roughly to the European summer holidays, during which the draft treaty text was reviewed and cleaned up. A preliminary review was conducted by the 'Friends of the Presidency' group on 27 June 1997, followed by an official review at the meeting of the 'Jurist/Linguists' on 16 September 1997. The plenipotentiaries of the (then) fifteen EU Member States[5] formally signed the Amsterdam Treaty on 2 October 1997. A month later, on 19 November 1997, the European Parliament (EP) formally signed and approved it. From then on, each Member State proceeded to take whatever steps were required under its domestic law to bind itself to the Treaty. This ratification phase proceeded relatively quickly. Eleven of the then fifteen Member States ratified in 1998, and the remaining four in 1999, culminating with France, which triggered the Amsterdam Treaty's entry into force on 1 May 1999 by depositing its instrument of ratification on 30 March 1999.[6]

The EU's competence to legislate on communitarized issues (including civil justice) was, technically speaking, in abeyance during this hiatus, pending ratification. It would be a mistake to conclude, however, that efforts to develop the EU's civil justice field (or other AFSJ subfields) were on hold between June 1997 and May 1999. Indeed, this interim period was a crucial stage in the development of the AFSJ. Transition from the former (Maastricht) to the future (Amsterdam) Treaty framework was underway well before the moment when the Amsterdam Treaty became legally binding, and the EU's new competence vested. EU policy-making during this period, however, was carried out according to the cumbersome intergovernmental procedures of Maastricht's Third Pillar, rather than the revved-up supranational legislative procedures that the Amsterdam Treaty ultimately introduced for most AFSJ areas (including civil justice), and which account for the dynamism of the civil justice field after May 1999. Important steps were taken between 1997 and 1999, notwithstanding the constitutional abeyance during this interim period, and some of these steps shaped the outcomes in Tampere.

As during the preceding treaty-revision (Amsterdam) process, urgent security concerns drove some developments, which in turn laid the foundations for the entire AFSJ and also cleared a path for civil justice and other policy subfields to follow. For example, already during the IGC, a High Level Group of Member State senior police officials drafted an action plan to combat organized crime (Fortress Europe 1997), which the European Council approved at its Amsterdam summit in June 1997.[7] This plan not only pushed the EU's fight against organized crime forward but also served as a template for the Tampere Milestones and the emerging AFSJ regime. This action plan was the first policy document in the field that established concrete priorities and a timetable for achieving particular goals, set up a system for monitoring progress, and assigned tasks to particular institutional actors (Interview # 67), all of which characterizes the five-year plan agreed in Tampere as well. This example illustrates that high-salience security concerns continued to drive the AFSJ agenda during the interim period, but also reveals the deeply intertwined relationship between 'domestic' policy processes inside the EU structures, on the one hand, and the overarching intermittent 'international' decision-making during EU's occasional summits, on the other, when the national heads of state and government (meeting as the European Council) get together to amend treaties among the Member States and set overarching policy objectives.

While some pressing AFSJ issues moved forward rapidly during the hiatus, others – such as civil justice issues – were left to simmer on the back burner. Somewhat paradoxically, the pace of developments was quick during this interim period for police and criminal law matters,

which were destined to remain in the cumbersome Third Pillar, even after the Amsterdam Treaty entered into force. In contrast, progress was glacially slow on low-salience civil justice issues during the interim period and went into overdrive only after the policy sub-field was transferred out of the Third Pillar and into the First Pillar, where EU institutions gained the right of initiative and ordinary legislative procedures were available to move policy initiatives forward rapidly.

Security-related AFSJ issues were not, however, the only high-salience issues on the EU's agenda during this two-year interim period. Rather, the EU's agenda was crowded with a number of complex issues, notably enlargement to bring in ten new Member States; economic and monetary union; and employment, competitiveness and growth (Amsterdam Presidency Conclusions 1997). Thus, while the Amsterdam Presidency Conclusions made brief mention of AFSJ issues, they emphasized ongoing concerns about organized crime, drugs, and corruption, but made no mention of civil justice issues at all.

8.2 Early Preparations for Developing the Area of Freedom, Security and Justice (1997-1999)

After the Dutch Presidency ended in June 1997, four other Member States – Luxembourg, the United Kingdom, Austria, and Germany – took the helm during their half-year stints in the Presidency, and moved the project of developing the AFSJ forward, prior to the intensive final preparations that occurred during the Finnish Presidency in the second half of 1999. It was not known at the outset of the interim period that there *would be* a special European Council summit on the AFSJ, since this decision was not taken until late in 1998, during the Austrian Presidency. Bearing this in mind, the key developments during each of these four interim Presidencies are surveyed in this section. These developments can be best appreciated in the context of the shifting institutional landscape that the Amsterdam Treaty set in motion, which exacerbated old tensions, generated new ones, and occasioned some push-back.[8]

To some degree, EU institutions were involved in the process of developing the emerging Area of Freedom, Security and Justice by virtue of their ongoing roles in the existing policy-making process for Justice and Home Affairs (JHA) issues under the Third Pillar, which continued to run in the background, while the constitutional changes agreed in Amsterdam were pending. Beyond this, however, some EU institutions were called upon to play an additional role in the extraordinary process of putting meat on the AFSJ's bones. While these two processes are formally distinct, they are de facto intertwined in the EU, where ordinary policy-making provided further opportunities for the EU Commission and the European Parliament (EP) to flesh out their visions of the AFSJ, including its civil justice component. As during the treaty-revision process examined in Chapters 7 and 8 above, EU institutions – in particular, the Commission – played an important role as idea entrepreneurs and helped to shape the five-year plan for developing the AFSJ that was formally decided in Tampere in October 1999.

8.2.1 The Shifting Institutional Environment

Numerous tensions characterized the interim period. Some of the institutional dynamics were old, such as those emerging from the Council Secretariat's role as the 'power behind the throne' of Member State activities, the Commission's awkward position between the Member States' "suspicions" and the EP's "high expectations" for greater integration (Kaunert 2012: 36), and the EP's frustrated ambitions stemming from its very limited real powers. But some of these dynamics – notably those linked to the Commission's rising assertiveness – were new and flowed

directly from the agreement in Amsterdam. Together, these tensions define the playing field for the efforts to establish a five-year plan for developing the AFSJ.

8.2.1.1 The General Secretariat of the Council (GSC)

The General Secretariat of the Council has historically punched above its weight, insofar as its actual capacity to influence EU decision-making exceeds its formal institutional powers, both in regard to 'secondary' EU law (legislation) and 'primary' EU law (treaties). The GSC is one of the "hidden powers" that has operated in the shadows of European integration, its ascribed role as handmaiden to the Member States masking what is often quite considerable power behind the throne of Member State activities in the EU (e.g., Christiansen 2002). Sperl (2009: 34) quotes a Commission official as saying "even though the Council Secretariat did not formally have the right of initiative, it saw itself as being the brain behind the screen in preparing Member State initiatives." There are multiple avenues through which the General Secretariat may exercise its "distinctly quiet influence" (id. at 81), both in the EU's day-to-day legislative process (in service to the Member States when acting in their capacity as the Council of the EU, i.e., its upper chamber), and in the context of treaty-revision and summit meetings (in service to the Member States when acting in their capacity as the European Council, and particularly its role in supporting the activities of each Member State during its stint in the rotating Presidency).

In regard to both secondary (legislative) and primary (i.e., treaty- and summit-related) matters, the General Secretariat provides centralized administrative services, along with legal and political advice (Christensen 2002: 82).[9] In both contexts, the GSC assists the Presidency "in the taking of minutes in Council meetings, the setting of meeting agendas and the running of meetings"; helps the "Commission and Presidency in the search for compromise in Council decision-making"; and maintains "regular relations with the Commission and the European Parliament in joint management of the legislative process" (id.). The GSC also helps the Presidency and the Member States search for compromise in the context of European Council decision-making, such as in the context of treaty-revision (see Chapters 7 and 8 above) and summit meetings (see section 8.5 below).

The General Secretariat enjoyed an especially powerful role in the context of Third Pillar decision-making, precisely because this was an intergovernmental field of EU policy-making, in which the roles of the EU's supranational institutions – principally the Commission and the EP, but also the Court of Justice – were so severely circumscribed as to be nearly non-existent. The GSC had "witnessed ... unprecedented growth" since the 1980s, and evolved from being "essentially a small bureau providing logistical support, legal opinion and political advice" on JHA matters (and particularly foreign and security policy) into a "sizeable executive agency in its own right," as it "acquired new tasks, responsibilities and resources" (Christensen 2002: 82). In a telling example, one General Secretariat staff member bragged about how he had maneuvered to bring the representatives of two key Member States together at a crucial meeting on a controversial Third Pillar topic, as a way of engineering the consensus needed to adopt the measure in question (Interview #1). If the Member States (as Council) are the head of the EU, then the General Secretariat appears as the neck that supports but also turns the head.

The Amsterdam Treaty posed a threat to the privileged position of the General Secretariat, which was used to ruling the roost – in its usually quiet way – under the Third Pillar, at least in one context. Amsterdam made clear that the Commission and EP would gain power in regard to secondary (legislative) matters in the communitarized AFSJ policy fields, at the

expense of the Member States and, hence, also of the GSC. This does not necessarily imply that the General Secretariat and the Commission were on a collision course, but points to the importance of understanding how the rise of the Commission's (and to a lesser extent, the EP's) power began to alter the institutional landscape during the interim period leading up to the Tampere summit. In contrast, the Amsterdam Treaty did not alter the General Secretariat's position in the EU's treaty-revision process, nor did it do so in regard to EU summit meetings of the European Council. As such, its position was – and remained – strong in the process of preparing for the Tampere summit on AFSJ matters. And, manned as it was by senior staff members who had deep personal and professional experience with security-related cooperation, the GSC's position and interests were particularly strong when it came to developing the AFSJ.

The General Secretariat is "at the heart of proceedings in treaty reform" (Christensen 2002: 83), where staff members have multiple opportunities to influence the course of negotiations, as seen in Chapters 7 and 8 above. While the GSC does not influence "decisions about the broad outlines of treaty reform," which are incumbent upon the Member States, its staff members may influence "legal detail" by virtue of their role in "fine-tuning the detail of treaty provisions" during the drafting process (id. at 87). The process of preparing for a summit meeting of the European Council provides similar drafting opportunities. Indeed, the Tampere summit, by virtue of being devoted solely to JHA issues, provided a once-in-a-lifetime occasion for men in powerful positions at the General Secretariat, such as Director-General for Justice and Home Affairs Charles Elsen and his Deputy Gilles de Kerchove, to harness their deep expertise and strong commitment to furthering European cooperation in these (and other) AFSJ subfields to the task of moving the ball forward. Statewatch, an NGO that has been a close observer and strong critic of the Tampere process, claimed that it was "Charles Elsen who took the initiative to prepare and 'sell' the first five-year JHA programme" that was ultimately adopted by the European Council as the Tampere Milestones (Bunyan 2013: 2). To be sure, Elsen was most concerned with the types of security-related issues – movement of persons, drugs, crime and police – on which he had worked since the 1960s while at the Luxembourg Ministry of Justice. The in-house expert on civil justice matters was then (and remains) Fernando Paulina Pereira, who began working on justice and home affairs with a very small group in the GSC in 1989.[10]

The Council Secretariat's influence in the context of summit preparations is potential, rather than ensured, and depends crucially on its "relationship with the Presidency," which Christensen (2002: 87) characterizes as "flexible." Whether the Council Secretariat realizes the potential that inheres in its "role in drafting agendas and meetings, providing legal and other advice and fine-tuning the detail of negotiations depends crucially on the permissiveness of the Presidency to provide such opportunities for influence" (id.). Small Member States have often relied heavily on the Council Secretariat during their Presidencies, "given the pressure on a country's resources during a Presidency" (id.). However, Section 8.5 below shows that Finland – not just a small country, in terms of population, but also a new and hence inexperienced Member State during its 1999 rotation in the Presidency – pushed back and tried to resist the GSC's attempt to dominate the Tampere process.

8.2.1.2 The European Commission

The Commission's authority was limited during the interim period, though it did not sit on its hands, despite its modest role in JHA legislative matters[11] in the Third Pillar and virtually non-existent role in treaty negotiations. The Commission's role in both contexts would be

considerably enhanced once the Amsterdam Treaty entered into force, but these new powers were inchoate during the interim period. As one observer put it, the Commission was "an actor" on the European stage in JHA matters during this period, albeit "not a very strong and effective (much less [an] autonomous)" one (Uçarer 2001: 3). And yet, its actions during the interim period suggest that the Commission could already taste the extended powers to which it would become formally entitled under the Amsterdam Treaty, both as initiator of legislation and key player in the EU's 'domestic' (i.e., federal-level) legislative process and as negotiator on behalf of the EU for international treaties on matters falling within EU competence (such as civil justice). Member States were thus on track to lose their primary role in international treaty negotiations over communitarized JHA issues, while the Council Secretariat was on track to lose its privileged position in regard to Justice and Home Affairs, which it had previously occupied without much interference from the Commission (or the EP) in the Third Pillar. The promise of greater institutional responsibility led to growing self-confidence in the Commission's dealings with the traditional holders of power – namely the Member States and the Council Secretariat – even before its new powers vested in May 1999.

Many of my interviewees remember the Commission as becoming increasingly assertive during the interim period, even getting a bit big for its britches (e.g., Interviews #33, #39, #43, #45, #48, and #59). However, my research has not uncovered any incident of over-stepping by the Commission prior to May 1999, when its new powers in regard to legislation and treaty-making finally vested. This is not to say, however, that the Commission lacked influence or ambition during this period.

The Commission Task Force on Justice and Home Affairs (Task Force) was set up after the Maastricht Treaty entered into force in 1994, in order to fulfill the Commission's limited responsibilities in the Third Pillar, and in hopeful anticipation of any greater role that it might enjoy at some point in the future (Uçarer 1999: 3; Lewis & Spence 2010: 106-7). The Commission was thus active in JHA matters long before agreement was reached on creating the AFSJ, or communitarizing any aspects of JHA policy, or creating a separate Directorate-General for Justice and Home Affairs. It was the Task Force that carried the AFSJ ball for the Commission during the interim period, as it had done during the IGC, since no full-fledged Commission Directorate-General (DG) could be established until after the Amsterdam Treaty entered into force.[12] The Task Force was established within the Commission's General Secretariat[13] under the leadership of "gifted diplomat" (and non-lawyer) Sir Adrian Fortescue from the United Kingdom,[14] who had started working on JHA issues in the Commission as early as 1989 (Shelley 2001), when he was one of just three persons doing so. At its largest, prior to becoming a full-fledged Directorate-General, the Task Force had 46 staff (Occhipinti 2003: 80).[15] Owing in part to his long diplomatic career and lack of legal training, Fortescue was known for being cautious in his dealings with Member State and Council Secretariat representatives (Interviews #10 & #56). That caution notwithstanding, the Task Force played a key – but by no means an exclusive or even dominant – role in articulating a new discourse around civil justice and other dimensions of the AFSJ.

Ongoing projects pertaining to rules on jurisdiction and on recognition and enforcement of judgments for civil and commercial litigation illustrate key aspects of the Commission's role during the interim period. Two major projects were underway at the time: first, efforts to draft a global Judgments Convention at the Hague Conference on Private International Law, which had formally commenced in 1994, and second, efforts to revise the EU's own 1968 Brussels

Convention (as well as the parallel 1988 Lugano Convention with non-EU countries), which had gotten underway in 1997. Both projects involved international treaties, which means that they were for the Member States to conduct and conclude in their sovereign capacity. However, the Brussels Convention was of a hybrid nature – simultaneously a creature of public international and of European law – since it had been concluded pursuant to Article 220 of the EC Treaty (see Section 3.2 in Chapter 3 above). This distinction, as explained below, is the fault line that reveals the Commission's growing ambition to lead in the civil justice arena.

Prior to May 1999, the EU had no competence, and hence the Commission had no authority to act in the international arena in regard to civil justice issues, such as rules on jurisdiction and judgments. But once the Amsterdam Treaty entered into force and the EU gained competence over civil justice issues, the Commission gained the right to negotiate treaties on behalf of the Member States in The Hague (external relations in regard to a matter within EU competence), as well as to participate fully in the process of adopting EU legislation on such matters. During the interim period, the Commission was thus on the threshold of gaining – and the Member States of losing – voice in this central civil justice domain.

In the traditional public international law setting, the Hague Conference on Private International Law created a Special Commission for the [Global] Judgments Convention in 1994, and appointed Gustav Möller from Finland – a judge on the Finnish Supreme Court (1992-2009) – as chairman.[16] This Hague Special Commission prepared a draft convention between June 1997 and October 1999, which is nearly identical to the interim period between Amsterdam and Tampere. During this period, the EU Commission (like the GSC) had observer status at the Hague Conference, and regularly sent staff members to participate in meetings in The Hague. Notably, the Commission sent senior Task Force members on occasion, such as Mrs. Vernimmen in 1994 (Head of the Judicial Cooperation Unit), as well as staff members with particular expertise in the subject matter of negotiations, such as family law expert Anne-Marie Rouchaud in 1996.[17] Highly respected Commission Task Force experts were thus present in pertinent Hague Conference negotiations during the interim period, but by no means in the driver's seat. These dynamics only changed after the EU created a full-fledged Directorate-General in late 1999, which triggered a 'big bang' expansion of Commission staff working on AFSJ issues. It was thus not until the post-Tampere period that the Commission "rode into the Hague like cowboys" (Interview #33, similar also Interview #59) and elbowed aside the Member State experts with their (often) long experience of negotiating complex legal treaties in diplomatic settings.[18] Yet during the interim period, the Commission's activities remained constrained in The Hague.

In contrast, the emerging powers and ambitions of the Commission are clearly visible in the context of efforts to revise the EU's own (hybrid) Brussels (and parallel Lugano) Convention during the interim period. This process involved a race by Member States to complete their treaty-revision negotiations before the moment when the Commission's new Amsterdam powers would vest. Here, the Commission was clearly breathing down the Member States' necks. Early negotiations commenced in Lugano in September 1997. By late November of that year, the Commission had jumped into the fray with both feet by issuing a Proposal to Establish the Brussels Convention, accompanied by a visionary report *Towards greater efficiency in obtaining and enforcing judgments in the European Union*. The proposal itself is puzzling, since the notion of "establishing" the Brussels Convention "in the Member States of the European Union" is legally meaningless, at least in the English language. That oddity aside, the Commission's intent was clear: it not only solicited input from "all legal practitioners and interested parties" in order

to "prompt debate on a common Union approach to certain aspects of national laws of procedure (¶ 2), but had the cheek to submit a draft Convention text for the Member States' consideration. For their part, the Member States were not about to let the tail wag the dog, and proceeded at their own pace, according to their tried and true working methods, to revise the two conventions. One week after the Commission's eager proposal, the Council of the EU appointed an ad hoc Working Party[19] (December 1999), which was also chaired by Finnish Supreme Court Judge Gustav Möller. Treaty revisions really got underway at this point (Beaumont 2000: 171).

The Member States were in a race against time, and tried (but ultimately failed) to maintain control of the process without interference from the EU Commission. The Member States just barely managed to complete drafts for both revised treaties (i.e., Brussels and Lugano) by April 1999, which was the eleventh hour before the Amsterdam Treaty entered into force and altered the institutional landscape (Interview #69).[20] According to one participant (Interview #59), "we finished on the 29th of April, and on the first of May, the Treaty of Amsterdam entered into force. It was terrible." The Justice and Home Affairs Council of the EU[21] met in late May 1999 and "confirmed the agreement reached at expert level on the revision" of both treaties (2184th Council Meeting – JHA 1999, point 16). By this point in time, however, it was "no longer possible" for the desired changes to the EU's Brussels rules on jurisdiction and judgments to be made in the form of a treaty (Pocar 2007: 127), in the wake of communitarization of the civil justice field, and the Member State representatives in the JHA Council – in an effort to tie the Commission's hands – "froze" the changes "pending a proposal from the Commission" for EU legislation that would replace the Brussels Convention but "incorporate the working party's suggestions" (UK Report on Brussels/Lugano Conventions, 1999, ¶ 2.7).[22] At that same JHA Council meeting in late May 1999, the Commission also put the Member States on notice that it had issued formal proposals – on 4 May 1999, just days after the Amsterdam Treaty entered into force – to convert (or 'reformat') two other existing 'international' EU treaties[23] into 'domestic' EU legislation (2184th Council Meeting – JHA 1999, point 17), and that it was moving forward with the formal measures that would authorize the Commission to take the reins in the context of Hague Conference negotiations (id. at point 16). As the timing of these new proposals shows, the Commission had built up quite a head of steam during the interim period and was primed to assert its institutional prerogatives the minute its powers vested on 1 May 1999.

The Commission did manage to influence the development of the civil justice field during the interim period, notwithstanding its frustrated attempt to seize the reins on the Brussels/Lugano Convention revision process. This influence stems primarily from two visionary reports that the Commission prepared during the interim period, which shaped the Tampere process and much of what followed. While the Commission's Proposal to Establish the Brussels Convention (November 1997) was shot down by the Member States, the accompanying report *Towards greater efficiency in obtaining and enforcing judgments in the European Union* had a major and lasting impact. The Commission issued the final version of its report in January 1998 as a Communication to the Council and to the European Parliament (Commission Communication on Judgments).

The Commission Communication on Judgments called for launching "a debate on the substance of the problem of litigation in Europe" (¶ 11), in order to "ensure access of litigants to efficient, swift and inexpensive justice" (¶ 3), and to reduce "barriers" that "impede the free movement of judgments between Member States" (¶ 5). In its Communication, the Commission diagnosed a wide variety of problems resulting from the "arcane" and "widely divergent

procedural systems" that coexist in the EU (¶ 6), and offered a welter of proposals for addressing them. The Commission backed away from calling upon the Member States "to narrow the current wide divergences between national procedural systems" (¶ 11), although its proposals for improving the administration of justice in the EU (Part II, ¶¶ 30-60) clearly called for "establishing as horizontal an approach as possible" in order to ensure the "harmonious administration of justice" (¶ 32). The Commission supplemented this language, which implies improved coordination between the national legal systems, with calls for the creation of common European procedures across a broad swath of issues. Some of the Commission's proposals found their way into the Tampere Milestones, while others only bubbled to the surface in the decades after the Tampere summit. As such, the Commission's Communication on Judgments provided a detailed roadmap for developing the civil justice area, and the Commission returned to it time and time again. This document, along with the influential Vienna Action Plan (discussed in subsection 8.3.3 below), nicely illustrates the Commission's growing expertise in regard to JHA matters, at a time when it – by virtue of its limited real powers under the Third Pillar – was "forced to always table a better and more competitive proposal than any member state would or could," in order to establish its credibility, and effectively did so during the Tampere process (Kaunert 2012: 36).

The ideas put forward by the Commission came out of the Task Force, but were a confluence of ideas from various sources. For one, the Commission Task Force stated that it aspired to bring more civil society actors into the policy-making process in the civil justice arena (e.g., Commission Communication on Judgments 1998: ¶ 2 & p. 6, FN 10).[24] The Commission also made clear that it was working collaboratively with Member States to develop particular policy proposals (e.g., in connection with the Helsinki Conference organized by Mrs. Rissanen in March 1997, see Commission Communication on Judgments 1998: ¶ 11). Finally, the Task Force channeled ideas that had been worked out in other parts of the Commission, notably from the Directorate-General for Consumer Policy and Consumer Health Protection (DG XXIV/SANCO), which was already working on access to justice and consumer litigation issues in the early 1990s (Commission Communication on Judgments 1998: ¶ 2),[25] as well as from Fortescue's prior position as Head of Cabinet to Lord Cockfield, the British Commissioner for Internal Market and Services (1985-1989), who was behind the Commission's 1985 White Paper on Completing the Internal Market and its paradigm shift from harmonization of national rules to a system based on the principle of mutual recognition (¶¶ 57-59), and had been instrumental in pushing for the creation of the Single European Market in 1992.[26] While the language of 'mutual recognition' did not appear in the Task Force's 1998 Communication on Judgments, it later emerged as the cornerstone of the Commission's strategy for building the AFSJ. Indeed, according to Fortescue, a "key moment in the evolution of the EU's role in the area of Justice and Home Affairs" was when the Commission started using the phrase "Europe without frontiers" in the 1985 White Paper, "instead of just talking about the internal market as a place in which goods and services circulated" (Kaunert 2012: 36).

8.2.1.3 The European Parliament (EP)

The European Parliament's powers in the Third Pillar were even more constrained than those of the Commission. Still, the EP was an active, if less overtly influential actor in the process leading up to the Tampere summit. The EP had no formal role in preparing the agenda for the Tampere European Council meeting as such. However, it was – in theory, if not always in

practice – regularly informed about, and expressed its views on Third Pillar (JHA) matters, in accordance with institutional arrangements established in the early 1990s by the Maastricht Treaty.[27] Once the Amsterdam Treaty entered into force in May 1999, the EP's institutional role was strengthened considerably, in regard to both EU legislation (secondary law) and treaty-making on communitarized JHA issues (among them civil justice), but this did not fundamentally alter its weak position in the context of high-level political decision-making by the European Council.

The EP's evolution "from consultative assembly to co-legislator" (Neuhold 2000: 3, §2.2) was slow and frustrating for members of the EU's only popularly elected body. Its legislative powers had grown considerably under the Single European Act (1985/1987) and the Maastricht Treaty (1991/1994), but the EP's role in regard to JHA issues was highly constrained, consistent with the intergovernmental nature of the Third Pillar. Still, its increasing interactions with the Commission and the Council gave rise to "new patterns of negotiations" (Neuhold 2000: 5), which prepared the ground for the EP's greater responsibilities under the Amsterdam Treaty. So long as the Third Pillar rules held, however, the EP's formal role was largely consultative. Yet this did not prevent the EP from pushing to beef up its bare bones role.

According to Emilio de Capitani, who headed the Secretariat of the EP's Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee)[28] from 1998-2011, the EP developed a complex strategy during this awkward growing period. One key prong of the EP's strategy was to increase pressure on the Commission, in order to bring it "closer to the EP, or at least in a more neutral position," from which the Commission could serve as an "honest broker between the EP and the Council" (de Capitani 2010: 119). This strategy reflects the EP's recognition of the "impossibility" of having much influence on the Council (id.), but does not imply that the EP abandoned all hope. Indeed, the EP had pushed in the early 1990s for a "contact-procedure" that would institutionalize regular contacts between the Presidency of the Council (Justice and Home Affairs) and the EP's Committee on Legal Affairs (JURI Committee) (id. at 122-3). These efforts resulted in regular meetings between the rotating Presidency and a "a designated Vice-President of the Parliament (and some members of the [JURI Committee])," during which the EP could express its views (id.). These discussions were "held behind closed doors and very often the [Member State] minister responsible was rather reticent and elusive," which led de Capitani to label them as "more theoretical than substantial," at least at the outset (id.).

Despite increasing formal powers, the EP experienced an ongoing "lack of cooperation from other institutions" (de Capitani 2010: 125). This situation prompted the EP's LIBE (Civil Liberties, Justice and Home Affairs) Committee to adopt a strategy oriented towards citizens and the public sphere, rather than Member States or the Commission (id.). In particular, the LIBE Committee "decided to re-focus its activity on the annual political debate on Justice and Home Affairs," which "were extensively reported in the press," and thus bolstered the EP's efforts to "develop community action" in the JHA policy field (id.). At the same time, the LIBE Committee – which is the source of the visionary and influential report during the IGC that called for the creation of a "European legal area" (European Parliament 1995b, see Section 7.1 in Chapter 7 above) – turned its sights toward the pre-eminent goal of enhancing the protection of fundamental rights within the EU (id.). This was the main thrust of the EP's activities in preparation for the Tampere meeting of the European Council.

Consistent with the positions it had taken during the IGC (see Chapter 7 above), the EP

resolved to "become a driving force in shaping the future EU action" to develop the AFSJ, guided by the "ambitious but fragile perspectives opened by" the Amsterdam Treaty (de Capitani 2010: 128). Animated by both the LIBE Committee and the Committee on Constitutional Affairs (AFCO Committee), the EP continued to "make clear to the other institutions" – as it had "from the very beginning" – that the task of creating the AFSJ was "much more than a simple consolidation of the policies previously listed in the administrative [Justice and Home Affairs] formula" (id.). Indeed, in the EP's view, the task of creating the AFSJ entailed a "more ambitious political objective focused on the fundamental rights of the individual and on a more general vision of the European public order where the EU institutions and the national authorities act in a multilevel and legally integrated framework" (id.). The EP aspired to "promote and not only protect fundamental rights," and insisted that policies on "transparency, data protection and the fight against discrimination" were "essential elements for the development of the AFSJ" (id.). The EP conveyed its message by means of a handful of Resolutions, so that the European Council might take the EP's views into consideration when preparing the Tampere program.[29]

Like the Commission, the EP had no seat at the negotiating table in Tampere. However, the President of the EP, Nicole Fontaine (France),[30] was invited to participate in an "exchange of views" at the "start of proceedings" of the summit meeting (Tampere Presidency Conclusions).[31] President Fontaine's speech in Tampere went beyond the EP's perennial calls for greater democracy and transparency in the EU, and greater attention to fundamental rights (EP President Speech at Tampere, EP 1999f). Notably, she called upon Member States to "give fresh impetus to the concept of European citizenship," and offered scathing criticism of Member State foot-dragging on JHA matters. Stressing the need for "credibility" on the part of the EU, the EP was "adamant that the five-year deadline laid down by the Amsterdam Treaty for [establishing the AFSJ] should be inviolable and that every possible step should be taken ... to ensure that the requisite measures can be planned in such a way as to meet the deadline," irrespective of the "difficulties involved" (id.). To illustrate her point about the EU's failure to meet the needs of its citizens, President Fontaine cited an "eloquent example" of dashed hopes in the civil justice field, namely the Brussels II Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, which the Member States had negotiated under the Third Pillar and signed on 28 May 1998, but had failed to ratify prior to the date when the Amsterdam Treaty entered into force in May 1999. Noting that the Brussels II Convention was one of the "rare achievements in the sphere of" civil justice in the Third Pillar, she argued passionately that it constituted "one small step towards the framing of a body of European family law, a nettle which, sooner or later, will have to be grasped," in view of the "thousands of children [who] are caught in the trap of contradictory national laws when husbands and wives of different nationalities separate." EP President Fontaine warned the European Council (i.e., national heads of state or government) that EU "citizens failed to understand how an agreement which had taken fifteen years to draw up and sign could not be ratified" and are "no longer satisfied with resounding policy statements" by EU leaders and elected representatives. In this spirit, she called upon the European Council to "confirm ... the intention" that the Brussels II provisions would "finally become positive law under your Presidency, since the Union needs more than virtual laws."[32]

President Fontaine's speech at the opening of the Tampere summit in October 1999 nicely embodies one key dynamic of the Tampere preparation process: a legally trained woman occupying a position of institutional authority who firmly insists that national political leaders –

for whom concrete notions about civil justice, family law, and the daily lives of citizens and children may be remote from their minds – must pay attention to such matters and not ignore them in favor of more salient security-related issues on the crowded agenda. Section 8.4 below traces a similar dynamic during the Finnish Presidency in the second half of 1999, which was the most intense phase of preparation for the Tampere summit.

8.2.2 Conclusions

As during the Intergovernmental Conference that led to the conclusion of the Amsterdam Treaty in June 1997, the supranational EU institutions – Commission, Court, and European Parliament – had very limited formal roles to play in the process of preparing for the European Council meeting in Tampere. Albeit of a fundamentally different nature, both events involved high-level political decision-making regarding the EU by Member States wearing their national hats. When meeting in Amsterdam, the political leaders of the Member States (sitting as the European Council) decided on treaty amendments, while in Tampere, they decided on political guidelines – a blueprint – for developing the Area of Freedom, Security and Justice, which they had agreed to create in Amsterdam. Tampere was thus, formally speaking, a matter for the Member States to decide, with such input from the EU institutions as the Member States themselves chose to incorporate.

Legal niceties and formal powers aside, the Commission and the European Parliament were not shy about expressing their far-reaching visions of how they would like to see the AFSJ develop. And, while the new powers which these institutions would gain under the Amsterdam Treaty had not yet vested during the interim period, these EU institutions nonetheless had the Member States' ears, which is hardly surprising, given that the Member States had decided, in mid-1997, to give up a good deal of their national prerogatives in at least some AFSJ subfields, in favor of the Commission and EP.

8.3 Interim Presidencies between Amsterdam and Tampere (1997-1999)

The following subsections trace the key steps in the process of formulating a program for developing the new Area of Freedom, Security and Justice, which was destined to come online as an overarching new goal of European integration once the Amsterdam Treaty entered into force. As after the conclusion of any treaty, the mid-1997 Amsterdam Treaty was followed by a period of uncertainty regarding if and when it would enter into force. This uncertainty was short-lived, since Member States moved quickly to ratify it. Once the last of the (then) fifteen Member States (France) ratified in March 1998, it became clear that the Amsterdam Treaty would enter into force on 1 May 1999. The period of uncertainty thus hung over the Luxembourg Presidency during the second half of 1997, but lifted mid-way through the UK Presidency during the first half of 1998.

8.3.1 The Luxembourg Presidency (July - December 1997)

The conclusion of the Amsterdam Treaty at the end of the Dutch Presidency in June 1997 allowed Member States to turn their attention to other pressing matters, such as employment (Agenda 2000), monetary union, and enlargement. These priorities feature prominently in the Luxembourg Presidency Conclusions (December 1997). During ordinary summit meetings, like the one held in Luxembourg in December 1997, the European Council typically takes note of developments that occurred during the host Member State's six-month rotation – among them,

some that have been reported to it by other EU institutions – and expresses its approval or calls for further action. Thus, for example, the Presidency Conclusions from the Luxembourg summit contain eight paragraphs that briefly summarize JHA developments in the (still existing) Third Pillar, which were, in turn, derived from a report that the Justice and Home Affairs Council had submitted to the European Council (Council JHA Report 1997). With regard to civil justice, the Luxembourg Presidency Conclusions merely welcomed the "political agreement reached" on "basic principles" of the draft Brussels II Convention (family law), noted that this Convention "is likely to play an important part in the lives of the citizens of the Union," and requested that work on Brussels II be completed during the ensuing UK Presidency (id. at ¶ 60).[33] No mention was made of plans for the upcoming Tampere summit, since no decision had yet been taken to hold an extraordinary European Council summit meeting devoted solely to the AFSJ.

One event during the Luxembourg Presidency warrants brief mention, because it introduces an important institutional actor to the scene – the Troika. The Troika is an informal EU institution comprised of a trio of Presidencies, namely the former, current, and next Member State to hold the rotating Presidency of the Council of the EU.[34] Under the Troika, EU leadership – both internally, when dealing with EU 'domestic' matters, as well as externally, when dealing with EU 'foreign/international' affairs – is frequently three-headed.[35] Thus, one Member State holds the Presidency at any given time, but that Member State collaborates with two other Member States within this shifting constellation. The institution of the Troika emerged to provide some continuity to EU leadership, and has served to strengthen working relationships among national experts in policy fields such as JHA. It is, in a nutshell, the EU's 'buddy system' for national leaders. The Troika can be particularly important when the country holding the Presidency has recently joined the EU, as was the case with Austria and Finland, both of which became Member States on 1 January 1995, and both of which served in the rotating Presidency in the lead-up to the Tampere summit.

In operational terms, the Member State that occupies the six-month rotating Presidency sets the agenda and chairs EU meetings, notably those of the European Council (summits), of the Council of the EU (e.g., the JHA Council composed of national Ministers of Justice and Interior/Home Affairs), and of committees. The committee of interest here is the K4 (Coordinating) Committee, which was set up to handle JHA matters in the Third Pillar. The K4 Committee consisted of national officials from the relevant ministries responsible for JHA issues, along with such experts as the Member States might appoint.[36] Thus, a meeting of the 'Troika of the K4 Committee' indicates a high-level meeting involving senior national JHA ministers from three Member States.

In November 1997, the Troika of the K4 Committee – composed of senior civil servants from the Netherlands, Luxembourg, and the UK – met to discuss JHA issues with a high-level expert delegation from the pan-European Council of Europe (CoE)[37] (K4 Troika-CoE Meeting Report 1997). The details of the meeting, at which each international organization informed the other about current and planned activities in the broad JHA policy field, are less significant than the fact that such meetings regularly occur between the CoE and the EU[38] – two separate but overlapping organizations – which the Amsterdam Treaty placed on a collision course by increasing institutional competition (i.e., potential turf wars) between them in regard to civil justice matters.[39] The Luxembourg delegate ran the K4 Troika-CoE meeting, but the UK delegate (Timothy Walker from the Home Office) also spoke and informed those present that the forthcoming UK Presidency would be "driven rather by the need to pave the way for the entry

into force of the Amsterdam Treaty than by its own priorities."

8.3.2 The United Kingdom Presidency (January - June 1998)

During the UK Presidency in the first half of 1998, the last Member State ratified the Amsterdam Treaty. This removed the uncertainty about whether, and if so when the Amsterdam Treaty would enter into force, and precipitated the first concrete steps toward developing a blueprint for the AFSJ.

First, while already in the works, it was at the start of the UK Presidency that the Commission formally published its far-reaching Commission Communication on Judgments (January 1998), which was discussed in subsection 8.2.1.2 above. While not yet in possession of the legislative powers it would gain under the Amsterdam Treaty, the Commission nonetheless anticipated its coming role by issuing a call to launch a "debate on the substance of the problem of litigation in Europe" (id. at ¶ 11), and by providing a detailed roadmap for developing the civil justice area, in order to "ensure access of litigants to efficient, swift and inexpensive justice" (id. at ¶ 3) and to reduce "barriers" that "impede the free movement of judgments between Member States" (id. at ¶ 5).

Second, the Member States continued to grapple with pressing matters related to employment, competitiveness, public finance of EU activities, and monetary union. JHA matters warranted some attention as well. Thus, at the Cardiff summit towards the end of the UK Presidency (June 1998), the European Council noted the importance of ongoing efforts to "bring the Union closer to people by making it more open, more understandable and more relevant to daily life, ... notably through greater openness, and progress on ... justice and home affairs" (Cardiff Presidency Conclusions 1998: ¶ 27). With regard to JHA matters in general, the Presidency Conclusions emphasized the fight against organized crime, fraud, and drugs, as well as measures to combat racism and xenophobia, and the influx of migrants (id. at ¶¶ 37-43). On the particular topic of justice, the Cardiff European Council called for more "effective judicial cooperation in the fight against cross-border crime," and asked the Council to "identify the scope for greater mutual recognition of decisions of each others' courts" (id. at ¶ 39).[40] Civil justice itself, however, did not earn special mention in the Presidency Conclusions.

Finally, the Cardiff European Council proclaimed that the Amsterdam Treaty "should be fully operational once it enters into force" (id. at ¶ 47) in 1999. To that end, the Member State representatives (meeting as the European Council) "held a wide-ranging discussion about the future development" of the EU (id. at ¶ 61) and resolved to "take the necessary decisions in this regard at its meeting in Vienna" during the upcoming Austrian Presidency (id. at ¶ 47). With this deadline in mind, the Cardiff European Council kicked off the process of planning for the AFSJ by calling upon "the Council and Commission to present to its meeting in Vienna an Action Plan on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom and security and justice" (id. at ¶ 48). The European Council did not, however, ask the European Parliament to submit its views on the matter.

8.3.3 The Austrian Presidency (July - December 1998)

The Austrian Presidency during the second half of 1998 was Austria's first turn in the rotating Presidency since it joined the EU in 1995. As a new member, Austria benefitted from the Troika, where it was sandwiched between a long-standing Member State (the UK) and a founding Member State (Germany), both of which had built up dense policy networks through

decades of close policy coordination with other EU Member States, which experience the Austrians lacked (Huelshoff 2002: 72). The Troika arrangement provides incoming presidencies with a six-month opportunity to "familiarise themselves with the agenda and assimilate its elements into their own preferences" (id. at 73). Many feared that "small Austria, with comparatively little political power, would have a difficult time," which led the Austrian government to "rely heavily upon the Commission," which has the role of advising the Presidency (id. at 72). In view of these considerations, it is not surprising that Austria's agenda was highly "derivative" of the existing agenda (id. at 77).[41]

Yet despite lacking the "political connections, power and knowledge to exercise power in the European Council" (id. at 73), the Austrian Presidency was a turning point in the preparations for developing the AFSJ, largely because the process had already been set in motion. As noted above, the European Council had already signaled in Cardiff (June 1998) that some steps toward developing the AFSJ were to be taken at the Vienna summit in December 1998, and gave the Council and Commission marching orders to prepare an Action Plan to that end. With that momentum, the decision was taken during the Austrian Presidency to hold an extraordinary European Council summit meeting devoted solely to AFSJ issues in the second half of 1999, shortly after the Amsterdam Treaty entered into force, during the first Finnish Presidency.

8.3.3.1 The Commission AFSJ Communication (July 1998)

The Commission reacted quickly to the June 1998 Cardiff Presidency Conclusions by issuing a Communication entitled 'Towards an Area of Freedom, Security and Justice' (Commission AFSJ Communication) at the very start of the Austrian Presidency (July 1998), at a time when many Europeans are off on holiday. The speedy appearance of this ten-page document, which offered a concise overview of the Commission's priorities for developing the AFSJ, suggests that the Commission aimed to get a jump on the Member States, with whom it was to share joint responsibility for preparing the Vienna Action Plan.[42] In institutional terms, the Commission stated that it "feels that the European Parliament should also be involved," and likewise considers "dialogue with ... civil society ... essential" (id. at 10), thus foreshadowing the democratic turn that the Amsterdam Treaty set in motion. In terms of substance, the Commission's AFSJ Communication condensed some of the ideas found in its earlier Communication on Judgments (January 1998), but eschewed the level of detail found in the earlier document, in favor of a broad-stroke presentation of its (occasionally radical) ideas.

The document prepared by the Commission Task Force set out to "examine what the area of 'justice' should seek to achieve," and expressed the "ambition ... to give citizens a common sense of justice throughout the Union" (id. at 8). The AFSJ Communication is simultaneously pragmatic and visionary. It asserts that justice

> must be seen as facilitating the day-to-day life of people and bringing to justice those who threaten the freedom and security of individuals and society. This includes both access to justice and full judicial cooperation among Members States [sic]. What Amsterdam provides is a conceptual and institutional framework to make sure that those values are defended throughout the Union; in other words, the context in which *a Union global policy in the administration of justice* can be developed (id., emphasis added).

The Commission's AFSJ Communication addressed particular priorities regarding civil and criminal matters, as well as concrete procedural issues and other problems arising out of cross-

border litigation (id. at 9-10). In regard to civil justice, the Commission insisted that the EU must "simplify and facilitate the judicial environment in which [EU citizens] live," and emphasized fundamental "principles such as legal certainty and equal access to justice" (id. at 9). Finally, the Commission tipped its hand in regard to its views on national sovereignty by calling upon Member States to supplement the traditional "concept of public order," which has historically allowed each country to invoke its own national interest as an exception to general rules of private international law, with a new concept of " 'European public order' based on an assessment of shared fundamental interests" (id. at 9). In the context of private international law, it is hard to imagine a more far-reaching proposal to displace particular conceptions of national interest by shared European ones.

8.3.3.2 The European Judicial Network (EJN) and the Avignon Declaration

Around the same time, the European Judicial Network (EJN) was created within the Third Pillar, pursuant to a Belgian initiative, as a means to improve cooperation among national law enforcement officials in cases involving transnational criminal activity (EJN Decision - Criminal 1998). The first formal meeting of the EJN-Criminal was held on 25 September 1998. Shortly thereafter, the French Justice Minister (*Garde des Sceaux*), Elisabeth Guigou, convened a seminar in Avignon to discuss "The European Judicial Area: A New Challenge for Tomorrow's Europe" (16-17 October 1998), which considered the fight against organized crime (criminal justice) as well as family law issues (civil justice). At the close of that seminar, some Member States – France, Germany, Italy, Spain and the United Kingdom – formulated the so-called Avignon Declaration, which called for the creation of a genuine European judicial area.[43] In fact, the Avignon Declaration is an extension – in EU context – of the earlier Geneva Appeal of 1 October 1996 (Tinoush 1998), in which a small group of magistrates from Belgium, France, Italy, Spain and Switzerland had urged European countries to revamp the "current legal framework inherited from a time when borders still made sense" and "to eliminate outdated protectionist tendencies in police and judicial matters" by creating a "single European judicial area" (Bassiouni 2008: 499). (Note that both the Geneva Appeal and the Avignon Declaration were issued after the LIBE Committee Opinion and other EP documents prepared in 1995 for the IGC.[44]) French Justice Minister Guigou transmitted the Avignon Declaration to the EU Presidency and was informed by her Finnish counterpart that it would be a priority of the Finnish Presidency (Guigou 2004).

8.3.3.3 The Decision to Convene a Special Summit on AFSJ Issues

A few months later, Commission President (and Luxembourger) Jacques Santer[45] gave a State of the Union Speech to the European Parliament (21 October 1998), which presented a different, and less legalistic view of the forthcoming AFSJ. In his speech, Santer cited justice and home affairs as one of three core areas in which

> people in Europe want to see action taken by the Union as a matter of urgency. It is an ever-present, growing worry for all our citizens. Here ... it is felt that Europe should be doing more. And this feeling is shared by the players in the field: police officers, immigration services and the courts. They are all calling on us to help develop our capacity for reacting quickly, shoulder-to-shoulder and at the operational level. ... [I]t is vital that those involved trust each other (Commission President Speech 1998).

While Santer's language does not exclude civil justice, it nevertheless resonates strongly with

security concerns relating to movement of persons, crime and drugs, which had been a policy priority of Luxembourg for many years, including the decade when Santer had served as Prime Minister (1984-1995).

President Santer's speech was inspired in part by the view that had emerged by early autumn that the forthcoming Vienna Action Plan would not be the "great leap forward" that many Member States and EU institutions were hoping for (Monar 2000: 27, my translation). The fate of the AFSJ had also been called into question by the fact that German Chancellor Helmut Kohl's Christian Democratic Party (CDU) lost national elections in September 1998, after sixteen years in office, which meant that the EU had lost one of the strongest proponents of closer integration in the JHA (and particularly the police cooperation) field.[46]

In view of the importance of the issues at stake, Santer proposed that a "special meeting of the [European Council] be held in 1999 to discuss just this crucial issue" (Commission President Speech 1998). He also called upon Member States to establish "clear objectives with precise deadlines" for the Vienna summit, and urged Member State representatives to "make sure that their national government departments overcome the old national knee-jerk reactions and see beyond the futile partition walls which divide the Member States from the Community" (id.). Santer called upon Member States to put a "real political will behind" the Vienna Action Plan, adding that "[i]f it is a priority for ordinary citizens, then it must be a priority for the Heads of State and Government."

Commission President Santer's speech to the EP was given just days before the informal European Council meeting on the future of the EU, which was held in Pörtschach am Wörthersee (24-25 October 1998). At this "brainstorming session" (Occhipinti 2003: 81), Spanish Prime Minister Aznar took up Santer's idea, which was "supported by the Austrian Presidency and all Heads of State and Government" (House of Lords Tampere Report 1999: ¶ 14; see also *Jahrbuch der europäischen Integration* 1998: 52). Aznar's contribution went beyond pushing Santer's proposal forward, and included a "very good and thorough" briefing paper that addressed "all Tampere issues"[47] and was "read and reread" by key persons during the Finnish Presidency (Interview #10).

At its Vienna summit in December 1998, the European Council committed itself to the future challenge of building the AFSJ, despite the loss of "long-time champion" Kohl (Occhipinti 2003: 81),[48] and reaffirmed "the importance it attaches to a full functioning of the Amsterdam Treaty as soon as it enters into force" (Vienna Presidency Conclusions 1998: ¶ 72). With this in mind, the European Council underlined "the need to finalise urgently the necessary measures including in the important area of justice and home affairs" (id.), and formally decided that the upcoming Finnish Presidency would convene a special European Council session devoted to the creation of the AFSJ in October 1999, in order to "evaluate progress achieved and give further guidance to the actions of the Union in the fields of justice and home affairs" (id. at ¶ 94; see also House of Lords Tampere Report 1999: ¶ 14).

Once this decision had been taken, the Finnish government wasted no time and set up the so-called 'Tampere Group' in November 1998 (Prime Minister's Roadmap 2000). The Tampere Group was an internal Finnish structure, which included representatives from the Prime Minister's Office, the Ministries of Justice, Home Affairs, and Foreign Affairs, and Finland's Permanent Representation to the EU.

8.3.3.4 The Vienna Action Plan

Pursuant to instructions given by the Cardiff European Council (June 1998), the Council and Commission presented their joint "Vienna Action Plan on how best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice" (Action Plan) in early December 1998,[49] and the Vienna European Council approved it the following weekend. This "unprecedented display of interinstitutional cooperative spirit" (Vink 2001: 15) covered the entire range of AFSJ policy sub-fields. It was a "simultaneously remarkable and unsatisfying" document (Monar 2000: 26, my translation). One the one hand, it reaches far beyond the Amsterdam Treaty's narrow language calling for the creation of an area of freedom, security and justice (AFSJ), which is limited to the traditional justification of ensuring free movement of persons.[50] For example, the Action Plan articulates expansive notions of freedom, of security, and of justice, which are, in turn, derived from ideas that the Commission had explored in its earlier effort to synthesize the tripartite conceptual structure into "a single *concept*" that would lend "sense and coherence" to the multifaceted and multistage process of creating the AFSJ (Commission AFSJ Communication 1998: 2). As such, "freedom" is not limited to movement of persons across borders, but includes "freedom to live in a law-abiding environment in the knowledge that public authorities are using everything in their individual and collective power ... to combat and contain those who seek to deny or abuse that freedom," along with the "full range of fundamental human rights" and "protection from any form of discrimination" (Vienna Action Plan 1998: ¶ 6). For its part, justice "must be seen as facilitating the day-to-day life of people and bringing to justice those who threaten the freedom and security of individuals and society" (id. at ¶ 15).

With regard to civil justice issues, the Vienna Action Plan repeats most of the concrete proposals found in the Commission's earlier AFSJ Communication, often verbatim. And yet, the Member States[51] also pushed back and made a number of significant changes that clipped the Commission's wings. First, while the Action Plan embraced the Commission's call to "give citizens a common sense of justice throughout the Union," it simultaneously bounded this aspirating by insisting that the emerging area of justice must respect "the reality that, for reasons deeply imbedded in history and tradition, judicial systems differ substantially between Member States" (Vienna Action Plan 1998: ¶15). In this context, the Action Plan backs away from the Commission's earlier lofty statements about European judicial systems and the role of an "independent and well-functioning judiciary" as "one of the backbones of our shared tradition of Rule of Law" (Commission AFSJ Communication 1998: 8). Second, and consistent with the Member States' apparent discomfort with measures oriented towards their national judiciaries, the Action Plan dropped the Commission's visionary call for developing a "Union global policy in the administration of justice" (Vienna Action Plan 1998: ¶15). Third, the Member States rejected the Commission's call to displace traditional national conceptions of public policy in favor of a new concept of "European public order" (id.). And fourth, the Action Plan narrowed the scope for EU action involving procedural rules by noting that many procedural guarantees were "already achieved" under the CoE's European Convention on Human Rights and Fundamental Freedoms (id. at ¶19) to which all EU Member States were (also) party, and hence unnecessary within the EU context.

Last but not least, the Vienna Action Plan provided an ambitious and detailed catalogue of ten concrete civil justice measures that should be taken within two and five years after the Tampere summit (id. at ¶¶ 40-41).[52] Unlike other AFSJ policy sub-fields, as to which the Vienna

Action Plan has been criticized for not going far enough or not fully exploiting the possibilities opened up by Amsterdam (e.g., Monar 2000: 26-27), its civil justice proposals go beyond initiatives already on the table and include some (albeit not all) elements from the wish list expressed in the Commission's far-reaching Communication on Judgments (December 1997). And yet, the Vienna Action Plan is still considerably *narrower* than what was ultimately agreed in Tampere for the civil justice component of the AFSJ (see subsection 8.5.1 below).

The Vienna European Council welcomed the Action Plan as a "concrete framework" for developing the AFSJ (including but not limited to civil justice), and urged the Council to "start immediately with the implementation of the two-year priorities" that it mapped out (Vienna Presidency Declarations 1998: ¶84). On the matter of justice, the European Council called for "particular attention to be paid to the creation of a European judicial area, ... endowed with the necessary instruments for effective judicial and police cooperation," and made special note of priorities in regard to movement of persons (Schengen), Europol, organized crime and migration (id. at ¶ 85), but made no mention of civil justice.

8.3.3.5 Conclusions

It is ironic that the European Council embraced President Santer's proposal to devote an extraordinary summit meeting to the AFSJ at just the moment when Santer's power – and that of the Commission as a whole – was crashing in the wake of a whistle-blower report alleging financial mismanagement and cover-up. The Commission corruption scandal reached crisis proportions during the same month as the Vienna summit (December 1998), and resulted in the Commission's resignation *en masse* in March 1999 (BBC News 1999), which left the EU "decapitated" (Walker 1999) in the period when the Amsterdam Treaty was entering into force. The institutional instability set off by these events persisted throughout the pre-Tampere preparations, insofar as the EU's executive body was led by a caretaker Commission under Manuel Marín until 16 September 1999 – one month before the Tampere summit – when a strong new commission led by Romano Prodi (Italy) took office.[53] The Commission's leadership role, which was already quite constrained in the Tampere process, was considerably diminished by this institutional crisis during the increasingly intense preparations for Tampere. And yet, the resignation of the Santer Commission did not simultaneously displace or disrupt the work of the Commission JHA Task Force, which remained an active and influential force in the preparations for the Tampere summit.

As for the Austrian Presidency itself, it was an important stage in the development of the AFSJ, but not because Austria had any particular devotion to AFSJ issues or was keen to put its unique mark on the process of preparing for the Tampere summit. Rather, as a new Member State, Austria relied heavily on the Commission, which was (as it turned out) in peak form just before its fall. Austria was the site at which important decisions were taken, but the most important ideas and impulses were coming from the Commission, as well as from Member States with a keen interest in seeing the AFSJ fulfill its promise. As luck would have it, the two Member States scheduled to hold the presidency in 1999 – Germany and Finland – were both devoted to this goal.

8.3.4 The German Presidency (January - June 1999)

Paradoxically, despite Germany's weight and experience in EU affairs, the 1999 German Presidency was marked by "confusion and inexperience" (Huelshoff 2002: 79) in the wake of the

September 1998 election that had turned Helmut Kohl's government out of office.[54] The incoming government was a coalition of the Social Democratic Party, which had been in opposition for sixteen years, and Alliance 90/The Greens (Green Party), which was in the federal government for the first time and had "no experience at all in running an EU presidency" (Maurer 2000: 43). Moreover, hostility prevailed between the outgoing and incoming German governments, which meant there was "little continuity between the two" (Huelshoff 2002: 72). This left the new German government scrambling to prepare for its rotation in the Presidency (Interview #46).

The EU was under acute pressure at the time, with large issues on the table, among them monetary union and the launch of the single currency, and institutional reform in the face of enlargement negotiations. Most pressing, however, was the need to settle the Agenda 2000 package to reform the Common Agricultural Policy and Regional Policy (i.e., structural funds transferred from wealthier to less developed parts of the EU), and to fix a budget for the years 2000-2006, both of which needs had huge financial implications for Germany as a net payer (Maurer 2000: 43-4). The European Council had decided at its Vienna summit (December 1998) that the Agenda 2000 package should be completed by March 1999, which made it an urgent priority for the new German government. Moreover, consistent with the turn to the left in the recent election, the German Presidency placed greater emphasis on the social dimension of European integration, particularly unemployment (id. at 45). For their part, the Greens were interested in some AFSJ issues, notably the goal of deepening integration in regard to asylum and migration, and the call for a charter of fundamental rights (id.). The priorities announced by the German Presidency in early 1999 reflected these goals, along with a call for closer cooperation to combat trans-frontier crime (id. at 45-46). Civil justice issues were not on their radar at all. The first half of the German Presidency focused largely on agenda 2000 negotiations, which were concluded at the Berlin European Council (24-26 March 1999), just over a week after the Commission's unexpected *en masse* resignation.

Amidst this turmoil, the preparations for the Tampere summit proceeded, running largely in the background at the level of civil servants. These preparations, along with the role of the German Federal Ministry of Justice (BMJ), are examined in section 8.4 below, since they were organized largely by the incoming Finnish Presidency, even during the ongoing German Presidency.

8.3.4.1 Contributions by the European Parliament

Despite its lack of formal institutional role in the preparations for Tampere, the European Parliament (EP) – in particular, its LIBE (Citizens' Freedoms and Rights, Justice and Home Affairs) Committee – did not remain silent during the transition period. Notably, it adopted two resolutions addressed to JHA/AFSJ issues, and organized an Interparliamentary Conference, in its ceaseless efforts to be heard on matters it considered to be of the utmost importance for the future of Europe.

Informal institutional arrangements that had been introduced to strengthen the EP's role in regard to JHA matters (subsection 8.2.1.3 above) yielded disappointing results. The EP's frustration reached the boiling point by January 1999, just a few months before its new powers would vest (on 1 May 1999) under the Amsterdam Treaty. Time, in the EP's view, was wasting and there was much work to be done to prepare for Tampere. Miffed that it was sidelined from virtually all aspects of JHA policy-making and planning for the AFSJ, the EP came out swinging

at the start of the German Presidency with a strongly worded Resolution on JHA Progress in 1998 (EP 1999a),[55] in which the EP expressed its extreme displeasure over the institutional status quo (id., preamble, ¶¶ J & K). On matters of substance, the EP "regard[ed] as unsatisfactory the level of preparation of the work intended to lead to the establishment of an [AFSJ]" (id. at ¶ 1) and expressed a wide range of concrete concerns and suggestions (id. at ¶¶ 1-24). With regard to justice, the EP insisted that judicial cooperation should "progress more rapidly in order for the necessary civil- and criminal-law area to be created to guarantee the freedom and security which citizens of the European Union have the right to expect in an enlarged Europe" (id. at ¶ 13) and urged that "particular efforts ... be made to eliminate obstacles to judicial cooperation and greater efforts to establish the European Judicial Network."[56] The EP also urged that "direct contacts between the competent authorities" should replace "traditional legal assistance" procedures (id. at ¶ 14).[57]

Next, in late March 1999, the EP convened an Interparliamentary Conference with Member State parliamentarians, with the aim of improving democratic oversight in the policy field by establishing regular consultations among the EP, national parliaments, and NGOs (EP 1999c). "All speakers agreed on the urgent need for a European area of freedom, security and justice," and a handful of prominent speakers – among them two national Justice Ministers[58] – articulated particular priorities (id.). Thus, German Justice Minister Herta Däubler-Gmelin noted that the Amsterdam Treaty would lead to major progress on home affairs, significantly facilitate cooperation in the civil justice field, and improve protection of the public against crime, but also called for "better legal protection of the public" in terms of protections for fundamental rights, as urged by several NGOs (id.).[59] The Finnish Justice Minister, Jussi Järventaus, stressed the need to ensure that decisions must be clearly understood by the public, and called for an "integrated approach" to the AFSJ, involving "common minimum standards, harmonisation and the elimination of technical cross-border barriers" (id.).

Midway between the Interparliamentary Conference (late March) and the Amsterdam Treaty's entry into force (early May), the EP adopted a comprehensive Resolution on the Vienna Action Plan/AFSJ (13 April 1999) (EP 1999d). This Resolution, which focuses on issues of substance, constitutes a more measured intervention than the EP's resolution from January of that same year (EP 1999a) and shows the EP finally coming into its own as a real institutional player in the JHA/AFSJ field. In this Resolution, the EP returns to the visionary mode it occupied in connection with its AFSJ-related interventions during the IGC leading up to the Amsterdam Treaty. Here, the EP undertakes to expand and refine the discourse around the AFSJ. The EP nods briefly in passing to national cultural and historical differences, then hastens to assert that "strictly national responses" are inadequate to solve problems arising "in the context of large scale processes affecting the whole continent" (EP 1999d: preamble, ¶ C), and invokes the "increasing demand of civil society for greater fairness, justice and comparable conditions of security and judicial protection" as overarching rationales for creating the AFSJ (id. at ¶ B). The EP links the creation of the AFSJ explicitly to the protection of fundamental rights (id. at ¶ J), as well as to the "development of real – and not merely theoretical – European citizenship" (id. at ¶ K).

With these overarching goals in mind, the EP called upon the European Council, the EP and national parliaments (albeit not the Commission) to "draw up a common strategy" for Tampere – which should include "mutual recognition of civil and criminal sentences"[60] – and declared "its readiness, as of now, to participate in the definition of this strategy in collaboration

with the high-level group responsible for preparing the Tampere conclusions, promoting, together with national parliaments, appropriate participation by civil society" (EP 1999d: ¶ I(1)). The EP Resolution prioritized the need to ensure fundamental rights (id. at ¶ I), but also offered detailed suggestions regarding the creation of a "European area of justice" (id. at ¶ III), the goal of which should be to "simplify the relationship the citizen and the business sector have with the judicial system and to make the judicial system more effective within an integrated European area, particularly by encouraging the emergence of a common judicial culture" (id. at ¶ III(16)). The EP invoked the rights of fair trial, echoing those found in the CoE's European Convention on Human Rights (id. at ¶ III(17)), and asserted that "the granting of judicial assistance free of charge in cases of difficulty must be guaranteed in all judicial proceedings" (id. at ¶ III(19)).[61]

8.3.4.2 The Cologne European Council (3 June 1999)

The European Council heeded the EP's call to some degree, meeting with EP members on 22-23 May 1999 – shortly before the Cologne summit (Cologne Presidency Conclusions 1999: ¶ 3) – and welcoming the EP's Resolution on the Vienna Action Plan/AFSJ (id. at ¶ 45). The European Council also met with the incoming Commission President Prodi to hear his views about future work in the AFSJ field (id. at ¶ 2). And yet, the Cologne European Council gave short shrift to the AFSJ in its Conclusions, which is hardly surprising in view of the upcoming Tampere summit, and limited itself to urging the EU "institutions to press ahead swiftly" to implement the Vienna Action Plan (id. at ¶ 45).

8.4 The Finnish Presidency – Preliminary Preparations during the German Presidency (January - June 1999)

Amidst the political turmoil during the first half of 1999, preparations for the Tampere summit proceeded, running largely in the background, at the level of civil servants. The Finnish Presidency faced a dual challenge. At the macro level, it had to create an overarching conceptual structure to accommodate all interests that converged in the Tampere summit, while at the micro level, it had to realize its own policy preferences on particular issues. Both tasks were managed by the EU Unit in the Prime Minister's Office, under the leadership of PM Paavo Lipponen, along with Alec Aalto (State Secretary, EU Affairs), Antti Peltomäki, Mikko Puumalainen, and Inga Korpinen. Peltomäki and Puumalainen – the "men of Tampere" (Interview #20) – did most of the leg work and drafting, aided by Korpinen. All three had close ties to the Ministry of Justice, and to Secretary-General Kirsti Rissanen, its top civil servant.[62]

The Finnish preparations for Tampere, which got underway already during the German Presidency, were extraordinarily painstaking (Monar 2000: 27, my translation), and involved an "intense process of consultation and deliberation" (House of Lords Tampere Report 1999: ¶ 15). As a new Member State preparing for its first Presidency, the Finns were initially uncertain how to organize the summit, and sought advice from more experienced EU insiders. While technically a member of the Troika from the moment Germany assumed the Presidency in January 1999, Finland opted for a modified approach and supplanted this existing informal institution with an even more informal one – the 'Group of Four' – as its 'brain trust.' This small contact group included persons from the German and Finnish Presidencies (i.e., the Troika, minus Austria), along with civil servants from the Commission and the Council Secretariat (Prime Minister's Roadmap 2000), in all a group of "six or seven, even perhaps eight" persons, who were already known by the Finns from working together in various EU fora and trusted in view of their long

experience (Interview #46). Dr. Jürgen Jekewitz, who was the senior civil servant from the German Federal Ministry of Justice at the time,[63] was invited to the first meeting of this group, along with representatives of the Council Secretariat (Charles Elsen, Gilles de Kerchove, Clemens Ladenburger) and the Commission Task Force (Adrian Fortescue and a few others), and participated regularly until the end of the German Presidency, at which point the Germans were no longer invited to attend (Jekewitz Interview). This group developed some "very broad, very vague" ideas (Interview #32), but was not itself a drafting group.

The 'Group of Four' met with some frequency and "started to collect ideas" (Interview #46). These meetings often took place on the periphery of other formal and informal meetings of the ministerial-level JHA Council and the expert-level K4/Article 36 Committee.[64] This kind of informal arrangement is "common" since "you can't do this kind of work with fifteen Member States," much less twenty-eight, "you would never get anywhere," so you "need a group of four or five or six people" to prepare things, and later it is "accepted as a joint effort of the whole" (Interview #46). After each round of meetings, the Finns were "writing, writing, writing" (id.) to consolidate discussions, then sought feedback from members of the Group of Four. During the German Presidency, these informal meetings were supplemented by meetings of the JHA Council, an informal meeting of the European Council, and a *tour de capitales* (explained below).

Member States began expressing their concrete preferences for the Tampere program at an informal meeting of national Justice and Home Affairs (JHA) Ministers in Berlin at the start of the German Presidency (January 1999). This meeting entailed drawing up a preliminary "shopping list!?" (Prime Minister's Roadmap 2000, punctuation in the original), or wish-list of issues that each Member State would like to see included.[65] The incoming Finnish Presidency was fundamentally opposed to the shopping list approach, as exemplified by the Vienna Action Plan (Interview #10). From the Finnish perspective, a shopping list meant that the Presidency "doesn't do its job, it just collects and works as a secretariat" by compiling the "different ... political hobby horses of the Member States" (id.). But this approach is "quite useless," it "doesn't really work" (id.), and the Finns had a different goal in mind. The Finnish Presidency aimed rather to "give a feasible program," which means you have to "say no to someone, and you have to balance, to see the relationships between ... freedom, security and justice," in order to achieve results (id.). If all you do is make a shopping list, the balancing, synthesis and selection needed to make good policy is missing (id.). The Finns, who wanted to move beyond describing the issues, aimed to figure out "how to make sensible proposals for decision, a realistic program" (id.). The Group of Four had urged that the Tampere program should be "ambitious but not too detailed" (Interview #46). As expressed in PM Lipponen's letter to other members of the European Council, the Tampere European Council

> should not result in a new Action Plan but rather in a strong political commitment to effect an area of freedom, security and justice with the help of a comprehensive approach. The European Council is to define the central priorities for the implementation of the area, establish political guidelines and, if necessary, concrete objectives for future action (Finnish PM's Tampere Letter 1999).

Still, the team from the PM's Office had to find a way to incorporate proposals coming from inside the Finnish government, as well as from other Member States and EU institutions. There ensued a remarkable tug of war for control over the content of the Tampere program.

The next stage of Tampere preparations entailed an informal meeting of the European

Council in Petersburg during the German Presidency (February 1999). This proto-summit meeting resulted in a joint letter circulated by German Chancellor Schröder and Finnish PM Lipponen (18 March 1999), in which they expressed their personal commitment to the Tampere process and the goal of bringing the Union "closer to its citizens," and announced that a first round of shuttle diplomacy – a *tour de capitales* (tour of national capitals) – would be held in the spring (Schröder-Lipponen Letter 1999). The Presidency *tour de capitales* practice is a key resource of the Member State occupying the EU Presidency, because it affords an opportunity to collect information and bring pressure to bear in advance of the summit meeting at which final decisions are taken, and where time is always in short supply (Tallberg 2006: 115).

In terms of substance, the Member States had agreed at their informal meeting in Petersberg that the Tampere program should focus on a "limited number of central issues in the fields of immigration and asylum, the fight against cross-border crime and the establishment of a European judicial area, including citizens' access to justice" (Finnish Presidency – First *Tour of Capitals* Letter 1999). This reflects one of the Finnish Presidency's key strategies, which was to establish a clear overarching structure – "three baskets" of issues (Interview #49) – and to emphasize concept development, in lieu of a mere shopping list. In this context, the Finnish Presidency also proposed that the AFSJ should be based on the idea of a

> common *area*, i.e., something different from the territories of the Member States. The concept of such an area is original and should entail legal consequences. The main issue is to take joint responsibility for the project and to refrain from unilateral actions as they will inevitably affect everyone. In principle, this is a significant change: The Treaty of Maastricht ... contained no comprehensive objective nor a coherent approach in this respect. The Treaty of Amsterdam contains more far-reaching objectives (Finnish Presidency – First *Tour of Capitals* Letter 1999).

The Finnish Presidency thus took on board the *area* (*l'espace*) concept, along with the challenge of spelling out its practical implications. The idea of the area had already been in circulation for some years: it was first mentioned by French President Giscard d'Estaing in the 1970s, elaborated in the EP's LIBE Committee during the IGC (European Parliament 1995b), advanced by France and Germany (Joint Letter from French President Chirac and German Chancellor Kohl) in December 1995, proposed in more concrete terms in the 1996 Geneva Appeal and the 1998 Avignon Declaration, and strongly endorsed by the EP in its 1999 Resolution on the Vienna Action Plan/AFSJ (European Parliament 1999d). Thus, while the *area* (*l'espace*) concept was a priority of the Finnish Presidency, it did not originate there and was strongly endorsed by other actors as well, in particular by French Justice Minister Guigou, who pushed consistently for it throughout the Tampere process (Monar 2000: 28).

As a follow-up to the February 1999 Petersberg meeting, the Finnish Presidency distributed a detailed questionnaire to ministers and senior officials of the other fourteen Member States, and then held extensive talks with many of them during the first pre-Tampere *tour de capitales* (April-May 1999) (Occhipinti 2003: 81). The *tour de capitales* was led by the personal representative of the Finnish PM, Antti Peltomäki (State-Under-Secretary), together with Mikko Puumalainen (Councellor, PM's Office/EU Unit), Klaus-Peter Nanz (German Presidency), Adrian Fortescue (Commission Task Force, *Consellier hors classe*),[66] and Charles Elsen (Director General, Council General Secretariat). The goals of the first *tour de capitales* were to test the basic concepts, sell the main objective, and collect different ideas and initiatives (Prime

Minister's Roadmap 2000). According to one participant, "in the *tour de capitales* you never discussed draft conclusions, you discussed issues and ideas" (Interview #32). The results of discussions were subsequently presented at the 27-28 May 1999 meeting of the ministerial-level JHA Council. A *tour de table* was conducted at that meeting, which allowed the national ministers to state their positions on the items under discussion, without taking any formal decision (id.). The conclusions from that meeting reflect agreement that the "agenda of the meeting should be ambitious and that the meeting should provide an important impulse especially in the areas of immigration and asylum, the fight against organised crime and judicial cooperation in civil and penal matters" (2184th Council Meeting - JHA 1999, ¶12). The French delegation "availed itself of this opportunity to develop some of its ideas in these three fields" (id.).[67]

The Finnish Presidency agreed that the Tampere meeting would be prepared within the existing (Third Pillar) institutional framework of the "Council structures" in Brussels (including the ministerial-level JHA Council), but wanted "to direct the discussion," to define the "goals and the principles and the tuning of the meeting," and to prepare the papers that were distributed in Brussels (Interview #10). What the Finns did not want was for the EU institutions to run the show. The Commission was weak at the time, owing to the recent resignation of the Santer Commission (in mid-March 1999), which made Fortescue's position precarious (id.), although he was "always very helpful" (Interview #46), and a "highly valued member" of the team (Interview #41; similarly Interview #56). Fortescue had a rare gift for seeing the big picture – the EU as a system – and for understanding how the parts fit together in a whole (Interview #46). Not only his diplomatic skills but also his lack of formal legal training led him to tread gently. Whatever friction there was arose primarily between the Finnish Presidency and the Council General Secretariat, which "took a very active political role, ... even dominating the whole process" (Interview #10). According to a Finnish participant, the "position of the Council Secretariat was very bizarre, ... because their role is to ... give services to the Member States. But ... they took a different role in the Tampere preparations. They were the super Commission ... in a way. They ... tried to dictate the whole thing" (id.).

The struggle for control over the Tampere preparations posed a challenge to the Finns' ability to fulfill the 'broker' function of the Presidency (e.g., Elgström 2993c). One of the Presidency's major resources is its "asymmetrical control over negotiating procedure and ... Council sessions," which are "essentially stage-managed by the Presidency" (Tallberg 2006: 115). The Presidency has a "broad repertoire of procedural instruments" for the task of controlling the negotiation process (id.). One such resource is the ability to determine the *pace* of negotiations (id.), such as can be seen in the unusual number of preparatory meetings held by the Finns during the German Presidency. Another resource, also already noted, is the Presidency's ability to decide the *format* of negotiation sessions, such as by constituting the Group of Four, or restricting who may be at the table during particular sessions (id. at 116). An example of the latter was the Finnish Presidency's (controversial) decision that national Justice and Interior Ministers would *not* be invited to negotiate in Tampere – only the heads of state or government[68] – since the Finns wanted the summit meeting to be something "other than a ministerial 'Jumbo [JHA] Council' " (Monar 2000: 28, my translation), that is, not just another round of detail-oriented discussions among wonkish policy experts about ongoing matters. Rather, the Finns aspired to ratchet up the level of discussion by keeping Member States focused on defining political goals for the next five years and hammering out a realistic way to pursue them, rather

than allowing the negotiations to be sidetracked by detail-oriented experts.

The Presidency's last – and possibly most essential – resource is the ability to establish its *text* as the basis of negotiations. This is crucial to the Presidency's ability to "stitch together unorthodox deals that stretch across a number of issue areas" (Tallberg 2006: 117), as was called for in Tampere. In ordinary circumstances, it is "relatively easy for the Presidency to place its own text at the center of negotiations where these follow the intergovernmental, rather than the supranational mode of decision-making" (id. at 118).[69] The extent to which the Presidency can establish its text as the

> basis of negotiation grants the government at the helm significant room for maneuver. ... He who proposes is in the driver's seat. Member states only say no if they totally cannot buy it, which grants the Presidency quite some room to shape deals to its own liking. ... Once the Presidency's compromise text has been established as the basis of negotiations, the chair's ability to engineer agreement around its preferred outcome expands considerably" (id. at 117).

A member of the Finnish Tampere Team confirmed that "we had a lot of room for maneuver, because we were coordinating the whole meeting. And we were ... constructing a package with a very clear goal to do that in a balanced fashion, not to [give too much way] ... but also to make it realistic" (Interview #10). And yet, the Finnish Presidency was hard-pressed to maintain control over the process of drafting the Presidency Conclusions, in view of the dominant role played by the Council Secretariat in the Tampere process.

8.5 The Finnish Presidency (June - December 1999)

To focus the process of tracing how civil justice priorities were worked out during the Finnish Presidency, I begin by summarizing the *outcome* of the Tampere process (subsection 8.5.1), as reflected in the agreement embodied in the Presidency Conclusions (Tampere Milestones), then compare it to the starting baseline. The five-year program agreed by the European Council in October 1999 differs substantially from the formal starting point that it endorsed nearly a year before in the Vienna Action Plan (December 1998), which itself was largely based – insofar as civil justice matters are concerned – on the Commission's earlier Communication on Judgments (January 1998). Identifying key differences between start and end points of this policy articulation process enables me to focus on explaining those changes that were made in 1999 during the Finnish Presidency.[70]

Once the key changes introduced in 1999 have been isolated from proposals on the table as of December 1998, I turn to the task of tracing events during the Finnish Presidency, with the aim of explaining preference formation in the context of the complex processes that were underway. The narrative alternates between macro-level focus on the larger institutional process, and micro-level attention to preference formation in Finland (subsection 8.5.2.1), and later, other Member States (subsection 8.5.2.2). The process of drafting the Tampere Milestones, which exposes tensions between the Finnish Presidency and the Council General Secretariat, warrants separate discussion (subsection 8.6.1), while the events during the Tampere summit itself are examined in subsection 8.6.2.

8.5.1 Overview of Key Civil Justice Provisions Agreed in Tampere

The Tampere Milestones[71] (Appendix I) call for the creation of a "Genuine European Area of Justice," where "individuals and businesses should not be prevented or discouraged from

exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States" (¶ 28). The Milestones elaborate the concepts intended to animate the creation of the AFSJ, while also specifying priority items to be addressed within an established time frame. They endorse the concrete proposals laid down in the Vienna Action Plan, but expand on them considerably, and on occasion incorporate detailed suggestions found in the Commission's earlier Communication on Judgments. Appendix J compares the Vienna Action Plan, which was the formal baseline at the start of the Tampere process, with the final Milestones.

As definitively framed in Tampere, the 'European Area of Justice' (EJA) was envisioned as having three components: better access to justice in Europe, mutual recognition of judicial decisions, and greater convergence in civil law. While many of the concrete proposed measures have roots in the Commission's earlier Communication, some key elements – along with the conceptual structure used to bundle them – were added during the Tampere process. In part, the Tampere process entailed imposing a simpler and more coherent rationality on the welter of ideas generated by the Commission, which (as noted above) was straining at the bit to jump into the civil justice arena as co-legislator. At the same time, however, the Tampere Milestones both broaden and deepen what was already on the table at the outset of preparations for the October 1999 summit. The creation of the three Tampere categories constituted the first major exercise in stretching the language of the Amsterdam Treaty – "judicial cooperation in civil matters" – beyond its original, modest contours.

When compared to the baseline established in the Vienna Action Plan, the Tampere Milestones contain the following additions and enhancements:

Access to Justice:

- Launch an information campaign, publish appropriate 'user guides,' and establish an easily accessible information system, in order to facilitate access to justice;
- Establish minimum standards ensuring an adequate level of legal aid in cross-border cases;
- Establish special common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims, maintenance claims, and uncontested claims;
- Member States should create alternative, extra-judicial procedures (i.e., mediation);
- Set common minimum standards for multilingual forms or documents to be used in cross-border court cases, which should be accepted mutually as valid documents in all legal proceedings in the EU;

Enforcement of Judicial Decisions:

- Endorse the principle of mutual recognition as the cornerstone of judicial co-operation in both civil matters within the Union, which should apply to judgments, as well as other judicial decisions, including pre-trial orders and the gathering of evidence;
- Adopt a program of measures to implement the principle of mutual recognition, including a European Enforcement Order and "those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition";

Greater Convergence in Civil Law:

- Prepare new procedural legislation in cross-border cases, particularly on those elements which are instrumental to smooth judicial co-operation and enhanced access to law, e.g. provisional measures, taking of evidence, orders for money payment, and time limits; and
- Conduct a study on the need to harmonize substantive law in civil matters in order to eliminate obstacles to the good functioning of civil proceedings.

This ambitious legislative blueprint constitutes the first five-year plan for building the civil justice side of the AFSJ's Area of Justice. The Tampere Milestones also designate which actors – in most cases, EU institutions – are to take which steps.

Ascertaining which of these were added during the Tampere process itself is a three-step exercise. First, as noted above, some items that do not appear in the streamlined interim Vienna Action Plan (December 1998) had already been suggested in the Commission's earlier and more thorough Communication on Judgments (January 1998). For example, that Communication already noted the need for "trust in judicial institutions" (¶ 11), an "information exchange scheme" (¶ 12), a "rapid procedure for money claims" (¶ 12), "provisional and protective measures" (¶¶ 22-29), the recovery of "uncontested cross-border debts" (¶ 35), the potential use of multilingual forms (¶ 19), the European Enforcement Order (¶¶ 18-19 & 26), and maintenance claims (¶ 59). Second, I set aside one notable (but only apparent) difference – namely, the cautious calls made by EU institutions for "minimum standards" and "common procedural rules," in contrast to the strong calls made by the Member States (acting as European Council) in the Tampere Milestones – because it simply reflects inherent differences in the institutional capacity and role of the actors who uttered these calls. As such, this is not a difference that emerged during the Tampere process and hence requires explaining here, so much as one that mirrors structural features of the EU institutional landscape. Finally, by filtering the first two factors out of the Tampere Milestones, I can ascertain the core additions made during the Tampere process, namely: the conceptual architecture itself, an enriched notion of what access to justice should entail, the reliance on mutual recognition, and the surprising (if somewhat lackadaisical) reference to harmonization of substantive law, together with the linkage between such measures and the "good functioning of civil proceedings." These are the key changes that I seek to explain.

8.5.2 Working out Civil Justice Priorities

My approach to this question is especially skeptical and cautious. It is possible to trace the chronological strands of events, but often difficult to pinpoint with certainty who presented which particular idea first. A handful of my interviewees claimed – more or less modestly – to have originated proposals which I know, on the basis of documentary evidence, to have been under discussion in EU or related circles for years, if not decades. The task is further complicated by the fact that the Tampere preparations involved a dizzying number of parallel (and occasionally overlapping) processes taking place in multiple fora. Within the Finnish government, a small Tampere group in the EU Unit of the Prime Minister's Office (Tampere Team) steered the negotiations, drafted key texts, and had to coordinate with the Foreign, Justice and Interior Ministries, as well as with the Parliament. The Finnish Tampere Team also had to coordinate with the other fourteen Member States, as well as with key EU institutions (i.e., the

EP, the Commission, the Council Secretariat, Committees, and relevant Council configurations), and even some international organizations. It was, according to some interviewees, a thrilling but exhausting blur. Despite these difficulties, my research allows me to draw some conclusions as to who was the moving force behind some of the key additions that ended up in the Tampere Milestones, to identify key actors and institutional moments, and to explore the dynamics that generated the outcome.

Member States submitted a variety of written statements revealing their priorities during the lead-up to the Tampere summit in 1999. While my interview-based research on the processes that generated national priorities focuses on Finland and Germany, I summarize key statements by Member States other than Finland in subsection 8.5.2.2 below, insofar as they are available,[72] as an aid to understanding the final outcome agreed in Tampere. Given its key role in the Tampere process, I first examine Finnish sources (subsection 8.5.2.1), then turn to other Member States (subsection 8.5.2.2), before drawing preliminary conclusions about the preference-formation process (subsection 8.5.2.3).

8.5.2.1 Working out Civil Justice Priorities: Finnish Preferences

After the first *tour de capitales* during the German Presidency (April-May 1999),[73] the 'Incoming Finnish Presidency' circulated reports on different policy sub-fields, among them a Presidency Memo on Civil Justice Issues and a Presidency Memo on Criminal Justice Issues.[74] These memos were presented in late June, on the eve of the Finnish Presidency. On their face, they are puzzling documents because they bear the notation of Gilles de Kerchove – a key figure in the Council General Secretariat – which lends the appearance that these are Council General Secretariat documents. Not so, according to a member of the Finnish Tampere team, who stated that these documents were "prepared in this house" in Helsinki (Interview #10), in regular consultation with the Ministry of Justice and other affected ministries (Interview #8). The hybrid appearance of the documents may simply result from the fact that they were circulated a week before the official starting date of the Finnish Presidency (1 July 1999), but it is also possible that such authorial ambiguity is routine in the context of European Council summits, where the Council Secretariat assists the Presidency. Whatever the reason, these documents neatly embody the ambiguity that permeates the question of leadership during the Tampere process, given that both the Finnish Presidency and the Council General Secretariat had strong ideas about how to move the Tampere agenda forward, and in which direction.[75]

Inside Finland, the process of working out national preferences entailed close coordination between the tiny Tampere Team in the EU Unit of the PM's Office, the affected Ministries, and the Parliament. As during the Amsterdam Treaty negotiations, civil justice matters were centered in the Finnish Ministry of Justice (MoJ), where Kirsti Rissanen remained in position as Secretary-General.[76] Her deputy (Inga Korpinen, then Pöynten) served as a member of the Tampere Team that ran the summit preparations. As before, in connection with the Amsterdam Treaty, Rissanen pushed hard on the agenda for civil justice. She firmly insisted on a balanced approach to the AFSJ as a whole[77] – so that justice issues would not be submerged in larger discussions about security and policing or about asylum and immigration – and advocated a holistic or comprehensive approach to the civil justice field itself (Interviews #8, #37 & #49).

8.5.2.1.1 <u>Presidency Civil Justice Memo</u>

An early articulation of the holistic or comprehensive approach can be found in the

Presidency Memorandum on Civil Justice Issues (Presidency Civil Justice Memo), which insists that the creation of a justice *area* is something quite different from – and hence must also transcend – the earlier (Maastricht) approach, which entailed adopting so-called flanking "measures to compensate for the abolition of internal border controls" on the movement of persons (id. at 2). The "common *area*" introduced by the Amsterdam Treaty, in contrast, "represents a significant change of approach and of concept," and necessitates a "comprehensive objective" and a "coherent approach" (id.). The main contributions of the Finnish Ministry of Justice, working closely together with the Tampere Team, were to flesh out such objectives and map out such an approach, while also ensuring that particular Finnish preferences remained part of the much larger discussions that were underway.

The Presidency Civil Justice Memo already reveals some key features of the Milestones (Presidency Conclusions) that were ultimately adopted by the European Council in Tampere a few months later. As a general matter, it calls for "development of a common sense of justice" as an alternative to "uniformity of national legal systems in all fields" (id. at 5). That said, the Memo moves beyond mere *negative* integration measures designed to remove barriers, and emphasizes *positive* integration techniques, calling for a combination of, "on the one hand, harmonisation of legislation, or where it is considered more appropriate, creation of common minimum standards with, on the other hand, the application of the principle of mutual recognition" (id. at 2). In particular, it recommends "laying down the fundamental principle of mutual recognition of judicial decisions," which idea had been suggested in embryonic form during the UK Presidency a year earlier.[78] Moreover, the Presidency Civil Justice Memo recommends "harmonisation of certain areas of substantive and procedural legislation," alongside the "removal of technical, legal and administrative barriers" (id.). This is particularly noteworthy, insofar as the enabling provision in the Amsterdam Treaty on civil justice foresees the possibility of harmonizing *procedural* law, but makes no mention of harmonizing *substantive* law. Notwithstanding the absence of any treaty basis for doing so, the Presidency Memo specifically mentions the possibility of harmonizing some areas of "substantive civil law (e.g. the law of contracts, perhaps specific fields of it such as sales of goods, 'new' types of contracts (franchise, lease), or bona fide acquisitions [i.e., property law]"[79] (id. at 8). Finally, this early proposal by the Finnish MoJ asserts the need to strike a balance between measures addressed to traditional concerns about citizens' economic relationships, on the one hand, and those addressed to their family relationships, on the other (id. at 3). In each of these respects, the Presidency Memo reflects the preoccupations and commitments of Secretary-General Rissanen.

8.5.2.1.2 *Ministry of Justice Access to Justice Report*

The Ministry of Justice (MoJ) subsequently expanded on the proposals contained in the Presidency Civil Justice Memo. One major contribution was the MoJ's report on "Creation of a European Area of Justice: Access to Justice in the European Union" (13 September 1999) (MoJ Access to Justice Report), which was prepared on the eve of an informal meeting of Justice and Home Affairs Ministers (JHA Council) in Turku, Finland (16-17 September 1999).[80] The MoJ Access to Justice Report, which analyzed the current situation and identified future needs, was submitted to the PM's Tampere Team, but also "used informally in negotiations with some like-minded countries" – in particular, France and Germany[81] – as well as "with the Commission when preparing the Tampere European Council" (Rissanen Interview). This Report echoes the earlier Presidency Civil Justice Memo's call for a "common sense of justice," noting that the

Vienna Action Plan is not ambitious enough and fails to ensure a "comprehensive assessment of the rights of the citizens of the Union and their status" (MoJ Access to Justice Report 1999: ¶ 2.2). The Finns pushed hard to link the concepts of citizenship, rights and civil justice, according to a Council General Secretariat insider (Interview #32), and this core idea found its way into the Tampere Milestones (see ¶¶ 2, 3 & 7). To be sure, the linkage among citizenship, rights and justice, more generally, is a thread which also runs throughout documents presented by the Commission and the EP, and which reaches back as far as debates connected to the 1991 Maastricht Treaty. Likewise, the theme of fundamental rights runs through the Tampere Milestones, and has long historical roots.[82] On these two issues, therefore, there is insufficient evidence to argue that the *inclusion* of citizenship or rights language in the Tampere Milestones originated in Finnish efforts. Rather, the Finnish contribution was to articulate the linkages between these issues and *civil* justice, which entailed a much more concrete and practical orientation to the problems faced by EU citizens, along with a strong commitment to carrying these objectives forward and a steadfast refusal to allow them to fall by the wayside during the Tampere process.

In regard to further policy preferences articulated by the Finnish MoJ – whether raised in the MoJ Access to Justice Report or in other proposals noted below – some elements found their way into the Tampere Milestones, while others did not. The MoJ Access to Justice Report is key to discerning where the Ministry of Justice succeeded and where it overreached. For this reason, detailed consideration of its content is necessary. The MoJ Access to Justice Report contains thoughtful discussions of three major dimensions – access to justice (¶ 2.3), legal security (¶ 2.4), and the need for a secure social environment (¶ 2.5) – and provides a set of annexes listing concrete measures endorsed by the MoJ. The third dimension regarding the need for a secure social environment pertains to crime prevention and the needs of victims of crime. Since this dimension falls outside the scope of civil justice issues, it is not examined further here. The following discussion scrutinizes the first two dimensions – access to justice and legal security – more closely.

In regard to *access to justice* (¶ 2.3), the MoJ Report lays out three issue clusters: (i) fair trial, good governance and mutual recognition of decisions (¶ 2.3.1); (ii) access to justice in practice (removal of barriers) (¶ 2.3.2); and (iii) right to good governance (using social security as an example) (¶ 2.3.3).[83] The MoJ Report breaks new ground on some issues, while on others it synthesizes discussions already underway in the Tampere process and advocates for the more far-reaching proposals already on the table. The first and second issue clusters illustrate both tendencies.

The *first issue cluster* on access to justice (fair trial, good governance and mutual recognition of decisions) (¶ 2.3.1) exemplifies the Finnish MoJ's less original, but still far-reaching vision of the area of justice. For example, it calls for creating a set of *minimum procedural rights for civil proceedings* similar to those found in Article 6 of the European Convention on Human Rights for criminal proceedings, in order to "enhance the mutual trust of the Member States" – which is, "sadly, usually not there" – and thereby ensure the reciprocal enforcement of judgments (¶ 2.3.1).[84] This would constitute a step towards the larger goal of removing all procedural barriers to cross-border movement of judgments, so that a judgement from one Member State could be directly enforceable in another. Already in 1995, the Commission had begun "thinking about" the possibility of replacing (or at least supplementing) tricky and burdensome *Member State exequatur procedures*, which require registration of foreign

judgments prior to their recognition and enforcement, with an *EU-level procedure* called a "European enforcement order" (Commission Communication on Judgments 1998: ¶ 9).[85] Finland was an early supporter of this project, and took the initiative to organize the March 1997 seminar in Helsinki (discussed in Chapter 7 above), which brought together "a large number of experts from the academic and professional worlds and from national government departments" (id.). These ideas were discussed further during the Dutch Presidency in 1997 (id.), and culminated in the Commission's Communication on Judgments from January 1998.[86] In this context, the Finnish role was more akin to midwife than progenitor.

Somewhat more original, the MoJ Access to Justice Report advanced the idea that certificates and documents related to a person's civil status[87] that have been issued by one Member State should be more easily recognized by authorities in another Member State (id. at ¶ 2.3.2). It would be an exaggeration to say that the idea of reducing transnational red-tape by "promoting free movement of public documents and recognition of the effects of civil status records"[88] was originated by the Finnish MoJ. In fact, an International Commission on Civil Status (CIEC) was established in 1949 to promote international cooperation on civil status records, and the Hague Conference promulgated a treaty on the legalization of public documents (the 'Apostille Convention') in 1961 (Documents and Civil Status Green Paper 2010: ¶ 3.2). However, the MoJ's proposal served to incorporate this set of issues into the broader debate about mutual recognition, free movement, and citizenship, in view of their practical importance in the lives of EU citizens (MoJ Access to Justice Report). It did so, for example, by calling for mutual recognition of *inter alia* "the validity of a Finnish population register extract as a birth certificate" as a means to reduce the citizen's duty to "provide certificates, documents and translations etc. from one authority to another while the authorities themselves take a passive role" (id.). In a related vein, the MoJ Report proposed to extend similar simplifications into the realm of social security benefits, such as pensions (id. at ¶ 2.3.3).[89]

The *second issue cluster* under the access to justice dimension is the MoJ Report's insistence that access to justice should be promoted by eliminating practical barriers that arise in cross-border cases (e.g., relating to language, distance, cost and lack of knowledge) (id. at ¶ 2.3.2). This proposal is more synthetic of prior discussions taking place in multiple fora than original to Finland. But here, too, there was 'added value' from the Finnish MoJ, which proposed to push beyond negative integration techniques and into a more positive mode of integration. It is not enough to remove practical barriers, but it is also necessary to train national administrative and legal staff, so that they "recognise the rights of the citizens exactly as citizens" of the EU (id.). This proposal includes the need to build databases for legal professionals, but also extends to the more pervasive (and intrusive) notion of intervening in the socialization of national administrative and legal staff in order to serve the larger goal of building the AFSJ.

The second major dimension of building the AFSJ identified in the MoJ Access to Justice Report is the goal of "guaranteeing a certain standard of basic *legal security* in the Union" (¶ 2.4). In this regard, the MoJ Access to Justice Report first argues that there is a need for more legal protections – more legislation – to protect the interests of *economic actors* (including consumers) who engage in cross-border transactions, and extends beyond the realm of contract law into some aspects of property law (¶ 2.4.1).[90] The Report identifies a number of specific areas of law in which the EU was already active, as well as some in which the EU should become active. Annex 1 to the Report endorses a number of far-reaching (and long-standing) proposals aimed at harmonizing civil law as a means to develop "a more uniform area of justice," notably

the European Parliament's repeated calls (1989 & 1994) for drafting a European Civil Code, and the Lando Group's 'Principles of European Contract Law' project.[91] Annex 2 to the Report, which is based on proposals already made in the earlier Finnish Presidency Memo on Civil Justice Issues, calls for defining the "concrete areas of the law where efforts of harmonisation or the setting of minimum standards should be pursued with priority in the next years and on the longer run," with emphasis on procedural matters but also on "some areas of substantive law."

In addition, and more originally, the MoJ Report urges that *legal security* must be guaranteed in regard to citizens' *personal or civil status* (¶ 2.4.2). Here, by drawing attention to and calling for solutions to problems relating to fundamental aspects of the laws pertaining to a person's *status* – marriage, divorce, and parenthood[92] – the Finnish MoJ brought new issues to the EU's table. The MoJ advocated for the "mutual, general recognition of personal status and family relationships throughout the Union," arguing that this would be a "clear and distinct step towards a European area of justice." These original proposals, like those in the MoJ Report that pertain to access to justice, are conceptually abstract yet simultaneously focused on real problems faced by real people, and draw partly on the first-hand experience of Finnish government officials who had spent time working in other Member States (Korpinen Interview). As such, the MoJ Report on Access to Justice added another 'third rail' topic[93] – family law – to the Tampere preparation agenda.[94] Moreover, it sought to broaden the notion of 'security' to include private law relations involving citizens and companies alike.

8.5.2.1.3 MoJ Memoranda on European Area of Justice

The last major written contribution by the Finnish MoJ was a set of internal policy memoranda drafted at the end of September 1999 by a handful of civil servants working on civil (and criminal) justice issues, in which positions were worked out by those units having responsibility for each issue under discussion (MoJ Memoranda on European Area of Justice). These Memoranda follow the basic conceptual lines of the MOJ Access to Justice Report, but go into much greater detail about policy alternatives relating to access to justice, minimum standards, and personal status, including some discussions about how particular matters are handled in Finland which might prove useful in the broader EU context (e.g., on legal aid). In regard to the issue of personal status, one Memorandum (from the MoJ Law Drafting Department, dated 27.9.1999) notes that a person's 'social security rights' (such as right to pension, inheritance, alimony, or other forms of social support) can hinge on one's personal status, and that one's rights as a citizen may be weakened when they move from one Member State to another.[95] The MoJ asserted in this context that mutual recognition of a citizen's personal status would remedy this unjust situation, and urged other Member States to agree on the principles upon which a person's home state is to be determined, as well as the minimum requirements which must be fulfilled in order to ensure recognition in another Member State of that person's status.

8.5.2.1.4 Tampere Team (Office of the Prime Minister) Draft Documents

While my documentary evidence on the Tampere Team's internal Finnish proposals for the Tampere Milestones is incomplete, I have been able to examine one draft, which is labeled as a confidential fifth draft (Finnish Draft Tampere Conclusions).[96] This Draft proposes the creation of "A European Legal Area" in order to "guarantee citizens' administrative and legal protection within the whole Union" (section 3),[97] and subordinates 'access to justice' to this overarching

goal. The Draft divides civil justice issues into three[98] components: access to justice and administration (¶ 3.1); mutual recognition of judgements and administrative actions (¶ 3.2); and approximation[99] of legislation (common minimum standards and codification of procedures) (¶ 3.3). The Draft is unusual insofar as it extends the scope of discussions on judicial proceedings to include far-reaching provisions on *administrative* proceedings.[100]

In terms of specific proposals, the Finnish Draft Tampere Conclusions elaborate eight concrete means to attain the three stated objectives. In order to ensure *access to justice and information* (¶ 3.1), the Draft calls for measures: safeguarding individuals' access to information; enabling the initiation of legal procedures and the right to legal aid in another Member State; implementing procedural rights and improving the smooth functioning of administrative as well as legal procedures; and establishing alternative means for the settlement of civil matters that have cross-border implications. In order to ensure mutual recognition of judgements and administrative actions, the Draft calls for measures aimed at ensuring "full mutual recognition and enforcement of judgements and decisions – including certain administrative actions – in all Member States," and supports abandoning the use of the cumbersome exequatur procedure. In addition, the Draft calls for measures aimed at ensuring the recognition of "individuals' civil legal status (matrimonial, family and hereditary rights)" (id. at ¶ 3.2). And finally, in regard to approximation of legislation (common minimum standards and codification of procedures) (id. at ¶ 3.3), the Draft calls for measures to remove "unwanted discrepancies in the Internal Market ... on law of trade, obligation, property and family" law, and to simplify the current legislation on procedural rules.

With the exception of its failed effort to expand the scope of discussions to include administrative proceedings alongside judicial ones,[101] the Draft prepared by the Tampere Team reflects many of the key goals that had been articulated by the Finnish MoJ. In particular, it picks up on the MoJ's call for measures that would ensure the citizens' civil law status, and appears to embrace the far-reaching proposal to harmonize *substantive* laws relating to trade, obligation, property and family law, alongside efforts to codify procedural law.

The core proposals found in the Finnish Draft Tampere Conclusions found their way, albeit in a slimmed-down format, into the contemporaneous Draft Tampere Agenda that Finnish Prime Minister Lipponen circulated in connection with the second *tour de capitales* (discussed in subsection 8.5.3 below). That document also adopts the 'European Judicial Area' as the umbrella concept, but breaks it down into four components: access to justice, ensuring the legal status of a citizen, mutual recognition of judgements and decisions, and approximation (i.e., harmonization) of legislation (common minimum standards for the "central provisions of e.g. law of trade, obligation, property and family"). As such, the Draft Tampere Agenda omits entirely the references to administrative proceedings, which were found in the Tampere Team's Draft Tampere Conclusions, but faithfully reflects the bulk of preferences articulated by the MoJ for the civil justice field.

8.5.2.1.5 <u>*Conclusions*</u>

As suggested at the outset of this survey of Finnish preferences for Tampere, most MoJ proposals were reflected in positions taken vis-à-vis other Member States in the Draft Tampere Agenda, and some ultimately found their way into the Tampere Conclusions, while others did not. For example, the Tampere Milestones took on board the possibility of harmonizing substantive law in some areas,[102] which is a significant departure from the enabling language of

the Amsterdam Treaty, and embraced a broad and enriched notion of 'access to justice.' The European Council did not, however, expressly take up three of the Finns' most far-reaching proposals, namely those pertaining to property, family law, and social benefits. Moreover, the MoJ's proposal on personal status, which had been pushed hard by the MoJ and put forward in the Finnish Draft Tampere Agenda, was not included in the Tampere Milestones. Similarly, the Finnish efforts to incorporate practical notions relating to social welfare into the notion of 'justice' did not succeed in Tampere.

8.5.2.2 Working out Civil Justice Priorities: Other Member States

The discussion in this subsection is based in part on interviews with participants from Member States other than Finland,[103] and in part on papers (so-called 'non-papers'[104] and other documents) presented by Member State governments during the course of the Tampere preparations.[105] There is no single model that describes how Member States prepared for Tampere or organized the coordination between, on the one hand, affected policy ministries, and, on the other, those who were responsible for handling the EU negotiations and coordinating the input from the ministries and other experts. The Ministers of Justice themselves played a prominent leadership role in a few Member States – notably France and Germany – but were less visible elsewhere. Civil servants, particularly those in the Ministry of Justice (or functional equivalent), were prominent in the national preference formation process for civil justice issues in some of the countries covered by my interview data (i.e., Finland, Germany, and the Netherlands), but my research is not comprehensive across the remaining fourteen Member States. Independent experts, including those from academia who regularly advised (and on occasion represented) their Member States in international negotiations involving civil justice issues, were largely out of the loop (e.g., in the Netherlands and Spain), but some reportedly shared information with fellow-experts from other Member States, even when that information came from confidential sources in their own governments (Interviews #39, #46 & #50). Input from practicing lawyers or business actors was virtually absent, though it found indirect channels into government policy preferences on two documented occasions, both involving conferences devoted to civil justice issues. Therefore, the analysis offered here focuses on the written positions articulated by each of the Member States for which I have data, supplemented (where possible) by interview-based data on the process by which these positions were worked out. Overall, the documentary record shows that the Finnish Presidency, together with the Council General Secretariat and the Commission's Task Force, were able to rally a remarkable degree of consensus during the Tampere process leading up to the October 1999 summit. Disagreements are noted, where known, along with differences in emphasis.

Member States' written submissions were prepared at various times throughout 1999, which makes it difficult to ascertain which other documents may have been in a particular author's possession at the time. While some documents are undated, many were prepared in conjunction with the *tours de capitales* in April/May and in September/October. The documents submitted by the Member States rarely refer to other sources, though some of the later ones are clearly reacting to Finnish proposals, such as those contained in the Draft Tampere Agenda or in those MoJ documents that were circulated outside the Finnish government.

While criminal justice received extensive attention from virtually all Member States, most also attended to the civil justice side of the equation.[106] Noting that "tackling crime and its effects... is only part of the picture," the UK argued that "civil legal co-operation" is "vitally

important to the proper functioning of the single market" and urged the Tampere Council to give it "appropriate weight" (UK Position Paper 1999: ¶ V, at p. 6), insofar as the "inability economically to obtain redress in other countries discourages trade and consumer confidence and represents a serious obstacle to the functioning of the internal market" (UK Non-Paper on Access to Justice 1999: 1).[107]

The rationales advanced by the Member States for the civil justice arena focused heavily on the needs of the citizen.[108] Austria, for example, highlighted the need to ensure that citizens know about and are able to assert their rights under EU or national law (Austrian Considerations 1999: ¶ IV, at pp. 5-7), while Greece identified "transparency, protection of personal data and simplification of legislation" as key to achieving the larger AFSJ goals (Greek Tampere Contributions 1999: ¶ C, at p. 5). Yet numerous Member States (Austria, France, Germany, and the UK) also emphasized the need to address problems arising in business life as well as private life.[109] Other Member States drew attention to the particular needs of "consumers and small and medium-sized firms" (Dutch Priorities 1999: ¶ 10, at p. 6).[110] The UK presented particularly strong arguments for attending to the needs of such persons, noting that "better recourse to justice" outside the home Member State is "vitally important to the proper functioning of the single market" (UK Position Paper 1999: ¶ V, at p. 6; UK Non-Paper on Access to Justice 1999: 1).

In their written submissions, most Member States embraced either the 'access to justice'[111] or the 'European Judicial Area'[112] (EJA) umbrella concepts put forward in the Finnish MoJ and the Draft Tampere Agenda, respectively.[113] (For its part, the Commission also supported the broader EJA concept.[114]) Those Member States that preferred the EJA notion also included 'access to justice' as a goal, but subsumed it as an element, or a rationale under that broader conceptual umbrella.[115] Belgium's own contribution adhered to the less ambitious treaty language about 'judicial cooperation' (*coopération judiciare*) (Belgian Contribution 1999: section B, at p. 3),[116] but also joined the Benelux position, which called for the "actual creation of an area of justice" that places "the citizen at centre stage" (Benelux Priorities 1999: chapter 3(4), at p. 6).

The most extreme conceptual outliers were the Netherlands and Sweden. At the high end of the spectrum, the Netherlands oriented its contributions towards the lofty goal of "strengthening the European legal order,"[117] and placed strong emphasis on the need to promote rule of law, particularly in the accession context. At the other end of the spectrum, Sweden was silent on both the EJA and 'access to justice,' but did express general support for "the views of the German and Finnish Presidencies" aimed at providing "political guidelines" for developing the AFSJ in order to bring the EU closer to its citizens (Swedish Non-Paper 1999: 1).[118]

No Member State rejected 'access to justice' as a policy goal, but each understood it in different (if largely compatible) ways, and bundled a variety of issues under this heading. Some Member States embraced a limited notion of 'access to justice,' such as Germany, which emphasized a narrow and concrete focus on measures aimed at ensuring "access to civil courts,"[119] and Italy, which pointed solely to mediation and pre-trial arbitration as means to ensure access to justice by avoiding Italy's famously congested courts.[120] Other Member States, in contrast, advanced much broader concepts, either conceptually, in terms of content, or both. The UK, for example, was pragmatically committed to improving access to justice as a way to "demonstrate that the EU can make a decisive contribution to the quality of life and prosperity of its citizens" (UK Position Paper 1999: 1).[121] Portugal, for example, put forward a notion of "access to law and justice" that runs along the visionary lines laid out by the Finnish Ministry of

Justice.[122] For example, the Portuguese government not only put civil justice issues in the foreground – unlike most other Member States, whose written contributions prioritized the security aspects of the AFSJ (viz., asylum and migration and issues pertaining to criminal law, including police cooperation)[123] – but also laid out an expansive notion of what 'access to law and justice' should entail. For Portugal, 'access' includes, but is not limited to prototypical procedural aspects, such as the availability of legal aid and legal information, or harmonization of civil procedure where obstacles exist that "inhibit the swift and most efficient course of justice" for EU citizens (Portuguese Contribution 1999: ¶ B(1), at p. 5). Rather, Portugal espoused an ambitious notion of "access to law" that linked "[a]ll matters pertaining to the access to the law and justice" to the free movement of persons (Portuguese Non-Paper1999: 2-3), proclaiming this a means of "substantiating the true practical dimension of the concept of European citizenship" (id. at 1). Portugal argued that "protection of the European citizen implies the need to guarantee a similar level of protection in the whole of the [EU], making judicial protection clear and accessible to the receiver," and went so far as to call for an "**adequate mandate to establish the fundamental guidelines of a Judicial Statute of the European Citizen within a given period**" (Portuguese Contribution 1999: ¶ B(1), at p. 5) (emphasis in the original).[124] Thus Portugal, like Finland and the Netherlands, saw the AFSJ as an opportunity to address civil justice issues in a comprehensive way, and thereby bolster the rule of law in the EU.[125]

Some Member States reached beyond the core concern with citizenship and the free movement of persons, and sought to advance more systemic goals for discussion in Tampere. In alignment with the Netherlands' orientation towards the European legal order writ large, Benelux argued that "responsible citizens need security of the person, guaranteed by the executive and the judiciary, but they also need to have legal security guaranteed by the legislature" if they are to "benefit from their freedoms" (Benelux Priorities 1999: chapter 1, at p. 2).[126] Austria, for its part, stressed the need to "ensure confidence in the European legal system on the part of citizens seeking justice, and for the sake of consistency of national and cross-border administration of justice" (Austrian Considerations 1999: ¶ IV, at p. 6).

To further these goals, a number of Member States went beyond identifying particular types of *rules* that might be needed and drew attention to *institutional aspects* of the civil justice arena as well.[127] These proposals are of three general types, the first of which refers to *institutional integrity* across the board. This emphasis is most pronounced in the contributions by the Netherlands and Benelux. For example, Dutch contributions repeatedly stress the need to maintain and strengthen the "integrity of the authorities" in order to ensure rule of law.[128] In this context, the Netherlands also called upon Member States to "make sufficient funds available," insofar as an "effective legal system has its price; this is also of importance in ensuring access to justice" (Dutch Tampere Memorandum 1999: ¶ 4.1, at p. 16). Benelux took this one step further and called for measures aimed at "guaranteeing and strengthening the integrity of public administration" (Benelux Priorities 1999: 3).

The second type of institutional proposal takes a similarly macro view, but emphasizes *measures at the EU institutional level*. Here, too, Benelux noted the need to ensure that the Commission receives "the necessary funds and staffing ... so that [its] new powers [in the civil justice field] can be implemented to the full (Benelux Priorities 1999: ¶ 4, at p. 7). Moreover, both Austria and the Commission drew attention to the changed decision-making context. For its part, Austria stressed the need to ensure "an efficient coordination of all Council formations and subordinate working groups dealing with civil law questions ... in order to avoid legal

fragmentation and unproductive redundancies."[129] The Commission emphasized the need to "ensure transparency and democratic control," as well as closer coordination between Member States and the Commission, in order to "avoid competition between proposals or contradictory agendas," and announced the introduction of the 'Scoreboard System' for tracking progress towards implementing the goals to be established in Tampere, as a means towards these ends (Commission President Prodi Letter 1999: 2).

The third type of institutional proposal, which focuses on *institutional dimensions of horizontal cooperation among Member States*, is the most diverse. The Netherlands, as already noted, called upon Member States to provide adequate funding for *national* legal authorities (Dutch Tampere Memorandum 1999: ¶ 4.1, at p. 16). A number of Member States expressed concern about problems in cases involving trans-national judicial procedures[130] – in criminal as well as civil cases – and proposed ways to ameliorate delay and other complexities. Some called for extending the European judicial network from the criminal to the civil justice area,[131] and for creating a "central permanent secretariat to coordinate the judicial requests between Member States and examine any problems or delays that take place" (Spanish Drafting Points for Tampere Conclusions 1999; Spanish/British Joint Letter to Lipponen 1999: 3).[132] Spain went even further and drew attention to the key legal actors in the Member States, arguing that it is "essential to have the backing of the main protagonists – i.e., the judges" (Spanish Contribution 1999: ¶ IV, at p. 8). France joined Spain in emphasizing the key role of judges, and proposed bringing together national judicial training institutes in order to foster the emergence of a European judicial culture ("*promouvoir l'emergence d'une culture judiciare commune*") (French Tampere Priorities 1999). Finally, in the context of civil justice, Spain also pointed to the need for "improvements ... in the systems of cooperation between lawyers' associations, ... and also in the formulation of procedures that will allow for a simple way of making it possible in one Member State to engage lawyers from another Member State" (Spanish Contribution 1999: 9).

I turn now to concrete proposals made by Member States. While a detailed survey of civil justice proposals would require a separate chapter, an overview of the policy preferences expressed in the run-up to Tampere gives a sense of national priorities. While some Member States would have been satisfied with piecemeal efforts, others favored a more comprehensive approach. France, for example, supported Finland's position that the Tampere Summit conclusions should emphasize creation of a "genuine" (*véritable*) EJA, and not merely provide a catalogue of technical measures.[133] Austria, for its part, espoused "a complete integral concept of legal measures for judicial cooperation in civil-law matters," and urged that the "current meshwork of [EU] legislative acts" on various civil justice issues "is to be completed in a conclusive manner" (Austrian Considerations 1999: 6-7). Italy stressed the "progressive objective of the path we are taking," and insisted that the first step must be to "go beyond mere judicial assistance promoting various forms of direct co-operation ... and implementing a progressive harmonization of the different systems" (Italian Non-Paper 1999: 5). The Netherlands believed that "further harmonisation and simplification of the law of civil procedure" would serve the needs of the "the public – especially consumers and small and medium-sized firms" (Dutch Priorities 1999: ¶ 10, p. 6). Spain drew attention to the fact that "European citizens' daily lives have become increasingly alike and interdependent,"[134] and noted that the "European area is taking on the shape of a territory belonging to and common to all the citizens of the Member States as well as, in general, all those resident in it, including those from third countries" (Spanish Contribution 1999: 1).

Most Member States expressed support for some measure of *harmonization of procedural law*,[135] in order to make it easier for citizens to enforce their rights (whether based on national or on EU law) in other Member States, given the high degree of diversity among European legal systems,[136] but identified different priorities, as well as different conceptions of the larger goal of improving access to justice. When examining concrete proposals in the field of civil procedure, it is helpful to differentiate two types of measures. The first type, according to the UK, aims to "make it easier for citizens in one member State to take legal action and obtain a judgment in another member State," while the second type aims to ensure that "judgments obtained in one Member State are enforceable in another with the minimum of formality" (UK Position Paper 1999: ¶ V, at p. 6). The first type includes a wide range of procedural issues, including measures aimed at eliminating obstacles that "inhibit the swift and most efficient course of justice" for EU citizens (Portuguese Contribution 1999: ¶B(1), at p. 5), while the second type focuses more narrowly on the system for ensuring the recognition and enforcement, or the 'portability' of judgments in a Member State other than the one in which the judgment was rendered (UK Position Paper 1999: 7).

Member States proposed a wide variety of measures of the *first type* aimed at harmonizing procedural law for civil litigation, including some prototypical procedures that fall within the more traditional understanding of 'access to justice.' Notably, the call for harmonizing rules to ensure *legal aid* was widespread,[137] with Portugal staking out a maximalist (and ultimately, over-ambitious) position, arguing that such "aid should be granted in any situations of difficulty and not only economic difficulty, whenever a citizen is in a Member State, which is not that of his nationality or of normal residence" (Portuguese Contribution 1999: ¶B(1), at p. 5; see also Portuguese Non-paper 1999: ¶II(A), at p. 3). Only the UK expressed reservations about the prospects of harmonizing the rules of legal aid at EU level.[138] Less controversial, on the other hand, were proposals to improve access to justice by making civil litigation more transparent to users of the legal system via provision of *legal information*.[139] Austria was especially articulate in spelling out the need for a "comprehensive and citizen-friendly system of information on the rights that individuals are granted and that they are able to claim and on ways and means of asserting these rights," which it considered an "indispensable prerequisite" to ensuring both "confidence in the European legal system on the part of citizens seeking justice" and "consistency in national and cross-border administration of justice" (Austrian Considerations 1999: 6). Such measures were not just seen as "practical means" aimed at "improving the information available about the court systems and appeal procedures (for example by providing multi-lingual brochures and information on the Internet)" (German Tampere Proposals 1999: ¶ C.1, at p. 7), but had a more profoundly political purpose. In Austria's view, preparation of a "citizens' guide" would not only "achieve more transparency and ... promote the highest degree of self-determination possible," but would serve the higher "aim ... to facilitate and strengthen citizens' identification with the underlying values by imparting knowledge on the development and enforcement of laws enacted on the national and Community levels" (Austrian Protocol 1999: 6).

The lofty intentions manifested in Austria's contributions are occasionally, but not always readily apparent in the particular procedural measures put forward as candidates for harmonization. As noted above, the majority of Member States expressly embraced the overarching goal of facilitating citizens' access to civil courts, and proposed various practical measures toward that end. Some drew attention to problems involving small or simple (e.g.,

uncontested) claims that arise in connection with family or commercial disputes.[140] The UK was the most articulate on this matter, having convened a Multidiscipliary Conference of Experts on Resolving Small Claims Across European Borders at Down Hall in Hertfordshire (22-23 June 1998) during its Presidency (UK Non-Paper on Access to Justice 1999: 1), arguing that there was a "clear need for work in this field, which would be worthwhile, directly relevant to European citizens in their day-to-day lives and understood by them as being directed to their needs and interests" (id. at 2). According to the UK, a consensus emerged at the Down Hall Conference that the "development of a special European procedure for consumer and other claims of low value could be of value for litigation" within the EU, given the "increased mobility of individuals and trade across borders and the manifest difficulties which present themselves to individuals and small businesses in seeking to obtain redress in respect of such claims" (id.).[141] In this context, "small claims, and even some medium sized claims, are uneconomic to bring, and the legal right is rendered worthless. ... Rights of redress which exist in theory are being rendered non-existent in practice because it is too difficult, slow and expensive to have recourse to them. This is a clear gap in the European Union's protection of citizens' rights" (id. at 1-2). In order to tackle this "significant obstacle to the proper functioning of the internal market," the UK called upon the European Council at Tampere to "launch a rolling programme ... aimed at making it easier, quicker and cheaper for citizens in one country to bring claims in another," noting that there "are solutions if Member States are willing to address the problem, and [that] the Down Hall conference demonstrated their willingness to do so" (id. at 1-2).[142] In the UK's view, measures related to "better access to information, increased awareness of the protection available from the courts, and specific measures to eliminate technical, administrative, and legal obstacles to access to judicial bodies all over the Union" could be implemented quickly and "would make an immediate difference" that would "benefit tourists and travellers, consumers and small businesses, and might in time extend to those confronting difficult situations of family law, such as custody and access to children" (UK Position Paper 1999: ¶ V, at p. 7). Greece, for its part, went beyond the call for adoption of "speedy and efficient" procedures, and urged far-reaching steps to ensure that "necessary fees should be relatively low and not differ substantially from country to country" (Greek Tampere Contributions 1999: ¶ C, at p. 5). The UK also called for a broad range of "minimum standards' for civil litigation.[143]

The *first type* of civil procedural issues pegged by Member States as candidates for harmonization also includes a number of issues whose connection to the overarching theme of 'access to justice' is less readily apparent. The Netherlands was keen to see access to justice enhanced "by giving priority to the further harmonisation and simplification of the law of civil procedure ... in particular to time limits, costs and provisional measures," as well as by legislation devoted to specific problems posed by on-line transactions, "the electronic superhighway,"[144] or special procedures for consumer disputes.[145] Other Member States identified a range of technical procedural issues that it would be expedient to harmonize at EU level. Germany, for example, suggested "approximation of the rules concerning the burden of proof," along with measures aimed at rationalizing the taking of evidence in cross-border cases.[146] Similarly, Italy and Spain supported measures aimed at the process of taking evidence.[147] Italy also supported measures aimed at simplifying the service of judicial documents in other Member States (Italian Tampere Proposals 1999: 6). Finally, another German proposal warrants special mention, because my interview data provides some insight into the process by which this preference came to be put forward.

Germany proposed the creation of a "European summary procedure for recovering debts," which it viewed as an "essential step towards the speedy and smooth collection of debts throughout Europe" that would aid companies as well as consumers entering into cross-border contracts (German Tampere Proposals 1999: ¶ C.2, at p. 7). This was by no means an entirely new proposal. In fact, the idea of adapting Germany's innovative 'order-for-payment' (*Mahnverfahren)* procedure for European use had been under discussion for years, notably in Belgium and the Netherlands. The Storme Commission, which commenced its comparative work on civil procedure in the late 1980s, had considered it, and – as Germany itself noted – such a procedure "was already included in the European Commission's 1998 proposed directive on combating late payments in commercial transactions" (German Tampere Proposals 1999: ¶ C.2, at p. 7).[148] This course of action had also been discussed for years in the Netherlands, where Mirjam Freudenthal – a leading Dutch civil procedure scholar – had been encouraged by the Dutch Government (Ministry of Justice) to write her dissertation about the topic in the early 1990s.[149] But this history was not on the mind of the senior German civil servant from the Federal Ministry of Justice (BMJ), Dr. Jekewitz, who played a key role in formulating Germany's preferences regarding civil justice issues when he was in search of ideas for Tampere. Rather, Dr. Jekewitz brain-stormed with colleagues in the BMJ and sought concrete input from the civil and criminal law sections of the BMJ, although he found that "mostly ... they were not that interested" (Jekewitz Interview), with the exception of Margarethe Hoffman.[150] In regard to civil justice issues, Jekewitz and Hoffman collaborated to come up with some "typically German" legal institutions that might work at EU-level, something that "Germany could contribute from our experience, personal national experience, and where we are interested to have a European solution because we ran into troubles ... with boundary, trans-boundary questions" (id.). This process led the BMJ to propose two speedy, simple and inexpensive procedures for debt collection: one for enforcing undisputed claims,[151] and the *Mahnverfahren* (i.e., the 'order-for-payment' procedure). The BMJ civil servants deemed these procedures appropriate for Tampere because they worked well within the German legal system, they were something of which Germany could be proud, and relevant to problems that German parties encountered when trying to enforce cross-border claims (id.).[152] "Both procedures would speed up the debt collection process, which was desirable, especially for craft tradesmen, for whom collection delays pose an existential threat" (id.). Yet these procedures would not only be helpful for business, but also for individuals, such as a homeowner who might need to collect rent from a foreign renter: they would provide something for the "little people" as well (id.).

Last but not least, many Member States identified *family law* as an area where common action was urgently needed. According to Austria, "family relations" – along with commercial relations – "have the most direct impact on the everyday life of European citizens" (Austrian Protocol 1999: 6). France – under strong leadership by Minister of Justice Elisabeth Guigou – was a key protagonist in this regard, but by no means the only Member State urging the European Council to make advances in this field (Monar 2000: 29).[153] France argued that it was "important to do everything possible to ensure that the procedures that apply to cross border disputes, in particular family disputes, are simplified and explained, so that citizens know their rights and how to go about enforcing them" (French Tampere Proposals 1999: 5). Three Member States foresaw that work in the field of family law would, at some point, also need to address issues relating to marital property and inheritance.[154] In terms of the types of concrete proposals put forward in connection with cross-border family conflicts, some Member States emphasized

particular niche issues,[155] while most focused on core ('big-ticket') issues, namely: (1) jurisdiction and the recognition and enforcement of court judgments; and (2) the need for common choice-of-law rules to guide courts in cases involving family relations. Member State positions on these two issues – including but not limited to the family law context – are examined below.

- Recognition and Enforcement: Judgments and Beyond

Member States strongly supported efforts to improve the portability (i.e, recognition and enforcement) of civil judgments from the courts of one Member State in another Member State, in order to make life simpler for individuals and companies alike. The topic is not merely a technical one, but rather requires agreement on fundamental questions, such as *jurisdiction* (i.e., which court is empowered to render a judgment on each type of dispute) and the availability of *defences* (i.e., whether the court in the second Member State can scrutinize an incoming judgment for defects, such as for corruption or lack of due process). As in the U.S., these questions have constitutional status, at least in some Member States.

The problem of enforcing a judgment in a country other than where it was rendered has long been a burr under the saddles of the Member States. The practical difficulties, expenses, and delays had already been reduced by the Brussels I Convention among Member States, but by no means eliminated. The fact that consensus on the need for improvements already existed heading into Tampere does not mean, however, that there was nothing to discuss in that unique forum. Rather, considerable points of contention remained open, as indicated by the Member States' written positions, notably the fundamental question about the proper mechanisms for doing so and how far the Member States were prepared to go in limiting their own courts' abilities to exert some kind of control over incoming judgments.

These difficulties aside, nearly all Member States expressed support for further efforts to simplify and expedite the portability of civil and commercial judgments, along the lines laid out by the Commission's 1998 Communication on Judgments[156] and in the European Council's 1998 Vienna Action Plan.[157] The Member States' particular positions were generally consistent with their priorities in regard to harmonizing procedural law (discussed above). Thus, France was very keen to move the ball forward in regard to family law (French Tampere Proposals 1999: 5), including parental custody and visitation rights (id.), as were a few other Member States,[158] while Germany focused more on needs in the area of contractual disputes.[159] Other Member States did not emphasize particular types of disputes but simply called for improving the portability of judgments across the board.[160] Two Member States – Austria and Belgium – drew special attention to the need to expand the scope of work to include matrimonial property and inheritance law,[161] while Spain wanted to extend the work on recognition to ensure that "evidence gathered in other Member States" and "precautionary measures" ordered in one Member State (such as an order to block bank accounts) would be effective in another Member State (Spanish Contribution 1999: 10).

On the issue of recognizing a person's *civil status*, which was a particular goal of the Finnish Presidency, only the UK took a written position. While noting that it "recognises most foreign marriages and divorces," the UK "added that "[o]ther issues of civil status, such as the effect of 'registered partnerships', or of gender reassignment surgery for transsexuals, are treated very differently in the Member States and give rise to much more difficulty" (UK Note on Tampere Agenda 1999: 3). By stating that the "[r]ecognition of the civil law status of citizens in

other Member States could be problematic," and questioning "whether the time is right for work at EU level on these sensitive topics" (id.), the UK clearly signaled that the unanimity required to move forward on this issue could not be attained.

The key question to be resolved pertained to the mechanisms for moving forward, including the possibility of eliminating the burdensome exequatur procedure.[162] A number of Member States voiced support for measures that would "get rid of intermediate steps" and "permit direct enforcement" of judgments or other decisions in family and commercial law disputes (French Tampere Proposals: 1999: 4-5; see also French Tampere Priorities 1999: 5).[163] Germany was one of numerous Member States that supported the creation of a "European execution title" or "judgments passport" (Crifò 2009) as a substitute for an exequatur order issued by a court in the country where enforcement of a judgment or court order is sought, "which would result in the automatic execution of civil judgments from one Member State in all the others, insofar as constitutionally permissible" (German Tampere Proposals 1999: ¶ C.2, at p. 7). With this goal in mind, the question that remains is how to achieve it.

A few Member States – notably, France and Italy – saw extensive harmonization as the path to this desired outcome,[164] while others preferred a less intrusive mechanism. The UK led a long (and ultimately successful) campaign to introduce the 'mutual recognition' principle, which was already well-established in EU law and well-known to the players, in lieu of a commitment to legal harmonization and unification as the path forward, "which could achieve effective results more quickly, and without deeper incursions into national legal systems" (Monar 2000: 23-30).[165] The British had been advocating this approach at least since the Cardiff European Summit (June 1998), and it had been endorsed in the Vienna Action Plan (December 1998), albeit in connection with criminal (but not civil) law judgments. Mikko Puumalainen of the Tampere Team recalls discussing this idea with Adrian Fortescue, head of the Commission Task Force, during the first *tour de capitales*,[166] but evidence from the British Presidency during the first half of 1998 (see subsection 8.3.2. above) indicates that the British were already behind this idea, at least in regard to criminal judgments.[167] While generally in favor of harmonization and even unification of law in the civil justice field, the Finnish Presidency also took on board the 'mutual recognition' approach to judgments for civil as well as criminal matters at a relatively early stage in the process.[168]

The British proposal to introduce the 'mutual recognition' paradigm as the key mechanism for ensuring free movement of judgments was not an attempt to block progress in this field of endeavor, but rather a pragmatic and measured approach towards the more ambitious goal of creating a European enforcement order. Three of four British Government documents submitted in the run-up to Tampere support the stated goal of "strengthening ... mutual recognition" by taking steps "to improve legal co-operation ... in an ambitious rolling programme of work" (UK Note on Tampere Agenda 1999: 2-3). In the UK's view, "[a]pproximation may be appropriate ... But Tampere should not give the impression that a great wave of harmonisation awaits European civil law" (UK Note on Tampere Agenda 1999: 2). Rather, the British Government urged a more gradual approach, which would entail "[i]dentification and adoption of *minimum procedural standards*, [which] could assist both in making it easier to pursue claims across borders and in *reinforcing* the *trust* between Member States' legal systems necessary for automatic mutual recognition of judgments" (UK Note on Tampere Agenda 1999: 3, emphasis added).[169] Ultimately, the UK did not reject the ambitious goal of creating a European enforcement order, but saw it as the endpoint of a program designed to build trust as a substitute

for layers of procedural formality,[170] by means of developing common ground about fundamental (i.e., de facto constitutional) notions of procedural fairness.

Leading academics, who were largely out of the loop in the run-up to Tampere,[171] were "surprised to see the accent put on mutual recognition" (Interview #48) and were highly critical of this approach. "So you have non experts on private international law who are fascinated by the idea of mutual recognition and say, yes yes yes that's a beautiful idea, ... but now it's making a mess of private international law" (id.). As another expert explained, the chosen mechanism goes about it backwards: "It's the other way around ... recognition is the second stage, the first stage is to make uniform the rules on conflict of laws" (Interview #39).

- Applicable Law

Notwithstanding critical views expressed by some academics, the Member States did not neglect the topic of unifying choice-of-law (private international or conflict of laws rules) in the run-up to Tampere. Rather, a handful of them took up this issue and called for further action at EU level. One of the key protagonists, Austria, urged that the "current meshwork of legislative acts ... governing ... applicable laws" for civil (including commercial and family) matters should "be completed in a conclusive manner" (Austrian Protocol 1999: 6). In particular, Austria urged that "Rome II [on choice-of-law rules for "non-contractual relations" (i.e., torts)] must be concluded" (id.), and added that a "further logical step in the field of family law" would be to unify the rules on the law applicable to divorce matters" [i.e., Rome III] (Austrian Considerations 1999): 6). Italy also called for "common rules" on "separations and divorces."[172] For its part, Germany supported the goal that national judges in all Member States would apply "the same divorce law ... to the same case," but added expansively that "[i]n the longer term, the rules concerning ... applicable law in the fields of [marital] property law and the law of succession should also be harmonized" (German Tampere Proposals 1999: 8). Finally, the Netherlands[173] and Portugal[174] expressed general support for work to unify choice-of-law rules throughout the EU, but did not designate particular areas of interest.

The final set of civil justice issues taken up by Member States during their preparations for Tampere pertain to whether the *scope* of efforts to create the European Judicial Area should also include efforts to *harmonize or even unify substantive civil law*.[175] This is quite a stretch, given the largely procedural nature "judicial cooperation in civil matters" (TFEU art. 81, ex EC Treaty art. 65). Still, some Member States saw Tampere as an opportunity to push this horizon and seized the opportunity to make their views known. As noted in section 8.5.1.2 above, the Finnish Presidency supported the inclusion of a range of substantive legal issues. Finland received some strong support in this context, particularly from Germany, which called for creating a "European civil code," arguing that the "coordination of procedural law must be accompanied by a gradual approximation of the substantive law of contract in the Member States. An overall concept must be developed, into which the previous sector-specific efforts to harmonize civil law in the EU (in particular in the field of consumer protection) can be worked so as to form a consistent whole" (German Tampere Proposals 1999: 6-8, at p. 7). In addition, Germany called attention to the need to achieve "uniform protection of intellectual property" rules (id. at 8). No other Member State came close to the level of concrete detail provided by Finland and Germany, but two others – Greece[176] and Italy[177] – clearly included substantive law within the realm of the imaginable. As for Portugal, it is possible to read some of its proposals as extending into the realm of substantive law as well.[178]

8.5.2.3 Conclusions

Concrete proposals aside, Member States also articulated political views on the importance of Tampere's civil justice agenda. Overall, they aimed not only to achieve *objective* improvements in the operation of the European legal order but were also concerned about the *subjective* effects of the European Council's Conclusions ('Tampere Milestones'). Member States recognized, in other words, that Tampere would not just generate a legislative agenda, but that it also had a crucial public relations function. The Summit will be "closely followed by ... all the actors operating directly or indirectly in the spheres of Justice and Home Affairs: judicial authorities, police services, NGOs. It is ... essential for the [European] Council to send concrete signals to these professional bodies, signals which will signpost the way towards our common objectives" (Benelux Priorities 1999: 2). The most widely embraced goal, however, was to "make it clear to European citizens that the creation of [the AFSJ] also carries with it advantages and benefits that are of relevance under civil law" (Austrian Contribution 1999: 5), and thus "directly relevant" to citizens "in their day-to-day lives and understood by them as being directed to their needs and interests" (UK Non-Paper on Access to Justice 1999: 2). The Tampere summit "offers an opportunity to demonstrate that the EU can make a decisive contribution to the quality of life and prosperity of its citizens" (UK Position Paper 1999: 1)[179] and must "send a strong political message to citizens ... [that it] is addressing their concerns" (French Tampere Priorities 1999: p. 1), a message "whose content and scope is easily understandable for everybody" (Portuguese Contribution 1999: 2). The European Council should emphasize proposals that "have direct public appeal" to the citizens (Dutch Priorities 1999: 6),[180] in order to bolster the "legitimacy of European activities" by means of strengthening the legal order (Dutch Tampere Memorandum 1999: 15). The task of "[g]etting the message across to Europe's citizens – how they will benefit in practical ways – will be a major challenge for Tampere" (UK Note on Tampere Agenda 1999: 1). Moreover, some Member States highlighted that Tampere must avoid giving the impression that the EU is only concerned with security and police matters: it is "equally important that the discussions do not just focus on repressive measures" (Swedish Non-Paper 1999: 1),[181] but rather "guarantee a balance between freedom, security and justice" (Benelux Priorities 1999: 2).[182]

Commission President Prodi also hammered these political themes in September 1999, just prior to his meeting in Helsinki with Finnish Prime Minister Lipponen, in a letter urging the European Council that its message "must reach public opinion in language with which it can identify. We would hope that the Presidency conclusions ... will be just as accessible to citizens as they are to the various Ministers whose job it will be to follow them up" (Commission President Prodi Letter 1999: 1). Prodi, too, stressed the need to "avoid any danger that Tampere might come to be viewed as a 'repressive' Summit,"[183] noting that the "security aspect of the [AFSJ] tryptich is important ... [F]reedom and justice, particularly access to justice, must be emphasised" (id.).[184]

A final concern that runs through Member State documents like a red thread is relevant to the overarching task of explaining these changes in Chapter 9, and thus warrants brief mention here. A number of Member States were careful in their written submissions to refer to work previously done on civil justice issues, notably in the Commission Communication on Judgments (January 1998) and the Vienna Action Plan (December 1998), and to express their intention to carry on in the spirit of that preparatory work.[185] The Vienna Action Plan earned praise from Germany for the "very precise" work carried out under the Austrian Presidency, which resulted in

well-formulated and concretely worked out[186] proposals. Also noteworthy is that Member States commonly invoked preparatory work related to civil justice issues that was carried out during their own presidencies, notably Austria,[187] the Netherlands[188] and the UK,[189] or even earlier, as in the case of Belgium.[190] One might be tempted to write off such national positions as mere assertions of national pride or 'ownership' of particular issues, but to do so would miss an important dimension of policy-making in the EU. Such assertions also acknowledge the way complicated policy issues are often managed at the EU level, via longstanding collaboration involving experts, whose views may filter into political discussions either via irregular conferences or via the regular technocratic meetings of civil servants in the framework of EU structures like the K4/Article 36 Committee. Such Member State positions may express notions of efficiency – why reinvent the wheel? – as well as national pride, which is particularly evident when a Member State seeks to remind others of achievements during its Presidency. The preparations for Tampere illustrate, however, that other forces may also be at play when Member States formulate their preferences for EU policy-making.

The civil justice policy field, with its strong roots in expert notions of proper legal order and the relationship between law and overarching political goals, is especially revealing. With three exceptions (discussed below), the picture that emerges from the Tampere preparations is one of a mosaic or composite,[191] in which Member States seek to contribute solutions to practical problems that draw upon their experiences – as well as their national traditions, in some cases – in a process that is oriented towards the goal of jointly building a European legal order, and not one of zero-sum bargaining. "Naturally" each Member State "gets something from," and "contributes something to" the overall picture that emerges from such collaborative efforts (Jekewitz Interview).[192]

This perspective is not inconsistent with national pride – as in the case of Germany, which urged the European Council to consider adopting unique German civil procedures at the EU level (Interview #46) – but nor was the process of Member State preference formation necessarily rooted in national institutional chauvinism. As the Finnish example shows, national priorities drew on experience and attitudes rooted in Nordic cooperation, rather than on particular Finnish institutions, as well as on personal experience of free movement. While some Member States emphasized particular priorities – such as Portugal, with its firm commitment to consumer protection, or France, with its experience-driven goal of solving problems affecting cross-border families – others were oriented more generally towards the joint project of creating a workable European legal system that accorded due respect to the concrete needs of citizens. It may be that European legal elites are particularly susceptible to such idealistic and collaborative approaches to policy-making, or alternatively, that such an approach is compelled by the institutional environment in which the legal elites find themselves.[193]

The one-happy-family mosaic image must not detract, however, from the fact that there were disagreements during the Tampere preparations and that ultimately some Member States' preferences won out over those expressed by other Member States. While it is premature here to focus on outcomes – winners and losers in Tampere – it is nonetheless important to note that key battle-lines emerge clearly from the preparatory documents submitted by the Member States. Three issues, already flagged in the foregoing discussion, illustrate some of the tough choices facing the European Council in Tampere. The UK was the Member State pressing on the brakes in regard to harmonizing the rules on legal aid and to the Finnish proposal to expand work on cross-border portability beyond judgments to include the civil status of persons. Moreover, the

UK was the protagonist in the drive to import the more gradual (hence nominally less intrusive) 'mutual recognition' paradigm into the justice arena, in lieu of a more far-reaching mechanism based on harmonization and, over time, unification of law.

This subsection 8.5.2 has summarized the content of proposals advanced during the Tampere preparations by the Finnish Presidency and (most) other Member States, along with input from the European Commission and the European Parliament. The narrative in subsection 8.5.3 below returns to chronological tracing of the final stage leading up to the Tampere Summit itself and picks up the thread from section 8.4.

8.5.3 Late-State Preparations for Tampere Summit

The final weeks before the Tampere Summit (15-16 October 1999) involved a frenzy of meetings and behind-the-scenes drafting, both in Helsinki and in Brussels. The closer one gets to a summit, according to one participant, the higher-level the discussions (Interview #46). Finland signaled its intention to "follow the established procedure" in this regard (MOI/MOJ Joint Statement to EP 1999: 2). The late-stage preparations entailed five key elements: first, an interaction between the Finnish Presidency and the European Parliament (September 1999); second, an informal meeting of the Justice and Home Affairs (JHA) Council in Turku (Finland) (16-17 September 1999), followed by a formal meeting of the JHA Council (4 October 1999); third, a meeting of the General Affairs Council (13 September 1999); fourth, the second *tour de capitales* (29 September - 7 October 1999); and fifth, formal preparation at the diplomatic level in Coreper and in the General Affairs Council (11 October 1999).

The Finnish Ministers of Justice and Interior (Johannes Koskinen and Kari Häkämies, respectively) met with and informed members of the European Parliament (LIBE Committee) in September 1999 about the issues to be covered in the Tampere Summit and "expounded on the Finnish working programme" on JHA issues (MOI/MOJ Joint Statement to EP 1999: 1). Finnish Justice Minister Koskinen "underlined the need to establish within Europe a consistent judicial area where ... legal equality and freedom of movement of the Union citizens is true both in theory and also in practice," which implies that citizens "must be able to trust the functioning of the legal and administrative systems" within the EU (id. at 2). Also in September, the Finnish Minister of Foreign Affairs (Tarja Halonen)[194] presented a report to the Plenary Session of the EP. The EP adopted a Resolution (European Parliament 1999e) that echoed the EP's ongoing frustration at being sidelined from JHA matters, but also endorsed the call to create a European Judicial Area (id. at ¶ 21), which it linked to the Avignon Declaration (discussed above in subsection 8.3.3.2). Overall, the EP supported proposals on legal aid, small claims, and portability of judgments (including the abolition of exequatur), but wanted to see the European Council go much further and establish a new "judicial body (consisting of specialist judges)" whose role would be to "protect the individual rights of European citizens to the extent required to compensate for the inevitable loss of the judicial review hitherto carried out by the authorities of a Member State requested to enforce a court ruling originating from another Member State" (id. at ¶ 21(d)). The EP had no decision-making role in Tampere, but its President was invited to give an opening speech at the summit (see 8.2.1.3 above).

Two meetings of Member State justice and interior ministers were held just prior to the Tampere Summit: first, an informal meeting in Turku (16-17 September), and second, a formal JHA Council meeting in Luxembourg (4 October). The Finnish Ministries of Justice and Interior took the lead in preparing for both meetings.[195] The Ministers reiterated the Presidency's

objective that "the outcome of Tampere must not be confined to a mere publicity-oriented restatement of what was already agreed upon in the Treaty of Amsterdam and the Vienna Action Plan; rather, Tampere should establish concrete political guidelines and initiatives which will then guide our future work" (MOJ/MOI Joint Letter on Turku JHA Council 1999). In order to avoid the "shopping list" phenomenon, they reiterated the aim to "concentrate on ... three major themes: a common EU asylum and immigration policy, cross-border crime, and *a European Area of Justice including access to justice*" (id.) (emphasis added). In conceptual terms, this signaled the Presidency's acceptance of the EJA as the umbrella concept, rather than access to justice, as urged by the Ministry of Justice. At the same time, however, the Ministers also echoed the call to ensure that "Tampere will address all three themes in a balanced fashion" (id.), which was one of Mrs. Rissanen's strong themes, since she feared that civil justice issues would get short shrift. Moreover, the Ministers also endorsed the broad array of preferences that had been formulated within the MoJ, namely:

> the legal status of an individual, legal protection (including access to justice and good administration), mutual recognition of decisions and judgments, approximation of certain aspects of civil law, improvement of victims' rights, simplification and strengthening of judicial co-operation and crime prevention (id. at 2).

Notwithstanding the stated aim of the JHA Council meetings to "ensure that the substantive ground of the Tampere discussions is thoroughly prepared before the usual machinery of European Council preparations ... begins" (id. at 1), no draft text was provided or discussed in either forum.[196]

At the informal meeting in Turku, the Finnish Ministers called upon their counterparts in other Member States to submit a handful of "issues under these themes" to "specific, in-depth examination" (MOJ/MOI Joint Letter on Turku JHA Council 1999: 2). The Finnish Presidency scheduled (a mere) two hours of discussion on mutual recognition, access to justice, and approximation of substantive law (id. at 3-4). This, along with the fact that the ministers were not themselves invited to participate in negotiations in Tampere, reflects the goal of the Finnish Presidency and the Council Secretariat to "keep the ministers ... more or less out of the discussion. Because we thought involving the tactical ministers of justice and home affairs would be more complicated than to have it negotiated at the level of heads of state. ... The only thing we did is to involve our tactical ministers in the process by inviting them to a meeting in Turku ... one month previous to Tampere. And that was not very much, well that was more or less to tell them this is where we stand and what we want to achieve in the summit in Tampere" (Interview #41).[197] This was, according to one senior civil servant, the "right decision," because normally "there is no preparation at sectoral level" for a European summit, since the purpose of the summit is "normally to ... put new ideas ... and that's something which you should leave open to the heads of state who are there. So it would have been unusual to negotiate everything among technical ministers and then put it before the heads of state and say, take it or leave it" (id.). In the view of another source in the Council Secretariat, this meeting "didn't serve much of a purpose, it really confirmed that justice and home affairs ministers did not have much ambition" (Interview #32). From the perspective of the Finnish Presidency, however, this meeting was part of an "early warning" system designed to smoke out problems in advance, in order to avoid surprises in Tampere (Interview #56). Although the ministers were "not involved in preparing" the summit itself (id.), their views would presumably be channeled through their national capitals

to the heads of state and government who would be negotiating in Tampere (id.).

The detailed nature of questions posed for discussion by the justice and interior ministers in Turku provides a good indication of what remained on the table for negotiation in Tampere, and are reproduced here for that reason. With regard to the concept of *mutual recognition* (id. at 3-4), the following questions were presented:

> "- Could the principle of mutual recognition be endorsed in Tampere as the cornerstone of EU judicial co-operation in criminal law as well as in civil law?
> - Should the legal status of individuals acquired in one Member State be recognised as such by other Member States?
> - What concrete legislative measures should be contemplated to further mutual recognition in both civil and criminal matters ... ?
> - What steps could be agreed on at Tampere with a view to facilitating and extending extradition ...?"

With regard to *access to justice* (id. at 4), the following questions were presented for discussion in Turku:

> "- What should be the central elements of a Union policy enhancing access to justice throughout Europe?
> - What kind of measures are needed to help persons in another Member State facing difficulties in access to justice ...? What kind of Union or national measures could help in such situations?
> - Should special common procedural rules be set up for simplified cross-border litigation and mutual legal assistance in particular cases? What cases might these be?
> - Where does a specific need for procedural harmonisation exist in order to facilitate access to justice ...?"

Finally, with regard to *approximation of substantive law* (id. at 4), the following questions were presented for discussion in Turku:

> "- Should the approximation/harmonisation be extended to new fields (e.g. contract law, corporate law, law of property and family law)?
> - If so, what should be the extent of ... approximation/harmonisation?"

As this extensive list suggests, all issues remained open for discussion, though it is inconceivable that each of them could be discussed thoroughly in the scant time allotted for discussion in Turku. The closed list of suggestions also implies that it was "too late" to add new issues for discussion, which "must [have] come in earlier" in the preparatory process (Interview #41).

At its formal meeting on 4 October 1999, the JHA Council "had a final exchange of views, over lunch" on the preparations for Tampere, where participants "were apparently much concerned with being excluded from going to the Tampere Summit" (Bunyan 2003: 4). The bulk of the JHA Council meeting was addressed to a wide range of ongoing policy issues requiring immediate action (2203rd Council Meeting - JHA 1999: 13).[198] The fact that "there was already much consensus on the agenda" for Tampere (Occhipinti 2003: 81) by the time of the formal JHA Council on 4 October 1999 provided small comfort for the Finnish Presidency, which realized during the ministerial meetings that cooperation, which had been "very good" during previous months, was waning, and that "we really faced serious problems" (Interview #56). As the summit date approached, the other Member States "brought their views, ... made them public.

They made their own domestic policy with those issues, they wanted to make European policy on those issues" (Interview #10).[199]

Meanwhile, at the diplomatic level, the Finnish Presidency reported on the state of Tampere preparations to the 13 September 1999 meeting of the General Affairs Council, which is composed of the Member States' ministers for foreign affairs (2201st Council Meeting - General Affairs 1999: 7). In regard to justice issues, the Presidency reiterated the desiderata laid out in the MOJ/MOI Joint Letter on Turku JHA Council (1999), which described the European Judicial Area as encompassing "the legal status of an individual, legal protection (including access to justice and good administration), mutual recognition of decisions and judgements, approximation of certain aspects of civil law, improvement of victim's rights, simplification and strengthening of judicial cooperation" (id.). Given the foreign affairs preoccupations of the General Affairs Council, discussions focused on the "need for enhanced and more coherent external action" on JHA issues, which provided a way for the foreign ministers to "have their ... place in the whole thing ... to make a big issue, in order to lift their profile" (Interview #10). This meeting "gave rise to so many different dramas" (id.). The core of the problem was that the foreign ministers were displaced from their usual role in preparing for a summit because Tampere involved a "very substantial area of Union policy" that fell outside the normal scope of foreign ministry affairs, and the ministers were thus "a little bit jealous" that their role had been usurped by the Prime Minister's office (id.).[200] The General Council meeting concluded by noting that preparations for the Tampere Summit would be finalized by the General Affairs Council at a subsequent meeting in October 1999 (2201st Council Meeting - General Affairs 1999: 7-8).

The prelude to that final preparatory stage was the second *tour de capitales* from 29 September until 7 October 1999. This high-level round of shuttle diplomacy was kicked off by a letter from Finnish Prime Minister Lipponen, who subsequently visited all EU capitals to meet with his counterparts just prior to the Tampere Summit.[201] Unlike the first, lower-profile *tour de capitales* involving mainly civil servants and on occasion some ministers, the bilateral format of the high-profile *tour de capitales* immediately prior to a summit meeting "enables prime ministers to share information about their bottom lines with the Presidency, without granting the same favor to other bargaining parties, thus improving the chances of agreement at the summit without exposing themselves to exploitation" (Tallberg 2006: 115). PM Lipponen was accompanied on the *tour de capitales*, among others, by high-ranking Council representatives, namely Jürgen Trumpf (Secretary General of the Council) and Charles Elsen (Director General, General Secretariat of the Council). According to Mr. Elsen, who visited around half of the capitals with PM Lipponen,[202] the format and tenor of such meetings varies. Meetings may be small, with just the head of state and an advisor, or large, with more than a dozen people around the table, but they generally last from one to two hours and conclude with a press conference. The general format at such meetings is for the Presidency to explain how it intends to deal with particular issues, before posing questions designed to see "whether there are points where there is real resistance," and if there are, to find out "how they could be overcome," since there is "not that much time for real negotiations" at the summit itself (Interview #41). The unique nature of the Tampere European Council, at which heads of state and government would be called upon to negotiate and decide a broad range of complex and often highly technical matters pertaining to all aspects of the Area of Freedom, Security and Justice – without their advisors in the room to guide them on particular points of policy – presented the Finnish Presidency with special challenges and opportunities.

In preparation for the second *tour de capitales*, Prime Minister Lipponen circulated a Draft Tampere Agenda, which "corresponds with the views presented by the Member States in the course of preparations" (Finnish PM's Tampere Letter). This "ambitious blueprint" was crucial to the Finnish Presidency's strategy for Tampere (Interviews #10 & #56),[203] and was arguably the "most important single invention in this procedure ... that ... other presidencies hadn't done before" Tampere (Interview #10). It was key to Finland's "early warning" system, insofar as it contained "not only ... headings but [also] very preliminary conclusions, what we are aiming for," and thus "provided a very good basis for our Prime Minister to test ... the sensitive points ... and concentrate on those issues which we could quite openly discuss and in a way to reveal our cards, so that nobody was surprised" (Interview #56), yet it still fell short of a preliminary draft of conclusions for the summit (Interview #10). This strategy reflects the Finnish Presidency's assessment of the unique opportunity offered by Tampere, where the heads of state and government would be called upon to negotiate complex issues which are "politically difficult, sensitive, but also technically challenging" (Interview #10), and to do so without their expert advisors in the room to guide them on particular points of policy. "If for instance Mr. Blair has a problem, he doesn't get any help with that problem from his minister, nor his secretary of state. That is the beauty of the European Council. And that was what we wanted to exploit" (Interview #10). Also mindful that there would not be enough time in Tampere for thorough negotiations, the Finnish Presidency sought to "strike a balance" between the need for sufficient technical expertise to achieve "operative results" that would be "sound and right" in substance and "not ... too superficial," on the one hand, and the desire to avoid delegating the issues to the national ministers, on the other hand, who were seen as "the reason that there had not been any progress on these issues in the Council, because Justice ministers would say to their heads of state, no no, we cannot agree with this" (Interview #10). The "early warning" system embodied in the Draft Tampere Agenda aimed to walk this tightrope by providing sufficient information ahead of time, so that the heads of state and government, who are "not specialists in these issues," can "reflect on the paper with their collaborators, with their ministers of justice and home affairs, but not to make it too detailed, in order not to open the negotiating too early," in other words to "concentrate" the issues but not to "pre-empt the meeting of the European Council" (Interview #10). The aim was to "prepare the ground sufficiently that the heads of state or government have the ability and the courage to make the decisions [in Tampere]" ... but not to open it too much for the ministers" (id.).

With that in mind, the Draft Tampere Agenda lists four elements that pertain to the European Judicial Area: access to justice,[204] ensuring the legal status of a citizen,[205] mutual recognition,[206] and "approximation of legislation (common minimum standards)"[207] (Draft Tampere Agenda 1999: 3-4).[208] My interview data provides no further insight into the dynamics or substance of discussions of civil justice issues during the second *tour de capitales*, except to note how crucial this information was to the Finnish Presidency for the final preparations for the Tampere Summit. In the final days and nights before the meeting, the Finns used the information gleaned during the second *tour de capitales* to prepare detailed issue-focused memoranda that compiled the responses, pin-pointed problematic issues, anticipated surprises, and defined negotiating fall-back positions (Interview #10).

The final formal step prior to the Tampere Summit was the meeting of the national ministers of foreign affairs in the General Affairs Council on 11 October 1999. At that meeting, the Finnish Presidency provided a "general account of the Prime Minister's tour [of capitals,]

followed, [when] considered necessary, by discussions on a limited number of clearly defined issues" (Prime Minister's Roadmap 2000). The Finnish Presidency also foresaw that it might, on that occasion, be necessary to pursue "bilateral consultations with Member States at either ministerial or civil servant level" to address particular issues (id.). My interviewees reported that none of the last minute issues that came up affected civil justice matters. In terms of the outcome of that meeting, the Council simply noted that Lipponen had "encountered in all capitals much support for his agenda ... and [hence] there appeared no reason to make fundamental changes to it" (2201st Council Meeting - General Affairs 1999), and moved on to consider a wide-range of pressing matters that required immediate action.[209]

And all the while these formal meetings took place, discussions on particular issues among civil servants, and drafting – both in Brussels and in Helsinki – continued in the background.

8.5.4 Conclusions

The picture that emerges from my examination of preferences and process in the preparations for Tampere during the Finnish Presidency is both institutionally and substantively complex. The key actors – Member States, the Finnish Presidency, and EU institutions – were engaged in a multi-sited process of forming preferences, learning about the preferences of other key actors, and devising strategies and tactics for managing the wide range of AFSJ issues that would be formally decided in Tampere. The key tactics of the Finnish Presidency – in particular, the wish to balance the need for technical expertise against its disruptive effects and to avoid surprises during the summit negotiations that might wreck the deal – have already been noted. However, another core set of tactics – that of the "holistic approach" and of the "package deal" – require mention.

The "holistic" and "package deal" tactics were deployed by the Finnish Presidency and the Council Secretariat. The "holistic" line of thinking is embedded in the choice to focus negotiations in Tampere on the *area* of freedom, security and justice, which entails seeing all different elements of the area as "interlinked" rather than addressing the different dimensions of the area separately (Interview #10).[210] Thus, the Finnish Presidency aimed to "build up a balanced package where everyone gets something but has also to give something" (id.). "Rissanen was right," according to one member of the Tampere Team, that "all the elements are necessary and there is none of them you can totally leave aside. The civil law side has to be part of the picture" (Interview #56). For its part, the Council Secretariat was a proponent of the more focused "tactic of the package deal" in the justice arena, which entailed "forging a compromise, or presenting something as a compromise," then arguing that "no one should pick pieces out because then the whole would unravel" (Interview #1). These tactics were instrumental in keeping civil justice issues on the table in Tampere, when strong disagreements over sensitive AFSJ issues – notably asylum and migration, criminal law cooperation, and money laundering – threatened to capsize the negotiations, as well as in developing a comprehensive set of measures for the civil justice arena itself.

Agreeing on an agenda was the first step for each issue area, but ultimately the crucial question turned on the substantive issues under discussion. In this regard, the challenge facing those steering the preparations was how to get the issues right, given their substantive complexity and technical nature. This question brings the relationship between different groups of government lawyers to the fore. My research sheds light on the tensions facing civil servants

inside the Finnish Presidency. The Tampere Team not only had to prepare the summit in such a way that the heads of state and government would feel adequately prepared and thus confident about making decisions in Tampere on issues about which they had little knowledge, but also had to represent the preferences of the Finnish government faithfully in the process. These are in tension with one another, at least to some degree. While all were pulling in the same direction in terms of achieving ambitious results in Tampere and making the first Finnish Presidency a success, the particulars were more problematic. From the perspective of the legally trained civil servants on the Tampere Team (in particular, Antti Peltomäki and Mikko Puumalainen),[211] their mission was to enable a good deal in Tampere, of which civil justice was just one part, which required making compromises. In contrast, the goal of the civil servants in the Ministry of Justice (in particular, Kirsti Rissanen and Inga Korpinen) was to advance the civil justice agenda as far as possible, without regard to what might be happening in other AFSJ subfields.[212]

The difficulties that emerged were not so much related to issues of substance as they were to approach and style. On the one hand, the Tampere Team found itself in the "paradoxical" situation domestically of getting too much input from the Ministry of Justice – which was "too eager" – and not enough from the Ministry of Interior, which "didn't bring anything" (Interview #10). But the greater challenge for the Tampere Team, at least in the civil justice area, was to navigate between the preferences articulated by the Ministry of Justice, on the one hand, and the dynamic decision-making context of the EU, on the other. The issue of access to justice provides an apt example.

As discussed above (subsection 8.5.2.1.2), the Finnish Ministry of Justice had presented a far-reaching report on access to justice in mid-September (MoJ Access to Justice Report 1999). Members of the Tampere Team agreed with "what Rissanen wanted politically, there wasn't any dispute on that. That wasn't the problem. [We] agreed with her that access to justice is an important part of the Tampere package, it's balancing the other questions, and it's itself important" (Interview #10). The problem, rather, was how to operationalize the Ministry of Justice's extensive wish list. "It was very difficult to make it ... convincing and operational," because the proposals were "too abstract, ... too academic" (id.). For an example of the latter, the Ministry of Justice proposed that the EU should "launch a process, a program, trying to analyze what's the problem with access to justice in the EU" (id.). In response, the Tampere Team stressed that Council settings are "not a university seminar. The European Council is a decision-making body, ... it has to solve problems, so we have to propose them problems or identify problems, and recommend then the solution where they take decisions" (id.). Another academic trait that presented a challenge was the strong principled stance taken by the Ministry of Justice on some issues, in contrast to the more flexible and pragmatic positions taken by those involved in negotiations (id.).[213] The problem was thus not that the Ministry of Justice was too idealistic, but rather that the proposals were seen as being impractical in the institutional context of an EU summit. According to a member of the Tampere Team, the Commission's response to such proposals was "What the hell is this? What are we supposed to do with this? What we are expected to do? What kind of legislation do you want? Who is going to draft it? You have to give better ideas" (id.). The Tampere Team thus had to "give substance" to the abstract ideas proposed by the Ministry of Justice, to translate them into concrete action items for the Tampere agenda. In the end, "we were loyal because we were agreeing with [Rissanen], with the basic thing," but we used "our own ... understanding" about how to put that idea into practice (id.).

8.6 The Tampere European Council

The Tampere European Council, where the EU heads of state and government agreed on a large package of issues in a very short amount of time (e.g., Wagner 2014a: 469),[214] was a "key agenda-setting moment" in the creation of the AFSJ (Sperl 2009: 2). This agenda comprised the Presidency Conclusions – the 'Tampere Milestones' – which laid out a five-year work program for building each subfield of the AFSJ. How this outcome was achieved, given the complex, interlocking and often controversial range of issues on the table, is examined in this section. While my focus remains on the civil justice arena, it is not possible to explain this outcome without considering the process as a whole.

In formal terms, a European Council summit works like this: "You have an exchange" of views by the EU heads of state and government on the first day, and "then the Secretariat drafts things to be the conclusions ... [which] are normally drafted, finished, finalized in the evening after the first day, and then translated into all the languages, and then the ministers get them under their door in the morning of the second day, and they have time over breakfast to discuss with their counselors," then they meet and agree on changes to the conclusions, if needed (Interview #41). But in practice, since time is so short during summit meetings, "these conclusions are negotiated in advance. It's always like that" (id.). My research shows, however, that the process of reaching an agreeable set of conclusions was rather more complicated in Tampere. Unlike summits where Presidency Conclusions tend to be "pre-cooked" (Interview #32), the process was more open-ended in Tampere and the outcome more uncertain heading into the two-day summit meeting. In fact, the Tampere Presidency Conclusions had not been discussed with the other Member States at all prior to the summit (GCS Interview), although they were based on discussions that had been ongoing for months (FP Interview). (Given the sensitivity of the topic and the extreme candor that I enjoyed during my interviews, I do not always attribute quotes in the following discussion to particular persons, but merely identify them as being from the Finnish Presidency (FP) or the Council General Secretariat (CGS).) This section traces the process of drafting the Presidency Conclusions in the period before the meeting (8.6.1), along with the events that transpired at the summit meeting itself (8.6.2).

It is an understatement to say that tensions erupted between Helsinki and Brussels in the weeks and days before the summit, which was held on 15-16 October 1999 (Friday-Saturday). My research on European integration has not turned up any other occasion where the General Secretariat of the EU Council (Council Secretariat or GSC), while often acknowledged as the power behind the throne of the Presidency,[215] went so far in trying to assert its own position vis-à-vis that of the Presidency to which it was formally subordinate. Indeed, one of my most puzzling research findings is that there are two sets of actors who take credit for the Tampere Milestones: the Finnish Presidency and the Council Secretariat.

Untangling this story has required me to interview at length[216] and gain the trust of a handful of key insiders who graciously agreed to share with me their first-hand views as participants in the events, along with many others (Appendix C). Given the sensitivity of the topic, and the extreme candor that I enjoyed during my interviews, I do not always attribute quotes in the following discussion to particular persons, but merely identify them as being from the Finnish Presidency (FP) or the Council General Secretariat (CGS). The views offered by these two sets of actors are in some instances complementary, and in others contradictory. I present both perspectives, without trying to adjudicate between them.

8.6.1 Drafting the Presidency Conclusions ('Tampere Milestones')

While it is ultimately the *substance* of proposals contained in the Tampere Milestones matters that most to the outcome of the process, it is the *process* leading to these proposals that is central to understanding the dynamics of European integration, and hence the core of my explanatory task. While the heads of state and government did discuss, negotiate, and take decisions in Tampere, they did so on the basis of a text which was put before them. There was a struggle between Helsinki and Brussels to control the drafting of this text, and this struggle, which boiled over in the weeks and days before the summit meeting, is key to the outcome in Tampere.

As noted earlier, it is normal for the drafting of summit conclusions to begin well in advance of the meeting itself. It is also normal for the Presidency to collaborate with the Council Secretariat (and, at least on occasion, the Commission) in this process. As noted in the Prime Minister's Roadmap (2000), draft conclusions were to be prepared by the Presidency in collaboration "with the Council Secretariat and Commission in Tampere." What is unusual in this case, however, is that both the Finnish Presidency and the Council Secretariat worked up their own sets of conclusions, which took a significantly different approach. Thus, despite the expectation of collaboration, there ensued a "crisis" (Interview #56) and struggle for control over the text.

My interviewees – even those most intimately involved in the drafting and negotiations – universally had a difficult time remembering details about the contents of the different drafts. In this respect, the following discussion is partial and draws only upon what the participants were able to recall.

8.6.1.1 Drafting the Presidency Conclusions: The Council Secretariat's Perspective

After the summer holidays, and the transition from the German to the Finnish Presidency, the Council Secretariat began the process of drafting Presidency Conclusions for Tampere (Interview #32). Ideas were drawn from the 'Group of Four' discussions (section 8.4 above), but also from internal discussions among persons working in the Council (notably, Elsen, de Kerchove, Ladenburger, and Pereira for civil justice issues). According to one drafter in the CGS, "in fact we had a large amount of initiative" and we were "not just responding" to what the Member States or the Finnish Presidency wanted; on civil justice we "relied on Pereira quite heavily," but there was also "impact ... some input from the Group of Four" (id.). And then "we refined these conclusions ... working together with the Finns here in Brussels. We had meetings with Antti Satuli, the [Finnish] ambassador" to the EU. ... And so we in Brussels did this process, refined our draft conclusions" (id.). Another civil servant in the CGS stated that the Finns were "doing all that stuff in Turku"[217] and they were "busy, busy, busy drafting, but we drafted the Tampere Milestones, and that was kept pretty secret from the people that thought that they were doing it. So [Finnish Ambassador to the EU] Sattuli was in on it, and [Finnish Prime Minister] Lipponen too" (CGS Interview). By contrast, the "tiny, tiny Commission Task Force ... contributed least" to the process, they had "given us a paper which was more lyrics [i.e., poetry], ... it was not worth a lot" (CGS Interview).

To their great surprise, the civil servants at the CGS in Brussels learned roughly ten days before the Tampere summit that the Finns in Helsinki – in their view "piloted by Antti Peltomäki and with Kirsti Rissanen" – "had been doing a parallel draft" of the Presidency conclusions (Interview #32). The Finnish Presidency "had cooked a different thing," they prepared "a

completely separate draft of conclusions" (id.). This was, according to a civil servant at the Council Secretariat, "embarrassing and annoying" to Ambassador Satuli,[218] who "told his people in Helsinki, that's not the way we work here. We work with the Council Secretariat and the Commission ... we pool expertise and we try to influence, bring in our ideas" (CGS Interview). The existence of "two parallel drafting processes" was "quite dramatic and almost led to a crisis," and was "very annoying" for the CGS (id.).

In terms of substance, the Council Secretariat was "deeply disappointed" in the Finnish draft (discussed below), "we found that they had ludicrous ideas on some issues, but that they were very timid on a number of key issues for us" (CGS Interview). In this context, it bears mention that the CGS was particularly concerned with seeing Eurojust[219] and the common asylum system adopted. On these issues, the CGS "believed that [the Finns] were far too timid, and so we tried to raise the level of ambition of the draft, of their draft, to merge it with our ideas" (id.). With respect to civil justice, there was less controversy, and thus some of the provisions that the Ministry of Justice had pushed for found their way in. According to another civil servant involved in drafting, the Council Secretariat's first draft of the Tampere Presidency Conclusions did have a section on civil justice, but it was much narrower than what the Finns wanted. The concept of access to justice was "something that the Finns liked, but [it] was also in our draft, so ... we didn't have much of a controversy on that" (Interview #32). Thus, on matters of legal aid, small consumer and commercial claims, uncontested claims, damages for victims of crimes, "not much of that was very controversial" (id.). More controversial, however, was the Finnish "concept of citizenship" and "measures to promote mutual recognition of status of family law. And that was an idea which we advised them to tone down, or to drop, because we felt that would never fly with a number of the Catholic Member States ... And ... you do not find much of a trace in the final conclusions of this. So ... [that] is an idea, a direction in which the Finns wanted to go, and which they completely lost" (id.). Another issue that the Finns had promoted was the notion of civil law harmonization, a civil code," and "very little of this idea remains in the final conclusions," just a request for a study. That was something that the Finns wanted to push. And didn't get very far" (CGS Interview).

According to the Council Secretariat, the problem presented by "two complete and separate, quite different drafts" was resolved through a series of video conferences in the last days before Tampere between the CGS in Brussels and the Finnish Presidency in Helsinki (CGS Interview). Ambassador Satuli was "helpful" insofar as he mediated between the CGS and the Tampere Team in Helsinki, and they agreed to "try to bring the two [drafts] together, to merge them and mix them" (id.). There was "one video conference just before Tampere where we had to speak with the people in Finland," with Peltomäki chairing the Finnish delegation, and Elsen and de Kerchove speaking for Brussels (id.). Some Commission representatives also participated in that video conference – Fortescue from the Task Force, plus Michel Petite[220] – but "the Commission people didn't make much of a contribution, it was really a negotiation between the Council Secretariat, pushing for more progress, and the Finns, because we [in the CGS] were disappointed with the Finnish draft" (id.). "And that is why the people in Helsinki claim that it's their baby, and why [those in the CGS] claim that it's [their] baby" (id.).

The dominant (if not domineering) role played by the Council Secretariat in the prelude to the Tampere summit was centered on holding "the master copy, as always," of the Presidency Conclusions (CGS Interview). Those involved in the process of merging the two drafts managed, though they "don't remember exactly how we did that," but somehow "we did arrive at a

common draft," with drafts hammered out in Brussels being sent to Helsinki for approval (id.). The CGS was "under instructions from the Presidency, as always, so the Presidency could dictate to us, and they had to agree in Helsinki to the final draft" (id.). The last days before Tampere were "very hectic" because of this "back and forth" (id.).

8.6.1.2 Drafting the Presidency Conclusions: The Finnish Presidency's Perspective

The Tampere Team understood from the outset that the process of drafting Presidency Conclusions was to be done in collaboration with the Council Secretariat and the Commission. At the same time, however, the Finnish Presidency had its own ideas, and was deeply committed to making the Tampere European Council a success. In particular, the Tampere Team wanted the Presidency Conclusions that emerged from the summit to be "so transparent and operative, operational, that you don't really need too much guidance [to carry them out], at least not in the immediate future" (FP Interview).

According to a member of the Tampere Team, the normal practice is for the Presidency to receive a draft text of the Presidency Conclusions "some three or four, maybe even six" weeks prior to the summit (Interview #10).[221] This did not happen, however. Shortly before the summit, a member of the Tampere Team learned from a colleague that Ambassador "Satuli has the draft conclusions, and I said that's not possible because we haven't even seen those" (FP Interview). In fact, the Council Secretariat's draft Presidency Conclusions were only forwarded from Brussels to Helsinki one week before the summit meeting, on Thursday or Friday. "We didn't have even a hint of what it's going to be" (id.).

The Finnish Presidency was disappointed with the nature of Council Secretariat's draft, which proposed a "very concise political declaration to be signed by heads of state and government, and then attached to that there would have been some kind of action plan," which was "very technical" (FP Interview). "We said, this is no good, this is not what we wanted, and this is not going to make a good meeting" (id.). It was "totally contrary to what we had been preparing more or less over half a year, ... [O]ur own early warning system has been all the time signaling that it's going to be a TRUE Presidency with operational conclusions," and we wanted to "have a direct influence on the work to be done" after the summit (id.). The discrepancy between the Council Secretariat draft conclusions, on the one hand, and discussions between the Finnish Presidency and other Member States, on the other, posed a "risk that we would run into difficulties" with our colleagues in other Member States, and "would have meant lowering the ... level of ambitions," thus undermining the work "we had done in persuading the Member States to really agree on something" (id.).

As it happened, one member of the Tampere Team had set himself the task of drafting a "blueprint" document which, in the end, had a major influence on the Presidency Conclusions. This blueprint was not initially intended to be a counter-draft to the Council Secretariat's draft. Rather, Mikko Puumalainen "started to write as a sort of intellectual exercise the conclusions" in September 1999, at a time when the Tampere Team was still waiting to receive the Council Secretariat's draft, and had realized that "we may have problems" based on the number of issues upon which agreement had not yet been reached. He did not "want to be in the situation that before the meeting we wouldn't have a draft of the conclusions," so "I started to write conclusions for myself. The ... conclusions that I wanted, how I wanted them to look like. ... [B]ecause it was such a difficult area, I wanted to organize my thoughts by writing."[222] These were "internal papers ... we were preparing" that were used for various purposes, such as

preparing for discussions in the *tour de capitales*, cross-checking other documents, and as a guide for drafting the conclusions (Puumalainen Interview). Thus, Puumalainen drafted the blueprint for himself, used it during meetings (including a meeting with PM Lipponen a week before the summit), but also "made it for security's sake if there's going to be a catastrophe with the conclusions. As it happened." The paradox is that this internal blueprint, which was prepared in part as a failsafe mechanism in case "something ... will happen," in fact "ends up to be the conclusions" when that "something" did happen.

The "drama" unfolded a week before the summit, when the Tampere Team received the Council Secretariat's draft conclusions and saw that they were "not the kind of conclusions we wanted" (FP Interview). "We tried to say to the Commission and also the Council Secretariat we want concrete operational conclusions, not sort of ... ambiguous talk ... but ... it was very difficult to get that message through" (id.). Another problem was that there were "some overambitious unrealistic [provisions], not that they weren't good ideas, but they were so strange, they haven't been prepared, discussed," for example the proposal to create a 'European bail system" which had been pushed by "very aggressive lobbyists" (id.). The "problem was that" they were trying to "make the European Council ... adopt the idea of the system without any previous preparation or discussion. We didn't want anything of that on board, because that would take away the credibility of the whole thing" (id.). Another issue that came up at this stage pertained to provisions on money laundering, where the Council Secretariat claimed that the Luxembourg position was not adequately represented. But, according to the Tampere Team, "we have been negotiating with the Luxembourgers, I think ... we use that, we are not starting to ... all the weeks listening here and there, and I think we are not making that kind of last minute changes. Of course it can be done, when the heads are there, but ... our Prime Minster has ... just returned back from his tour of the capitals, ... it doesn't really strengthen his credibility if ... when they come to Tampere they found totally different ... conclusions in front of them as what they have been promised" (id.).

The Finnish Presidency thus held a "crisis meeting here in Helsinki Saturday" before the summit, and spent the weekend prior to the summit making "our own draft conclusions," taking as much as possible from the draft of the Council Secretariat, so's not to waste scarce time, and "adding our own material ... from the blueprint," which was discussed at length internally within the Finnish Presidency (id.). The Council Secretariat's draft conclusions "came so late," and so "we used our own structure" (FP Interview). This document "compiled broadly everything what we wanted from the meeting, because it was more detailed" than the Draft Tampere Agenda that PM Lipponen had circulated just before the second *tour de capitales*. According to one source, PM Lipponen said "this ... paper, if someone leaks this, he'll be shot in the dawn of the morning, that kind of paper" (FP Interview).

At some point during that weekend – here the precise sequence of events is not quite clear – the Finns let it be known that they did not "have any time to come to Brussels, that if you want to discuss this draft then we are here on Sunday, no Saturday, and I think they came with a number of Council people, the Commission also, they came to Helsinki" (FP Interview). Prior to that meeting, members of the Tampere Team had a discussion with PM Lipponen and informed him "that we are not going to change the basis of our work" (id.). The meeting itself entailed two or three hours of intensive discussions, after which the Finns "drafted the next stage of those conclusions. Then we had a meeting on Sunday morning, we wanted to see, are we on the right track? And then we in our internal preparation meeting, we made some changes to that. And then

... continued to draft those conclusions, [Sunday] night, and then we sent them on Monday to Brussels. And then we had Monday evening a video conference with the colleagues in Brussels and they were saying this is no good. This is rubbish basically" (id.). At this stage, the Finns said, "well OK we will take your comments on board, and then on Tuesday, we sent [our draft] to the translators" (id.).

In sum, the Finns found it "a bit frustrating ... that we were not really working in the same direction" because of the "dispute between the capital and Brussels," but ultimately, "we are all happy" with the results (id.).

8.6.2 The Summit Meeting in Tampere[223]

According to PM Lipponen's letter to other heads of state and government, the plan was to "consider establishing a European area of justice and the fight against crime," including "improving access to justice, mutual recognition and the approximation of legislation" in the morning of the first day (Friday, 15 October 1999), then take up the topics of migration and asylum after lunch (Finnish PM's Tampere Letter). The morning of the second day (Saturday, 16 October 1999) was reserved for finalizing conclusions. Only a limited number of persons were allowed to be in the room with the heads of state and government when they met as the European Council: their foreign ministers, a few officials from the EU Council[224] and Commission,[225] and a handful of note-takers from the EU institutions (Interview #32)[226] and the Finnish Presidency (FP Interview). Thus, "the heads ...are isolated from their assistants who don't have access to the meeting rooms" (id.). And all the while, civil servants from the Finnish Presidency and the EU institutions continued their drafting efforts in the background in Tampere, both prior to the opening session of the summit and through the night after the first day (CGS Interview).

The morning round on the first day is "easy ... because this is the opening round of the whole meeting. Meaning that you go through the ... people give speeches, the different members of the Council, you listen very carefully to what they say, because you have ... prepared [the draft conclusions], which the heads and the delegations are not supposed to have. The idea is that you listen to this very carefully and then you [prepare for] the final sessions. The second day is the critical day. The idea is that you listen the first day and then in the evening and the night, you prepare the final version of the conclusions, then you distribute this draft in the dawn of the morning at five or six a.m. To the delegations, to the heads of the delegations. Then they have their own meetings in the early morning [with their advisors], and then the meeting starts at nine a.m. Then you start to go through the conclusions. THEN you propose your final draft for the conclusions for acceptance. That is the moment when the success of the meeting exists" (FPInterview).

Despite the Finnish Presidency's "early warning system" designed to avoid surprise at the summit (8.6.1. above), the element of surprise *did* play a significant role in Tampere. While normally the heads of state and government would have seen the draft conclusions prior to the summit meeting, this did not happen in Tampere, owing to the "back and forth between Helsinki and Brussels in this strange process of merging two completely different drafts" just prior to the summit (CGS Interview). As it happened, the draft conclusions were not formally "unveiled to the Member State" until the "morning of the second day" of the summit (id.) due to the drafting crisis,[227] although they were apparently leaked.[228] A final marathon drafting session "to adapt the draft conclusions to what had been said at the meeting" commenced after dinner on the first day of the summit and involved the Finnish Presidency, as well as the Council Secretariat and the

Commission (Interview #32). They "drafted until four in the morning," and it was an "intense drafting session, where still we had real conflicts with the Finns. But that's normal" (CGS Interview).

The late release of the draft conclusions in Tampere left little time for national experts to brief their leaders and "absolutely no opportunity for parliaments or civil society to have any say" (Bunyan 2003: 1).[229] This "surprise effect" (CGS Interview) was in part due to the drafting crisis, but also partly by design, insofar as it reflects the strategy of the Finnish Presidency and the Council Secretariat to get their ambitious agenda through the European Council by sidelining the ministers of justice and interior as much as possible. "The governmental experts were all at Tampere, they were around. But they hadn't seen the draft before. So they discovered it in the morning [of the second day]. And then they had a couple of hours' time to write something down for their Prime Minister to say" (CGS Interview).

As might be expected, civil justice provisions were not the main source of controversy in Tampere. A number of Member States expressed support for the Presidency's proposed provisions in their statements at the summit. Finnish PM Lipponen supported adopting mutual recognition in both civil and criminal matters – which happens also to be a feature of Nordic legal cooperation – along with most other core civil justice proposals (Tampere Summit Protocol 1999: 3). Many emphasized the need to "get across a clear message to citizens that we are dealing with things relating to citizens,"[230] as well as the need for an accountability mechanism such as the scoreboard approach.[231] Numerous other Member States also embraced the mutual recognition approach in general,[232] while others went into greater depth[233] or offered broader institutional perspectives.[234] Some expressed support for particular civil justice issues, such as access to justice,[235] family law,[236] small claims,[237] and other procedural matters.[238] In contrast, there was no express support for recognition of civil status of persons or for harmonization of substantive civil law, while one Member State – Denmark – expressed clear opposition to "harmonizing systems" in the civil justice arena (id. at 9).[239]

The topic of mutual recognition was one of the most controversial points decided in Tampere, but the controversy centered on criminal rather than civil matters. Spain, France and the UK were strongly in favor of adopting the mutual recognition approach (particularly for criminal law), whereas the Dutch were reluctant to accept it (FP Interview). The Dutch were, on the other hand, keen to reach agreement on a common asylum and migration policy, which was difficult for the British and the French (id.). In the end, this was a key compromise reached in Tampere. The perception was that "if [the Dutch] get what they want on asylum and immigration, then they are ready to find a way to accept mutual recognition" (id.) The issue of money laundering was also key to decision-making in Tampere (id.). In the end, "it was very, very critical, it was a question of thirty seconds, ... the success of the meeting ... finding the right words" to deal with asylum and immigration (id.). "If that didn't happen, then the rest ... would fall apart" (id.).

The heated controversy over mutual recognition also affected civil justice, but "it was not any topic of discussion to be quite frank" (Interview #56). This is not to say that there were no discussions within European Council about civil justice issues, just none that can be described as key to the bargaining outcome, in contrast to the 1997 Amsterdam European Council (Chapter 7), when agreement to communitarize civil justice issues played an important role in the overall bargain. One source found it "extremely funny, extremely comical" to watch "those poor people" – i.e., the heads of state and government, who "have NO expertise at all" – correcting the

conclusions on the second morning of the summit (CGS Interview). "There they were, Chirac and Schröder and Kok and others, making interventions on civil justice, and ... we don't like that, would you put another word here. No one in the room really understood the technical questions behind all this" (id.).[240] Ultimately, this is "why the Tampere European Council Conclusions could go so far. Because had you, or had we pre-negotiated the conclusions with the justice and home affairs ministers, they would have been far more modest" (id.). They would have "picked things apart"; there "would not have been a Eurojust, for example. You can be sure about that" (id.).

According to Statewatch, the Presidency Conclusions were "adopted at 12:40 pm and formally released at 2:00 pm" (Bunyan 2003: 1). And with that, the summit ended.

8.6.3 Conclusions

In the end, Tampere "achieved more than the Vienna Action Plan" of December 1998 (Lewis & Spence 2010: 91), while leaving most of its proposals intact, and established an ambitious five-year plan for building the AFSJ. The Finnish Presidency did not achieve all of the "far-reaching ideas, civil justice goals" (Interview #41) that had been advanced by the Ministry of Justice, but it did achieve a number of them. Mrs. Rissanen was, according to one member of the Tampere Team, "happy," as were members of the Tampere Team, who had "pushed" and "put that into reality" (FP Interview). From the perspective of the Council Secretariat, "we had ... very high expectations, which we did not all realize," but still "I consider 1999 the year when Europe was really ambitious, REALLY ambitious" (CGS Interview). Those who wanted more harmonization "achieved partial success" (Monar 2000: 30), and mutual recognition was adopted as the cornerstone of the new system.

The Tampere Summit was unusual because of its focus on sectoral issues, but also because of the struggle over control of drafting the Presidency Conclusions (Tampere Milestones). This is not to say that tensions are not a normal part of the relationship between the Presidency and the Council Secretariat. According to one source in the GSC, "I was the person holding the pen, of course, supporting the Presidency, but I can't say it. I can't take credit for the things that I've done, but ... who prepares the text, you know, has the power of the pen. You can't force the Member States to follow, but you can drive them in the direction you want, if you make reasonable compromises. If we're seen to be too influential, then there would be resistance. So we cannot be seen to be too influential" (CGS Interview). Thus, even though "we in-house prepare conclusions here, ... we cannot claim to be the author" (id.).

The Council General Secretariat has acknowledged that the "Finns had a very strong lead on the whole thing. They really wanted to make this their first summit a success, and the involvement of Mr. Lipponen was ... in my opinion beyond what is usual, he was fighting for his ideas" (Interview #41). Still, the final outcome in Tampere is attributable in some measure to the priorities of *both* sets of actors, as well – ultimately – to the priorities of the Member States acting in the European Council.

8.7 Conclusions

The complex and at times convoluted and controversial process of preparing for the Tampere European Council reveals a number of important aspects of the European integration process at a moment in time.[241] A quick recap of the key players and institutional dynamics illustrates some features that will play an important role in my arguments (Chapter 9).

The vision of EP President Fontaine opening the Tampere European Council summit meeting by lambasting the EU Member State heads of state and government for having failed to ratify the Brussels II Convention on family law neatly illustrates one significant dynamic of the overall process itself. Within Finland, in particular, women in the Ministry of Justice relentlessly pushed political actors to pay attention to civil justice matters affecting citizens and give them their due, rather than to focus only on the security-inflected issues – asylum and immigration, crime and police cooperation – which threatened to push less salient issues (such as civil justice) off the agenda. Strong leadership on civil justice issues also came from the French and German ministers of justice, both female at the time and both linked to left-of-center parties. And, while the influential Secretary-General of the Finnish Ministry of Justice was not herself linked to a left-of-center party, her positions (as well as her writings) reflect the strong social welfarist position of her Nordic tradition, as well as of the Social Democratic government that led Finland during its first EU Presidency.

In institutional terms, the key players driving the process – aside from the Member State heads of state and government who had the final say in the European Council – were the Finnish Presidency and the Council Secretariat. The rising Commission played a surprisingly modest role, owing both to its (hitherto) limited institutional competence and its political weakness in the wake of the resignation of the Santer Commission a few months before the Tampere summit. Incoming Commission President Prodi made a number of strong statements in the period immediately before the Tampere summit, but he entered office at a late stage in the preparations, so his positions appear to be largely supporting those already articulated by the Member States and the Commission Task Force, rather than leading the discussion into new territory. For its part, the European Parliament had plenty to say, but little formal role or influence over the outcome.

The Commission – principally under the Task Force led by Adrian Fortescue, but also (closer to the summit) through incoming Commission President Prodi – was a rising power in the AFSJ field at the time, but that power was not yet manifest in the Tampere process. The EU institutions were, by one account, "engaged in intense institutional rivalry" at the time, owing to the Commission's rising power and the Council Secretariat's concomitant fear of "losing influence" in JHA policy fields (Sperl 2009: 34). While Sperl's general characterization is correct, my research does not support his assertion that the Commission was in a position, at the time, to challenge the Council Secretariat effectively for control over the Tampere preparation process. This is not to say that the Commission wielded no influence, merely that its influence was largely indirect and restrained. Sources in both the Finnish Presidency and Council Secretariat downplayed the role of the Commission in Tampere, despite close collaboration during the process, but were equally quick to compliment Fortescue as a wise colleague and helpful presence (Interviews #46 & #56). According to one civil servant, Fortescue was a constant presence, "passionate" but also "very calm and persuasive," with "truly stupendous intelligence" and "excellent knowledge of legal matters" (even though he was not himself trained as a lawyer), a consensus-builder who had an "integrative effect" (Interview #46), but manifestly *not* someone who was pushing his own agenda (Interview #10). Notably, the idea of mutual recognition "did not come from Fortescue, his major contribution was the ... so-called scoreboard," which had "helped a lot" in the internal market, because it forces people "to stick to time limits and precise action plans. ... There was NO OTHER – as far as I can remember – substantial plan of the Commission" for Tampere (CGS Interview).

The Tampere European Council was unusual because of the high level of tension that emerged between the Finnish Presidency and the Council Secretariat. There are two sides to this equation. Despite its avowed role to "forge a consensus" as an "honest broker" (CGS Interview), the Council Secretariat also had its own agenda, stemming in large part from the high degree of autonomy it had enjoyed in the JHA arena since the 1991 Maastricht Treaty. As one civil servant expressed it, "for ... about ... 10 years, we were ... they left us to do what we want to do" (Interview #1). From the perspective of the Finnish Presidency, however, the "position of the Council Secretariat was very bizarre ... They took a very active political role, well even dominating the whole process. ... They saw the Tampere meeting as – we saw that in a similar way – as a unique opportunity to give a push to the procedures in Brussels" and break through the stalemates that had hamstrung intergovernmental cooperation in the Third Pillar (FP Interview). But despite this shared overarching goal, "there was a distrust of us [Finns], ... as a new Member State" (id.). "We shared and we appreciated some of their views, but quite clearly we didn't appreciate everything. In some issues they were trying to reach too much, they were too ambitious, they were accusing us not to be ambitious enough. But we were saying ... we want to be ambitious but in a different way. We want to be ambitious, not that things would look nice, we wanted to be ambitious that this would last. And create real change. ... They wanted us to have the conclusions in a way that there would be a part one, for the greater public, and very high-flying nice wordings, etc. And then there would be a technical index, [containing details of the program]. But we said we don't want that, we want to have a concise background, conclusions [which] should ... be approachable for everyone. They would be so clear and rational, pragmatic, that they were readable ... and also transparent. Everyone could see that, what are the goals, what are the reasons for that, and what is the procedure? So that could be easily checked afterwards" (id.).

The Finnish Presidency, as a new Member State, was keen to "[foster] its own profile in the Union's political process ... and establish the Finnish identity on the EU scene" (Tiilikainen 2007: 6). Thus, rather than limit itself to the agenda it inherited from its predecessors (see e.g. Huelshoff 2002: 101) – i.e., the Austrian and German Presidencies – the Finns were more oriented towards winning the respect of other Member State governments, and perhaps also demonstrating "international prominence and leadership to the domestic public" (id.). That said, the "Euro-enthusiastic" (Tiilikainen 2007: 1) Finnish Presidency did not use Tampere as an "opportunity to shape EU policy-making in directions beneficial to domestic groups" (Huelshoff 2002: 101),[242] but treated the Presidency as a "national project" rather than "making it an object of domestic politics" (Tiilikainen 2007:1).[243] In the end, the Finnish Presidency – like Austria and Germany before it – "exhibited significant elements of continuity and path dependence" vis-à-vis its predecessors in the Presidency, while also putting a "distinctly national [spin] on agenda items, and [adding] items important to [itself]" (Huelshoff 2002: 105-6).

One important area of agreement between the Finnish Presidency and the Council Secretariat was to steer the Tampere process away from the "tactical ministers of justice home affairs" (CGS Interview), in order to limit their ability to nit-pick the issues in such a way as to prevent agreement in Tampere. This was not intended so much to prevent JHA ministers from having their say as part of national preference-formation, as to keep them away from negotiations and ultimate decision-making. According to one EU senior civil servant, "you find it very difficult to get consensus" at meetings with "a lot of top specialized people, law professors ... at the expert level, then things are very complicated" (CGS Interview). The Finnish Presidency was

very conscientious about using its "early warning system" during the preparations for Tampere in such a way to ensure that all Member States were on notice of the issues on the table and would have adequate time to consult their experts at home prior to the summit (FP Interviews).

My research on the Tampere European Council also reveals the virtual absence of input from civil society, in general, or from the legal profession or academia, in particular. The legal profession did have some indirect influence, but it was filtered in via academic conferences which were, in turn, taken into consideration by (at least some) national civil servants when working up their Member State's preferences for the summit. Moreover, one member of the Tampere Team – Inga Korpinen (then Pöynten) – had been drafted from private law practice to work for the Finnish Presidency. In terms of academic influence, Tampere may be unusual in the extent to which high-profile academic ideas filtered into the national preference-formation process, through the person of the top civil servant in the Finnish Ministry of Justice, Kirsti Rissanen, who had been drafted into government service from the law faculty at the University of Helsinki. Rissanen's positions as a civil servant were strongly shaped by her prior academic work, such as the 1994 conference she organized on European ideas of justice, and a report prepared at her request by University of Helsinki faculty member and scholar of European and Nordic legal history, Pia Letto-Vanamo (Paasivirta & Rissanen 1995). Rissanen, who presented herself in interviews as profoundly shaped by Nordic legal traditions, was described by a member of the Tampere Team as "credible" and as believing deeply in the proposals put forward by the Ministry of Justice (Interview #10).

At the same time, my research on the Tampere European Council also demonstrates some of the problems that academics might encounter in the high(er)-politics setting of an EU Presidency.[244] The problems that arose within the Finnish Presidency were more stylistic than substantive. According to a member of the Tampere Team, "we were on board" with Rissanen's proposals, such as the emphasis on access to justice, based on "our own experience" and not just on her insistence (Interview #10). The challenge was, how best to achieve the shared goals. The difficulties arose rather from the fact that Rissanen's approach was occasionally seen by the political actors – albeit themselves trained in law – as being "impractical" or "too abstract" in a context that called for concrete, operationalizable aims, or as "uncompromising" in a context that demanded flexibility in negotiations and the willingness to formulate back-up options.

III.2. Conclusions to Part III

The chapters in Part III have examined the background from which the 1996 Intergovernmental Conference emerged (Chapter 6), the creation of the Area of Freedom, Security and Justice (AFSJ) and the commuitarization of civil justice in the 1997 Treaty of Amsterdam (Chapter 7), and the formulation of the first five-year policy program for the AFSJ at the Tampere European Council (Chapter 8). While tightly bound together sequentially, these events in the 1990s differ in important ways, such as the institutional setting, the nature of the decision-making process, and the actors who were involved in each. Many actors appear at each stage of the sequence, providing continuity, while others make brief (but occasionally significant) cameo appearances. There are important similarities as well. All events take place in a complex and highly collaborative landscape where EU and Member State actors struggled to shape and steer the process of European integration, and where civil society actors remained in the distant background.

These events also provide insight into how highly technical legal knowledge is incorporated into the transnational process of European governance. Both of my two case studies – the Treaty of Amsterdam (Chapters 6 & 7) and the Tampere Summit (Chapter 8) – involve high-level decision-making by the European Council, which is the EU's highest political body, and the one in which Member States most clearly exercise their traditional role as masters of the treaties and strategic mappers of the course of European integration. And yet, my findings show that the role of the European Council, while highly autonomous in formal terms, is shaped and steered – even "driven" (CGS Interview) – in significant ways by the ongoing (neofunctional) processes set in motion by prior decisions along the path-dependent road which, at the time, was oriented towards "ever closer Union" (TEU preamble). Chapter 9 below takes up the challenge of providing an adequate explanation of these events.

Endnotes to Chapter 8 and III.2

1. Discussed in section 8.3 below.

2. My translation from the original German ("Dennoch beklagte Juncker auch 'die oberflächliche Art und Weise, in der beim Gipfel über sehr diffizile Rechtsprobleme gesprochen worden sei.' ")

3. My translation from the original German (" 'Einige Regierungschefs dürften sich in ihrem eigenen Kabinett nicht derart detailliert äußern,' sagte der Premier.").

4. The official name of the Amsterdam Treaty is the 'Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts." As this name indicates, the Amsterdam Treaty did not *replace* the existing foundational treaties, but rather amended them.

5. Namely, Austria, Belgium, Denmark, Finland, Germany, Greece, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom.

6. Article 14(2) states that the Amsterdam Treaty "shall enter into force on the first day of the second month following that in which the instrument of ratification is deposited by the last signatory State to fulfil that formality."

7. The European Council charged the High Level Group on Organised Crime with the task of preparing the action plan at the Dublin summit in December 1996, during the Intergovernmental Conference.

8. Subsection 8.2.1 sketches these dynamics as a prelude to examining the four interim Presidencies in subsections 8.3.1 through 8.3.4.

9. The Council Secretariat also provides legal representation to the Council in cases before the European Court of Justice.

10. Initially, Pereira's expertise was in the field of public international law, but he developed expertise in private international law over time.

11. The Commission shared with Member States the right of initiative on some Justice and Home Affairs matters – including civil justice matters – under the Third Pillar rules (EU Treaty art. K.3(2)) and was "fully associated with the work" on JHA cooperation (EU Treaty art. K4(2)).

12. The Commission's Task Force for Justice and Home Affairs was formally expanded into a full Directorate-General (DG JAI or DG-X) in October 1999, after the Amsterdam Treaty entered into force.

13. Some sources (e.g., Occhipinti 2003: 80) claim that this Task Force was within the *Council* General Secretariat, but this is erroneous. The Council of the EU *does* have a General Secretariat (GSC or Council Secretariat), as well as a Directorate-General D on Justice and Home Affairs. The Council DG-JHA is divided into two sub-directorates: Directorate 1 covers Home Affairs, while Directorate 2 covers Justice.

14. Fortescue Obituary (2004). Fortescue bore the honorary title 'Sir' after being recognized for his service to his country. He was a Knight Commander in the Order of St Michael and St George (KCMG) and a Lieutenant in the Royal Victorian Order (LVO).

15. When the Directorate-General was created in 1999, it was the "newest and smallest Commission department, with approximately 180 officials out of a total of 17,000 Commission officials" (Hartnell 2002: 72, fn. 46). The original DG combined Justice and Home Affairs, but was later split into two separate DGs. As of January 2018, DG JUST 397 staff members, while DG HOME had 475 (Commission Human Resources – Key Figures 2018).

16. Justice Möller had served as Counselor of Legislation in the Finnish Ministry of Justice from 1975 until 1986, and as Judge in charge of a District Court from 1986 until he was appointed to the Supreme Court in 1992. Prior to joining the Ministry of Justice, he had taught at the University of Helsinki from 1970 until 1975.

17. The General Secretariat of the Council was regularly represented in The Hague by Mr. Pereira.

18. The cited (and other) and other national experts recalled with consternation the arrival of the Commission's "new man" for negotiations in the Hague, and directed me to turn off my recording device before they would speak about him. However, the Commission staff member in question only joined the Commission's DG for Justice and Home Affairs at a later date, and thus was not present in that capacity during the interim period (Interview #51).

19. The Working Party consisted of representatives of all fifteen EU Member States, plus Iceland, Norway and Switzerland, and was instructed to work towards parallel revision of the Brussels and Lugano Conventions, with the "twin objectives of modernising the system of those two Conventions and eliminating differences between them" (Pocar 2007: 126).

20. The Council Working Party Note on Brussels/Lugano Conventions is dated 30 April 1999, which is the day before the Amsterdam Treaty entered into force.

21. The JHA Council is that configuration of the Council of the EU (formerly Council of Ministers) that is composed of national ministers of justice or interior/home affairs from each Member State and represents the interests of the Member States in the EU.

22. The Commission submitted its proposal on 14 July 1999 (Pocar 2007: 127), and the new Brussels I *Regulation* was adopted eighteen months later, on 22 December 2000.

23. Namely, the former conventions on jurisdiction and recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children (Brussels II) and on the service in the Member States of judicial and extrajudicial documents in civil or commercial cases (Service of Documents).

24. With regard to the Helsinki Seminar held in March 1997, the Commission noted: "To feed its own reflections and enrich these debates, the Commission widely circulated a questionnaire in preparation for the Helsinki seminar; this went to European associations representing professional circles (notaries/solicitors, advocates, the judiciary, bailiffs and court registrars). The replies were collated for the seminar." Commission Communication on Judgments 1998: 6, FN 10.

25. The moving force in this arena was Mario Tenreiro, who served as Head of Unit (C-2) for Legal Matters prior to joining the new Directorate-General for Justice and Home Affairs in 2000.

26. Lord Cockfield angered Margaret Thatcher, who had sent him to Brussels expecting him to follow her Euroskeptic line, when he "went native" and became a strong proponent of integration. She did not reappoint him for a second term, at which point Fortescue moved into the Commission Secretariat to take up his work on Justice and Home Affairs and was asked "to reflect on the consequences for the EC of removing frontier controls" on the movement of persons (Lewis & Spence 2010: 85).

27. Title VI of the Maastricht Treaty, which sets forth the Provisions on Cooperation in the Fields of Justice and Home Affairs, provides in Article K.6 of the EU Treaty: "The Presidency and the Commission shall regularly inform the European Parliament of discussions in the areas covered by this Title. The Presidency shall consult the European Parliament on the principal aspects of activities in the areas referred to in this Title and shall ensure that the views of the European Parliament are duly taken into consideration. The European Parliament may ask questions of the Council or make recommendations to it. Each year, it shall hold a debate on the progress made in implementation of the areas referred to in this Title."

28. As late as 2000, a prominent scholar noted that "the existing body of knowledge about committees of the European Parliament (EP) is rather limited" (Neuhold 2000: 3).

29. These Resolutions are examined chronologically below in subsection 8.3.4.1.

30. Nicole Fontaine was a Member of the EP from 1984 through 2009, except for a short term of ministerial service in the French government (Ministre déléguée à l'industrie auprès du ministre de l'économie, des finances et de l'industrie, 2002-2004), and served as President of the EP from July 1999 until January 2002. Prior to becoming President, she was a (substitute) member of the LIBE Committee (January 1997 - July 1999). She was educated in law (Licence en droit à la Faculté de droit de Paris, 1962; Doctorat d'Etat en droit public, 1969) and public affairs (Diplôme de l'Institut d'Etudes Politiques de Paris, 1964). She was a member of the bar from 1996 until 2008 (except during her term as minister in the French government).

31. Finnish Prime Minister Lipponen's formal letter inviting EP President Nicole Fontaine to address the European Council was sent just a few days before the summit meeting took place (Lipponen Letter to EP President 1999).

32. A proposal to 'reformat' the Brussels II Convention as an EU Regulation was pending at the time, pursuant to the new arrangements laid down in the Amsterdam Treaty.

33. As noted in section 7.2.1.3 above, this convention never entered into force.

34. Recall that the actual appointment of a President of the European Council for a term of two and one-half years was an institutional innovation that began when the 2007 Lisbon Treaty entered into force in 2009. This development altered somewhat, but did not fully displace the role of the rotating national Presidency.

35. Jensen & Nedergaard (2014) have created a typology of Troikas, but their study does not include the constellation examined here.

36. Recall from Chapter 6 (see Figure 6.1) above that the K4 (Coordinating) Committee was an umbrella group of senior national JHA officials who oversaw the work of the three Steering Groups in the Third Pillar, i.e. Immigration and Asylum (I); Security, Police and Customs Cooperation (II); and Judicial Cooperation (III). Each Member State had a member in the K4 Committee, as did the EU Commission.

37. The Council of Europe (CoE) is an international organization based in Strasbourg, of which all EU Member States are parties, but which is not limited to EU countries. The CoE, which is discussed more extensively in Chapters 2 (subsection 2.2.1) and 5 (subsection 5.3.2.1) above, pre-existed the EU and is best known for its role in the human rights arena. The 1950 European Convention on Human Rights and the European Court of Human Rights are both part of the CoE's pan-European institutional system. In addition, the CoE is also active in regard to many issues that fall within the EU's overlapping (but not co-extensive) JHA policy domain.

38. The November 1998 meeting was the second such K4 Troika-CoE meeting. These informal meetings entailed closer attention to particular policy issues than the so-called 'Quadripartite Meetings' between the Council of Europe and the European Union, which began in the late 1980s and have occurred with some regularity since then (Kolb 2013: ch. 3). Quadripartite Meetings addressed more general policy guidelines and were attended by a representative of the Member State holding the rotating Presidency of the Council of the EU, a high-ranking official from the EU Commission, a representative of the country then serving as Chair of the Committee of Ministers of the Council of Europe, and the Secretary of General of the Council of Europe. Thus, for example, the 9th Quadripartite Meeting on 28 April 1997 mentioned that the first informal K4 Troika-CoE meeting had been held on 25 March 1997, and that such meetings would continue in the future, in order to "compare work programmes and avoid duplication of effort" (9th CoE-EU Quadripartite Meeting 1997: ¶ 9).

39. Recall that some persons closely involved with the work of the Council of Europe were incensed by the Amsterdam Treaty's decision to transfer competence over civil justice matters from Member States to the EU (see Chapter 7 above).

40. The ‘mutual recognition’ language extends the arguments put forward by the Commission in its 1998 Communication on Judgments, which aims to improve “the free movement of judgements,” but that Communication did not mention mutual recognition at all.

41. The Austrian Presidency did manage to achieve some results on issues that were of particular interest to it, notably environment, cross-border traffic pollution, and the “prevention of violence, AIDS, drug use, and social models to accommodate both family and professional life” (Huelshoff 2002: 78).

42. However, this is not meant to imply that the Commission was shooting from the hip. In fact, the Communication on Judgments (1998: ¶ 9) states clearly that the Commission had been thinking about the need for radically altering and simplifying the procedure for recognition and enforcement of civil judgments in the EU *since 1995*.

43. The Avignon Declaration defines the European judicial area as an area in which:
“(a) citizens of a Member State who for any reason (victims or perpetrators of an offence, etc.) are brought before the civil or criminal judicial authorities of another Member State are given adequate guarantees and assistance (e.g. interpretation into their own language, free legal aid if they do not have the means to pay for it, and the right to be properly informed about and assisted in connection with the related application procedures), with a convention being established to allow provision for bail to be granted to allow the citizen to return to his/her home country while awaiting trial;
(b) common legal standards are attained in order to encourage judicial authorities to recognise the judicial or extra-judicial acts adopted by the judicial authority of another Member State, without the need for an exequatur;
(c) European writs of execution are established for the recovery of sums under a certain limit;
(d) free circulation and automatic recognition of court rulings are guaranteed through a newly established judicial body (consisting of specialist judges) serving to protect the individual rights of European citizens to the extent required to compensate for the inevitable loss of the judicial review hitherto carried out by the authorities of a Member State requested to enforce a court ruling originating from another Member State;
(e) special emphasis is laid on crime prevention, targeted more specifically at juvenile delinquency, a symptom of spreading urban violence, and justice is not merely synonymous with punishment, but above all opens the way to mediation and/or steps to make up for harm done, and educative measures effectively counter the risk that offenders might reoffend.” EP Resolution on Tampere/AFSJ (EP 1999e).

44. See the discussion in subsection 7.1.1.2 of Chapter 7 above.

45. Jacques Santer succeeded Jacques Delors (France), the strong, federalist-oriented French politician who served three terms as EU Commission President between 1985 and 1995. Some Member States (notably the UK) wanted a less forceful person in the office when Delors left and rejected the nomination of Luxembourger Jean-Luc Dehaene because of his strong federalist leanings. Santer was the compromise candidate.

46. According to a succinct history of Europol, the EU’s law enforcement agency, “Germany, backed by Spain, called for the establishment of a real European federal police force, modelled on the American FBI, allowing the police force from one country to have the right of hot pursuit in a neighbouring country (as is the case in the Benelux countries) and also the right to arrest people. However, France, the United Kingdom and most of the countries of the Community were opposed to the idea. On a proposal from the German Chancellor, Helmut Kohl, the principle of the establishment of a European Police Office (Europol), responsible for combating international drug trafficking and organised crime, was adopted at the Luxembourg European Council on 28 and 29 June 1991. Europol came into being with the establishment of a ‘Drugs Unit’ by the Maastricht European Council on 9 and 10 December 1991.” CVCE (2016).

47. Aznar’s paper paid much more attention to asylum and police issues than to civil justice. As such, it is not a key statement for purposes of tracing the sources of the civil justice components of the Tampere Milestones.

48. The Vienna European Council recognized Kohl’s extraordinary contribution to the goal of promoting European integration by awarding him the title ‘Citizen of Europe’ (Vienna Presidency Declarations). This honorary title had only been awarded once before, namely to founding father Jean Monnet (April 1976), and has only been awarded

once since, namely to former Commission President Jacques Delors (June 2015).

49. The JHA Council agreed to the Vienna Action Plan on 3 December 1998 and formally adopted it on 7 December 1998. The Vienna European Council approved it on 11 December 1998. *Bulletin EU* 12-1998, at ¶ I.12.84.

50. Article 2 of the EU Treaty aspires "to maintain and develop the Union as an area of freedom, security and justice, in which the *free movement of persons is assured* in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime" (emphasis added).

51. The Member States were represented in this context by the JHA Council, which is the EU institution that adopted the Action Plan before it was presented to the European Council.

52. According to the Vienna Action Plan (1998: ¶ 40), the following should be achieved within two years after the Tampere summit: complete the revision of Brussels and Lugano Conventions; prepare legislation on applicable law for non-contractual (i.e., tortious) obligations (Rome II); revise Rome I Convention on law applicable to contractual obligations; and examine the possibility of extending the concept of the European judicial network in criminal matters to embrace civil proceedings. The following should be achieved within five years after the Tampere summit: prepare legislation on applicable law for divorce (Rome III); examine the possibility of drawing up models for non-judicial solutions, such as mediation, particularly for transnational family conflicts; prepare legislation on international jurisdiction, applicable law, recognition and enforcement of judgments relating to matrimonial property regimes and relating to succession (i.e., decedent's estates); identify rules of civil procedure which urgently require harmonization as a means to facilitate access to justice for the citizens of Europe, and consider proposing further legislation to improve the "compatibility of civil procedures," such as rules relating to legal aid and rules pertaining to the requirement to deposit security for litigation costs; improve and simplify cooperation between courts in the taking of evidence; and examine the possibility of approximating certain areas of civil law, such as creating uniform private international law applicable to the acquisition in good faith of corporal movables (id. at ¶ 41).

53. The Santer Commission was replaced on 16 March 1999 by a caretaker Commission headed by Manuel Marín, which served until 15 September 1999 – just one month before the Tampere summit – when it was replaced by the Prodi Commission.

54. Cole (2014: ch. 7) reports that "[o]n a number of occasions the German government appeared overwhelmed by the presidency. There was an obvious lack of coordination in German negotiating positions." To be fair, JHA/AFSJ policy was not a major focus of that author's analysis.

55. The EP adopted two other resolutions during the German Presidency which were tangentially related to the JHA and its transformation: the EP Resolution on JHA Progress in 1998 (EP 1999a) and the EP Resolution on Democracy and Liberty (EP 1999b).

56. This suggestion is directed towards cooperation in the field of criminal justice, in which the European Judicial Network was set up in June 1998. The European Judicial Network in the field of civil justice was not established until 2001 (EJN Decision - Civil 2001).

57. In simple terms, the EP was calling for court-to-court contact, rather than ministry-to-ministry contact.

58. I have only seen partial reports from this meeting, and do not know whether other Justice Ministers attended the Interparliamentary Conference, or only those from Germany and Finland. At least, these are the only two quoted in the EP's own report (EP 1999c). It makes sense that these two Justice Ministers would be invited, given the leadership responsibilities inherent in their Member States' occupation of the Presidency during the first and second halves of 1999.

59. In January 1999, a meeting took place between the General Secretary of the Council Secretariat, Jürgen Trumpf, and the German Justice Minister, Herta Däubler-Gmelin, to discuss German plans in the field of justice (Interview #46). The Justice Minister proposed to push the idea of a Charter of Fundamental Rights, which had long been on the German agenda. The idea was to organize a forum that was not limited to participation by governments, like the summit meetings of the European Council, but rather a more open forum in which civil society could also play a role. The first EU Convention was convened in Cologne in December 1999, and its deliberations continued until October 2000. The Nice European Council (December 2000) "solemnly proclaimed" the Charter, but the Charter had no legal effect until nearly a decade later, when the Lisbon Treaty entered into force (December 2009).

60. It is significant that the language of 'mutual recognition' did not appear in the Commission's 1998 Communication on Judgments. Mutual recognition *is* mentioned in the later Vienna Action Plan, but only in connection with criminal justice.

61. On particular civil justice issues, the EP notes the following. First, it is a "matter of urgency" to adopt Community acts on Brussels I and II, and on access to justice (EP 1999d: ¶ III(20)). Second, measures are needed to ensure that "recognition and enforcement of decisions between Member States is virtually automatic and that, in this context, there is an urgent and vital need to promote the compatibility of the rules applicable in the Member States concerning civil procedure, the conflict of laws and of jurisdiction ... and to step up administrative cooperation between civil-law services by establishing specialist networks (Eurojust) at European level, by exchanging officials or by appointing liaison officers" (id. at ¶ III(21)). Third, the EP suggests that the "principle laid down in Article K.4 (future Article 32) of the Treaty on European Union with regard to mutual judicial assistance whereby the Council is to determine 'the conditions and limitations under which' judges and investigating and prosecuting officials may operate in the territory of another Member State in liaison and in agreement with the authorities of that State *could be applied more in the civil field*, where the degree of integration should reflect the fact that this legislation is now of a Community nature" (id. at ¶ III(22), emphasis added). And fourth, the EP calls on the Commission "to take full advantage of the fresh possibilities offered by [Article 65] of the EC Treaty in order to draw up its own body of rules in the area of civil law and to promote the compatibility of civil procedures" (id. at ¶ III(23)).

62. Peltomäki and Puumalainen had worked closely with MoJ Secretary-General Rissanen before moving to the Prime Minister's Office, whereas Rissanen recruited Korpinen from private law practice to serve as her liaison for Amsterdam and Tampere.

63. Dr. Jekewitz headed the Section of EU Law and Public International Law Section, and served for over 30 years in the German Federal Ministry of Justice.

64. The K4 Committee was renamed the 'Article 36 Committee' once the Amsterdam Treaty entered into force in May 1999.

65. Some scholars refer to this process as "Christmas Tree" policy-making, in which Member States and EU institutions "decorate" a bare bones structure, such as the AFSJ (see e.g., Maricut 2014).

66. According to one participant, Fortescue's position was extremely difficult, institutionally speaking, in the wake of the Commission's resignation in March 1999.

67. The French proposals are examined in subsection 8.5.2.2 below, which considers the priorities articulated by Member States other than Finland in the run-up to the Tampere summit.

68. My research is incomplete in regard to which of the national heads of state or government who attended the Tampere summit had studied law. It so happens, however, that the German Chancellor Schröder had completed his legal studies (i.e., was a *Volljurist*) and took an active interest in a number of the detailed civil justice proposals (Interview #46).

69. European Council summit meetings involve intergovernmental decision-making.

70. I have been unable to obtain copies of some documents, which limits my ability to draw definitive conclusions. The following discussion notes the missing documents and their relevance.

71. Technically speaking, the 'Tampere Milestones' are the Finnish Presidency Conclusions following the Tampere summit meeting of the European Council.

72. I have obtained one or more written statements from all fifteen Member States except Ireland and Luxembourg.

73. A second *tour de capitales* took place from 29 September until 7 October 1999 (see subsection 8.5.3 below).

74. These two Memos were addressed to the Civil Law Committee and the Criminal Law Committee, respectively. These two committees, which were Council working structures in the EU's Third Pillar, entailed policy coordination by senior civil servants from Member States, who worked hand in hand with the Commission Task Force and the Council Secretariat.

75. I cannot assert that their notions in regard to civil justice issues were different, because I have not been able to pin down concrete differences between what the Council Secretariat wanted and what the Finnish Presidency wanted on the basis of the documentary record. I have one internal Finnish government document (dated 23 September 1999) containing proposed language for the Tampere Milestones (Finnish Draft Tampere Conclusions), which is a fifth version with full English translation, but do not have earlier or later Finnish drafts in my possession, nor do I have access to any draft conclusions "from Brussels." The process of drafting the Tampere Milestones is examined in section 8.6.1 below.

76. The Ministry of the Interior was responsible for asylum, migration, and security-related issues.

77. It is possible that the insistence on taking a balanced approach can be traced back to the views expressed by Spanish Prime Minister Aznar. In his address to the informal Pörtschach meeting during the Austrian Presidency in 1998, he noted that "the three components, security, freedom and justice, are closely linked and it is not possible to move ahead on one of them without at the same time progressing on the others" (Aznar Statement 1998). In May 1999, Aznar sent a letter to Finnish President Lipponen, responding to the Schröder-Lipponen Letter from March 1999, in which he stated that "we must prevent Tampere from becoming a Summit on Asylum and Immigration. The three aspects of the [AFSJ] must be developed together in harmony" (Aznar Letter 1999). Commission President Prodi also emphasized this point in the lead-up to Tampere (Commission President Prodi Letter 1999).

78. As noted above in subsection 8.3.2, the Cardiff Presidency Conclusions (June 1998) at the end of the UK Presidency during the first half of 1998 called for more "effective judicial cooperation in the fight against cross-border crime," and asked the Council to "identify the scope for greater mutual recognition of decisions of each others' courts" (¶ 39), but did not envision extending this approach to civil justice issues as well. As the discussion in subsection 8.5.2.2 shows, the UK continued to push this issue in the context of the Tampere Summit.

79. All these measures fall within the scope of the law of civil obligations (contract), while the third of them crosses the line into the law of property as well.

80. This informal meeting of the JHA Council was to prepare the ground for the formal meeting of the Justice and Home Affairs Council in Luxembourg (4 October 1999). Both the informal and formal meetings allowed national ministers to have a say on the Tampere agenda, but they themselves were not – as noted earlier – invited to attend the Tampere summit itself, where final decisions would be taken by their heads of state or government acting as the European Council.

81. "Rissanen had allies" for her agenda, in the view of a Council General Secretariat insider, "notably France and Germany" (Interview #32).

82. This thread culminated in the European Council's decision at Tampere regarding the composition, method of work and practical arrangements for the body that would prepare a draft EU Charter of Fundamental Rights. However, the basic decision to prepare such a draft had already been agreed at the Cologne summit (June 1999).

83. The *third issue cluster* under the access to justice heading on good governance (using social security as an example) is not analyzed in this subsection, because it was not fleshed out in the MoJ Access to Justice Report. It is taken up below in subsection 8.5.2.1.3, which examines the MoJ Memoranda on European Area of Justice.

84. Annex 1 endorses the Storme Commission's project to harmonize principles of civil procedure in Europe.

85. On occasion, the older terminology 'execution title' is used in connection with the mutual recognition under the EU's civil justice laws, such as the European Enforcement Order (EEO) for Uncontested Claims Regulation (see Appendix B, as well as Chapter 5 above).

86. The Commission Communication on Judgments from January 1998 provides a great number of detailed proposals on these issues and mentions the need for "trust in judicial institutions" (¶ 11). Yet this document did *not* incorporate the principle of mutual recognition, which came to be introduced at a later stage in the Tampere preparations.

87. 'Civil status' refers to matters such as marriage and divorce, domestic partnership, parenthood, adoption, guardianship, a person's name, gender, identity, etc. As such, it pertains to "social relations within the family, between adults and children as well as between adult individuals" (EP Civil Status Study 2012c: 7).

88. This language comes from the title of the Commission's Documents and Civil Status Green Paper from 2010.

89. These far-reaching concrete proposals were not taken up in the Tampere Milestones. This does not mean, however, that the issues disappeared. They remained in the hopper until 2016, when the EU adopted the Public Documents Regulation.

90. Property law has traditionally been treated as a topic that is exclusively reserved to the Member States under EU law. This tabu has eroded in recent decades, with the rise of EU-level intellectual property and environmental law, but the EU has largely refrained from seeking to regulate issues surrounding real property (i.e., land and buildings).

91. Annex I to the MoJ Access to Justice Report also endorses a proposal by Professor Mireille Delmas-Marty to draw up "common penal norms and sanctions" in matters relating to fraud.

92. *See* footnote 87 above regarding civil status.

93. As noted above, the Finnish MoJ also placed an issue of substantive property law on the Tampere agenda.

94. This is not to say that Finland was the only Member State pushing family law issues. As noted earlier, France was also a strong supporter of putting family law issues on the EU's agenda. Yet Finland goes further in the MoJ Access to Justice Report than other Member States – even France – were willing to go at the time.

95. This Memorandum fleshes out the *third issue cluster* of the access to justice dimension, which was noted in the MoJ Access to Justice Report (discussed above in subsection 8.5.2.1.2).

96. This Draft was prepared the week before the second *tour de capitales* (29 September - 7 October 1999).

97. Section 3 of the Finnish Draft Tampere Conclusions also discussed the need to "reinforce the rights and protection of victims of crime and also to safeguard the status of a person suspected of a crime."

98. I omit discussion of ¶ 3.4, which deals with improving the status of a victim of crime and safeguarding the status of a person suspected of a crime, since criminal law issues fall outside the scope of my study.

99. The term ‘approximation’ is the English translation of the French term ‘rapprochement,’ which is the language used in the original EU treaties. The term ‘harmonization’ is more common in contemporary usage, but the old terms remain in use as well. The meaning of ‘harmonization’ is ambiguous, but it generally refers to something *less than* full normative unification of rules regarding a particular matter. The classic instrument for harmonization (or approximation) in this sense is the EU directive, which requires Member States to achieve a particular result without dictating the means of achieving that result, and which normally requires some form of implementing legislation at national level.

100. This proposal was not taken up in the final Tampere Milestones.

101. This goal does not emerge from documents and other sources from the Finnish Ministry of Justice.

102. The Tampere Milestones did not, however, take on the Finnish language referring to the law of trade, obligation, property and family law, but rather adopted more open-ended language.

103. In addition to Finland, my interview-based research covers seven of fifteen Member States (Belgium, France, Germany, Luxembourg, Netherlands, Spain, and the United Kingdom), although not all interviews are relevant to the discussion here.

104. ‘Non-papers’ are informal discussion papers “put forward in closed negotiations within EU institutions, ... in order to seek agreement on some contentious procedural or policy issue. Often circulated by the presidency of the Council, an individual member state or the European Commission, non-papers seek to test the reaction of other parties to possible solutions, without necessarily committing the proposer or reflecting his or her public position up to that point” (Teasdale & Bainbridge 2012). They are common in international negotiations, not just those within the European Union.

105. In addition to Finland, I have reviewed written documents submitted by eleven of the (then-) fifteen Member States (Austria, Belgium, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom). I have not been able to obtain documents from Denmark, Ireland or Luxembourg, though Luxembourg’s views are at least partially represented in a joint Benelux position paper. I have also reviewed a number of other jointly prepared documents (e.g., France-Germany, Spain-UK, and France-Germany-UK).

106. Sweden focused on criminal justice and made no specific reference to civil justice matters (Swedish Non-Paper 1999). Belgium also focused heavily on criminal issues, but did not neglect civil justice issues entirely. The Belgian Contribution (1999: ¶ B.9, at p. 3) notes that the harmonization of penal law is “indispensable” and proposes extensive penal institutional measures. The Belgian Non-paper (1999: 5-6) contains very extensive proposals related to the fight against organized crime, fraud on the EU budget, and corruption, and suggests that the EU should extend some of the measures already in place for civil law in order to build the EJA for criminal law. The UK devoted extensive attention to cross-border crime (judicial co-operation and law enforcement) and to crime prevention (UK Position Paper 1999: ¶¶ II, III & IV), but also made substantial contributions to the discussion of civil justice issues (id. at ¶ V; UK Non-Paper on Access to Justice 1999).

107. In justifying the need to address civil justice issues at EU level, the UK pointed to examples (e.g., the tourist who buys a camera in another Member State or rents a holiday cottage in another Member State, the student who has a holiday job in another Member State and whose wages are not paid), and asserted that there is “clear evidence (for example a Eurobarometer survey from 1993) that this difficulty in obtaining redress is a major deterrent to consumers buying goods abroad” (UK Non-Paper on Access to Justice 1999: 1).

108. Germany, for example, bemoaned the fact that the “development of the EU into a single judicial area has not kept pace” with the increasingly transnational conditions of life, which is “often to the disadvantage of the citizen” (German Tampere Proposals 1999: ¶ C.1, at p. 1). France also pointed to fact that “the citizens’ daily lives [are] increasingly transnational and face new problems posed by this way of life” (French Tampere Priorities 1999: 4).

109. Austrian Protocol (1999: 6); French Tampere Priorities (1999: 4-5); German Tampere Proposals (1999: ¶ C, at pp. 6-8); UK Non-Paper on Access to Justice (1999: 1).

110. With regard to consumers, see also Benelux Priorities (1999: chapter 3(4), at p. 6); German Tampere Proposals (1999: ¶ C, at p. 7); Portuguese Non-Paper (1999: 3); Portuguese Contribution (1999: 5); UK Non-Paper on Access to Justice (1999: 1); and UK Position Paper (1999: 7). Portugal's far-reaching proposals in regard to consumer protection are discussed further below.

111. Austrian Considerations (1999: Part IV, at pp. 5-7) (*Zugang zum Recht*); Portuguese Non-Paper (1999: 2-3); Portuguese Contribution (1999: 4-5); UK Position Paper (1999: ¶ V, at pp 6-7).

112. French Tampere Proposals (1999: 1 & ¶ III, at pp. 4-5) ("*la mise en place d'un véritable espace judiciare européen*"); German Tampere Proposals (1999: 1 & ¶ C, at pp. 6-8); Greek Tampere Contributions (1999: ¶ C, at pp. 5-6); Italian Tampere Proposals (1999: ¶ C, at pp. 5-6).

113. Recall that the Tampere Milestones settled on "A Genuine European Area of Justice" as the overarching and organizing concept, and broke it down into three sections: better access to justice in Europe, mutual recognition of judicial decisions, and greater convergence in civil law (Tampere Milestones 1999: Part B).

114. Commission President Prodi argued for a broad conception of this goal, while simultaneously refraining from commenting on particular proposals put forward by the Member States (Commission President Prodi Letter 1999: 2-3). Overall, Prodi agreed with the Finnish Presidency's suggestion to divide the "subject matter into three main headings: immigration and asylum; combating organised crime; and *establishing a judicial area*. ... I am conscious that over recent months, many Member States have written it (sic) with interesting and imaginative suggestions in all these areas, with many of which the Commission would agree. It is not my intention to comment on these in detail, but rather to highlight some suggestions which we believe deserve priority attention and could usefully be emphasised in the Tampere conclusions" (id. at p. 2) (emphasis added).

115. Spain noted that "the setting up of the [EJA] will not be effective if access to justice is not made generally available to European citizens. ... The final goal should be to enable a European citizen to bring suit in any country of the Union as easily and at the same cost as in his own" (Spanish Contribution 1999: 9).

116. Belgian Contribution (1999: section B, at p. 3, ¶ 7) ("Le Gouvernement belge estime important d'améliorer la coopération judiciare civile entre États membres et ce, notamment, dans le cadre de l'accès à la justice.").

117. Dutch Non-Paper (1999: ¶ III, at pp. 4-5); Dutch Tampere Memorandum (1999: 15-18).

118. Civil justice issues were absent from Swedish priorities, although Sweden did express concern about tax havens and issues related to diversity and racial discrimination (Swedish Non-Paper 1999: ¶¶ 3.3 & 3.4). Sweden also put forward innovative and far-reaching proposals relating to crime prevention in the EU (id. at ¶ 3.2). Overall, it argued that Tampere should offer "comprehensive long-term visions" and that discussions "should be limited to a number of central issues in order to produce effective and balanced results" (Swedish Non-Paper 1999: 1).

119. German Tampere Proposals (1999: ¶ C.1, at p. 7).

120. Italian Non-Paper (1999: ¶ vii, at p. 6); Italian Tampere Proposals (1999: ¶ vi, at p. 6).

121. "The UK believes that in the context of civil law co-operation, the Tampere Council should set the objective: *To make it as easy to go to court in another EU member state as in your own*" (UK Position Paper 1999: ¶ V, at p. 7).

122. Portuguese Non-Paper (1999: 2-3); Portuguese Contribution (1999: 4-5).

123. Portugal was not alone, however, in foregrounding civil justice issues. See also French Tampere Priorities (1999: 4-5).

124. Elsewhere, Portugal explains that adequate protection of the citizen requires a "common effort to define a Legal Statute of the European Citizen: it's necessary to guarantee a similar level of protection throughout the whole of the [EU] territory, making legal protection clear and easily accessible to all persons (Portuguese Non-Paper 1999: ¶ II, at p. 2).

125. A number of Member States noted that the AFSJ would be incomplete without a Charter of Fundamental Rights and measures on data protection. Benelux Priorities (1999: ¶ 3(4), at p. 6) (protection of personal data); German Tampere Proposals (1999: 1) (Charter and data protection); Greek Tampere Contributions (1999: ¶ C, at p. 5) (protection of personal data); Italian Non-Paper (1999: 5). See also Commission President Prodi Letter (1999: 1) ("Citizens must find ... the guarantees they are looking for in terms of fundamental rights ... and in terms of ... data protection."). On the Charter, see also endnotes 34 & 43 in this chapter.

126. Commission President Prodi reinforced this perspective. "There is," he argued, "more to a common judicial area than ensuring that criminals have 'nowhere to hide'. Access to justice also means facilitation, in the sense of facilitating access to justice for law-abiding citizens to enjoy the freedom of cross-border movement inherent in the very concept of the European Community as an area without internal frontiers" (Commission President Prodi Letter 1999: 3).

127. Most discussions of institutional issues tend to combine, or at least do not clearly differentiate, civil justice from criminal justice issues. I note where the focus is specifically on one or the other. It is clear, however, that many Member States are extrapolating from their experience with cross-border criminal law matters.

128. Dutch Tampere Memorandum (1999: ¶ 4.2, at pp.16-17); Dutch Priorities (1999: ¶ 9.III).

129. Austrian Considerations (1999: 7); see also Austrian Protocol (1999: 3).

130. In particular, these cases involved requests for judicial co-operation in so-called letters rogatory (*Commissions Rogatoires*), when the authorities of one Member State ask the authorities of another Member State for assistance in regard to cases ongoing in the requesting country. Spain, for example, argued that "Commissions Rogatoires have to be dealt with more rapidly" (Spanish Drafting Points for Tampere Conclusions 1999).

131. Belgian Non-Paper (1999: 5-6); Italian Non-Paper (1999: ¶ vi, at p. 5); Italian Tampere Proposals (1999: ¶ vi, at p. 6); Spanish Drafting Points for Tampere Conclusions (1999).

132. In order to "strengthen judicial co-operation in civil matters," Italy called for provisions that would "allow to carry out [sic] judicial activities in the territory of another Member State in connection with the local judicial authorities ... " (Italian Non-Paper 1999: ¶ v, at p. 6; Italian Tampere Proposals 1999: ¶ v, at p. 5).

133. French Tampere Priorities (1999: 1) ("*... la mise on place d'un véritable espace judiciare européen. En ce sense, les conclusions ...ne devront pas etre un catalogue de mesures techniques*"). Commission President Prodi also warned the Member States against extending "the list of priorities beyond the point where it ceases to be a programme and starts looking like a shopping list" (Commission President Prodi Letter 1999: 3).

134. As causes of this "common European reality," Spain pointed to the "continuous rise in tourism ..., the growing phenomenon of pensioners who go to live permanently or for long periods in Union countries other than their own, the greater frequency of mixed marriages, and the larger presence of students from one Member State who take courses in another Member State" (Spanish Contribution 1999: 1).

135. Member States were not equally enthusiastic about wide-scale harmonization in the wake of communitarization. Spain, for example, noted that setting up the EJA "does not ... imply the complete harmonisation of the legal order, since that would be contrary to historic tradition and its deep roots in the different European

judicial systems. In view of this fact, the Treaty of Amsterdam is designed to trace a path on which a *minimum amount of harmonisation* of laws is proposed when it is feasible" (Spanish Contribution 1999: 8) (emphasis added). Along the same lines, Spain accepted in principle that some civil justice instruments already in place among EU Member States, which had been adopted unanimously as conventions (treaties), would be converted into EU legislation in the wake of communitarization, but issued a warning in this regard as well: "[T]he Amsterdam Treaty enables us to make much faster progress in this field. The opportunity to convert agreements adopted by Member States into Union-wide instruments can and must be taken wherever it would be useful. However, we must not forget that these agreements have often been adopted on account of their specific features, such as allowing for the introduction of reservations and the delimiting of their scope of application, etc. An ambitious plan of "Unionisation" of the agreements could result in discovery of the lack of agreement necessary for the approval of the corresponding Union instruments, leading to delay, and even creating a certain amount of legal insecurity in the event of suspension of the procedures for ratifying the agreements in force that were about to be replaced by the new instruments" (Spanish Contribution 1999: 8).

136. For example, German Tampere Proposals (1999: Part C, at pp. 6-8) ("At present the legal systems in Europe are ... still so divergent that it is difficult for citizens to enforce their rights in other Member States."). Austria emphasized that the proposed "complete integral concept of legal measures" aimed at facilitating the "cross-border enforcement of substantive national laws" is of "fundamental importance for the functioning of the internal market" (Austrian Considerations 1999: 7).

137. Austrian Protocol (1999: 6-7); Belgian Contribution (1999: B.7) (the Commission should make proposals on the matter of legal aid without delay) ("*le Gouvernement belge demande à la Commission de saiser le Conseil dans les meilleurs délais de propositions en ce domaine*"); Benelux Priorities (1999: 6); German Tampere Proposals (1999: ¶ C.1, at p. 7) ("[T]he differences between court proceedings must be reduced through an approximation of procedural law by aligning the various standards to be found in the Member States. Of particular significance here is a harmonization of the conditions for receiving legal aid ..."); Greek Tampere Contributions (1999: ¶ C, at pp. 5-6) ("the treatment of the European citizen should be harmonized, particularly as far as the ... judicial assistance ... [is] concerned. ... We should furthermore not overlook the technical support in the form of computerized documents and forms according to each case, easily comprehensible and translated into various languages."); Portuguese Non-Paper (1999: 2-3); Portuguese Contribution (1999: 5); Spanish Contribution (1999: 9) (calling for "improvements ... in the extension of the benefit of legal aid").

138. The UK noted that the language used in the Finnish Presidency's Tampere Agenda – "equal treatment in legal aid" – was susceptible to different interpretations. "It is unclear whether [this phrase] means equalising the provision of legal aid in each Member State (harmonisation) or non-discrimination in access to legal aid on grounds of nationality or residence. Legal aid in the UK is already available to people irrespective of their nationality or residence, so non-discrimination would pose no difficulties. An attempt to harmonise legal aid provision would, however, pose great difficulties" (UK Note on Tampere Agenda 1999: 3).

139. Greek Tampere Contributions (1999: ¶ C, at pp. 5-6) ("The European citizen should be able to easily recognize the competent judicial authority and the applicable law in each case. ... the treatment of the European citizen should be harmonized, particularly as far as the legal information ... [is] concerned. ... We should furthermore not overlook the technical support in the form of computerized documents and forms according to each case, easily comprehensible and translated into various languages."); Portuguese Contribution (1999: ¶B(1), at p. 5) (need to harmonize "conditions of access to juridical information").

140. See, e.g., Greek Tampere Contributions (1999: ¶ C, at p. 5). See also Commission President Prodi Letter 1999: 3 ("This is particularly important where family law is concerned, as well as in the area of small and uncontested cross-border claims. Everything must be done to ensure that access to justice in this positive sense, already daunting in terms of complexity and expense within a single Member State, should be rendered accessible as between Member States.").

141. The Down Hall Conference, which was attended by a "significant number of experts" from EU Member States along with representatives of the EU institutions, "heard presentations about various types of procedure in Europe and elsewhere" (UK Non-Paper on Access to Justice 1999: 1).

142. In particular, the UK suggested the following ideas, which had been raised at the Down Hall Conference, for consideration in Tampere: measures aimed at providing better information on "how to make use of Member States small claims procedures ... in all the official languages"; use of information technology to "help break down barriers caused by language" and possibly also to allow "litigation to be launched without the claimant – whether he is represented or acting in person – being physically present: for example better use of information technology including the Internet, and allowing evidence to be given by telephone or video link." Moreover, Member States should be "encouraged to introduce measures to improve the efficiency of their civil procedures and reduce delay" (UK Non-Paper on Access to Justice 1999: 2).

143. The UK also supported efforts "in the medium term" to "explore **minimum standards,** such as accessibility, simplicity, speed, flexibility and the minimising of costs, in civil proceedings having cross-border implications," particularly in connection with small and medium-sized claims (UK Position Paper 1999: ¶ V, at p. 7).

144. "Examples of legislation which the Netherlands feels will have a direct public appeal in this area are: European legislation on the use of the electronic superhighway (protection of personal information, legal safeguards for transactions, consumer protection, etc.)" (Dutch Priorities 1999: ¶`10, at p. 6; see also Dutch Non-Paper 1999: 4). Benelux echoed the Dutch priorities (Benelux Priorities 1999: 6). In regard to harmonization of civil law and the law of civil procedure, the Netherlands cautioned that "when these powers under article 65 [of the Treaty] are used, account should always be taken of activities in other international forums," notably the United Nations, the Hague Conference on Private International Law, Unidroit, and the Council of Europe (Dutch Tampere Memorandum 1999: ¶ 4.3, at p. 18).

145. Portugal proposed a number of procedural innovations to enhance consumer protection. Notably, it called for "enabling the out-of-court resolution of cross-border conflicts through consumer representative associations, regardless of the physical presence of the injured party," which would be enhanced by the "making use of technology which enables the lodging of consumer complaints, or even mediation and arbitration" as a way to "facilitate the resolution of consumer conflicts and do [so] without the physical presence of the injured consumer" (Portuguese Non-Paper 1999: 3). See also Portuguese Contribution (1999: B(1), at p. 5) ("extra-judicial resolution of cross-border consumer conflicts ... through associations representing the consumer, independently of the presence of the injured party, and taking advantage, as far as possible, of communication technology").

146. German Tampere Proposals (1999: ¶ C.1, at p. 7) ("improve cooperation between courts" by introducing "direct dealings with each other as regards taking of evidence" as a way to speed up court proceedings).

147. Italy pointed to the need to simplify the systems of procedure used in taking evidence (Italian Tampere Proposals 1999: 6), and also proposed allowing officials in one Member State "to carry out judicial activities in the territory of another Member State in connection with the local judicial authorities" (Italian Non-Paper 1999: 5). Spain, on the other hand, called for "progress in recognition of the validity of evidence gathered in other Member States (Spanish Contribution 1999: 10). This issue is revisited in the discussion of mutual recognition below.

148. The Late Payments Directive was adopted into law in June 2000.

149. See Freudenthal (2003) for a history of efforts to create a simplified European debt-collection procedure. Freudenthal traces these efforts back to the work of the Storme Commission, which was led by Belgian law professor Marcel Storme and resulted in the publication in 1994 of the book *Rapprochement du Droit Judiciaire de l'Union Europeenne/Approximation of Judiciary Law in the European Union*. According to one source, the Dutch Ministry of Justice had encouraged the European Commission to provide financial support for the work of the Storme Commission (Interview #59).

150. Now Policy Director at the EU's European Anti-Fraud Office (OLAF), Ms. Hoffman was a senior civil servant (*Ministerialrätin*) at the German Federal Ministry of Justice from 1987 until 1999.

151. Dr. Jekewitz explained that this proposal was initially misunderstood by representatives of some other Member States, with whom he met regularly in Brussels in the context of Article 36 Committee (and afterwards for dinner), such as France and the UK, who were in favor of EU rules to deal with *small claims*. He explained to them, however, that he had something else in mind – that undisputed claims could be small but could also be "big and interesting" – and they ultimately went along with this suggestion.

152. "No other European civil procedure law has such a provision, why not bring this idea in as a European idea. We are proud of it, we have experience, and yes, we could use such a procedure in Europe." ("*Das kennt keine andere ZPO in Europa, warum nicht diesen Gedanken als europäische Gedanke da einbringen. Wir sind stolz darauf, wir haben die Erfahrung, ja, und wir könnten sowas in Europa auch brauchen.*") (Jekewitz Interview).

153. Belgian Contribution (1999: ¶ B.7, at p. 3); Belgian Non-Paper (1999); French Tampere Proposals (1999: 5); French Tampere Priorities (1999: 5); German Tampere Proposals (1999: ¶ C.4, at p. 8) ("Another important field for the creation of the European judicial area is international family law, which – in particular in regard to mixed-nationality marriages – must be further harmonized."); Greek Tampere Contributions (1999: ¶ C, at p. 5); Italian Non-Paper (1999: 5); Italian Tampere Proposals (1999: 5) (calling for "common rules ... relating to separations and divorces," as well as "basically automatic recognition of judgments and procedures in civil ... law," which includes the area of family law); Portuguese Contribution (1999: ¶ B(1), at p. 5); Spanish Contribution (1999: 9). See also Commission President Prodi Letter (1999: 3) (the need for harmonized civil procedure rules is "particularly important where family law is concerned").

154. Austrian Considerations (1999: 7) ("[I]t will eventually be necessary that an agreement on ... matrimonial property law, and hence, of inheritance law is aimed for in order to make life easier for European citizens..."); Belgian Contribution (1999: ¶B.7, at p. 3) (succession); German Tampere Proposals (1999: ¶ C.4, at p. 8) (calling for harmonisation in the "fields of property law (in) and the law of succession").

155. Spain drew attention to the need to improve access to justice in regard to claims of financial support ("international maintenance claims") (Spanish Contribution 1999: 9), while Portugal urged the European Council to stimulate the "adoption of alternative processes to traditional justice, namely by mediation to resolve cross-border family conflicts" (Portuguese Contribution 1999: ¶ B(1), at p. 5).

156. Recall that the Commission Communication on Judgments was issued in January 1998, which was well before the Member States had agreed to hold the Tampere Summit.

157. Among the Member States that did submit written statements on civil justice aspects, *only* two – the Netherlands and Portugal (with its heavy focus on the need for better measures to enhance consumer protection) – *did not* devote specific attention to the general problems surrounding portability of judgments, although work in this field would be consistent with Portugal's other expressed preferences. Portugal called upon the Tampere European Council to identify "the areas where the lack of harmonisation of certain elements of the civil legal process ... and of international private law inhibit the swift and most efficient course of justice for the European citizen, with a view to suppress the corresponding obstacles" (Portuguese Contribution 1999: 5; see also Portuguese Non-Paper 1999: 3).

158. Austrian Protocol (1999: 6) (calling for the "the current meshwork of legislative acts ... governing international jurisdiction, ... [and] recognition and enforcement of court decisions ... to be completed in a conclusive manner"; Austrian Considerations (1999: 6); Belgian Contribution (1999, ¶B, at p. 3).

159. Germany called for "[s]implified execution of civil judgments," which "simplification ... is particularly important for companies entering into cross-border business, but also for individual citizens, who increasingly conclude cross-border contracts" (German Tampere Proposals 1999: ¶ C.2, at p. 7).

160. Greek Tampere Contributions (1999: ¶ C, at p. 5) (emphasizing the need for "a rapid procedure of issuing and executing Court decisions"); Italian Non-Paper (1999: 5); Italian Tampere Proposals (1999: 6).

161. Austrian Protocol (1999: 6) (noting the need to expand beyond the Brussels II Convention's coverage of "divorce and custody decisions following dissolution of a marriage" to reach "agreement on ... matrimonial property law, and hence, of inheritance law"); Belgian Contribution (1999, ¶B, at p. 3) (succession).

162. The exequatur procedure – sometimes referred to as "registration" (e.g., Commission Communication on Judgments 1998: ¶5, at p. 5) – typically requires the party seeking to enforce a foreign judgment (or other judicial act) abroad to go before a court in the Member State where enforcement is sought, often with the aid of a local attorney, to secure an order permitting the foreign judgment to be executed within the enforcing jurisdiction.

163. Greek Tampere Contributions (1999: ¶ C, at p. 5-6) (noting the need to go "beyond the provisions of the Brussels I and II Conventions" and calling for a "feasibility study ... on the usefulness of establishing a Single European Judicial Title"); Italian Non-Paper (1999: 5); Italian Tampere Proposals (1999: 5) (calling for "basically automatic recognition of judgments and procedures in civil and commercial matters" and for "going beyond the principle of *exequatur*"); Spain (Aznar Letter 1999) ("An aspiration to be realised could be that a decision by a judge of a Member State might have the same recognition by a judicial authority of another Member State as that given to a decision given by a judge from that same State."). The UK also foresaw the possibility of steps that gradually could "make a reality of a European enforcement order" (UK Position Paper 1999: ¶ V, at p. 7).

164. The French government, for example, had "pushed for increasing approximation and eventually unification of national laws and procedures" (Monar 2010b: 29-30). See also Italian Non-Paper (1999: 5); Italian Tampere Proposals (1999: 5) (calling for "basically automatic recognition of judgments and procedures in civil and commercial matters through a speedy process of harmonization of the rules of substantive law and rules of procedures and of those applicable in cross-border litigation").

165. In Monar's view, this approach – which the UK pushed for "both before and during the summit" – was "very constructive" (2010b: 29-30).

166. Puumalainen had given a seminar presentation on the topic of using mutual recognition rules developed by the Court in the context of free movement of goods (*Dassonville*, *Cassis de Dijon*) in connection with internal security issues in the EU, to which Fortescue replied that he had written on the same issue (Puumalainen Interview).

167. The Greek Government also expressed explicit support (Greek Tampere Contributions 1999: ¶ C, at p. 6) ("A basic element of the Tampere debate is the mutual recognition of Civil Court decisions, going beyond the provisions of the Brussels I and II Conventions."), as did Spain (Aznar Letter 1999) ("Above all, progress is planned in the resolute mutual recognition of judicial decisions.").

168. See subsection 8.5.2.1 above. Mutual recognition of judgments was proposed in all key documents submitted by the Finnish Presidency in 1999, notably the Presidency Memo on Civil Justice Issues (8.5.2.1.1), the MoJ Access to Justice Report (8.5.2.1.2), and the Finnish Draft Tampere Conclusions (8.5.2.1.4). The MoJ Memoranda on European Judicial Area (8.5.2.1.3) also discuss mutual recognition, but in the context of civil status.

169. "[W]e should work for the adoption of minimum standards in the field of enforcement" (UK Position Paper 1999: ¶ V, at p. 7).

170. "Achieving such minimum standards might allow us to remove the remaining procedural formalities and make a reality of a European enforcement order" (UK Position Paper 1999: ¶ V, at p. 7).

171. As noted earlier (subsection 8.5.2.2), the academic experts I interviewed were – despite high positions, regular contact and even responsibility for advising (and in some cases even representing) their respective governments on civil justice matters – completely out of the loop in the lead-up to Tampere, and only learned about what had been decided after the fact. As one of them put it, "the [Ministry of Justice official who] was the communicator on this one

... did not send us documents, or ask us what do you think about this. So we were more or less surprised by the exact text" (Interview #48).

172. Italian Non-Paper (1999: 5); Italian Tampere Proposals (1999: 5).

173. The Dutch Government emphasized the importance of giving European citizens "more certainty about the rules that regulate their position under civil law in the different Member States," because doing so is not only "relevant to the internal market" but also "will help to achieve a European legal order" (Dutch Tampere Memorandum 1999: 3).

174. For its part, Portugal called upon the Tampere European Council to identify "the areas where the lack of harmonisation of certain elements of ... international private law constitute obstacles to the access by the European citizen to a more expedient and effective justice system" (Portuguese Non-Paper 1999: 3) and thereby"inhibit the swift and most efficient course of justice for the European citizen," in order to "suppress the corresponding obstacles" (Portuguese Contribution 1999: 5) by means of "the adoption of legal instruments appropriate for the elimination of the corresponding obstacles" (Portuguese Non-Paper 1999: 3).

175. Recall that the EU treaties already contained a wide range of provisions empowering the EU to legislate on particular matters, including a few catch-all provisions, such as Article 114(1) of the TFEU, which allows EU institutions to "adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market." As such, the question raised here is whether the "judicial cooperation in civil matters" provision added by the Amsterdam Treaty (Article 65 of the EC Treaty, now TFEU art. 81) opens the door to legislation on general matters of civil law, such as basic rules of contract, tort, persons (i.e., family law), property, or inheritance.

176. Greek Tampere Contributions (1999: ¶ C, at p. 6) ("The Single European Market presupposes, to a great extent, the approximation of MS legislations [sic] regarding both procedure *and substance*.") (emphasis added).

177. It is not entirely clear from the documentary evidence what the Italian Government had in mind. Italy called for a "speedy process of harmonization of the rules of *substantive law* and rules of procedures and of those applicable in cross-border litigation," but did so in connection with its call for "automatic recognition of judgments and procedures in civil and commercial matters" (Italian Non-Paper 1999: 5; see also Italian Tampere Proposals 1999: 5) (emphasis added). Unclear is what type of substantive issues were contemplated, or how Italy understood the nexus between substantive law and the procedures involved in cross-border litigation.

178. "In the civil area, protection of the European citizen implies the need to guarantee a similar level of protection in the whole of the European Union, making judicial protection clear and accessible to the receiver. The European Council could confer an adequate mandate to establish the fundamental guidelines of a Judicial Statute of the European Citizen within a given period" (Portuguese Contribution 1999: 5). It is not clear what the Portuguese had in mind, but the call for a "similar level of protection" appears to implicate substantive law.

179. The UK expressed its "hope that Tampere will endorse specific measures which, when implemented, will make a decisive contribution to the overall objective of an [AFSJ]. But Tampere must do more than that. It must demonstrate to our citizens that these are ideas which will make a difference, and that these are steps towards an ambitious and realisable global objective" (UK Position Paper 1999: 1).

180. Benelux backed away from the Dutch notion of "direct public appeal" and focused more concretely on "measures that would have direct impact on the public," such as "European rules for the use of the electronic superhighway (protection of personal data, legal safeguards for transactions, consumer protection etc), improved access to courts throughout Europe and improved victim support" (Benelux Priorities 1999: 6).

181. Austria argued that it was politically desirable to reduce the perception from the Third Pillar that EU efforts were heavily weighted towards police matters and the fight against crime ("*... politisch wuenschenswert ... den Eindruck der 'Polizeilastigkeit' der dritten Saeule zu reduzieren*") (Austrian Protocol 1999: p. 3).

182. "To benefit from their freedoms, responsible citizens need security of the person, guaranteed by the executive and the judiciary, but they also need to have legal security guaranteed by the legislature. ... Any reinforcement of security ... must ... be accompanied by respect for the fundamental concern of our Western democracies, i.e. the protection of privacy and the right to defend oneself in court. [The European Council] should reaffirm our respect ... by guaranteeing and strengthening the integrity of public administration" (Benelux Priorities 1999: 2-3).

183. Occhipinti appears to suggest that Commission President Prodi first brought this issue to the table (2003: 82). While it is possible that he had in fact publicized his views on the issue prior to his letter of September 1999, the issue is already mentioned considerably earlier during the Tampere preparations, notably in the Swedish Non-Paper from May 1999.

184. Prodi went on to argue that citizens "must find ... the guarantees they are looking for in terms of fundamental rights, ... and in terms of transparency and data protection" (Commission President Prodi Letter 1999: 1).

185. For example, Italy endorsed the Vienna Action Plan, then added that these "general principles are now to be converted into coordinated practical measures implementing an effective common European policy in these areas" (Italian Non-Paper 1999: 2; Italian Tampere Proposals 1999: 2).

186. Dr. Jekewitz used the term *durchdekliniert*, which invokes the linguistic notion of conjugating verbs through multiple cases (Jekewitz Interview).

187. It was "particularly important for Austria that at the Tampere Summit direct reference is made to the pertinent resolutions of the Vienna European Council (Vienna Strategy) [i.e., the Vienna Action Plan]" (Austrian Considerations 1999: 1).

188. Tampere "should build on the conclusions of the 1997 Noordwijk conference" (Dutch Priorities 1999: 5), which was held during the Intergovernmental Conference (IGC) during the Dutch Presidency in the first half of 1997 (see Chapter 7, section 7.1.7 above).

189. The UK relied heavily on the work on small claims that was carried out at the Down Hall conference held during the UK Presidency in the first half of 1998, noting that "[t]here are solutions if Member States are willing to address the problem, and the Down Hall conference demonstrated their willingness to do so" (UK Non-Paper on Access to Justice 1999: 2).

190. Belgium called upon the European Council to base its work on the 1993 proposals generated by the Storme Commission, which was led by Belgian law professor Marcel Storme (Belgian Contribution 1999: ¶ B.7, at p. 3) ("*Il faudrait également prendre appui sur létude réalisée en 1993 par une équipe présidée par le Professeur Storme en matière du rapprochement du droit judiciare.*").

191. Maricut (2014) calls this "Christmas tree policy-making" which entails "decorating" the field of Justice and Home Affairs.

192. "*Dann kriegt natürlich jeder Staat ... oder jeder Mitglied Staat hat natürlich was anderes*" (my translation).

193. These questions are taken up in Chapter 9 below.

194. A member of the Social Democratic party with a strong background in labor affairs, Ms. Halonen went on to serve as the first female president of Finland from 2000 until 2012.

195. My research has not revealed whether these meetings were attended by representatives from either the Tampere Team or the Finnish Ministry of Justice.

196. It is particularly noteworthy that the Draft Tampere Agenda (discussed below), which Finnish Prime Minister Lipponen had circulated to all Member State governments prior to the second *tour de capitales* in late September, was not on the agenda of the JHA Council (Bunyan 2003: 3-4).

197. The source of this quote is a Brussels insider, and *not* the Finnish Presidency, which denied that this decision had been taken by them. Rather, it was "the wisdom of our Brussels people that it HAS TO BE prepared not like normal Union business [at diplomatic level] in Coreper, but you have to have the personal representative of the Prime Minister ... not the Ministry of Justice or Ministry of Interior ... because the background idea was that it's a dead end, you face the same conservative defenders of national sovereignty all over the ministries if you do it that way" (Interview #56).

198. The list of issues presented to the JHA Council was more concise than the list presented at the informal Turku meeting a month earlier. In regard to justice issues, it merely refers to "a European judicial area (access to justice, mutual recognition of judgements and decisions, approximation of legislation, improving the status of a victim of crime and safeguarding the status of a person suspected of a crime)" (2203rd Council Meeting – JHA 1999: 13).

199. The context of this quote from a member of the Tampere Team is a discussion of the various documents presented by the other Member States.

200. A recurring discussion took place within the Finnish Prime Minister's Office about whether "JHA [Justice and Home Affairs] is subordinate to external relations policy or is it the other way around?" (Interview #10).

201. As noted by Tallberg (2006: 115), *tour de capitales* "take place at a number of levels in the political machinery. In addition to the prime minister's visits to all EU capitals prior to summits, which generally receive massive attention, less high-profile tours are undertaken by the ministers for foreign and European affairs, as well as senior civil servants."

202. Normally the Secretary General would go on the *tour de capitales*, but on this occasion, Mr. Elsen visited about half of the capitals in his stead (Elsen Interview). Mr. Elsen recalls visiting Austria, Germany, Italy and the UK.

203. Statewatch resported that this draft agenda and the reports on which it was based "were not presented as such to parliaments nor were they available to most NGOs and voluntary groups and citizens" (Bunyan 2003: 3-4).

204. In particular: "To establish information exchange systems and a network of competent authorities through which individuals can obtain information about systems in various countries and about their rights, To create a coherent legal aid system guaranteeing equal treatment in all Member States, To strengthen legal procedures and common minimum standards on documents, To introduce simplified/alternative legal and appeal procedures."

205. In particular: "To approve recognition with all countries of the Union of the citizens' civil law status as defined in their home country."

206. In particular: "To aim for full mutual recognition and enforcement of civil law judgements and decisions in all Member States."

207. In particular: "To conduct an overall study of the measures to be taken as regards the approximation of the central provisions on e.g. law of trade, obligation, property and family to guarantee the proper functioning of the Internal Market." Further provisions dealing only with criminal law matters are omitted.

208. Especially noteworthy here is the presence of the second element, which had been pushed by the Finnish Ministry of Justice but had not been embraced by other Member States in their written submissions.

209. Among the issues on the General Affairs Council's agenda on that date was the decision on the "necessary steps to set up the Body which shall elaborate a draft EU Charter of Fundamental Rights" pursuant to the Cologne Presidency Conclusions from June 1999.

210. According to a Finnish civil servant, the idea of treating the different dimensions of the area separately was considered early on but rejected in favor of the holistic approach, which was seen as more likely to lead to a balanced agreement in Tampere (Interview #10).

211. While Puumalainen presented himself as someone having substantive expertise in the areas of EU and criminal law, Peltomäki saw himself differently, stating that, "I'm a lawyer but ... I don't feel myself ... as a legal expert on the issues, [but] I tried to understand [the Ministry of Justice's] legal way of thinking, but that is not really my way. ... Even during my time at the Ministry of Justice, I had not that tendency to be a specialist" (Peltomäki Interview).

212. As a member of both groups, Korpinen's position was more complex, but her primary loyalty was to the Ministry of Justice.

213. As told by a member of the Tampere Team, "they drafted a paper in the Ministry of Justice [on access to justice] and [Korpinen] came to the meeting and said this is our position. But we can't negotiate on this basis. So what happened of course was that we said, OK it's an interesting paper, and we continued business as usual" (Interview #10).

214. Similarly, policy-planning for the second and third five-year AFSJ policy cycles, which were decided in The Hague in 2004 and in Stockholm in 2009, entailed "long, difficult, and enervating" preparations (Wagner 2014a: 469).

215. For example, Sperl (2009: 34) quotes a Commission official as saying "even though the Council Secretariat did not formally have the right of initiative, it saw itself as being the brain behind the screen in preparing Member State initiatives." See also Christiansen (2002); Kaunert (2012: 36).

216. I interviewed some persons more than once, and the longest of my transcribed interviews is 51 single-spaced pages.

217. Referring to the informal meeting of ministers of justice and interior in September 1999.

218. I was not able to interview Ambassador Satuli, who died in 2003. I did interview a member of his staff at the time, Heidi Kaila, who had been involved in the IGC and Tampere process almost to the end, but had dropped out because of an accident a few weeks before the Tampere summit, and was replaced by Alexander Stubb, whom I was not able to interview. However, he later published some of his insights as part of his doctoral thesis (Stubb 2000).

219. Eurojust, which was ultimately approved in Tampere, is a unit composed of national prosecutors, magistrates, and police officers from each Member State, who coordinate in the fight against cross-border crime.

220. Michel Petite had been Director of the Task Force "Intergovernmental Conference of Amsterdam" in the Council Secretariat General (1995-1997), but went to work for the Commission in 1998 and became principal advisor (and later Head of Cabinet) to the newly-appointed Commission President Prodi in 1999.

221. According to a civil servant in the Council General Secretariat, the "delegations see the first draft of conclusions about two weeks before" a summit meeting (Interview #32).

222. I have seen only the fifth draft of this document, dated 23 September 1999 (Finnish Draft Tampere Conclusions).

223. The discussion in this section is based on interviews with some of those who were present in Tampere, as well as on a transcript of notes taken during the summit meeting by the Finnish Government (Tampere Summit Protocol 1999). Alas, the first two pages of this document are missing from my copy, and the eleven pages I do have contain no notes on the positions taken by German Chancellor Schröder. However, the Protocol contains two sets of comments labeled as [Commission President] Prodi, so it is possible that one of those sets of comments in fact embodies the German position. The first set of notes attributable to Prodi (p. 3) clearly reflects positions taken by him elsewhere, so I am confident that these do reflect his statements. The second set of notes attributable to Prodi (p. 12) is highly consistent with Germany's positions expressed elsewhere, so I have cautiously attributed them to Schröder/Germany, because of my conviction that the document contains an error. {These attributions are set off by curved brackets to signal their tentative nature.}

224. Namely, Secretary-General for the Council, Jürgen Trumpf, and the Director-General of the Council Legal Service, Jean-Claude Piris.

225. Namely, Secretary-General for the Commission, Carlo Trojan, Commission President Romano Prodi, and his Chef de Cabinet, Michel Petite.

226. The role of note-takers from EU institutions is to "take turns and take notes on part of the discussion, ... then run" out of the room where the heads of state and government are meeting, and into another room, where they report orally to the members of the Antici Group, who are national diplomats from the Member States' permanent representations (i.e., embassies) to the EU (Interview #32).

227. According to one source in the Council Secretariat, this tactic "hasn't been repeated this way a lot since [Tampere]. Already the Hague Program [five years after Tampere] was done in a much different way," the conclusions "were shared with Member States much earlier" (Interview #32).

228. "They leaked probably when they were translated, because there are so many persons" who have access to the text at that point (Interview #10). It is not known whether all or only some Member States had seen the draft conclusions ahead of time.

229. According to Statewatch (20003: 1), there was "no advance text available. On the first day of the Summit a set of draft Conclusions appeared for the first time and at 10.00 am on the second day the final version came out ... ."

230. Prodi/Commission (Tampere Summit Protocol 1999: 4); see also Aznar/Spain (id. at 4-5); Chirac/France (id. at 5); Jospin/France (id. at 6); Simitis/Greece (id. at 8); Rasmussen/Denmark (id. at 9); and Verhofstadt/Belgium (id. at 13).

231. Prodi/Commission (Tampere Summit Protocol 1999: 4); Aznar/Spain (id. at 5); Guterrez/Portugal (id. at 6); Kok/Netherlands (id. at 7); Simitis/Greece (id. at 8); Verhofstadt/Belgium (id. at 11).

232. Aznar/Spain (Tampere Summit Protocol 1999: 5); Jospin/France (id. at 6); D'Alema/Italy (id. at 8); Simitis/Greece (id. at 9); Blair/UK (id. at 10); {Schröder/Germany (id. at 12)}; Klima/Austria (id. at 12); Ahern/Ireland (id. at 13). Austrian PM Klima noted, however, that it was not possible for the European Council to "do the work on the detail" on judicial matters, and urged that work on mutual recognition "should be concluded by" JHA ministers (id. at 12).

233. Juncker/Luxembourg called for a two-phase process towards mutual recognition, starting with harmonization, then moving on to mutual recognition (albeit in the specific context of criminal law) (Tampere Summit Protocol 1999: 11), while Verhofstadt/Belgium encouraged the European Council to "take a step further – let's make a European Enforcement Order that recognises things in force already" (id. at 11).

234. Commission President Prodi called upon the European Council to "maximise the mobilisation of the entire judicial system" (albeit in the context of criminal justice) (Tampere Summit Protocol 1999: 3), while Aznar/Spain reiterated the need to "strengthen cooperation between judges and lawyers" (id. at 5), and Kok/Netherlands noted the

fundamental need to ensure "mutual confidence in member states' systems ... based on integrity of services," which is an "important part of the rule of law" (id. at 7).

235. Aznar/Spain (Tampere Summit Protocol 1999: 5); Jospin/France (id. at 6); Rasmussen/Denmark (id. at 9); Blair/UK (id. at 10); Klima/Austria (id. at 12).

236. Jospin/France (Tampere Summit Protocol 1999: 6); D'Alema/Italy (id. at 8); Verhofstadt/Begium (id. at 11); {Schröder/Germany (id. at 12)}; Ahern/Ireland (id. at p. 13).

237. Lipponen/Finland (Tampere Summit Protocol 1999: 1).

238. Jospin/France (Tampere Summit Protocol 1999: 6) ("simplification of procedures").

239. Austrian PM Klima stated that "something has to be done in the field of judicial alignment," but went on to state that "harmonisation might be too ambitious," although the context of this statement is unclear (Tampere Summit Protocol 1999: 13).

240. My research turned up one exception where the head of state – German Chancellor Schröder – was himself a fully-qualified lawyer, and he understood the impact of technical matters, such as some of the procedural proposals that emanated from the Federal Ministry of Justice (Interview #46).

241. It bears mention that Tampere was the first in a series of five-year programs for the AFSJ. "Since they are the main agenda-setting instrument in the field, all institutions have a stake in their emergence, which is why the process of their adoption is quite sinuous" (Maricut 2014: 7). See generally Goetz & Meyer-Sahling (2009) (discussing the specific temporality of the way the AFSJ functions).

242. Compare Huelshoff (2002: 101-104) (arguing that the agendas of both the 1998 Austrian Presidency and the 1999 German Presidency were strongly oriented towards domestic political priorities).

243. To be precise, Tiilikainen (2007: 1) is speaking about the second Finnish Presidency in 2006 and comparing it to the earlier one in 1999, but the statement applies equally to the first Finnish Presidency during the Tampere Summit.

244. This is in contrast to the more routine expert work that academics are frequently called upon to do in Working Groups or committees in the EU context (Interview #46).

IV. ARGUMENT AND IMPLICATIONS FOR FUTURE RESEARCH

Chapter 9: Literature Review, Theoretical Framework, Arguments, and Implications for Future Research

My quest to explain a set of events in the 1990s raises straightforward questions – who, how and why – about complex political developments. An adequate explanation must simultaneously engage bodies of theoretical literature that focus specifically on the European Union (EU) itself, as well as those that focus more generally on political change and on the role of legal elites in such processes. These literatures intersect and overlap, but also diverge. As a hybrid entity, the EU spans – but also blurs – the boundaries between the disciplinary preoccupations of scholars who study international and domestic policy change. The EU is unique, and must be explained first on its own terms, but can also contribute to more generalized debates. My explanation for the emergence and elaboration of the EU's civil justice policy field (Part III above) therefore begins within the EU's own institutional context, then extends outward, to address macro- as well as meso-level theoretical debates to which my study contributes. Insofar as my two case studies deal with sequential events that involve related but fundamentally different institutional processes – the communitarization of civil justice (Chapters 6 and 7) and the first five-year plan for developing the newly communitarized policy field (Chapter 8) – they require linked explanations that both reflect these differences but also explore the continuities.

After a brief narrative summary of my key findings (section 9.1), I frame my research questions, then present my argument and explore how my findings contribute to theoretical debates (section 9.2). Section 9.3 considers the broader implications of my research.

9.1 Overview of Evidence

The sequence of events that led, first, to the 1997 decision to transfer legislative competence over civil justice issues from Member States to the EU (communitarization, see Chapters 6 and 7 above), and second, to the 1999 five-year Tampere plan for developing the newly communitarized policy area (Chapter 8 above), are path-dependent processes that were set on course and shaped by prior events and decisions. EU Member States agreed ahead of time that they would, five years later, review the new arrangements for Justice and Home Affairs (JHA) that had been introduced by the 1991 Maastricht Treaty, including especially intergovernmental cooperation on JHA matters in the Third Pillar. As such, the 1996 Intergovernmental Conference (IGC) that led to the 1997 Amsterdam Treaty was agreed in advance, and took place according to schedule, more *despite* than *because of* contemporary political conditions that might otherwise have prevented the Member States from deciding to revamp the EU's constitutional treaties at what was not an ideal moment in time. The 1996 IGC was one that "should never have started" (Weiler 1997: 310). But start it did, with the expectation that problems – notably those attending the much-maligned Third Pillar – should be solved, and some pro-integration result should be achieved. As one interviewee noted, there was a strong feeling in Amsterdam that "we must achieve something" (Interview #32, see generally Chapter 7 above).

Once in motion, the treaty-revision process took its usual course, with Member States and EU institutions conducting studies, presenting reports, making proposals, holding meetings and, in later stages, negotiating and making decisions. Voluminous draft texts were prepared during a succession of Council Presidencies, leading up to the final negotiations in Amsterdam in 1997.

One core concern throughout the entire process was, what to do about JHA and the Third Pillar. Civil justice was thus bound up with a larger set of debates about a bundle of issues related to the free movement of persons, which included criminal justice and police cooperation, as well as asylum and migration. As quite possibly the *least* salient issue under discussion, civil justice was often overlooked in policy documents and was by no means driving the process. It was initially present simply because it was part of the Third Pillar, structurally part of the reform debate on the table. This process created opportunities – indeed, generated institutional demands – for actors to express preferences about civil justice, among other JHA (or, as it came to be called, the Area of Freedom, Security and Justice or AFSJ) subfields.

Enabled by the structural pressures created by the treaty reform process, actors seized opportunities to develop and express their views. The relevant actors in the civil justice subfield were, almost exclusively, those working inside the EU institutions and Member State bureaucracies. There was no formal role for participation by legal professionals or other civil society actors, as there would have been in the context of the EU's legislative process, and such actors were largely excluded from the process by which the sovereign Member States revised their international treaty obligations. Legal expertise was needed, insofar as civil justice and other AFSJ subfields involved technical areas of law, but the leading experts in the field – notably, academics and lawyers who had traditionally advised and even represented their national governments in international treaty negotiations pertaining to just such matters – were largely excluded from the EU's treaty-revision process. Instead, the Member States relied on the knowledge of the civil servants in the ministries responsible for civil justice matters (i.e., the Ministry of Justice), who may have had – but according to my interview data, rarely had – technical expertise in the affected legal specialties (e.g. private international law and civil procedure). In a few cases – notably, France and Germany – the Ministers of Justice themselves took an active interest in civil justice matters. For the most part, however, proposals were developed inside the justice ministries, in cooperation with those governmental actors who were responsible for foreign and/or EU affairs. However, national civil servants did not operate in a vacuum; they had access to, and were also influenced by documents emanating from the EU institutions. Moreover, they were more or less permeable to input from outside legal experts, such as those from academia: some drew upon it, while others excluded it. Some experts in the affected legal subfields have criticized language that appeared in draft treaty texts for having been 'obviously' drafted by non-experts, among other sins.

EU institutions also participated in the treaty revision process, more often invited to submit their views than to sit at the table. The EP contributed visionary and influential documents (subsection 7.1.1.2 of Chapter 7 above), but ultimately pulled back from its earlier support for full communitarization of civil justice during the IGC, opting instead for a less radical solution. The Commission, in contrast, was an early, strong and consistent supporter of full communitarization of civil justice issues. And yet, while the Commission staked out an early position in support of introducing the 'mutual recognition' paradigm to the civil justice subfield (1996 Report on Political Union & Enlargement), its 1996 Report fell short of the EP's sweeping vision of a "genuine European legal" or "judicial area" (LIBE Committee Opinion 1995), which linked civil justice not only to the internal market objective of ensuring free movement of persons but also to citizenship and fundamental rights. Given that both the 'mutual recognition' and 'legal/judicial area' notions occupy a prominent role in the outcomes I seek to explain, my findings support the conclusion that both the EP and the Commission served as key idea

entrepreneurs, even though they were not themselves in the position either to force their ideas onto the agenda or see them through to the end of negotiations in the European Council (Chapter 7 above). Rather, it was incumbent on other – Member State – actors to pick up viable ideas, incorporate them into texts, and see them through the decision-making process.

Given that revision of the EU's foundational treaties is a matter for the Member States acting in their (residual) sovereign capacities, the key actors in Amsterdam were the national representatives – in particular, those who served in the rotating Council Presidencies,[1] the national negotiating teams, and the affected national ministries – together with the General Secretariat of the Council (GSC, better known as the Council Secretariat).[2] As noted in Part III of this dissertation, the GSC exercised a role that surpassed its formal institutional role, spurred by the interests and expertise its staff members had developed, particularly during the years of intergovernmental cooperation on JHA matters in the Third Pillar. A new Member State at the time – Finland – took an extraordinary interest in the topic of civil justice, owing largely to the convictions of the top civil servant in the Ministry of Justice (Secretary-General Rissanen) and formally presented draft treaty language to communitarize civil justice issues in early 1997. The Finnish proposal drew upon an earlier Commission draft from late 1996, which some national actors perceived as "overly ambitious" and hence ignored (Interview #49). The Dutch Presidency took the Finnish proposal on board, despite lack of consensus at that time on whether to communitarize civil justice issues, and incorporated it into the draft treaty text for the Amsterdam summit. Ultimately, Member States agreed to communitarize civil justice, because it was the easiest path towards the goal of showing results on AFSJ issues, when no consensus could be reached on more controversial questions, such as whether to communitarize criminal justice or police cooperation.

Shortly after Member States agreed to communitarize civil justice – and also to make achieving the Area of Freedom, Security and Justice a fundamental goal of European integration – they reached a further agreement to dedicate an entire special European Council meeting to the task of developing the AFSJ. This summit was scheduled to occur some time after the Amsterdam Treaty entered into force in May 1999. By coincidence, Finland assumed the Presidency in July 1999, and so the AFSJ summit was held in Tampere, Finland, in October 1999. Unusual insofar as it was devoted to a single policy area, the Tampere summit was as the same time a garden-variety high-level political meeting of the European Council, which entailed consensus-based decision-making by national heads of state and government, and limited formal participation by the EU institutions. Still, as in the case of the IGC and the Amsterdam Treaty, EU institutions presented reports and proposals, alongside those presented by the Member States themselves, and participated in meetings, even if they were not entitled to participate in the final decision itself. Both the EP and the Commission were in institutionally weak positions at the time. The Finnish Presidency took a strong lead in the process, in collaboration with the Council Secretariat. Together, Finland and the GSC devised a strategy for Tampere that entailed sidelining national legal experts from the final decision-making process – in particular, those from the affected line ministries – as a means of achieving consensus on an ambitious political plan without interference by legal experts, who they perceived as tending to get bogged down in nit-picking over technical issues. In an unexpected final-hour twist, the Finnish Presidency came to be at loggerheads with the Council Secretariat over drafting the Presidency Conclusions for the summit ('Tampere Milestones'), which embodied the EU's first five-year plan for developing the AFSJ. As in Amsterdam, the Finnish Ministry of Justice – under the leadership of its top civil

servant – pushed hard for a maximalist vision of civil justice, and partly succeeded in the end.

9.2 Questions Presented, Alternative Explanations and Argument

I seek to explain two sequential events in the 1990s, both of which involve decisions oriented towards significant increases in legal integration by Member States which agreed to cede more sovereignty to the EU. Both of these cases – the treaty amendment that communitarized (or federalized) cross-border aspects of civil justice (Chapters 6 and 7), and the five-year plan that operationalized the amended treaty (Chapter 8) – are similar insofar as they entail decisions by the heads of state and government of the EU Member States (acting as the European Council), and hence differ formally from legislation or other 'internal' or 'domestic' EU policy-making. These two cases differ, however, in terms of the formal nature of the decision made – in the first, amendments to the EU's founding treaties, in the second, a five-year policy program – and the procedures followed. Despite these differences, I argue that the two cases, taken together, provide new insight into fundamental aspects of European integration, in particular, and transnational governance in general. As such, I treat the challenge of explaining them as an exercise in "within-case analysis," which involves bringing "diverse forms of internal evidence about causation" to bear on "explaining a single, overall outcome within that case" (Brady & Collier 2004: 93).

Both of my within-case studies have been difficult to unravel empirically, since they occurred largely removed from public gaze, in a field of politics permeated by the "diplomatic secrecy culture" that characterizes the EU's intergovernmental processes (Bjurulf 2003: 146). Such a culture leads to a considerable amount of speculation, particularly among interested observers who are not privy to inside information. It bears repeating here that the 1997 decision in Amsterdam to communitarize civil justice came as a shock to many legal experts. At the early stage of my research, I encountered three types of anecdotal account – untheorized stories in circulation among legal experts – about the decision to transfer competence from Member States to the EU.[3] After laying out the anecdotal accounts, I will link them to theoretical explanations.

9.2.1 Anecdotal Accounts

The first type of anecdotal account is a *state-centric* one that emphasizes the key role of a pro-integration Member State government in shifting power away from the Member States and towards the EU. There are two versions of this account. Some believe that the Dutch Government[4] spearheaded the push to communitarize civil justice in a dramatic 'European land grab,' while others emphasize the role of Finland, which was a new Member State at the time. While both versions of this account are similar insofar as they emphasize the key role of a particular, pro-integration Member State, these anecdotal accounts come in 'critical' and 'heroic' versions. The critical account focuses on the machinations of the pro-EU Dutch Government, which some blamed for the centralizing excesses of the 1991 Maastricht Treaty. In one version of this critical tale, the Dutch government "embarrassed itself" by undermining an important multilateral international organization seated in the Netherlands (i.e., the Hague Conference on Private International Law), in favor of a more limited regional organization (i.e., the EU) (Interview #70). The heroic version of the state-centric account focuses on Finland, an EU-enthusiastic new Member State at the time, which takes pride in what it sees as its contribution to the common European project.

The second type of anecdotal account is an *EU-centric* one that emphasizes the

centripetal force of Brussels to draw ever more matters into the sphere of the EU's authority. This tale also comes in multiple versions, ranging from fatalistic to critical. Some observers simply see the accretion of authority by the EU as inevitable (i.e., naturalistic or pragmatic), while others emphasize strategic behavior by 'Brussels' as scheming to enhance its power. There are two versions of the strategic account. The first believes that the real driver behind communitarization was a power-hungry Eurocracy – eager to enhance its own power *vis-à-vis* the Member States – which manipulated the unwitting representatives of the Member States into doing its bidding. In contrast to this version, which emphasizes *internal* power relations within the EU as the driving force, the second version of the strategic account emphasizes the *external* (i.e., foreign relations) power of the EU (and its supranational institutions) *vis-à-vis* third countries (notably, the United States, with which EU Member States were negotiating at the time in The Hague over a Global Judgments Convention).[5] To understand this account, recall that external competence (i.e., foreign affairs power) under EU law follows internal competence (i.e., the power to legislate for the EU's internal or domestic market).[6] This version of the strategic account supposes that the EU supranational institutions – notably the Commission, which takes the lead in international treaty negotiations on behalf of the EU and its Member States – engineered communitarization as a way to expand its own external competence. Finally, strategic accounts vary in terms of which Brussels-based actor they point to. Brussels outsiders tended to focus on the Commission, which was an institutional winner in the wake of the Amsterdam Treaty, whereas Brussels insiders tended to focus on the Council Secretariat as the key Brussels-based actor.

A variation of the first two anecdotal accounts characterizes Article 65 of the EC Treaty and the communitarization of civil justice as an accident, a mere side-effect of larger political struggles over affiliated (but vastly more politically salient) matters such as asylum and migration or cross-border crime, which were on the table as part of the discussions over reform of the Third Pillar. The logic of this third account involves making a distinction between these politically sensitive topics, which were perceived as driving the Member States towards agreement, on the one hand, and low-salience issues such as civil justice which rode on their coattails, on the other.

A third type of anecdotal account looks to legal elites as the drivers of the process, rather than Member States or EU supranational actors. These accounts tend to be vague in terms of which legal experts were involved, with which institutions they were affiliated, or what their motives were, beyond a general assumption that some legal experts, somewhere, wanted to push legal integration forward. One more nuanced version of this type of account assumed that the key actors were the national legal experts who had represented their governments in intergovernmental negotiations within the Third Pillar, and who were frustrated that the conventions they so painstakingly negotiated were rarely ratified and largely left to gather dust on the shelf. Another version suggests that Member States became uneasy in the face of mounting pressure from legal elites to codify private law in the EU, and thus opted for communitarization as a less radical solution and one that the Member States believed they could control. As such, this third type of account cannot be fully differentiated from the first two types, insofar as the legal elites might occupy positions with national governments or EU institutions. However, it is also conceivable that legal elites might have been operating more autonomously, acting in pursuit of their own professional interests.

To conclude this overview of stories I heard at the outset of my research, I wish to stress that these are merely anecdotal accounts, told by law professors who were knowledgeable about

the civil justice subfield, but not necessarily about the detailed workings of the EU institutional system or about the events that I have investigated. It is incumbent upon me to translate these anecdotal accounts into theoretical frameworks that can provide an adequate explanation for the events that are the subject of my research.

My empirical findings in Part III reveal that some of these anecdotal accounts are flat wrong, while others contain kernels of truth. As a general matter, my findings show that single-actor explanations attribute too much agency, and tend to underestimate the structural complexity and role of the institutional process that generated these changes. They also tend to overlook the significance of the institution in which the actor is embedded. What is needed is an explanatory framework that incorporates all relevant actors and structural variables, as well as the special role played by legal elites in the processes that led to communitarization and the Tampere Milestones. The anecdotal accounts recounted above provide a good starting point, albeit an incomplete set of possible explanations for the developments in the 1990s.

9.2.2 Theoretical Framework and Literature Review

The core theoretical debates about European (dis)integration in political science have remained relatively stable over time, and revolve around two theories: neofunctionalism (sometimes called supranationalism) and intergovernmentalism. Among more recent theoretical innovations, some explicitly trace their lineage to one of these two historically dominant approaches, while others simply claim to be more explicit or updated versions of them. The two traditional approaches, which emerged in the early years of the European integration project, provide some theoretical infrastructure for the first (state-centric) and second (EU-centric) anecdotal accounts noted above, and are thus explored first, followed by newer theoretical approaches, some of which emerged from the narrow context of European integration studies, while others emerged elsewhere and were later brought to bear on European regional governance. The theoretical range has expanded as interest in European integration has spread from international relations, where it first emerged, to other subfields of political science, as well as to other disciplines.

Given that legal elites were important actors in the events which I seek to explain, I next turn to theoretical approaches that can help to understand the role of legal elites in transnational and multi-level settings. With few exceptions (notably, Stein 1981), this topic was overlooked in the early literature on European governance. However, attention to and knowledge about legal elites in – as well as beyond – Europe has exploded in recent years, as scholars across a spectrum of academic disciplines have begun to examine their roles more systematically. I also consider theories that focus on experts, professionals more generally, and epistemic communities.

This dissertation draws upon both bodies of theoretical literature to explain the emergence of civil justice as a Europeanized field. I argue that my findings on the role of legal elites in the context of European integration contribute to both bodies of literature, as explained in the remainder of this chapter.

I begin by examining the dominant theories of European integration – early as well as contemporary – and assess the extent to which they are sufficient to explain my findings. This entails sketching the theories, as well as scrutinizing them to discover where legal actors might fit within them. Next, I turn to theories about integration through law and those that deal explicitly with legal actors, as well as others oriented towards the political role of professionals and other experts, including epistemic communities, advocacy coalitions, and so on. These, too,

are assessed in terms of what they can contribute towards explaining my findings. I conclude that the leading theories of European integration go a long way towards explaining my findings, but are insufficient on their own.

9.2.2.1 *The Debate between Neofunctionalism and Intergovernmentalism*

Intergovernmentalism and neofunctionalism – both of which emerged in the International Relations (IR) subdiscipline of political science – have historically been viewed as the "main ongoing schism" in the field of integration studies (Rosamond 2000: 2). The continuing relevance of this debate has been challenged by the emergence of new theoretical approaches which tend to reflect the changing nature of the EU – today understood as a quasi-constitutional, federal entity (Stein 1981; Weiler 1991; Burley & Mattli 1993)[7] – as well as a broader range of disciplinary perspectives.[8] And yet, the question why Member States continue to cede (or pool) sovereignty re-emerges on regular occasion, particularly in scholarly work that seeks to explain treaty amendments that alter the EU's institutional arrangements, or summit-based decision-making that establishes new policy agendas. These two types of decision-making entail institutional constellations and procedures quite different from those that govern the EU's internal legislative, administrative or judicial activity, or its external (foreign) policy. As such, different bodies of theoretical literature have developed around these different modes of EU action. Since my case studies entail decision-making of the more overarching nature, they present an opportunity to revisit the dominant theories and consider their adequacy to explain the outcomes in question.

While fundamentally different in terms of how they explain integration, the two dominant approaches emerged against the background of functionalist thinking in IR, which is closely associated with the work of David Mitrany (e.g., Rosamond 2000: 31-42; Hooghe & Marks 2008: 3-6). The functionalist approach posits that human needs might be better served by international arrangements oriented towards particular functions – such as sectoral arrangements[9] – than by governance at the national level. Functionalism thus saw regional integration as a response to the "mismatch between efficiency and the existing structure of authority" (Hooghe & Marks 2008: 2), and one which perceived "collective benefits of extending the territorial scope of jurisdictions" (i.e., regulatory authority or competence) (id. at 3). Neofunctionalism and intergovernmentalism both share this basic assumption, and refined the earlier functional approach in the specific context of European integration (id.). The bulk of newer theoretical approaches – supranational governance, multi-level governance, postfunctionalism, liberal intergovernmentalism, and new intergovernmentalism – are derived from, and exhibit ongoing affinities with the early theories of European (dis)integration. All of them provide space for exploring the role of legal actors and other professions, as explained below, but remain underdeveloped in this regard. A parallel body of – largely court-centric – literature developed to explain the role of law and legal actors in European integration. Still other theories are available for explaining the role of professionals and other elites, epistemic communities, and other expert configurations. My dissertation provides an opportunity to synthesize different theoretical approaches, in order to bring legal actors more fully into theorizing about European integration and to understand their agency beyond the realm of court-centric activities.

Neofunctionalism and intergovernmentalism emerged to explain why Member States transferred (or pooled) sovereignty to create institutions capable of governing at the regional level in Europe. Intergovernmentalist accounts prioritize the interests of Member States (e.g.,

Hoffmann 1964 & 1966; Moravcsik 1998a), whereas neofunctionalism argues that states are not the only actors engaged in international relations, and draws attention to the role of supranational actors[10] and to the process by which actors' loyalties would gradually shift away from national towards supranational configurations. As Haas (1958: 16) explained it, actors "in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states."

The debate between these two approaches, which has been ongoing since the beginning of European integration, can be confusing. For one reason, the terms 'intergovernmental(ism)' and 'supranational(ism)' are used descriptively[11] as well as theoretically. For another reason, the theories themselves – and the labels applied to them – are occasionally conflated with particular outcomes. In this sense, the concepts can be envisioned as polar ends of a spectrum, with 'neofunctionalism' (or 'supranationalism') standing in for more integrative outcomes, and 'intergovernmentalism' for less integrative ones, and hence become associated with particular historical epochs. Thus, neofunctionalism emerged first, with Haas's seminal 1958 work linked to the early success of the European Coal and Steel Community (ECSC), and was followed by intergovernmentalism in the 1960s, which emerged as a critique of neofunctionalism, in the context of explaining French President Charles de Gaulle's oppositional stance towards the EEC, which impeded integration for a time (Hoffmann 1966; Moravcsik 1998b).[12] This conflation is misleading, insofar as there is no necessary connection between one or the other theoretical explanation and particular outcomes.[13] Mindful of the "major difference between *describing* regional integration and *explaining* it" (Puchala 1970: 762), the following discussion endeavors to avoid these traps by focusing on the assumptions and mechanisms of these and other theoretical accounts.

9.2.2.1.1 <u>*Neofunctionalism*</u>

The theoretical core of neofunctionalism emerged in the late 1950s from Ernst Haas's study of the ECSC. From the outset, it emphasized a pluralistic vision of international relations in which the calculated self-interest of political elites was key to explaining European integration: "The 'good Europeans' are not the main creators of the regional community that is growing up; the process of community formation is dominated by nationally constituted groups with specific interests and aims, willing and able to adjust their aspirations by turning to supranational means when this course appears profitable" (Haas 1958: xxiv).[14] Haas (id. at 17) had in mind "political elites in the participating countries," namely the "leaders of all relevant political groups who habitually participate in the making of public decisions, whether as policy-makers in government, as lobbyists or as spokesmen of political parties." In particular, he identified the "officials of trade associations, the spokesmen of organised labour, higher civil servants and active politicians" as key actors, noting their "manipulative role," given the "bureaucratised nature" of European politics (id.).[15] The activities of such actors often take the form of networks, advocacy coalitions, or epistemic communities (subsection 9.2.2.4.2 below).

Proceeding from the assumption that what matters are the "interests and values defended by the major groups involved in the process," Haas further assumed that the elites' "beliefs and aspirations" would undergo change – "due to the necessity of working in a transnational institutional framework" – with the result that values would merge and interests would come to be defined "in terms of a regional rather than a purely national orientation" (id. at 13-14).[16] This

"attachment to new foci of loyalty" implied a "proportional diminution of loyalty to and expectations from the former separate national governments," although it did "not necessarily imply the immediate repudiation of the national state or government," given the possibility of "multiple loyalties" (id. at 14). In addition, Haas and other neofunctionalists saw supranational institutions themselves as important actors in international relations, with their own interests to advance and their role in socializing national elites.[17] In the neofunctional approach, the "raw material of politics lay in the society and economy (unions, corporations, professions and craft organizations) and in practical problems faced by individuals in trying to solve them cooperatively" (Risse, Cowles & Caporaso 2001: 13).

Upon these foundations, Haas and later neofunctionalists built a dynamic theory to explain the expansionist logic of regional integration. Together with elite socialization and the supranational organization of politics, neofunctionalists identified 'spillover' as the key to the expansive logic of sectoral integration.[18] Initially, Haas identified two types of spillover. The first type – "task expansion" – referred to functional spillover from a core set of issues, such as production capacity and price of steel or coal, to interconnected issues (e.g., currency exchange rates, taxes and wage policy, transport), or from one sector, such as steel or coal, to other energy sectors (e.g., atomic energy) (Haas 1958: 49, 283 ff).[19] Functional spillover was said to occur when "a given action, related to a specific goal, creates a situation in which the original goal can be assured only by taking further actions, which in turn create a further condition and a need for more action, and so forth" (Lindberg 1963: 10).[20] The "increasing politicization of sectoral activity" – such as replacing policy coordination by a more centralized system of governance – was also flagged as a dimension of spillover (Caporaso & Keeler 1995: 31).[21] Another driver of integration identified by early neofunctionalists was 'political spillover.'[22] This concept denotes political pressure for more integration, which was presumed to result from the reorientation of interest group lobbying towards the supranational level, and from elite socialization more broadly (Niemann 2006: 34).[23]

Early neofunctionalists predicted that elite socialization, the increasingly supranational organization of politics, and spillover (MacRae 2016: 60) would continue, unabated and virtually automatically, and surpass the initial expectations of the nations that had set the process in motion.[24] Yet neofunctionalism – along with the European integration process itself – encountered a crisis in the 1960s, when the actions of French President de Gaulle brought joint decision-making to a halt. These developments gave rise to intense criticism of neofunctionalism and the emergence of a countervailing explanation – intergovernmentalism (examined below) – which prompted Haas (1975) to declare neofunctionalism obsolete. It did not stay dead for long, however, and has enjoyed a revival – along with considerable updating – since European integration picked up speed again in the 1980s.

There is no definitive statement of contemporary neofunctionalism, but Arne Niemann (2006) has offered a revised and restated version of the theory, which approach is integrated into the following discussion. Early neofunctionalism's basic assumptions have remained, minus the assumptions that the integration process is unidirectional and self-sustaining.[25] Thus, later neofunctionalists continue to assume that actors "above and below the nation-state" (Burley & Mattli 1993: 54) – i.e., supranational institutions and organized interests – play a key role in explaining European integration outcomes, rather than solely – or even primarily – states.[26] Moreover, scholars have articulated new types of spillover to capture various dynamic dimensions of the integration process. 'Exogenous spillover' refers to the effects of "changes in,

and pressures from, the external political and economic environment" (Niemann 2006: 32), and brings global context into neofunctionalist theorizing (e.g., Schmitter 1969; Sandholtz & Zysman 1989).[27] The term 'cultivated spillover' (Tranholm-Mikkelsen 1991: 6) has come to be applied to the efforts of supranational institutions to "cultivate relations with interest groups and national civil servants so as to gain their support for realising integrative objectives, and to cultivate pressures *vis-à-vis* governments, particularly by pointing to functional interdependencies or by upgrading common interests (e.g. through facilitating logrolling or package deals)" (Niemann 2006: 42). Moreover, Niemann has broadened this concept to include the "intrinsic propensity of supranational institutions to advance the European integration process more generally," arguing that supranational institutions become "agents of integration, because they are "concerned with extending their own powers ... and tend to benefit from the progression of this process," but also because they – as part of the EU's institutionalized structure – "have an impact on how actors perceive their identities and interests" (id. at 43). Initially, analysis of cultivated spillover focused on the role of the Commission, which was expected to encourage and even manipulate spillover pressure, such as by fostering the emergence of EU-wide pressure groups and cultivating contacts "behind the scenes with national interest groups and with bureaucrats in the civil services of the member states, who were ... potential allies against national governments" (Tranholm-Mikkelsen 1991: 4-6).[28] However, scholars have extended the scope of cultivated spillover to include the "integrative roles" of other EU institutions, notably the Council Presidency, the European Parliament, and the Court of Justice (Niemann 2013: 638).

More recently, Niemann (2006: 37-42) has extracted the notion of 'social spillover' from the (ostensibly overbroad) concept of 'political spillover.' Social spillover denotes the "processes of elite enmeshment, socialisation and learning ... among primarily ... governmental elites," in contrast to political spillover, which denotes the "development or organized interests at European level, mainly ... relating to non-governmental elites" (Niemann 2006: 34). Building on seminal work by Lindberg (1963),[29] Niemann's extension of neofunctionalism places greater "emphasis on socialisation, deliberation and learning than did Haas's early neofunctionalism" (Niemann 2013: 637). This entails four hypotheses: first, "socialization occurs among national civil servants within the Council framework,[30] often involving Commission officials"; second, EU "decision-making cannot be captured in terms of classic intergovernmental strategic bargaining but is better characterised as a 'supranational' problem-solving process";[31] third, "processes of enmeshment and socialisation tend to ease decision-making deadlocks and induce consensus formation and progress among member governments"; and fourth, "learning processes help generate a shift of expectations and perhaps loyalties towards the emerging European polity on the part of national elites"[32] (Niemann 2006: 37-8). Social spillover thus implies that "institutions at the European level – often broadly defined to include norms – shape agents' behaviour, preferences and identities" (id. at 38).[33] Moreover, building on Habermas's theory of communicative action, Niemann argues that "socialization through deliberation" (Niemann 2013: 635) can lead to reflexive "deep" or "complex" learning, which has the potential to change actors' "assumptions, values and objectives" (Niemann 2006: 42). As such, Niemann's revised neofunctionalism goes beyond early neofunctionalism's focus on the "interest- or incentive-based learning ... of egoistic actors" (id.),[34] and has closer affinities with constructivist approaches in IR than did Haas's original " 'soft' rational choice" ontology (id. at 24),[35] which he aims to supplement rather than to displace (id. at 24-7).[36]

Finally, building on Tranholm-Mikkelsen's (1991:18) vision of European integration as a

"dialectical process determined by the twin forces of a 'logic of integration' and a 'logic of disintegration'," [37] Niemann (2006: 47-50; 2013: 642-3) balances early neofunctionalism's exclusive focus on the "forward-urging dynamics" of integration by incorporating "countervailing forces" – which can be political (domestic constraints) [38] or ideological (sovereignty-consciousness) [39] – into the theory (Niemann 2013: 642). In his view, the "non-linear, stop-and-go nature of the European integration process" is the "product of both dynamics and countervailing forces," which interact to "determine the outcome of a particular decision or sequence of decisions" (id. at 638).

In sum, contemporary neofunctionalism provides a rich theoretical framework for analyzing the "interplay of values and institutions" (Haas 1958: 31) and explaining European integration outcomes. It is a multivariate theory that embraces a "multiple causality assumption," according to which "the same outcome can be caused by different combinations of factors" (Niemann 2013: 636). While neofunctional accounts have often focused on the role of civil society actors "below the state," even Haas's (1958) initial statement of the theory includes governmental officials – such as those who played significant roles in my case studies – among the actors whose behavior must be examined for evidence of spillover dynamics and, per Niemann's (2006) revised version, countervailing forces. Given that the bulk of neofunctional studies have focused on market integration, it is unsurprising that the literature devotes much attention to business, unions, technocrats, and other economic actors. However, the Area of Freedom, Security and Justice (AFSJ) introduced a new, non-market dimension to European integration, which brought new actors to the forefront, and possibly also new logics. I am unaware of any neofunctional study that focuses on the role of governmental legal elites outside the court-centric context. [40] As such, the application of neofunctional theories to the role of legal elites in treaty amendment and European Council decision-making processes has not yet been tested. A neofunctional account of the Europeanization of civil justice would search for evidence of functional, political and/or social spillover, [41] as well as countervailing forces, to explain the outcomes. My case studies provide an occasion for asking whether the neofunctional theoretical framework is adequate to account for their behavior in this context, and if not, to consider what contributions they might make to the theory.

My case studies also raise questions about whether the role of supranational actors is in line with, or diverges from existing neofunctional accounts. Neofunctionalists would expect the Commission to be a key policy entrepreneur (e.g., Sandholt & Zysman1989: 107-8) in the emergence of civil justice as a Europeanized policy field. Indeed, an extreme version of this expectation is manifest in the second anecdotal account of the stereotypical power-hungry Eurocrats in Brussels (subsection 9.2.1 above). Neofunctionalists would also anticipate that the EP might have played a significant role. However, they would not ordinarily expect the Council Secretariat to be a key driver, given its formal institutional rule as a neutral and shadowy helper to the Presidency, in particular, and the Member States in general. The relatively weak roles of the Commission and the EP in my case studies, on the one hand, and the assertively supranational behavior of the quintessentially intergovernmental Council Secretariat, on the other, are puzzling and require explanation. The latter finding poses a particular challenge for neofunctionalism. I am unaware of any neofunctional study that focuses on the role of the Council Secretariat as a supranational actor. Finally, neofunctionalists would predict that civil society actors likely to be affected by the changes being considered – such as lawyers, academics, or even judges – would have become engaged in the EU processes and made their views known

to national as well as supranational players. The fact that they did not do so in my case studies poses a further explanatory challenge.

9.2.2.1.2 Intergovernmentalism

As a theoretical approach to the study of European integration, intergovernmentalism emerged in the wake of the de Gaulle crisis in the 1960s as a critique of neofunctionalism. Building on realist premises in IR, Stanley Hoffmann (1964 & 1966) highlighted the convergence of national interests and the will of states to cooperate as key to explaining European integration,[42] in contrast to neofunctionalism's civil society and supranational actors. Intergovernmentalism is a state-centric approach that pinpoints national governments as the key actors in European integration, and interstate bargaining as the key process.[43] Nation-states are seen as uniquely powerful rational actors who play a "persistent gatekeeping role" (Pollack 2000: 1) within the EU, the "ultimate locus of decision making" (Risse, Cowles & Caporaso 2001: 13).[44] As such, they remain autonomous and control "the nature and pace of integration guided by their concern to protect and promote the 'national interest' " (Bache, Bulmer, George & Parker 2014: 13).[45] Their political calculations are "driven by domestic concerns," in particular the "impact of integrative decisions on the national economy and on the electoral implications for the governing party" (id. at 14). Thus, Hoffmann (1966: 156) saw the authority of the EU's supranational institutions as "limited, conditional, dependent and reversible," and claimed that neofunctionalism was "essentially mistaken" about the spillover dynamic, particularly in regard to matters of high politics (i.e., security and defense), where "grandeur and prestige, rank and security, domination and dependence are at stake." He conceded, however, that spillover might operate in the realm of low politics (i.e., technical or functional sectors) (Hoffmann 1964: 89). Intergovernmentalism thrived during the EU's "doldrum years" in the 1960s and 1970s (Diez & Wiener 2009: 6), when integration stalled, but ran into trouble after the mid-1980s, when Member States once again "willingly surrendered control over issues of central importance to national sovereignty" (Rosamond 2000: 79), a development which flew in the face of early intergovernmentalism's distinction between high and low politics.[46]

Andrew Moravcsik (1993 & 1998a) revised and restated the theory, calling his approach liberal intergovernmentalism (LI), which entails a two-level, sequential model for analyzing EU decision-making. At the first stage of the process, national heads of state aggregate domestic interests to form national preferences,[47] which they then take (at the second stage) to the bargaining table in Brussels (Moravcsik 1993: 480-2). At the stage of national preference formation, Moravcsik's approach is anchored in liberal pluralism, and focuses on the "effect of state-society relations in shaping national preferences," with economic interests and cost-benefit analyses paramount (id. at 483).[48] LI assumes that "state leaders must construct governing coalitions out of influential groups with specific interests," and that "private individuals and voluntary associations with autonomous interests, interacting in civil society, are the most fundamental actors in politics," but adds that not "all foreign policy proposals begin with direct pressure from pluralist groups" (id. at 483-4). It is an empirical question which groups and interests will prevail in a given case.

In an early statement of LI, Moravcsik identified three types of issues, and hypothesized that the sources of societal interests and the determinants of state action would vary across them (1993: 495, Figure 2). The first two types – "commercial liberalization"[49] and the provision of "socio-economic public goods"[50] – can be expected to attract the interest of economic and other

societal actors (id. at 488-94 & 495, Figure 2). In contrast, the third, catch-all category – "political, institutional or redistributional policies"[51] – recognizes that not all EU policies are "direct responses to policy externalities imposed by economic interdependence. Some, such as a common foreign and security policy, aim to provide non-socio-economic collective goods; others, such as general European Community institutions ... , exist either for their own sake or to facilitate other policies" (id. at 494). Civil justice – and the AFSJ more generally – fit best here, insofar as they encompass both non-socio-economic collective goods, as well as general institutions which exist for their own sake or to facilitate other policies (e.g., fundamental rights, citizenship, free movement).

With regard to this third type of policies, Moravcsik (1993: 495, Figure 2) suggested that the mobilization of social interests and ultimate determinants of state action depend primarily on whether "the implications are calculable." Where the "costs and benefits to societal actors" are "weak, uncertain or diffuse, governments will be able to pursue broader or more idiosyncratic goals" (id. at 494). Thus, in the case of political cooperation, where "the costs and benefits ... for private groups are diffuse and uncertain," Moravcsik predicted that private actors would have little interest, "leaving domestic influence over the policy almost exclusively to partisan elites, with a secondary, intermittent constraint imposed by mass publics," and that the "reasoning used to justify policies [would tend] to be symbolic and ideological, rather than calculated and concrete" (id.).[52] Moreover, he argued, the "difficulty of mobilizing interest groups under conditions of general uncertainty about specific winners and losers permits the positions of governments, particularly larger ones, on questions of European institutions and common foreign policy, to reflect the ideologies and personal commitments of leading executive and parliamentary politicians, as well as interest-based conceptions of the national interest" (id.). The bottom line in regard to such policies, according to LI, is that "governments and parliamentary elites enjoy relatively broad autonomy" (id. at 495, Figure 2).

Finally, as a corollary of its state-centric focus, intergovernmentalism tends to downplay the importance of supranational actors in EU decision-making, if not deny it altogether.[53] Moravcsik (1998) later incorporated institutions into the LI theoretical framework, but in a way that did not "signify a dramatic turn to institutionalism," in the sense that institutions are seen as "shaping the preferences of actors or affecting identities. Instead, institutions enforce agreements, make bargains credible, and provide a rule-based structure as a bulwark against defection" (Risse 2000: 13). LI is, rather, a bottom-up model in which national preferences reflect "the economic incentives generated by patterns of international economic interdependence" (Moravcsik 1998: 6), and "vary in response to exogenous changes in the economic, ideological, geopolitical environment" (id. at 23). Critics have pointed out that LI "systematically insulates domestic preferences from feedback effects of Europeanization" (Risse et al. 2001: 14). Thus, by failing to recognize that national preferences can be a "response to Europeanization itself," LI "ignores the potential endogeneity of domestic structures and preferences – the ways in which domestic institutions and preferences of domestic actors are dependent on Europeanization, and not just on the broader international political economy changes generated by integration" (id.).

While dominant in the 1990s, intergovernmentalism (and particularly LI) was heavily attacked, even ridiculed. Scharpf (1999b: 165) argued forcefully against the generalizability of Moravcsik's conclusions: "Since only intergovernmental negotiations are being considered, why shouldn't the preferences of national governments have shaped the outcome? Since all case studies have issues of economic integration as their focus, why shouldn't economic concerns

have shaped the negotiating positions of governments? And since only decisions requiring unanimous agreement are being analysed, why shouldn't the outcomes be affected by the relative bargaining powers of the governments involved?" Yet intergovernmentalism and LI have more to offer than the conclusions Moravcik drew from his particular case studies. Nor can intergovernmentalism (or LI) be reduced to the claim that Member States are the locus of decision-making, which is tautological in the context of case studies such as mine, in which Member States are engaged in treaty revision and summitry. Even in these situations, intergovernmentalism raises important questions about the formulation of national preferences, and the role of supranational or subnational actors in that process, as hypothesized by the neofunctionalists. Intergovernmentalism would predict a limited – if not non-existent – role for actors "above and below the state" in my case studies, and that national preferences would reflect some ambition to preserve national legal traditions.

9.2.2.1.3 The Theoretical Progeny of Neofunctionalism and Intergovernmentalism

Before assessing the adequacy of the traditional grand theories to explain my case studies, I must first incorporate their progeny – more recent theoretical innovations derived from them – into the theoretical framework. Three more recently formulated approaches are examined here: new intergovernmentalism, postfunctionalism, and supranational governance.

The most recent innovation – new intergovernmentalism (Bickerton et al. 2015: 703-5) – identifies a paradoxical "new phase" of European integration in the years since the 1991 Maastricht Treaty. The authors' main point is that Member States pursue "extensive and unprecedented" integration, but at the same time "stubbornly resist further supranationalism" (id. at 705), which is the traditional form of integration entailing delegation of powers, in particular to the Commission and the Court of Justice.[54] Rather, new intergovernmentalists point to the prevalence of hybrid forms involving "more flexible and open-ended procedures" (id. at 709) and of integration outcomes falling somewhere between the polar extremes of supranational and intergovernmental methods of integration. Moreover, they argue, political conflicts tend increasingly to be solved "from within the process," rather than via more sovereignty-oriented techniques such as "vetoes or exits" (id. at 704), which implies that the supranational style of deliberation has spread into the realm of intergovernmental decision-making. The authors' diagnosis, which accurately describes some changing characteristics of European integration, does not stop at mere description. Yet in their work, "new intergovernmentalism" is the outcome they seek to explain, rather than the theoretical explanation they advance. As such, the new intergovernmentalists' contribution is not so much to challenge the dominant explanatory theories, as it is to challenge the nature of the integration outcomes that are being explained. Given that the civil justice integration outcomes I seek to explain retained some intergovernmental features (e.g., preservation of Member State right of legislative initiative in the first few years after Amsterdam), and that family law matters continue to require unanimous rather than qualified majority voting, the observations of the new intergovernmentalists are apt at the descriptive level.

Beyond their insistence on closer attention to the need to account for hybrid (i.e., partly supranational and partly intergovernmental) integration outcomes, new intergovernmentalists also make an important theoretical contribution to the key matter of preference formation. Bickerton, Hodson & Puetter insist that the "ambition to specify exactly *how* domestic politics matter for the European integration process has long been at the heart of intergovernmentalist

concerns" (2015: 707, emphasis in original). In this context, the new intergovernmentalists offer a richer view of domestic politics – one that includes "legitimacy and authority and treats the process of preference formation itself as an input into institutional change at the EU level" – than the view offered by liberal intergovernmentalism (id.). Moreover, by insisting that there is no neat separation between domestic preference formation (LI step 1) and European integration, they effectively downplay the significance of Member State bargaining (LI step 2) (id.). Finally, Bickerton et al. argue that the "difficulties in the articulation of interests and ... a more generalized crisis of representative politics" (id. at 710) – which stem from the "loosening ... links between interests and organizations" (Schmitter 2008: 208)[55] – are key variables in explaining national preference formation (id. at 709-11). Notably, they argue that "governing parties rely increasingly on the state's bureaucratic apparatus (courts, regulatory agencies, independent commissions) for their power and legitimacy," in the "face of declining memberships and weak partisan alignments," which "reaffirms people's belief in the existence of an undifferentiated political *casta* that rules in unrepresentative ways" (id. at 710). The consequences of the "unravelling ... relationship between interests and organizations, and [its] impact upon the preference formation process at the domestic level," they argue, are that Member State executives have become increasingly committed to, yet simultaneously "wary" of pan-European policy-making – which comes to be dominated by European co-operation, while politics become "obstinately national in form" – and that "national executives in Europe often seem to identify more with one another than with their own populations" (id. at 710-1).[56] Given the apparent absence of both civil society involvement and political contestation in the context of civil justice, and the dominant role played by national civil servants, the new intergovernmentalist claim about Member State preference formation bears on my case studies.

Turning now to other recent theoretical innovations in European integration studies, the first – postfunctionalism – shares some commonalities with the traditional grand theories, but departs from them in significant ways, while the second – supranational governance – is explicitly rooted in neofunctionalism.

The collaborative work of Liesbeth Hooghe and Gary Marks, which began in the 1990s with the influential "multi-level governance" (MLG)[57] approach (Hooghe 1996; Hooghe & Marks 2001 & 2003; Marks, Scharpf, Schmitter & Streeck 1996), has more recently produced the "postfunctionalist" theory of European integration (Hooghe & Marks 2009a). Hooghe and Marks argue that neofunctionalism and intergovernmentalism "have become less useful guides" for EU research (id. at 3), because they fail to account for the increasingly tight coupling between decisions at EU-level and domestic politics in the Member States (id. at 2). In addition to emphasizing how "domestic patterns of conflict ... constrain the course of European integration" (id.),[58] the postfunctional approach – as its name suggests – parts company with earlier theories by abandoning the assumption that integration outcomes are necessarily functional, or even reflect functional pressure.[59] Postfunctionalism is thus oriented towards the growing "politicization" of European integration,[60] to which neofunctionalist and intergovernmentalist theories were ostensibly blind because in thrall to the overarching functionalist logic (Börzel & Risse 2018: 85-6). In this sense, postfunctionalism's concern with domestic politics situates it in a theoretical position contrary to the one staked out by new intergovernmentalists, for whom the crisis of representation and the rise of post-democratic "executive federalism" (Habermas 2011) play a central role. While politicization is apparent in view of contemporary crises (e.g., the Euro, migration), it was as yet largely incipient at the time of my case studies in the 1990s. As such,

civil justice looks more like a case of old-school "de-politicization through supranational delegation" (Boerzel & Risse 2018: 101) than a case of politicized decision-making.[61]

In lieu of functional logic, postfunctionalism identifies efficiency, distribution, and identity as the three logics driving integration (Hooghe and Marks 2009a:1).[62] Postfunctional theory's key insight is not simply that political conflict is crucial to explaining integration outcomes, but that communal identities are central to conflict: "Community and self governance, expressed in public opinions and mobilized by political parties, lie at the heart" of European integration (id. at 23). Thus, postfunctionalism seeks to move beyond the preoccupation with both functional pressures and economic interests that have characterized much of the debate between supranationalism and intergovernmentalism.[63] It "goes beyond economic utilitarianism to stress the sociality of governance," which includes the "geographical, cultural, and historical sources of group distinctiveness and the demands on the part of minority communities for self-rule" (Hooghe & Marks 2016: 151). Postfunctionalism insists on the need to take account of the meaning of institutions – not merely their effects – and "starts from the premise that jurisdictions are populated by groups of persons" for whom regional governance is "an expression of their community" (id. at 151-2).[64] In this regard, postfunctionalism signals a return to concerns with collective identity, which were present in the early work of Karl Deutsch (1957)[65] and Ernst Haas (1958),[66] albeit limited to collective identification with institutions beyond the nation-state.[67] Haas later paid greater attention to the role of "cognitive and ideational variables" in integration (Rosamond 2005: 250).[68] Contemporary work seeks to come to grips with the "interest- and identity-forming roles" of supranational institutions, and to capture the "constitutive dynamics, of social learning, socialization, routinization and normative diffusion" (Checkel 1999: 545). Risse argues that Haas "was exactly right in his thinking about multiple loyalties," insofar as "empirical findings ... confirm ... that people hold multiple identities and that Europe and the EU can be easily incorporated in people's sense of community" (Risse 2005: 295). Unclear, however, is what it means to have multiple identities "pertaining to territorial and political spaces" and how that plays out in the context of national preference formation (id.).[69] Contemporary work on identity cuts across disciplinary fields and finds a place in numerous theories, including new institutional theory (subsection 9.2.2.3 below). My case studies raise questions about the role, if any, of collective identity, socialization and related dimensions. I will argue that they did, but that their role – particularly in the case of Finland – differs from what prior studies have shown.

The third recent theoretical innovation is the supranational governance (SNG)[70] approach developed by Wayne Sandholtz, Alec Stone Sweet and others (e.g., Sandholtz & Zysman 1989; Sandholtz & Stone Sweet 1998; Stone Sweet & Brunell 1998; Stone Sweet 2000, 2004 & 2012). These scholars approached European integration as a set of sectoral regimes, having different characteristics, rather than conceiving it as a single outcome (Sandholtz & Stone Sweet 1998). The SNG approach is anchored in neofunctionalism (Haas 1958),[71] but also draws on transactionalism (Deutsch et al. 1957) and on new institutional theory (subsection 9.2.2.3 below).[72] The core of the SNG theoretical framework for explaining the expansion of supranational governance[73] is a "Haasian feedback loop" in which "(a) increasing cross-border transactions activate (b) supranational governance (dispute resolution and rule-making), which facilitate (c) a subsequent expansion of cross-border transactions, which translates into greater social demand for new forms of supranational governance (spillover)" (Stone Sweet 2012: 10). Thus, like neofunctionalism, SNG focuses on "transnational society" or "transactors" (i.e., actors or groups with transnational goals and interests),[74] supranational organizations,[75] and their

interaction with the "rule system (or normative structure) that defines the polity" (id. at 8), and aims to understand how these factors become "causally connected to one another to drive integration forward" (id. at 8-9).

In the SNG model, transactors consist largely of "non-state actors who engage in transactions and communications across national borders" who "need European rules, standards, and dispute resolution rules" (Stone Sweet 2012: 9), because they "experience the absence of European-level rules as a cost or an obstacle to the realization of greater gains," and hence create a "functional demand" for "European-level rules and policies and for supranational capacity to supply them" (id. at 10). Yet unlike neofunctionalism, the SNG approach does not assume that transactors' loyalties and identities shift from the national to the EU level, but asserts instead that there is "room for the expansion of supranational governance without that ultimate shift in identification" (id. at 9). Rather, SNG argues that – in pursuit of this need – transactors "exert pro-integration pressure on their own governments," but may also bypass national officials and "activate the Commission and the [Court of Justice]" instead (id.).[76] Citing empirical studies demonstrating that "increasing cross-border exchange generates political processes that lead to EU-level rule-making" (id. at 22-3), SNG scholars argue that transactors are "a primary motor of the expansion of supranational governance in the EU" (id. at 12), albeit not the only one.

Also like neofunctionalism, the SNG approach places the EU's supranational institutions – along with transactors – at the "heart of the expansive dynamism of European integration" (Stone Sweet 2012: 15). Thus, SNG assumes that the Court of Justice and the Commission[77] "will consistently work to produce prointegrative policies, even when these are resisted by the most powerful Member States" (Stone Sweet 2012: 12). Moreover, it claims, these supranational institutions are not "perfectly reactive agents" carrying out the "wishes of their masters, the member state governments," but rather "trustees exercising fiduciary responsibilities under the treaties," which "possess the authority to govern the principals themselves" and are capable of acting "with genuine independence from national governments" (id. at 12-13).[78] It is thus unsurprising that SNG rejects the intergovernmentalist hypothesis that "the demand for integration ... is funneled exclusively through national governments" (id. at 12).

Finally, like neofunctionalism, the SNG model is committed to understanding the EU dynamically. Yet at the same time, SNG distinguishes itself most clearly from neofunctionalism with regard to the dynamic aspects of the theory, which focus on "feedback loops" (id. at 8) or "cycles of institutionalization" in lieu of "spillover" (id. at 17). The SNG approach begins by reformulating neofunctionalism's spillover mechanism by shifting attention away from the latter's emphasis on functional linkages across different policy domains, and towards a process through which the removal of one barrier that hinders cross-border transactions "reveals additional layers of obstacles" (id. at 11). Beyond this insight, the SNG approach enriches neofunctionalism by linking it to contemporary theories about institutionalization, which "help to understand its logic and explain its observable consequences" (id. at 15; see also subsection 9.2.2.3 below on new institutional theory). More concretely, SNG scholars aim their focus at the cyclical process by which actors press for new rules, create legal rights and open new arenas for politics, which in turn "establish the context for subsequent interactions, disputes, and rule changes," to which actors – "including governments, private entities, and EU bodies" – adapt, and subsequently "generate new dispute resolution and rule-making processes" (id. at 17). As a result of this adaptive process, the normative structure "expands in scope and becomes more formal and detailed" – often in unexpected ways – and influences subsequent activity (id. at 16-

17; see generally Stone Sweet, Sandholtz & Fligstein 2001). In this regard, the SNG approach moves beyond neofunctionalism's concern with more traditional dimensions of integration, such as "competence creep" (Weatherill 2004), and offers a more nuanced understanding of the EU as a system of rules (Jepperson 1991: 149; North 1990: 3, 6; Stone Sweet 2012: 15). This understanding of institutionalization has the advantage of aligning with the notion of path-dependence, which plays a central role in historical institutionalist accounts of European integration (e.g., Pierson 1996 & 2004) (subsection 9.2.2.3 below).

9.2.2.1.4 Preliminary Conclusions with reference to the 'Grand Debate'

Here, as nearly everywhere in the literature on EU integration, much ink has been spilled on the 'grand debate' between neofunctionalism and intergovernmentalism, despite widespread consensus that it makes little sense to strive towards a single theory of European integration, or to perpetuate the struggle for theoretical dominance, particularly when the traditional theories are so deeply embedded in the narrow disciplinary subfield of international relations.[79] Rosamond (2000: 243) has argued that liberal intergovernmentalism (LI) and neofunctionalism "are pretty much indistinguishable" at the metatheoretical level, and hence that the "supposed 'great debate' ... is not such a great debate after all." Haas and Moravcsik have both addressed this point. Haas (2001: 30) argued that LI's "core assumptions are identical with" those of neofunctionalism, and added that he found it "difficult to understand why [Moravcsik] makes such extraordinary efforts to distinguish his work" from that of others. On the other side, Moravcsik and Schimmelfennig (2009: 84) have noted that LI "is itself a synthesis of rationalist theories" (including neofunctionalism), and one which "shares elements of traditional intergovernmentalist and neofunctionalist thinking" on European integration and is "open to dialogue and synthesis with other theories of integration." More recently, Niemann (2013: 642) has argued that his "revised neofunctionalist account has moved closer to other theories," including LI, its "closest rival."

For some theoreticians, the "persistence of a 'supranational-intergovernmental' dichotomy" is the "root of the problem with the current debate," the source of "fruitless controversy" and "impasse" (Branch & Øhrgaard 1999: 124). For countless others, it is an unavoidable feature of the theoretical landscape. Some scholars have endeavored to revise the traditional theories (examined above) and continue to argue for the superiority of their approach, while others are more inclined to endorse theoretical eclecticism, given that European integration "is clearly more than one thing" and that treating it as a "single, 'complex' phenomenon" is responsible for "much of the theoretical confusion generated" in the field (Puchala 1999: 330). For this reason, Puchala (id.) has suggested that efforts to synthesize the insights of both traditional theories and to elaborate a unified theory "would probably be a mistake." He is not alone in this view. Some argue, for example, that a flexible approach makes sense, given that "the 'substantive character' of the integration in question matters when ... selecting an appropriate explanatory framework," as does the level of analysis (Hooghe & Marks 2009a: 2).

Verdun (2002: 13-16) has gone a step further and elaborated an eclectic theoretical model, which takes the form of a "merger" or "marriage" between the neofunctionalist and intergovernmentalist theoretical "families."[80] These theories can be conceived as complementary, insofar as they draw attention to different actors and aspects of the integration process.[81] Such an eclectic approach does not strive to suppress differences between the theoretical camps, but is rather a pragmatic step towards acknowledging that they "appear to explain different phenomena" (Puchala 1999: 330), hence that "both schools are right" about key aspects of the

multi-faceted integration process, and both offer valuable "toolkits needed to unpack and understand it" (Checkel 1999: 545). Within such a broadened theoretical framework, inquiry should focus on what these approaches do explain about European integration, and what they do not explain (Puchala 1999: 330). The following discussion addresses these questions in the context of my empirical findings. I begin by synthesizing key theoretical issues, then apply them to my case studies.

Both neofunctionalism and intergovernmentalism are predominantly rationalist. Both have traditionally leaned towards structural explanation. Some have criticized both for providing "only a weak account of agency" (Caporaso & Keeler 1995: 47), while others disagree with this characterization. Niemann (2013: 637), for example, has argued that "early neofunctionalism viewed agents as predominant and paid relatively little attention to structure"; his revised neofunctionalism adopts a "structuration" framework (Giddens 1984)[82] and characterizes agency as "manifold, ranging from governmental elites to private and supranational actors" (id. at 638). Finally, early versions of both theories were criticized for failing to take account of the global environment as a driver of integration (e.g., Webb 1983; Branch & Øhrgaard 1999). Despite these similarities, important differences remain, which draw attention to contested frontiers of theorizing about European (dis)integration in political science.

The key variables for distinguishing between these two theories are the "the role of other actors versus the role of the state," on the one hand, and "the role of automaticity and path dependence versus no automaticity," on the other (Verdun 2002: 13). On the first point, members of the neofunctionalist family still expect to find supranational institutions playing a significant role, while those in the intergovenmentalist family continue to downplay the role of supranational actors[83] and to emphasize instead the centrality of national interests in explaining (dis)integration outcomes.[84] On the second point, more must be said to bring Verdun's eclectic "marriage" framework into alignment with more recent theoretical innovations, which look more deeply into dynamic aspects of the process.

The first generation of neofunctionalists soon relaxed the assumption of automaticity. This is not to say that they abandoned the concept of spillover, but rather that they treated it as a possibility rather than a firm prediction and set about to understand the mechanisms that might lead to what Haas called the "expansive logic" of European integration (1958). This move is illustrated by the postfunctional and supranational governance approaches (examined above in subsection 9.2.2.1.3). Once "separated" from its initial deterministic assumption about the automaticity of spillover, neofunctionalism came to embrace a "multiple causality assumption," according to which "the same outcome can be caused by different combinations of factors" (Niemann 2013: 636). As such, automaticity is no longer necessarily a distinguishing criterion between the two theoretical families, although neofunctional approaches preserve their affinity with spillover or feedback loop processes and lean toward "analysis of a continuous nature over a long time horizon," much like historical institutionalists (e.g., Bulmer & Burch 2001: 73).[85] From this perspective, intergovernmentalists – and particularly liberal intergovernmentalists – have been criticized for examining a 'single photograph' (Niemann 2013: 642) or at most an "iterative ... sequence of snapshot-analyses (Bulmer & Burch 2001: 73), rather than the 'whole film' (Pierson 1996: 127).[86]

These differences all come to bear on the question of preference formation, which is the crux of the ongoing debate between neofunctionalist and intergovernmentalist theories. The key disagreement focuses on whether Member State preferences are endogenous, as claimed by

neofuntionctionalists, or exogenous, as claimed by intergovernmentalists.[87] This distinction requires more detailed explication:

(1) Intergovernmentalism: Moravcsik's liberal intergovernmentalism (LI) (1998a) proposes a two-step, sequential model for analyzing EU treaty revision processes: first, Member State governments formulate national preferences by aggregating their own (predominantly economic)[88] interests with those of their domestic constituencies; and second, they carry these preferences to the negotiating table in Brussels, where bargained outcomes reflect the relative power of each Member State. Member States then institutionalize these outcomes, in order to lock in and enforce bargains (Caporaso 2007: 394). In the LI model, national preferences are assumed to emerge in a political space that is hermetically insulated from the influence of the EU and its supranational institutions, and hence exogenous to institutional membership in the EU (Sandholtz 1993: 3). According to this view, the EU's supranational institutions play little or no causal role in explaining outcomes, nor does membership in the EU influence the interests or identities of the national actors whose interests are aggregated under the first step of the analysis. LI rules out "any socializing impact of international interaction on national preferences, in favor of a purely domestic process of preference formation" (Pollack 2007: 46). LI thus "insulates the preferences of actors from ... feedback effects" of institutionalization, with the result that each successive round of treaty negotiations among Member States is seen as being "pushed by a new set of social and economic pressures, deriving from either domestic or transnational settings, working their way through distinctive domestic political processes," a "new cycle" that "starts with exogenous changes in patterns of domestic and transnational political economy leading to a renewed pattern of state preferences," with each new punctuated bargain generating new institutions that also exist in a discrete realm from the national one (Caporaso 2007: 394).

(2) Neofunctionalism: Neofunctionalists have criticized the intergovernmentalist (exogenous) view of preference formation, insisting instead that Member States and actor preferences are not limited to economic interests or other interests that pertain solely to their domestic political context but are also affected by the experience of membership in the EU (Sandholtz 1993: 3), that is, endogenous to institutional membership in the EU. Neofunctionalists are thus open to the possibility that the relationship between the EU and its Member States is important (Bulmer & Burch 2001: 73-4), and believe that the "interaction between the different actors matters, and ... affects the way that these actors perceive their interests" (Niemann 2013: 642, citing Haas 1958: 9-10). Thus, if the actions of the EU supranational institutions (e.g., the Commission or the EP) have an "impact on member state thinking and preference formation," and if these "interactions and discourses of the EU significantly shape state preferences, then interstate bargains are not what intergovernmentalists assume them to be" (Sandholtz 1998: 162). In this sense, neofunctionalism is committed to demonstrating "how, and the extent to which, intergovernmental bargaining and decision-making are embedded in the larger flow of integration, as integration has been institutionalized over time as supranational authority" (Stone Sweet 2012: 27).

To conclude, the key debate between neofunctionalism and intergovernmentalism continues to revolve around the question about drivers of (dis)integration, namely whether they are lodged in Member States alone or also in the EU's institutional configurations (Stone Sweet 2012: 6). This boils down to a question about national preference formation in the context of decision-making. Moreover, this core question must be supplemented by further questions about other potential drivers – such as conditions and pressures external to the EU (global

environment) or the activities of civil society transactors or other elites – as well as about the dynamics of the process.

These questions recall the three anecdotal accounts recounted at the outset of this chapter (section 9.2.1 above), but do not track them fully. The first (state-centric) account is loosely linked to intergovernmentalism, insofar as it privileges the role of Member States, while the second (EU-centric) account is loosely linked to neofunctionalism, insofar as it assumes that the EU's institutions can be expected to have some influence on a given decision. The third (legal elite) account overlaps – "the lawyers did it" – with the first and second anecdotal accounts, insofar as it does not differentiate between those legal elites inside government and those outside. As such, that account must be partially integrated into the discussion of the main theories, which have not paid much attention to elites in the past.[89] Finally, the third anecdotal account assumes a motive related to consolidating EU power (vis-à-vis the United States) for international treaty negotiations on civil justice matters. This dimension is linked more closely to the external (global context) driver, which is shared by updated versions of both neofunctional and intergovernmental theories, and is integrated into that discussion.

I propose three preliminary hypotheses to explain the emergence and development of the EU's civil justice policy field. First, Member States (including their elites) were the key drivers, and national interests were foremost, as an intergovernmentalist account would predict. Second, EU supranational institutions, together with civil society transactors (including non-governmental legal elites) were the key drivers, with European interests foremost, as a neofunctionalist account would predict. Third, these developments resulted from pressures coming from outside the EU (global environment), rather than from inside it. My findings show that both Member States and EU supranational institutions played significant roles, and that *governmental* legal elites were key actors in both contexts, thus that both the first and second hypotheses have some explanatory force at this level of generality. My findings do not, however, support the hypotheses that *non-governmental* legal elites played a meaningful role or that pressures coming from outside the EU were significant drivers. Finally, my case studies do not fit neatly within either intergovernmentalist or supranationalist theories, and thus expose some limitations of the existing theoretical framework, notably when it comes to explaining the agency of legal elites in transnational processes. For this reason, I examine below (in subsection 9.2.2.4) other theories about elites that supplement the existing theoretical frame, in order to account more fully for the role of these omnipresent but understudied actors.

My two case studies offer an appropriate – and in some ways unique – set of findings against which to test theories about regional integration in Europe. First and foremost, both involve intergovernmental decision-making on significant issues of national interest, insofar as civil justice impinges on national legal culture and the administration of justice, which are core dimensions of sovereignty. This fact, together with the theoretical predictions drawn from both intergovernmentalism and neofunctionalism, would lead one to expect to find political debates surrounding these issues in the national context. The fact that no public debates occurred reflects the technical nature of the expert legal knowledge involved, which politicians largely entrusted to the judgment of their legal elites, and raises questions about how the dominant theories explain elite-driven decisions. Second, EU institutions – not just the European Parliament and the Commission, but also the Council Secretariat – held strong views on civil justice (as well as other AFSJ issues), which they both expressed and endeavored to assert in Amsterdam and Tampere. Their efforts influenced some key national legal elites, which finding provides support

for a neofunctional explanation. Third, there existed relevant civil society actors whose influence (or lack thereof) can be traced. My finding that these actors played virtually *no* role detracts from a neofunctional explanation. Fourth, economic factors were virtually absent from the scope of consideration, with the result that my case studies filter out this common driver and allow me to examine what factors come into play when money is not an issue.[90] And fifth, there are plausible drivers from the global context (external environment), in addition to those inside the EU itself.

In the remainder of this section, I examine each of my three preliminary hypotheses briefly, before turning to the crucial question of preference formation.

Turning now to the first hypothesis, my empirical findings in both case studies reveal that Member States – and in particular their legal elites – were major drivers of both the Amsterdam and Tampere processes, as an intergovernmentalist account would predict. This is hardly surprising, given that both case studies involve intergovernmental decision-making on significant issues of national interest, insofar as civil justice impinges directly on core dimensions of sovereignty. According to the EU's formal decision-making rules, only Member State representatives could vote on treaty revisions in Amsterdam and on the Presidency Conclusions at the Tampere summit. Member State leadership and support – particularly that of German Chancellor Kohl, a strong pro-EU advocate who pushed in Amsterdam for visible (and pro-citizen) outcomes of the Intergovernmental Conference; of the Dutch Presidency; and of the Finnish government and its allies, who put key provisions on the Amsterdam and Tampere agendas and played a leading role in shaping outcomes – were crucial in reaching decisions about communitarizing civil justice. The overarching decision to communitarize civil justice in Amsterdam was a low priority issue for most Member States. The Finnish, French and German governments, in particular, backed the strong positions advocated by their Justice ministries, which at the time enjoyed forceful leadership (particularly in Finland, by Secretary-General Rissanen, but also in France and Germany, by their Justice Ministers Guigou and Däubler-Gmelin, respectively). Other Member States which were less enthusiastic nonetheless supported communitarization, or at least viewed civil justice as an acceptable sacrifice in the pursuit of more pressing concerns, such as keeping more sensitive issues relating to criminal law and police cooperation in the Third Pillar, and thus more firmly under Member State thumbs. Finally, the technical nature of the legal knowledge involved goes a long way towards explaining the key role of governmental legal elites, to whom national politicians delegated the task of working out the details.[91] As Sandholtz & Zysman (1989: 107) argued in an earlier historical context, these decisions were "contingent on leadership, perception, and timing," and thus must be "examined as an instance of elites constructing coalitions and institutions in support of new objectives. This is not a story of mass movements, of pressure groups, or of legislatures." Finally, economic factors played virtually no role in these decisions, which were oriented instead towards solving problems that were conceptually linked to the free movement of persons rather than of goods, services or capital,[92] as well as to concerns about the EU's legitimacy. In this regard, my case studies do not align with leading liberal intergovernmentalist accounts in which economic factors were dominant (Moravcsik 1993, 1998a).

Neither of these preliminary conclusions is sufficient to tip the explanatory scales toward or away from an intergovernmentalist explanation, however. The fact that Member States were the dominant actors is an artifact of the nature of intergovernmental decision-making involved, while the fact that earlier intergovernmentalist accounts focused on economic interests reflects case selection, i.e., the particular nature of decisions investigated (trade liberalization,

agriculture, etc.). As Scharpf (1999b: 165) has observed, it is natural that national economic interests would shape Member State preferences in case studies focused on economic integration, hence those particular LI findings are not readily generalizable. Thus, the lack of economic interest as a driver does not undermine an intergovernmentalist explanation. Rather, what matters in theoretical terms is how Member States *justified* giving up a measure of competence over civil justice issues – whether they conceived their preferences in terms of national interests related to legal sovereignty or something else – along with what other forces drove and shaped the particular outcomes in Amsterdam and Tampere.

My second preliminary hypothesis is that EU supranational institutions, together with civil society transactors (including non-governmental legal elites) were the key drivers, as a neofunctionalist account would predict. This hypothesis requires a more detailed explanation, since it considers the role of a multiplicity of actors in two different contexts, Amsterdam (Chapters 6 and 7 above) and Tampere (Chapter 8 above). Beginning with the traditional supranational actors – the European Parliament and the Commission – my empirical findings reveal that *both* played an active role in both case studies. Their roles were limited, however, owing to their formally weak powers in the context of intergovernmental decision-making, which was exacerbated (in the case of the Commission) by its unusual political weakness in the late 1990s, in the wake of a scandal that erupted in 1998 and led to *en masse* resignation in March 1999 (shortly before the Tampere Summit). These limitations aside, the EP and the Commission both held strong views on AFSJ matters, which they expressed and endeavored to assert in regard to both Amsterdam and Tampere. Notably, both EU supranational institutions provided numerous influential resolutions and reports during the preparations for both Amsterdam and Tampere, and served as important idea entrepreneurs by supplying a vision of the Area of Freedom, Security and Justice, by articulating complex justifications to support the proposed objectives, and by making detailed and far-reaching concrete proposals from which Member States could pick and choose.[93] Moreover, the Commission had other avenues of influence, notably in connection with its drafting responsibilities during the IGC (Amsterdam), as well as its close cooperation with the Finnish Presidency in the lead-up to the Tampere Summit. Last but not least, Commission President Santer played a significant role in the decision to communitarize civil justice, insofar as his concern that too little of substance would come out of the Amsterdam meeting led him to urge German Chancellor Kohl to push for communitarization, in order to ensure some pro-citizen outcome, as a way to bolster EU legitimacy. These findings support a neofunctionalist explanation.

An unusual feature of my empirical findings is the assertive role played by the Council Secretariat – formally an intergovernmental institution of the EU, but de facto operating in the context of Amsterdam and Tampere with a pro-integration agenda more characteristic of the EU's traditional supranational institutions.[94] The unusually active and (in the case of Tampere, domineering) role of the Council Secretariat – which can be attributed to its special responsibilities under Maastricht's Third Pillar, as well as to the long experience of key personnel (notably, Elsen and de Kerchove) in Third Pillar matters in their respective national settings before joining the Council Secretariat in senior positions – prompts the question whether the Council Secretariat should be added to the list of supranational institutions of the EU. The list of EU institutions that have exhibited pronounced "agent autonomy" (Niemann 2013: 639) conventionally includes the Commission (Nugent 1995, 2001: 7),[95] the EP (Westlake 1994: 243-44), the Council Presidency (Elgström 2003c: 44),[96] and the Court of Justice (Mattli & Slaughter

1998). In addition, Jeffrey Lewis's (1998: 16) important study of Coreper (i.e., the Committee of Permanent Representatives, which is comprised of Member State diplomats serving in Brussels) challenges the "intergovernmentalist image" of that quintessentially intergovernmental institution, arguing that it is de facto a "key site in the production and maintenance of a community-method, characterized by a dynamic process of *l'engrenage*, a shared mutual purpose to understand each others' problems, and a culture of compromise which results in a unique style of bargaining and context of interaction" (id. at 43-4).

My empirical findings support expanding the list of EU supranational institutions to include the Council Secretariat, at least in the historical context of the Tampere Summit in the late 1990s. Already regarded by some as the 'power behind the throne' of Member State sovereignty by virtue of its capacities as institutional memory of the Council and ubiquitous drafting responsibilities (e.g., Christiansen 2002; Ginsberg 2007; Sperl 2009), the Council Secretariat went beyond its ordinary role as helper to the Member State occupying the EU's rotating Presidency in the first half of 1999, as is apparent in the struggle for control over drafting the Tampere Conclusions (Milestones) (Chapter 8 above). That case study reveals that the Council Secretariat harbored its own pro-integration preferences, and endeavored to assert them vis-à-vis the Finnish Presidency, which was formally in charge.[97] My findings are in accord with those of Christiansen (2005: 164-5), who has noted the growing "actorness" of the Council Secretariat, which has "been remarkably successful in gaining an executive role in the more intergovernmental policy areas of the Union," such as Justice and Home Affairs in the Third Pillar, and "gone a long way towards developing into a political institution in its own right." The unusually active role of the Council Secretariat, particularly in the context of my second case study (Tampere), provides further support for a neofunctional explanation.

Finally, both intergovernmentalism and neofunctionalism predict that civil society (including economic actors) will seek to pressure Member State governments in the quest to see their preferences vindicated in the context of EU decision-making, while neofunctionalism goes a step further and predicts that such actors will also channel their interests through the EU's supranational institutions. My case studies are unusual in regard to the virtually absent role – albeit not the utter absence – of civil society actors. In the context of civil justice, a pan-European group consisting of leading (and primarily academic) legal experts – GEDIP (Groupe européen de droit international privé/European Group for Private International Law) – was established in 1991, around the time of the Maastricht Treaty, in order to participate in debates on civil justice issues that were increasingly taking on an EU dimension. Yet this high-powered (largely academic) brain trust did not participate actively in either the Amsterdam or the Tampere processes, in large part because neither the group nor its members in their individual capacities were formally included in either process, and were largely – to their dismay – out of the informational loop. Another explanation for the relative inactivity of these experts in the important political developments ongoing at the time was their traditional conception of their role – as experts whose role was limited to providing thoughtful proposals for and commentaries on legal drafts – rather than as political actors. As such, the role conception of these actors at the time was at odds with that of business actors and other civil society groups, who engage in pluralist political activity at both national and supranational levels, in order to advance their interests. While some members of the GEDIP group had the ear of civil servants in their national governments, they were for the most part outsiders to the EU processes that were underway at the time. Finally, neither bar associations or other professional legal organizations, nor members of

the business community, became involved in these decision-making processes, although – as explained below in the discussion of preference formation – some ideas from the bar and from academia were indirectly filtered into the processes.

There is one noteworthy exception to my conclusion that non-governmental legal elites played no meaningful role in the events that are the focus of my study, although it pertains to criminal rather than civil justice (see subsection 8.3.3.2 in Chapter 8 above). A small group of magistrates – criminal judges – from Belgium, France, Italy, Spain and Switzerland (the latter not an EU Member State) called upon European countries to create a "single European judicial area" (Bassioui 2008: 499),[98] and formalized their petition in the 1996 Geneva Appeal (Tinoush 1998).[99] Pursuant to a Belgian initiative, the EU took a step towards bringing magistrates 'into the fold' by creating the European Judicial Network in Criminal Matters (EJN-Criminal) in June 1998[100] (after Amsterdam but before Tampere) as a Third Pillar measure.[101] Shortly afterwards, during the French Presidency in the second half of 1998, French Justice Minister Guigou picked up the magistrate-generated proposal and convened a seminar in Avignon to discuss "The European Judicial Area: A New Challenge for Tomorrow's Europe." Guigou's seminar expanded the scope of discussions by placing family law issues (civil justice) on the agenda alongside the fight against organized crime (criminal justice). At the close of the Avignon seminar, some EU Member States – France, Germany, Italy, Spain and the United Kingdom – formulated the Avignon Declaration, which called for the creation of a genuine European judicial area. The 1996 Geneva Appeal, which emerged from voluntary action by magistrates, is the only example that fits the 'transactor' model hypothesized by neofunctional theory. However, its causal effect vis-à-vis EU measures, while likely, has not been established, and even if it were, then such direct effect would be in the context of criminal justice issues, with at best indirect effects on developments in the field of civil justice.

To wrap up this discussion of the second preliminary hypothesis, neofunctionalism contributes to an explanation of my two case studies, but only partially. Two of the traditional EU supranational institutions – the EP and the Commission – contributed important ideas to debates surrounding Amsterdam and Tampere, thus played a role in national preference formation, but had little political impact on the decision-making process. The Court of Justice was not involved at all, but the Council Secretariat – which I argue played a supranational (autonomous) role rather than the formal role of a constrained agent – was also a significant player, especially in Tampere but also in Amsterdam. In case of the three significant supranational actors – the EP, the Commission, and the Council Secretariat – the positions they developed were their own, by which I mean not influenced by lobbying or other activities by transnational interest groups, at least not in regard to civil justice issues. However, these EU institutions were involved in ongoing conversations with representatives of the Member States, which fact renders it impossible to claim that supranational preferences were hermetically sealed off from Member State influence. This question is taken up in greater depth in the following discussion of preference formation (in subsection 9.2.2.1.5 below), along with the role of the Presidency.

Before turning to that discussion, I must address my third preliminary hypothesis, which is that the key driver animating these developments was located outside the EU, in global conditions (labeled "exogenous spillover" by Niemann 2006: 32), rather than inside it. While plausible, as explained below, this hypothesis is not supported by my findings. As explained in Chapter 2 (subsection 2.1.1) above, EU Member States participated actively in multilateral

negotiations at the Hague Conference on Private International Law, aimed at achieving a global judgments treaty, which got underway well before the decision was taken in mid-1997 in Amsterdam to communitarize civil justice. Recall that one feature of the EU constitutional order is that communitarizing civil justice – i.e., the transfer of internal (i.e., legislative) competence to the EU – has the added effect of transferring external (i.e., treaty-making) competence as well (subsection 9.2.1 above). With this in mind, one version of the third anecdotal account about communitarization of civil justice suggested that it was the legal elites representing Member State governments in the intense and often heated negotiations in The Hague who had pushed for communitarization of civil justice, as a way to strengthen the EU's bargaining position vis-à-vis bargaining partners (in particular the United States). While this tactic may have been on the minds of some legal elites at the time, my interview data provide no support for this hypothesis, beyond a single source (representing a non-EU country) who claims to have discussed the idea with (fellow academic) colleagues in The Hague.

Further in regard to the third hypothesis about external (global) drivers – "exogenous spillover" in Niemann's parlance (2006: 32-4) – my findings provide some support for the argument that globalization can provide an impetus for further legal European integration – "as it appears to have done in market integration" (Sandholtz and Zysman 1989; see also Real-Dato et al. 2013: 76). Increase transnational movement of persons in the 1990s posed mounting challenges for the EU. Pressures on the EU's external borders bore directly on AFSJ issues other than civil justice, namely asylum, immigration, organized crime, and criminal justice. These were not new pressures, since organized crime and terrorism had been concerns since the 1970s, with both immigration and asylum picking up in the 1980s and accelerating in the 1990s, in the wake of war in Yugoslavia and the collapse of the East Bloc (Van Mol & de Valk 2016). However, communitarization of civil justice was driven by *intra-EU* movement of persons, which began to rise after the 1985 Schengen Agreement began dismantling internal border controls, rather than by pressure on the EU's external borders.

Moreover, the competition logic that underpins economic relations[102] plays no role in the emergence of civil justice as a Europeanized field.[103] While efficiency does appear to be a factor in documentary sources about civil justice, the efficiency at stake is oriented towards better functioning of the EU's *internal* legal order – for the benefit of EU citizens – rather than towards making the EU more efficient vis-à-vis non-EU countries. As such, the movement-of-persons and efficiency logics – while both relevant to civil justice – are driven by factors internal to the EU,[104] and should not be viewed as driven by 'globalization' pressures that impinge on the EU from its *external* environment.

These preliminary conclusions, which find some support for the first and second hypotheses, but none for the third, underscore the argument in favor of taking an eclectic theoretical approach to the study of European integration. But this preliminary assessment is just the first step towards explaining my findings. As noted earlier, my case studies straddle the intergovernmental-neofunctional divide, insofar both national and supranational actors played indispensable roles "and each was involved with the actions of the others" (Sandholtz & Zysman 1989: 108). Yet the absence of civil society actors and political contestation raise questions about whether the traditional theories are adequate to explain cases like mine, which involve elite decision-making outside the realm of liberal pluralist politics. The first step towards answering this question is to look closely at preference formation (subsection 9.2.2.1.5 below); the second is to consider the potential contributions of theories about legal elites, professionals, and other

experts (subsection 9.2.2.4 below).

9.2.2.1.5 Explaining Member State Preferences in Amsterdam and Tampere

Given the central importance of national preference formation in the more-or-less grand debate between neofunctionalist and intergovernmentalist accounts of European integration, I turn now to that question. Intergovernmentalism supplies the crucial starting point for analysis, by drawing attention to the major role played by national legal elites in my case studies, and providing a working hypothesis for how to understand these outcomes. In the end, however, it is neofunctionalism (together with its progeny, postfunctionalism) that provides the more convincing explanation for my findings, although that theory requires supplementation to come to grips with the agency of legal elites (subsection 9.2.2.4 below).

My case studies provide an opportunity to examine national preference formation that is unique in two respects. First, as explained below, the absence of key factors that often bear the heavy weight of explanation in both intergovernmental and neofunctional theories about European integration – economic interests, domestic politics, and civil society actors – provides a rare occasion to see what else can matter. And second, the fact that the elites involved in my case studies are almost exclusively legal elites, provides an equally rare occasion to scrutinize such actors outside the usual court-centric context in which they appear in European integration studies (see subsection 9.2.2.4.1 below). How, then, were national preferences formed, and what logics prevailed? In order to streamline my analysis, I focus on Finland, which was the most significant Member State actor, given its key role in both of my case studies, and is the one on which my empirical findings are most extensive, and supplement with evidence from other Member States, where it is available and relevant.

My analysis begins, as both theories do, with the core assumption that state-society relations – in particular, the actions of "influential groups" consisting of "private individuals and voluntary associations with autonomous interests" – shape national preferences via interest aggregation in a liberal pluralist setting (Moravcsik 1993: 483-4). Like (liberal) intergovernmentalism, neofunctionalism also assumes an active role by civil society actors, but assumes further that they direct their activities towards supranational as well as national actors, as the case may be, in seeking to influence political outcomes.[105] Postfunctionalism, like intergovernmentalism, calls for close attention to the (presumably) crucial role of domestic political contestation (Hooghe & Marks 2009a). These key assumptions fail to explain my case studies, however, which reveal no pluralistic political activity related to the issue of civil justice, that is, no public discussion of the issue, and – as noted above – no relevant activity involving national or transnational civil society actors whatsoever. The absence of activity that these theories predict does not necessarily undermine them, but prompts the question whether they provide tools for explaining cases where preferences were formed without meaningful input from civil society actors or other pluralist contestation. How, then, do these traditional theories about European integration account for cases where preference formation was conducted exclusively by governmental elites? Both theories recognize this possibilitys and provide some tools for analyzing cases where (legal) elites are the dominant actors.

(1) (Liberal) Intergovernmentalism (LI): Moravcsik (1993: 483-4) has explicitly noted that not "all ... proposals begin with direct pressure from pluralist groups." For such cases, he created a catch-all policy category – "political, institutional or redistributional policies" (id. at 494) – and predicted that mobilization of social interests and the ultimate determinants of

Member State action depend on whether "the implications are calculable" or not (id. at 495, Figure 2). As noted earlier, civil justice fits within this catch-all category, and straddles two of the dimensions identified by Moravcsik: measures that aim "to provide non-socio-economic collective goods," and measures that can be said to "exist either for their own sake or to facilitate other policies" (id. at 494), such as free movement of persons, fundamental rights, and citizenship. In regard to such policies, where the "costs and benefits to societal actors" are "weak, uncertain or diffuse," Moravcsik argued that private actors will have little interest, and governments and parliamentary elites will "enjoy relatively broad autonomy" (id. at 495, Figure 2) and "be able to pursue broader or more idiosyncratic goals" (id. at 494). Such a scenario, he argued, leaves "domestic influence over the policy almost exclusively to partisan elites," who are likely to invoke "symbolic and ideological, rather than calculated and concrete" reasoning (id. at 494). Finally, in regard to such policies, Moravcsik argued that Member States – "particularly larger ones" – would be able to advance preferences that "reflect the ideologies and personal commitments of leading executive and parliamentary politicians, as well as interest-based conceptions of the national interest ... ('dramatic-political' actors)" (id.). The "dramatic-political" actors in Moravcsik's case studies were persons who "hung onto symbols of national sovereignty and tried to preserve them" (Tranholm-Mikkelsen 1991: 16).

My case studies bear out the core of LI predictions that elites will "enjoy relatively broad autonomy" to "pursue broader or more idiosyncratic goals" and rely on "symbolic and ideological" reasoning in such cases (Moravcsik 1993: 494-5). However, LI predictions are *not* borne out in regard to the *reason* for lack of private actor involvement in my case studies, or in regard to the role of partisanship or "interest-based conceptions of the national interest." First, the reason for lack of private actor involvement in my case studies is fundamentally at odds with Moravcsik's argument that private actors would have little interest in cases where costs and benefits to societal actors are 'incalculable.' His argument, which implies a cost-benefit analysis by civil society actors leading to a decision that getting involved is not worth the effort, contributes little to understanding the communitarization of civil justice in Amsterdam. In my case studies, non-governmental legal elites (notably legal professionals and academics) would have been interested – given communitarization's impact on national legal systems, in general, and civil litigation in national courts, in particular – had they known what was afoot. It is primarily this lack of information, along with a generalized lack of access to the EU processes underway, that explains the relatively unencumbered autonomy enjoyed by governmental (legal) elites in formulating national preferences for Amsterdam, and not the difficulty of calculating the impact of the measures under discussion in the EU context. This information- and access-based argument also holds in the context of Tampere, but is less compelling, since it was widely known that a five-year plan for developing the AFSJ was on the table. Some civil society actors did become active, albeit none who were focused on civil justice matters. Finally, in regard to both Amsterdam and Tampere, I will argue below (subsection 9.2.2.4.3) that another reason for the disengagement of knowledgeable legal actors – in particular, legal academics – was their tendency to understand themselves as experts whose role was to advise government on legal matters when asked, rather than as political actors with an activist role to play in the EU context.[106] They were, in other words, also hamstrung by their own limited role conception.

Second, LI predicts that the "symbolic and ideological reasoning" deployed by governmental elites in cases where policy-making is relatively unconstrained by pluralistic political activity will, nonetheless, be oriented towards partisanship or "interest-based

conceptions of the national interest" (Moravcsik 1993: 494-5). My case studies support the prediction that symbolic and ideological reasoning will prevail,[107] but do not support LI's predictions about the relevance – much less the centrality – of partisanship or interest-based conceptions of the national interest. On the first point, partisan contestation played no apparent role in my case studies on civil justice, and governmental legal elites whom I asked about their party affiliation brushed the question aside as irrelevant, misguided, or insulting. This fact aside, the positions advanced by some key elites did reflect their own political leanings (e.g., Ministers of Justice from France and Germany) or broader ideological commitments (Secretary-General Rissanen in Finland), as well as those of the government they served at the time.[108] Moravcsik's second point – the notion of "interest-based conceptions of the national interest" – is more difficult to unpack, given that 'national interest' is a key (and highly contested) concept in the field of international relations, and that questions about the nature of interests are little more straightforward.

Taking the notion of "interest-based conceptions" first, Max Weber's (1964: 280) paradigmatic distinction between material and ideal interests remains useful, but is still the subject of intense academic discussion (e.g., Eastwood 2005; Lizardo & Stoltz 2017).[109] Material (or economic) interests were not present in my first case study (communitarization of civil justice), but were both directly and indirectly present in my second case study (Tampere), albeit in a very limited way. The only (apparently) direct role played by material interests in my findings was in connection with the UK's opposition to harmonization of legal aid.[110] Indirectly, my second case study shows that a few Member States wanted the EU to improve debt collection (e.g., Germany, the UK), while others were eager to bolster the legal position of consumers (e.g., Portugal). While plausibly significant in the few specific instances noted, economic interest cannot bear the weight of explaining preferences in my first case study at all, nor in regard to the vast bulk of the second. Rather, ideal interests played the dominant role in national preference formation in both of my case studies.[111]

Moravcsik's prediction that "national interest" would figure prominently in explaining outcomes appears at first glance to be misplaced in the context of civil justice. It may, however, be credited with some explanatory force, when linked to the material interests expressed by a few Member States in regard to improving debt collection (noted above). In particular, German preference formation for Tampere included proposing some "typically German" legal institutions related to debt collection that might work at EU-level. This provides some support for the LI position, given that the key civil servant noted that Germany was "interested to have a European solution because we ran into troubles ... with boundary, trans-boundary questions" (Interview #46). Moreover, national interest is an important factor in explaining the conduct of Member States during their rotation in the EU's Presidency, notably in regard to the Netherlands in 1997 (in connection with the Amsterdam Treaty), and to Finland in 1999 (in connection with the Tampere summit), which is taken up separately (in subsection 9.2.2.2 below).

Finally, I turn to the LI prediction that decisions in such cases as mine might "reflect the ideologies and personal commitments of leading executive and parliamentary politicians, as well as interest-based conceptions of the national interest ... ('dramatic-political' actors)" (Moravcsik 1993: 494). Can the role of German Chancellor Helmut Kohl in Amsterdam, whose insistence on achieving *some* meaningful results was a key causal factor in explaining the communitarization of civil justice (Chapter 7), be described as a "dramatic-political" actor? While it is possible to make this argument, it makes little sense to do so, given LI's orientation towards advancing the

national interest and hanging on sto symbols of national sovereignty. Kohl's motivation in Amsterdam was a supranational one, aligned with – if not actually animated by – that of Commission President Santer, and oriented towards achieving greater European integration, rather than promoting national interests. Moreover, in my second case study, there was no national figure who played the dramatic-political actor role; rather, preferences for Tampere were worked out by national and EU elites, who were motivated almost entirely by ideal (not material) interests that were oriented towards the perceived supranational needs of the European legal order, rather than by narrower national interests.

To conclude, my case studies bear out the liberal intergovernmentalist prediction that governmental elites will "enjoy relatively broad autonomy" and "be able to pursue broader or more idiosyncratic goals" (Moravcsik 1993: 494-5) where policy-making is relatively unconstrained by pluralistic political activity. However, my case studies provide little support for the argument that the "symbolic and ideological reasoning" deployed by governmental (legal) elites will be oriented towards partisanship or towards "interest-based conceptions of the national interest" (id.). In the context of concrete civil justice issues in Amsterdam and Tampere, interest-based conceptions of the national interest were not entirely absent, but played a supporting rather than a leading role in a small handful of Member States in regard to a small subset of civil justice issues – notably, legal aid and debt collection – under discussion in Tampere.

(2) Neofunctionalism: Neofunctionalists also explicitly include government elites within their universe of relevant actors. Despite a core concern with "political elites,"[112] Haas (1958: 17) also identified "higher civil servants" as key actors whose "beliefs and aspirations" might undergo change – "due to the necessity of working in a transnational institutional framework" – with the result that their values would merge, and interests would come to be defined "in terms of a regional rather than a purely national orientation" (id. at 13-14).[113] In such cases, neofunctionalism rightly insists that it is necessary to "relax the restrictive assumptions of national interest and preference formation found in the intergovermentalist image" (J. Lewis 1998: 16, fn 24). Whether national (legal) elites 'transfer' their loyalties towards supranational institutions or develop multiple identities, and if so, by what mechanisms, are empirical questions that require asking the same questions about – and applying the same tools to – government elites, as neofunctionalism and its progeny would apply to other actors.

Neofunctionalism offers three possible explanations to explain support for more integrative outcomes:[114] social spillover (Niemann 2006: 37-42), cultivated spillover (Tranholm-Mikkelsen 1991: 6; Niemann 2006: 42-7), and functional spillover (Niemann 2006: 30-1). The first (social spillover) posits that the interests of the executive branch of government "are not inherent, as if they were the product of fixed national characters," but are "constantly in the process of being 'produced,' and that theories "of learning, of acquisition of norms, and of socialization stress how preferences (and the learning of norms and rules) come into being" (Caporaso & Keeler 1995: 46). The second (cultivated spillover) asserts that the EU's supranational institutions might "cultivate relations with ... national civil servants so as to gain their support for realising integrative objectives, and to cultivate pressures *vis-à-vis* governments" (Niemann 2006: 42). The third (functional spillover) considers the impact of policy "interdependencies ... which induce policy-makers to take additional integrative steps in order to achieve their original objectives" (id. at 30). My case studies reveal that all three types of neofunctional spillover played a role in national preference formation, both in Amsterdam and in Tampere. Finally, given that "concern with ... preferences is not unconnected to the issue of

identity" (Caporaso & Keeler 1995: 47), postfunctionalism points to the "logic of identity" as a driver of integration (Hooghe & Marks 2016: 151), and calls for attention to the "sociality of governance" (i.e., the relevance of "geographical, cultural, and historical sources of group distinctiveness") (Hooghe & Marks 2009a: 1). This factor also played a role in national preference formation in my case studies, particularly in Finland.

Recall that Finnish preferences were articulated in the Ministry of Justice (MoJ), in coordination with the IGC negotiating team (EU unit of the Office of the President) for Amsterdam, and with the negotiators in the small Tampere Team (EU Unit, Prime Minister's Office) for Tampere. In both cases, the Finnish Parliament (*Eduskunta*) – in particular, its Grand Committee, which is responsible for most EU affairs – also exercised a controlling function. For example, it made the decision that Finland should support communitarization of civil justice. It was not, however, actively involved with concrete details about the policy positions taken by Finland, and – like the Finnish government itself – tended to sign off readily on the "reasonable" positions prepared by the Ministry of Justice (MoJ) (Interview #49). Recall, too, that the Secretary-General of the MoJ, Kirsti Rissanen, was not only the first female law professor at the University of Helsinki but also the first woman to occupy such a high civil service position in the Finnish government. She was selected as Secretary-General, according to the Minister of Justice who appointed her, because she was the best person for the job, and not because of party affiliation. Finally, recall that Rissanen's hand-picked deputy in the lead up to the Tampere summit, Inga Korpinen (then Pöynten), was drafted from private practice into the MoJ. She served as a member of the Tampere Team, along with two civil servants (Antti Peltomäki and Mikko Puumalainen), both lawyers who also had close ties with the MoJ based on past work experiences. The policy proposals formulated by Rissanen and her team in the MoJ were transmitted to the negotiators for both Amsterdam and Tampere, who represented those preferences to the best of their ability, subject to their views as negotiators on what was achievable, as well as to political directives from the top echelons of the Finnish government. Chapter 8 noted some tensions between the MoJ and the Tampere Team in regard to concrete preferences, but despite those tensions, the key documents put forward by Finland in the context of preparations for Tampere faithfully represented even Rissanen's most ambitious goals for creating the European legal area.

In connection with the treaty-revision process in Amsterdam, Finland is the Member State that gave the most thought to the civil justice issue and ultimately pushed to get the issue of communitarization onto the agenda.[115] Finland expressed support for creating a European judicial area (including civil justice) as early as 1995, though it did not formally come out in favor of communitarization until later (November 1996). During the Dutch Presidency in the first half of 1997, which prepared and then culminated in the Amsterdam summit, Finland played a key role in putting civil justice on the EU's treaty-revision agenda, thanks in large part to Rissanen's efforts. The Finnish delegate to the IGC Representatives Group – Antti Satuli, the Finnish Ambassador to the EU – presented ("tabled" in EU parlance) a draft provision for communitarizing civil justice (February 1997), to thunderous silence (Interview #60). The Finnish proposal, which was drafted by Rissanen and her staff, was in line with her maximalist views, and envisioned far-reaching Europeanization of the civil justice field. The Finnish proposal went far beyond the position that had been staked out a few months earlier in the Irish Presidency's Dublin II Draft (December 1996), in terms of the role and nature of civil justice in the EU, as well as of the scope of civil justice issues that would become fair game for joint action

among the Member States. The MoJ proposal was also unusual, in that it went beyond the extant logic of free movement of persons, and presented civil justice as an overarching issue that should be addressed on its own terms, oriented towards the goal of access to justice, and linked to the right to fair trial embedded in Article 6 of the European Convention on Human Rights. As such, the rights-oriented provision for communitarizing civil justice, which Finland inserted onto the treaty-revision process, reflected Rissanen's concerns with social justice and equity. These concerns are deeply embedded in Nordic legal culture and linked to her corresponding fears that joining the EU's internal market – which she saw as an "empty goal as far as social values are concerned" (Rissanen 1995b: 422) – would undermine the Nordic welfarist model. As noted earlier (in subsection 7.1.6 of Chapter 7 above), Rissanen expressed her views on these matters publicly in academic conferences, as well as in her academic publications.

Beyond these motivations, Rissanen has identified two additional rationales for the positions she advocated. First, she considered it a "very natural idea for a lawyer" – a "simple" matter – to see the AFSJ as the next developmental step for the EU to take, in order to prevent persons from falling through the cracks in legal protection, the "gaps or holes where people would fall, unless we build bridges between the ... judges and so on from each individual Member State ... when people move freely" (Rissanen Interview). And second, her experience with Nordic legal cooperation (subsection 2.2.3 in Chapter 2 above), which is built on strong institutional cooperation in civil justice and private law (among other issues), led Rissanen to consider such an integrative step a good fit for the EU. Nordic legal cooperation "shows a way that could be good for the EU too" (Rissanen Interview).

Yet Rissanen has explicitly acknowledged that the Finnish proposal to communitarize civil justice – despite being closely in tune with her vision of a communitarian "Europe which would be socially, culturally for everybody" and would create "more equality in ... social relations, diversity" (id.), her 'natural' instincts as a lawyer, and her experience with Nordic legal cooperation – was inspired and guided by the Commission's September 1996 Proposal, which had been sidelined because it was seen as too long and too ambitious (id.). In all modesty, and despite the strength of her vision and determination, Rissanen has characterized her action in 1997 as that of a "pragmatic Finn" who saw a "practical possibility to take a next step towards something which I idealistically think should be the vision for us all" and "picked it up" (id.). Her strategy was to select one piece of the Commission's Proposal that she believed could succeed at the time – and one which she suspected might otherwise fall by the wayside, given the enormous amount of attention being placed on internal security measures relating to visas, asylum, immigration, drugs, and the like – and to throw her weight behind it. "It was not my creation, my part was to understand that this, and only this, is now possible, but this is a way ahead. That's all that I brought. It's a political judgment" (Rissanen Interview).

Finnish preferences on civil justice in regard to the Tampere Summit (subsection 8.5.2 in Chapter 8 above) must be considered separately, even though they align with (but far surpass) those that were articulated in connection with the Amsterdam treaty-revision process. Notably, Finland's interests were more complex and layered in the context of the country's first rotation in the EU Presidency in 1999, which brought new political expectations to bear on it as a new Member State (subsection 9.2.2.2 below). Even before its Presidency formally started, Finland was pushing to treat the AFSJ notion of an 'area of justice' – which had been introduced by the Amsterdam Treaty – as something that was new and required a different, ambitious, and holistic approach. As with the proposal to communitarize civil justice, the 'area' idea did not originate

with Finland,[116] but the MoJ made the issue its own and put its back into the goal of succeeding on this front. Here, as during the earlier treaty-revision process, the strong views and firm pressure Rissanen brought to bear on Finland's negotiators in the Tampere Team played a major causal role, even though the Finnish negotiators were not able to push through everything that Rissanen wanted.[117] Many of her positions were supported by other Member States as well, particularly by France, whose Justice Minister Guigou also pushed strongly for the 'area of justice' throughout the Tampere process (Monar 2000: 28), and by Germany, whose Justice Minister Däubler-Gmelin was among Rissanen's strongest allies.[118]

In terms of orientation towards the EU and the explanatory role of social spillover, it is necessary to differentiate the position of the Finnish negotiators from that of Rissanen at the MoJ. Neofunctional research has delved into the so-called *view (or vue) d'ensemble* (Salmon 1971: 642; de Zwaan 1995: 34), which refers to the Janus-faced perspective of Member State representatives – like the Finnish negotiators in Amsterdam and Tampere – who have been socialized in the 'ways of Brussels' through personal experience working in those settings, and who are expected to "to deliver on both fronts" (J. Lewis 1998: 11).[119] As Lewis (1998 & 2005) has demonstrated, such fora tend to be characterized by a "culture of compromise" and participants develop a *view (vue) d'ensemble*, which is a "horizontal perspective" in which the national representatives " 'see' the broader picture in the interests of their country" (Lewis 1998: 11).[120] This orientation may manifest itself in "an extended time-horizon (generalized reciprocity), a more inclusive definition of the 'national' interest by endogenizing linkages to other issue-areas or member-states' preferences, or just a more-or-less predictable instinct of what will work and what will not" (id.). Governmental elite participation in such fora, in other words, serves as a mechanism by which Member State representatives "internalize or endogenize new ways of articulating, defending, and representing their 'self' interests" (id. at 10). The notion of "community" in the EU context thus breaks the "exclusivist ethos of statal autonomy" (Weiler 1991: 2479), at least for some Member State representatives. Jeffrey Lewis's work extends the insights of American neofunctionalist scholars who used the term "*engrenage*" to describe the process by which governmental elites interact with one another and gradually become socialized towards forming common interests, and possibly even identities (Lindberg 1963; Lindberg & Scheingold 1971: 119). *Engrenage* and the related *view (vue) d'ensemble* – both key explanatory elements for what neofunctionalism calls social spillover (Niemann 2006) – help to explain the position taken by the Tampere Team negotiators, who had to navigate between the MoJ's wishes – national preferences – and what they (believed they) could achieve in Tampere. However, these explanations fail to account for the actions of the Finnish Presidency's negotiators in Tampere, when they struggled against the Council General Secretariat to control the process of drafting the Tampere Milestones.[121] Nor can *engrenage* and the *view (vue) d'ensemble*, standing alone, explain the preferences articulated by the Finnish MoJ, where Secretary-General Rissanen – unlike the senior negotiators on Finland's Tampere Team – had not experienced the same kind of socialization in EU supranational fora such as Council committees or working groups.

As a general matter, Rissanen's pro-integration orientation is not surprising, since it was a factor in her selection as Secretary-General, and accorded with the strong pro-EU policy of the Finnish government. Still, neofunctionalism prompts the question why she developed this orientation in the first place, not least in view of one Finnish scholar's claim that Finland's "state-centric" and sovereignty-oriented political culture lacked "a cultural connection to the values inherent in the European integration project" and led Finland to have "limited"

enthusiasm for "alternative political communities" (Tiilikainen 2003: 104-6). If not through socialization in EU supranational fora, how can Rissanen's strong pro-integration orientation, as well as her holistic vision in regard to the place, dimensions, and meaning of civil justice in the emerging European legal area, be explained? In other words, is social spillover absent in her case, or can socialization take place in other settings? My findings suggest that Rissanen had been socialized towards supranational values, and that this socialization occurred primarily in academic settings, including her home institution – the University of Helsinki Faculty of Law – where she co-founded the International Institute of Economic Law (KATTI), which was the first research institute in Finland to focus on European law and which – despite its name – was deeply committed to bringing a communitarian perspective and social justice commitments into debates on EU law. Academic gatherings at KATTI were not limited to Finns, and on some occasions[122] included prominent scholars from leading European universities, including the European University Institute (EUI) (Chapter 8 above). Rissanen did not limit the scope of her activities to purely academic circles, however.

In March 1997, Rissanen convened a "Seminar on the Third Pillar of the European Union" in Helsinki during the IGC (subsection 7.1.7 of Chapter 7 above), which brought together Member State Ministers of Justice, the Commission, and the General Secretariat of the Council. This was not, strictly speaking, an academic conference, but Rissanen continually pushed to get "academic people and bureaucrats at the same table," in order to give academics a voice in the important decisions under consideration (Interview #37). On another occasion during the Tampere preparations, she tried – unsuccessfully, it turned out – to bring policymakers and academics together to "launch a process, a program, trying to analyze what's the problem with access to justice in the EU" (Interview #10) (subsection 8.5.4 in Chapter 8 above).[123] These hybrid efforts at cross-fertilization in the IGC (treaty-revision) context met with some resistance by Finnish negotiators, who insisted that Council settings are decision-making fora and "not a university seminar" (id.). However, the tension between Finnish negotiators and the MoJ over this issue were related more to style than substance. As one Finnish negotiator said, there was no problem with "what Rissanen wanted politically," the problem was how to achieve her extensive wish list, how to make the MoJ's "abstract" and "academic" proposals "convincing and operational" in the negotiating context (id.). This tension exemplifies the difficult situation occupied by Member State negotiators who must navigate the sometimes difficult narrows between national preferences, on the one hand, and the concrete expectations posed by their participation in supranational fora, on the other hand, where their experience has taught them to keep one eye on the national, and another on the EU interest.

In contrast, what was problematic for Finnish negotiators appeared in academic eyes as evidence of Rissanen's "special genius, trying to bring policymakers and academics together" (Interview #37).[124] Her hybrid position as an academic civil servant[125] was perceived by some as a strength, while by others as a limitation: she brought the same ideologies and commitments to both roles, and perceived no conflicts between them. What mattered to her – as to the Finnish negotiators – was a high degree of commitment towards achieving pro-integration outcomes, consonant with Finnish government position during the IGC (Amsterdam) and the Presidency (Tampere). The gist of my argument here about social spillover is that it is possible to develop a strong orientation towards integration – and a concomitant ability to reconcile national and supranational identities – outside the usual framework of *engrenage* or interaction in supranational EU fora. This can also occur in academic settings, as well as in the hybrid context

of academic-policymaker discussions, which can serve as non-Brussels-based fora where socialization can occur, common problems can be identified, common interests can be articulated, and European identities can be formed. And, not least, allies can be sought, such as in the German and French Ministries of Justice.[126] Yet this is not the whole story about the mechanisms that can lead to social spillover.

As Rissanen herself has noted on numerous occasions, her views and values are not only Finnish and European, but also Nordic. Thus, her experience with Nordic legal cooperation[127] – attending meetings, working on joint projects, participating in networks – provides an additional tool for understanding the preferences that emerged from the MoJ while she was Secretary-General. More broadly, Nordic cooperation goes further than the EU has gone in regard to civil justice issues, and encompasses a number of the fields that now fall within the scope of Europeanized civil justice, such as recognition and enforcement in civil (as well as criminal) law and measures related to the administration of justice in civil (as well as criminal) law. Echoes of the Nordic experience are visible in many of the preferences articulated by the Finnish MoJ for Tampere, among them the push to unify a broad range of substantive private law issues, and to address family law and other matters related to free movement of citizens.[128] Rissanen's strong identification with the practice of Nordic legal cooperation, as well as with the traditions of Nordic legal culture – "by law shall the land be built"[129] – serves as an additional and important driver for her conduct in the EU context. The iconic image of Nordic legal culture – the stone circles called 'judge's stones' or 'court circles,' such as those found on Käräjämäki Hill in Finland – is the face that the Finnish MoJ presented to the EU during the first Finnish Presidency, and examples drawn from Nordic legal cooperation were presented as suitable for consideration in the EU context during the Helsinki Seminar in March 1997 (Finnish Report on IGC Meeting - Civil Justice 1997).

The tradition of Nordic legal cooperation is something that Finland and its Nordic neighbors share with the three Benelux countries (Belgium, the Netherlands and Luxembourg) – founding members of the EU, which also continue their subregional[130] cooperation alongside their EU membership and which also supported greater EU integration in regard to civil justice. While the specifics are quite variable (section 2.2 in Chapter 2 above), both subregional organizations consist of relatively small countries that have strong historical ties and share a tradition of legal collaboration in regard to civil justice (and other civil law) matters that *precedes* their involvement with post-World War II European integration. Both subregions pioneered various dimensions of civil justice cooperation long before these issues ever reached the EU's agenda. These subregional groups of Member States are experienced in the habit of suppressing anxiety about national sovereignty in pursuit of deeper integration with their close neighbors.[131] And – at least in the context of Nordic countries – they have also forged a subregional identity that supplements (but does not replace) their respective national identities.[132] Subregional (Nordic) socialization is – at least in the Finnish case – a driver of closer EU integration.

In this context, postfunctionalist theory enriches the traditional neofunctionalist explanation by delving deeper into the role of identity as a driver of integration (Hooghe & Marks 2009a: 1). To be sure, the leading statement of postfunctionalism is oriented towards identity as a key factor for explaining political *conflict* among communities (id. at 23), such as diverse language/culture groups within one Member State. This is not the situation in my case studies, where Nordic cooperation is a story about the (predominantly) harmonious and effective collaboration among Nordic countries in regard to civil justice issues, and not about conflict.

This important distinction notwithstanding, postfunctionalism's emphasis on the "sociality of governance" is a useful concept for explaining Finnish preferences, insofar as it draws attention to the role of "geographical, cultural, and historical sources of group distinctiveness" (Hooghe & Marks 2016: 151). My argument is that a subregional sociality – such as can be seen in the context of Nordic legal cooperation and legal culture, and manifested in preferences expressed by the Finnish MoJ – is one driver of European integration of civil justice. This sociality is not so much a bottom-up (national) as a mid-level (subregional or intermediate) source of identities, and not so much driven by conflict as by the quest to find solutions to common problems. As such, subregional identity can – and did, in my case studies – serve as a mechanism of social spillover.

My argument about subregional identity as a driver of European integration supplements, but does not replace the more general neofunctionalist (and postfunctionalist) arguments that civil servants might come to define their interests "in terms of a regional" – that is, European – "rather than a purely national orientation" (Haas 1958: 13-14). Finland's preferences in regard to civil justice align with this broader notion of interest, which is anchored not just in Finland's complex identity as a nation, but also as a Nordic *and* a European state. As Tiilikanen (2003: 108) has explained it, the Finnish Presidency in 1999 "can be analysed as a Finish effort to access its own identify in the unification project," which identity "formed the essential basis for the formulation of Finnish interests for its Presidency."

To conclude, social spillover played a role in my two case studies, albeit in ways that do not fit the prototypical patterns found in the bulk of neofunctional studies. It provides a partial explanation by drawing attention to mechanisms of socialization and to the possibility that governmental elites might develop multiple identities – not just national and European, but also subregional (i.e., Nordic) – and that these identifies can serve not only as sources of ideas, but also as drivers of EU integration. Social spillover is thus the first, but not the last step towards a neofunctional explanation of national preference formation in Finland.

In addition to social spillover, neofunctionalism posits cultivated spillover as a driver of integration. Cultivated spillover is the idea that EU supranational institutions seek to "cultivate relations with interest groups and national civil servants so as to gain their support for realising integrative objectives, and to cultivate pressures vis-à-vis governments" (Niemann 2006: 42). My case studies show that the European Parliament, the Commission, and the Council Secretariat all made important contributions to the outcomes I seek to explain, although their roles, and thus their opportunities to exert influence over national civil servants, varied. There is clear evidence in both case studies that all three institutions were in favor of deeper integration in regard to civil justice issues,[133] and that their ideas – in particular those put forward by the Commission – directly influenced the preferences articulated by the Finnish MoJ, both in Amsterdam and in Tampere. However the fact that a key Member State (Finland) picked up ideas from written documents prepared by the supranational institutions does not itself make a strong case for cultivated spillover, which goes beyond dissemination of ideas to encompass personal contact and targeted persuasion. My findings (presented in Chapters 7 and 8) substantiate that civil servants from both the Commission and the Council Secretariat were closely involved in a personal way with the Member States, although they had fewer overt opportunities to collaborate with Member State actors in the context of the IGC (Amsterdam) than they had in the context of the Finnish Presidency and the Tampere summit. Yet Chapter 7 shows that both Commission and Council Secretariat officials played important drafting roles in the treaty-revision context (Amsterdam), and were thus closely involved and present in a variety of working sessions, even

if not always visibly so. Moreover, they also participated in the Helsinki Seminar in March 1997, which provided an occasion for them to engage directly in conversations with Member State civil justice officials about the communitarization of civil justice (Chapter 7). In regard to Tampere, Commission and Council Secretariat officials were closely involved from the earliest efforts by the Finnish Presidency, starting with the brain trust it assembled – the 'Group of 4' (section 8.4 in Chapter 8 above) and continued throughout the Tampere preparation process, including the *tours de capitales*, on into the final intense drafting of the Tampere Milestones. Activities surrounding the Tampere summit reveal a high level of interaction – both personally and in terms of detailed content – with at least some Member State representatives. Cultivated spillover was strongest in regard to the members of Finland's Tampere Team, which was not unlike preaching to the converted, at least up to the point when the Finnish 'congregation' rebelled and insisted on taking the lead in drafting the Presidency Conclusions for the Tampere summit. Opportunities for direct contact with civil servants in the MoJ were, on the other hand, more limited. In contrast, my findings do not reveal any direct EP efforts vis-à-vis Member State governmental elites in either case study, nor do they reveal any efforts by any EU institutions to mobilize civil society actors in regard to civil justice issues.

To conclude this point, I argue that cultivated spillover was present in both case studies, and contributes towards an explanation of the outcomes. Yet my findings are not specific enough to discern the actual influence of this factor or to disentangle it clearly from social spillover. All three EU institutions[134] influenced Member State positions by virtue of the ideas they put on the table, but were not in strong political positions to get their way. Except for the extraordinarily active and interested role of the Council Secretariat, I found no evidence of strategic efforts on the part of EU institutions to target particular national civil servants or civil society actors – at least not in regard to civil justice – beyond the ordinary activities that occur in the (admittedly intensive) collaborative process of preparing for a summit.

Neofunctionalism's third driver – functional spillover – was also present in my two case studies, and thus also contributes to an explanation of the outcomes. Functional spillover refers to the "situation in which the original goal can only be assured by taking further actions, which in turn create a further condition and need for more action, and so forth" (Lindberg1963: 10). While anchored in Haas's writings on the expansive logic of sectoral integration, Niemann's reformulation encompasses "all types of *endogenous-functional* interdependencies, i.e. all tensions and contradictions arising from within, or which are closely related to, the European integration project, and its policies, politics and polity, which induce policy-makers to take additional integrative steps in order to achieve their original objectives" (Niemann 2006: 30). As such, this type of spillover can lead to deeper integration in the same policy field, or in other policy areas (id.). Functional spillover is related, more generally, to the "globalization of problems" perspective that posits structural causes (Real-Dato et al. 2013: 76). However, as Niemann (2006: 31) points out, neofunctionalism does not treat functional spillover as a determinstic cause, but one that is only activated when agents "perceive functional structures as plausible and somewhat compelling."

Functional spillover played an important role in both my case studies. From the earliest policy proposals, pressures emanating from the free movement of persons – one of the EEC's original four freedoms – constituted the core argument put forward in regard to all JHA policy fields. While the impact of these pressures was especially clear in regard to the need for "flanking measures" related to external border control, asylum and immigration (Niemann 2006: 193-203),

they are equally clear – if less overtly compelling – in regard to civil justice issues.[135] Free movement of persons is significant because it is the freedom that has "the most direct bearing on the lives of individual citizens" and is thus of central concern when it comes to developing the EU's internal market beyond mere economic cooperation and eliminating discrimination among EU citizens (id. at 194-5). Moreover, ensuring free movement of persons is instrumental to achieving the other three (economic) freedoms (i.e., goods, services, capital). Measures related to transnational litigation and the free movement of judgments were tethered to these overarching integrative goals from the outset, while the loftier rhetoric linking such measures to fundamental rights and the status of EU citizenship emerged more gradually, particularly in connection with the notion of the Area of Freedom, Security and Justice. In addition, the deficiencies of the Third Pillar (Chapter 6 above) – such as the use of conventions (treaties) that were concluded but never entered into legal force, the absence of judicial review, the unanimity requirement for voting, and the excessive complexity of institutional arrangements for decision-making – were perceived as a "major stumbling block to co-operation" and thus also constituted a form of functional pressure "from within" that drove further integration (Niemann 2006: 198-201). These functional arguments, which have long been the common coin of the realm in EU integration discourse, were widely embraced in regard to civil justice (and other AFSJ issues), and not just by political elites, but also within the academic community. The European Parliament and the Commission devoted great effort to develop and articulate these arguments in increasingly expansive and imaginative ways (Chapters 7 and 8). While some have skeptically noted that the free movement of persons argument "contains an element of rhetoric," this is how the game is played; what "ultimately matters is that decision-makers ... bought the argument" (id. at 203). According to one Member State official who was closely involved with civil justice issues in the IGC (Amsterdam), "we mobilized that argument, but had something else in mind" (Interview #60). As this quote suggests, the functional logic is so well-established in EU discourse that it can easily be instrumentalized by knowledgeable actors.

In connection with civil justice, functional spillover arguments quickly evolved beyond the need to ensure adequate procedures to make life simpler for those who transact business or travel to other Member States, to more heartfelt concerns with the situations of families and the aim of securing the fundamental right of access to justice and procedural fairness. As such, civil justice must be seen as a hybrid policy field, in which the traditional concerns of free-movement oriented EU lawyers came to be infused with more universalistic concerns of legal elites who cared not only about the niceties of free movement, but also about a panoply of rule-of-law and social issues that could be linked, by extension, to the (initially) mechanistic concerns about coordinating national legal systems to make them mesh more efficiently. While civil justice initially emerged from a functional logic, it soon took on a larger life of its own, one which accorded with the more ambitious and idealistic visions brought to bear by the legal elites who became involved and recognized an opportunity to have a hand in building a more perfect European legal order.

To conclude, neofunctionalism makes major contributions towards explaining preference formation in my two case studies, despite the lack of pluralistic contestation or involvement of civil society actors. Social, cultivated, and functional spillover were not only present but provide causal explanations for major elements of Finnish proposals, both in Amsterdam and in Tampere. These forms of spillover do not necessarily exist in every case, despite some overlap between social and cultivated spillover. Despite his particular interest in "political integration toward

community" (Haas 1958: 28) and concomitant "changing attitudes, values and ideologies" (id. at 283), Haas also stated clearly that the logic of functional interdependency as a driver of integration does not necessarily imply "any ideological commitment to the European idea" (id. at 297). Thus, functional spillover, standing alone, would not establish a convincing case for neofunctionalism; this explanation is in (liberal) intergovernmentalism's DNA as well, and thus it does not suffice to distinguish between the two theoretical approaches. However, national preference formation in my case studies does not reflect only exogenous Member State preferences but also shows strong evidence of endogeneity – that is, having been influenced by the EU institutional environment. As Niemann (2013: 637) has explained it, the key "actors' interests and identities [were] moulded and constituted by both material *and* socio-cognitive structures. Their preferences [were] shaped by social interaction and the evolving structures, norms and rules of the domestic and the EU polity (i.e. membership matters) rather than exogenously given." These findings are what tip the explanatory balance towards neofunctionalism as the better theory, even though my case studies do not fit neatly within this theoretical tradition, and the theory does not explain everything of interest.

Neofunctionalism goes a long way, but not the whole way towards explaining key features of my two case studies. In particular, it does not adequately explain many of the key characteristics of Europeanized civil justice, notably the elites' specific concern with solving practical cross-border legal problems faced by real people – citizens and families, as well as business actors;[136] the perception that developing the AFSJ is a "natural idea for a lawyer"; the need to develop common notions about procedural fairness as a means to build trust among legal actors in the Member States; and the strategy of linking the concepts of citizenship, rights and civil justice, in order to build a more perfect European legal order – a holistic and "consistent whole" (German Tampere Proposals 1999: 6-8, at p 7) – which does not stop at ensuring that people do not "fall through the cracks in legal protection," but also embodies a "common sense of justice" (Presidency Civil Justice Memo 1999: 5) and entails a "comprehensive assessment of the rights of the citizens of the Union and their status" (MoJ Access to Justice Report,¶ 2.2). Fully explaining these particulars requires coming to grips with the world views of legal elites (subsection 9.2.2.4 below).

9.2.2.1.6 <u>*Conclusions*</u>

When seeking to explain important constitutional shifts in the course of European integration – such as treaty changes that extend EU competence into new policy fields (Amsterdam) and long-term policy formulation aimed at implementing the macro-level institutional change (Tampere) – one must refrain from assuming that such shifts are *tabula rasa* developments that emerge purely as a response to new conditions. They may well be, but it is more often the case – as here – that major integrative steps have long and tangled historical roots. An adequate explanation must therefore differentiate the structural situation that has created "the context of choice and cast up problems to be resolved" from the political processes it triggers, and which in turn lead decision-makers to make particular choices (Sandholtz & Zysman 1989: 127). The structural situation generates the opportunity, and impels action, but does not "dictate the decisions and strategies" as a matter of logic (id.). Rather, the choices which emerge from these "political processes ... have political explanations" and ultimately depend on the "timing and dynamics of a long series of contingent decisions" (id. at 127-8).

The main structural condition that set the communitarization of civil justice in motion

was a decision made by the Member States years earlier – in the context of the Maastricht Treaty – to return to the drawing table a few years later, even though many of the issues on the EU's agenda were not ripe for decision when the appointed time came. As Weiler expressed it at the time, the 1996/97 Intergovernmental Conference was the IGC that "should never have started" and "should never have ended," since there were "too many open agenda items to be discussed and negotiated seriously in the ludicrously short time available" (Weiler 1997: 310). This structural condition was exacerbated by pressures on EU external borders unleashed by the collapse of the East Block, war in Yugoslavia, and other global events that triggered massive movement of persons towards the territory of the EU, as well as by internal pressures resulting from increasing border-free movement of persons within the EU unleashed by the 1985 Schengen Agreement.[137] In addition, mounting pressure on the EU for institutional reform resulting from the wave of applications by prospective new Member States from Central and Eastern Europe heightened the atmosphere of crisis, and drew critical attention to the ability of such countries to adopt and implement EU law.[138]

The political processes that these structural conditions set in motion have been examined at length in Chapters 6, 7, and 8. The 'grand debate' between neofunctionalism and (liberal) intergovernmentalism provides valuable tools for making sense of these complex processes and explaining concrete outcomes. These theories go a long way towards explaining my case studies, which involve intergovernmental bargaining among Member State and EU elites who are called upon to exercise political leadership aimed at "creating a common European interest and then constructing a set of bargains that embody that understanding" (Sandholtz & Zysman 1989: 128). In particular, these theories raise the key question whether national preferences can be isolated from the European institutional context in which they act. My case studies show that national preferences – particularly those of Finland, which played a key role in the developments examined in this dissertation – were heavily influenced by ideas and experiences emanating from regional (European) as well as subregional (Nordic) sources. While my findings do reveal some instances where particular national concerns animated support for EU-level solutions, such as in regard to difficult cross-border family conflicts and debt collection procedures, these are ancillary issues – pieces of the puzzle but not part of the encompassing frame. The Finnish preferences examined in Chapters 7 and 8 above, which were instrumental in framing the emerging 'area of justice,' not only reveal a marked absence of concern with particular Finnish interests but also show that national and supranational infused each other and were not seen as clear separate realms. My findings in regard to the endogeneity of Finnish preferences provide strong support for neofunctionalism, even while the few examples noted above provide support for (liberal) intergovernmentalism.

My case studies depart from the common situation in which Member States and EU institutions are joined by a third set of actors from civil society – whether from the economy, NGOs, or the legal profession – who pressure public-sector actors to make policies that take their particular interests into consideration. In my case studies, there were no such 'third' actors, only what Haas (1968: xii) called "small groups of pragmatic administrators and politicians in the setting of a vague but permissive public opinion." So long as Member State "leaders and major elites share an incremental commitment to modest aims and pragmatic steps," integration can move forward; all the more so in a country like Finland at that time, where leaders and elites shared a deep "political commitment ... in favor of union" (Haas 1968: xxiv). While Finland was not the only Member State that strongly supported Europeanizing civil justice, it – together with

its allies in other Member States and in the EU institutions – carried the day. Member States having weaker preferences fell in line or – as in the case of Denmark, Ireland, and the UK in Amsterdam – opted out. My explanation does not privilege Member State actors over EU institutional actors, but merely acknowledges that Member States were the ultimate decision-makers in both of my case studies. As my process-tracing case studies show, the actors occupying key positions in both the EU institutions and in the executive branch of the Member State governments were "indispensable, and each was involved with the actions of the others" (Sandholtz & Zysman 1989: 108). The complex and layered "interconnections and interactions among them ... defy an effort to assign primacy, weight, or relative influence" (id.).

Given the absence of any 'third' civil society actors, my case studies call for a statist perspective that emphasizes the "power of public officials ... to impose long-term strategies without following the preferences of political parties or particular interest groups" (Ziegler 1997: 11-12). Unlike Ziegler's work on engineers, my case studies present a situation in which the (mostly) legal elites who occupied key positions in Member State executive branches and EU supranational institutions were on their own, locked in an ongoing policy-oriented dialogue with one another over an extended period of years, and virtually immune from any outside influences. Most of these actors were not experts in the particular civil justice fields affected by communitarization. Thrust into the political processes that led to intergovernmental decision-making in Amsterdam and Tampere, it is unsurprising that these elites looked to their own professional experience and values, alongside the expectations imposed by their bureaucratic position, to find ideas about what a European legal order should look like.

Legal elites and scholars[139] must be added to Haas's list of actors – economic technicians, planners, innovating industrialists, and trade unionists (id. at xix) – who have "advanced the movement" towards European integration. This in itself is step towards, but not a full answer to the question what drives legal elites, and whether the drivers are like or unlike the drivers that affect other types of actors. That Member States expressed different preferences about civil justice in connection with Tampere speaks against a one-size-fits-all explanation for the agency of legal elites and demonstrates that national cultures played a role (subsection 8.5.2.2 in Chapter 8 above). For example, Portugal's strong commitment to consumer protection is quite different from Finland's concern with the civil status of persons, the UK's concern with the connection between civil litigation and the internal market, France's concern with family law matters, the Netherlands' concern with higher-order ways to strengthen the European legal order, Austria's concern with the linkage between access to justice and EU legitimacy, Germany's concern with debt-collection procedures, Italy's concern with promoting alternative methods of dispute resolution, Spain's (and France's) concern with judicial training, Benelux's concern with ensuring adequate financial support for EU institutions, and Sweden's relative indifference towards civil justice matters. As the sociological approach (subsection 9.2.2.2 below) suggests, national "self-images and role conceptions ... based in tradition and culture ... help us understand why different member states vary in their goal priorities" (Elgström & Tallberg 2003: 203). Such particularities aside, it bears asking whether there is something particular in the orientation of legal elites, whether there is more to the story – in other words – than national interests, social spillover, cultivated spillover, and functional spillover. I will argue below (in subsection 9.2.2.4.3) that closer attention to the professional ideologies and logics of legal elites is needed in order to account fully for their agency in my case studies. As argued above, both neofunctionalism and (liberal) intergovernmentalism draw attention to the potential role of

governmental elites, and provide some tools for thinking about their role. Postfunctionalism, in turn, draws attention to the role of identity and sociality. Combining these theoretical frames is the first step towards explaining my outcomes. However, they must be supplemented, since none of them provides much guidance towards understanding what ideas, values, or professional interests influence the behavior of legal elites in transnational settings.

As noted at the beginning of section 9.2.2 above, theories used to explain European (dis)integration have been relatively stable, but have in recent years moved further away from the 'grand debate' for a number of reasons. I have chosen to work through these traditional theories with some care, since they provide useful tools, but also because my case studies are in line with their origins in the field of international relations. Yet the disciplinary narrowness of their IR heritage, together with the complex path-dependence that characterizes the debates, can make these theories cumbersome and limit their applicability and usefulness. As the nature of European integration has changed, new theoretical approaches have been developed, and theories developed in other contexts have been brought to bear on European integration. In the following subsections (9.2.2.2 and 9.2.2.3), I consider what some theories in wider circulation in political science and sociology can contribute to explaining my case studies, then turn (in subsection 9.2.2.4) to theories that are more narrowly tailored to the role of law and lawyers in European integration.

9.2.2.2 Widening the Theoretical Lens: Explaining Council Presidencies

Some scholars have taken the salutary step of using theoretical approaches more widely found in "general political science theory" (e.g., the rational choice, sociological and historical variants of neo-institutionalism) to explain EU outcomes, in lieu of the approaches that have developed in EU-specific research (e.g., intergovernmentalism and neofunctionalism), in order to "bridge the divide" and "bring the isolated study" of European integration "into a broader political science perspective" (Elgström's 2003b: 11).[140] With this broader theoretical agenda in mind, Elgström (2003a) offers a useful theoretical framework for understanding Member State role performance during a six-month rotation in the EU's Presidency. His theoretical framework separates country characteristics (i.e., individual qualities of a particular country that drive its behavior) from more generalizable drivers – namely the rationalist, goal-oriented "logic of consequences" and the sociological, normative "logic of appropriateness" – which Elgström (2003b: 8-14) adopts from the institutional approach developed by March and Olsen (1998).[141] Elgström treats country characteristics as "background variables that may in diverse ways influence actor *interests* and/or *identities*" (id. at 8, italics in the original), and relies on the two more generalizable logics to carry the weight of explanation.

These two logics are not identical to intergovernmentalism or neofunctionalism, nor to the more developed versions of new institutional theory (subsection 9.2.2.3 below), but are akin to both of them, and enable conversation between scholars working within an EU-specific theoretical frame, on the one hand, and those working within broader social scientific frames, on the other. Thus, like (liberal) intergovernmentalism, Elgström's rationalist approach is the "realm of instrumental rationality," where the Member State occupying the Presidency is seen as a strategic actor who is "seeking to satisfy exogenously given national preferences," and "strategic choices are guided by the outcome of actions" (Elgström 2003b: 10). In contrast, the sociological approach, like neofunctionalism, views the Presidency as an "identity-driven actor" who is "steered by notions of 'how a Presidency *should* behave', and of how other actor-types

should act, rather than by cost-benefit calculations" (id. at 10-11).[142] This bifurcated theoretical framework, which Elgström and Tallberg (2003: 203-5) treat as predominantly complementary – rather than competing – perspectives, offers a way to understand "how rational and ideational factors interact to produce EU policy" (id. at 191), given the possibility that "elements of both theoretical mechanisms may well be present" (id. at 204). I argue that both the rationalist and sociological explanations contribute towards an explanation of the Dutch and Finnish Presidencies in my two case studies.[143] I consider the rationalist logic of consequences first, then turn to the sociological logic of appropriateness.

The behavior of the Dutch Presidency in 1997 can be explained by the rationalist supposition that Member States are keen to be seen as having a "successful Presidency," given that "demonstrable progress carries positive reputational effects" (Elgström & Tallberg 2003: 193), which ultimately have (or at least may have) "strategic value" (id. at 204).[144] The Dutch Presidency in 1997 was characterized by a "modest, ... subdued," and "impartial" Presidency, during which the Netherlands – still reeling from the 1991 Maastricht trauma, which occurred when the Dutch Presidency's radical supranational approach to treaty-revision encountered massive resistance – concentrated on fulfilling the administrative, organizational, and mediator roles of the Presidency and opted to avoid stalemate and "come up with a treaty text," rather than raise "high expectations" about the outcome of the IGC or introduce "ambitious proposals of its own making" (van Keulen & Rood 2003: 82-3). Somewhat paradoxically, the Dutch in 1997 saw a modest Presidency "as a prerequisite for developing further the integration process which, in the end, is in the Dutch interest" (id. at 82). Moreover, the Dutch Presidency's modest approach was rational in the face of resistance by a number of line ministries in the Netherlands – such as the Ministry of Justice in regard to criminal justice – which did not "support the Dutch traditional supranational view of European integration unconditionally," but preferred a more intergovernmental approach instead (id. at 84).

Similarly, some behavior of the Finnish Presidency in 1999 can be explained in terms of a rationalist logic of consequences, albeit in a way that does not fully square with Moravcsik's (liberal intergovernmentalist) emphasis on national interest. Like the Dutch Presidency in 1997, Finland also stepped back from "immediate national interests" regarding some issues, in order to serve the higher goals of keeping the "EU machinery functioning" (Tiilikainen 2003: 115) and achieving a successful Presidency. At the same time, however, the Finnish Presidency also strove to "leave the Presidency's own imprint on EU structures," including efforts to "promote the role of its immediate [Nordic] neighbourhood on the Union's agenda" and to "introduce 'northern' values into European integration" (id. at 115-6).[145] My second case study provides further examples of how the Finnish Presidency sought to leave its imprint on the EU. First, the Tampere Team wrestled with the Council Secretariat over control of the Tampere Milestones, in pursuit of what the Finns considered a better way forward for the AFSJ. And second, the contributions of the Finnish Ministry of Justice in this context reveal another context in which Nordic values were promoted. As in the paradoxical case of the 1997 Dutch Presidency, which took a modest approach because it was ambitious,[146] these Finnish examples can be characterized as rationalist insofar as promoting pragmatic European solutions was perceived as being in the national interest. However, this reading of 'national interest' departs from a zero-sum image and becomes uselessly tautological, when used to argue that anything a Member State does can be characterized as being in its interest. More convincing are the rationalist arguments that both Member States acted in pursuit of their (reputational) interest in having a successful Presidency

and that Finland endeavored to leave a unique imprint on the AFSJ.

The sociological logic of appropriateness, which orients analysis away from cost-benefit calculations and towards notions about how a Presidency and other actors "should" act (Elgström 2003b: 10-1),[147] also provides insight into the Dutch and Finnish Presidencies in 1997 and 1999, respectively. The sociological approach emphasizes "antecedent factors" – such as "tradition and culture" – that "shape what rationalists later conceptualize as exogenously derived interests" (Elgström & Tallberg 2003: 203), along with learning and path-dependence (Elgström 2003b: 11). This approach provides an alternative explanation for reputational concerns, by underlining "the aspirations to live up to expectations and do what is considered appropriate" (id. at 204), rather than perceived strategic advantage.[148] In the case of the Netherlands, for example, some officials expressed the view that a "modest role conception is considered 'inherent' in the position and function of the EU Presidency" (van Keulen & Rood 2003: 82, 85).

In the case of Finland, which was a new Member State at the time, it is difficult to draw a clear line between a country characteristic, such as the typical behavior of a "debutante" Member State that places a high priority on the Presidency and devotes "substantial energy and resources to make its first stint in office a success" (Elgström 2003b: 9; see also Tiilikainen 2003) (sections 8.4 and 8.5 in Chapter 8 above), on the one hand, and the normative pressure (logic of appropriateness) "to 'do the right thing' within the given context" (Risse 2000: 4), on the other. Sociological explanations emphasize that EU Presidencies face a number of expectations, some of which are generic – such as the norm of impartiality and the expectation that the Presidency will provide leadership – and some of which are country-specific and "anchored in previous experiences and country characteristics (Elgström 2003b: 13). Unlike the Dutch Presidency, Finland did not face specific expectations based on prior experience, because it was a new Member State. Thus, Finland could concentrate on fulfilling the various "role ideals" to the best of its ability (id. at 14),[149] while also "agenda-shaping" (Tallberg 2003) by pressing on a select handful of national priorities (including the AFSJ and civil justice, Nordic values, and Nordic principles of administration). In regard to the former, Finland prioritized smooth handling of the "huge agenda it had inherited," relying on the Presidency's "co-ordination" (bureaucratic) and "mediator" (broker) functions (Tiilikainen 2003: 111), in line with the EU's "impartiality" and "effectiveness" norms (Elgström 2003b: 7). In regard to the latter, Finland also fulfilled the Presidency's "leader" and "entrepreneur" roles (id. at 14). Overall, Tiilikainen (2003: 111) argues that the sociological approach provides "the best understanding of Finland's action," insofar as the country "followed the norms and expectations that seemed to prevail for a good Presidency" and endeavored to balance the four role ideals, rather than "using its EU Presidency as an instrument for national interests."

The debate between rationalist and sociological approaches to EU Presidencies (Elgström 2003a) is closely related to broader institutionalist debates, to which I now turn.

9.2.2.3 Widening the Theoretical Lens: Institutions and Fields

The preceding discussion of the 'grand debate' in European integration studies has noted a number of points of contact and overlap – if not convergence – between the traditional theoretical approaches and their progeny, on the one hand, and theories used more widely in the social sciences, on the other. The EU-specific theories illuminate some important aspects of integration, and for this reason, I disagree with scholars who reject the traditional debate as "sterile."[150] Yet, at the same time, I agree that maintaining a *sui generis* Europe perspective runs

the risk of distorting understanding by obscuring other processes that might be at work, such as globalization, or by diverting attention from other important questions. Moreover, as implied by my earlier endorsements of Verdun's "eclectic" approach to integration theory and Elgström's complementary (rather than competing) way of framing the debate between the "rationalist" and "sociological" approaches to explaining EU Presidencies, I share the view that exclusive orientation towards dichotomies – national/supranational, state (top-down)/society (bottom-up), ideational/material – can lead into an interpretive dead end (see Parsons 2010). Thus I join those who continue to call upon scholars to "combine theoretical frameworks to understand [the EU's] complexity, just as theories of state building would do" (Saurugger 2016: 948).

Theorizing about institutions has a long history in the social sciences, and the "term *institutional* has come to mean rather different things in different contexts and disciplines" (March & Olsen 1998: 948).[151] Selznick (1959: 17) revolutionized the study of organizations by observing that some of them – which he labeled institutions – are "infused with value beyond the technical requirements of the task at hand." This insight led to a dual approach toward the task of understanding their social action, which integrates interpretive analysis of meaning or symbolic significance, on the one hand, with structural analysis oriented towards material factors and constraints, on the other. Institutionalism examines the "relations between institutional characteristics and political agency, performance, and change" (March & Olsen 2006: 4).

New variants of institutional theory have emerged in recent decades – rational choice, sociological, and historical institutionalism (Jepperson 1991; Powell & DiMaggio 1991; Thelen & Steinmo 1992; Hall & Taylor 1996; Immergut 1998).[152] These theories have been brought to bear on the study of the EU – a "large multi-institutional actor" (Madsen & Christensen 2016: 17) – which is "without question the most densely institutionalized international organization in the world" (Pollack 2009: 125). In the EU context, institutions serve both as independent variables that influence particular outcomes – such as the EU's supranational institutions and national ministries – and as dependent variables that are the outcomes to be explained, such as the AFSJ, the 'area of justice,' and the Tampere Milestones. In this sense, my dissertation is doubly institutional. The following discussion briefly sketches each of the three institutionalisms, and links them to neofunctionalism and intergovernmentalism. My aims here are to demonstrate these theoretical linkages, then explore how 'new' institutional theories can add to the (partial) explanations offered above (in section 9.2.2), but without repeating arguments already made.

While much richer as a theoretical tradition and set of analytical tools, rational choice institutionalism (RCI) in the context of EU studies is closely linked to, albeit not synonymous with (liberal) intergovernmentalism.[153] Both theories regard actors as "strategic utility maximizers whose preferences are taken as given" (Pollack 2009: 126), and are oriented towards methodological individualism and a "decision-making logic based on an interest in maximizing benefits relative to costs" (Campbell 2004: 14), i.e., the 'logic of consequences' or the "calculus approach" (Hall & Taylor 1996: 939). Economic factors – including an orientation towards efficiency and equilibria, transaction costs and property rights – play a prominent role in both theories, although neither limits itself to them. Also similar is a tendency to view the EU's supranational institutions as agents of the Member State principals, and to maintain a correspondingly limited view of their importance. Notably, institutions are seen to constrain actors and shape their strategies, but not to influence their preferences (Bulmer 1994: 356). These similarities aside, RCI has made many other contributions to the study of European integration (Pollack 2007 & 2009), but offers no value added for my case studies beyond the arguments

already considered above with regard to intergovernmentalism (subsection 9.2.2.1) and the rationalist/sociological approach to explaining Council Presidencies (subsection 9.2.2.2). As already noted, economic considerations played a very limited role in explaining the Europeanization of civil justice, while the rationalist 'logic of consequences' contributes to an explanation of Member State behavior in the context of the Presidency. The RCI argument that an institution reflects the "efficiency with which it serves the material ends of those who" have created it (Hall & Taylor 1996: 949) is an important one, but in my view is related to, and thus subsumed in the discussion of functional spillover (subsection 9.2.2.1 above).

In contrast, the sociological and historical variants of institutionalism offer a much better fit with my data. In a paradigmatic statement by March & Olsen (2006: 4), institutionalism "emphasizes the endogenous nature and social construction of political institutions. Institutions are not simply equilibrium contracts among self-seeking, calculating individual actors or arenas for contending social forces. They are collections of structures, rules, and standard operation procedures that have a partly autonomous role in political life." Sociological institutionalism (SI), which follows Selznick's work, places great emphasis on the role of ideational factors[154] and incorporates cultural factors into analysis of the origins and impacts of institutions. In this sense, SI defines institutions broadly to include "not just formal rules, procedures or norms, but the symbol systems, cognitive scripts, and moral templates that provide the 'frames of meaning' guiding human action" (Hall & Taylor 1996: 947). This definition "challenges the distinction ... between 'institutional explanations' based on organizational structures and 'cultural explanations' based on an understanding of culture as shared attitudes or values" (id.). In this sense, SI provides a much more open-ended framework for analyzing the role of culture than neofunctionalism, which made space for ideational and cultural factors, albeit in a limited way that is linked to the spillover mechanism. Like neofunctionalism, SI recognizes that institutions can have a normative impact on individuals, but also goes further by adding that they can have a cognitive impact as well. "Institutions influence behaviour not simply by specifying what one should do but also by specifying what one can imagine oneself doing in a given context" (Hall & Taylor 1996: 948).[155] As Ziegler (1997: 20) has noted, "recent variants of sociological institutionalism replace the concepts of ethical norms and value orientations with the concepts of cognitive norms, classifications, and repertoires of action." The distinction between normative and cognitive is significant, because it supplements 'old institutionalism's' emphasis on deliberate and self-conscious norms and values by adding the "taken-for-granted scripts, schema, habits and routines" through which actors "interpret the world" (Campbell 2004: 19).[156] SI does not deny individuals the possibility of rational action, but argues that "what an individual will see as 'rational action' is itself socially constituted" (Hall & Taylor 1996: 949), thus that institutions "do not simply affect the strategic calculations of individuals, ... but also their most basic preferences and very identity" (id. at 948). An individual's behavior is thus "not fully strategic but bounded by [his or her] worldview (id. at 939). In contrast to RCI's emphasis on efficiency and the "logic of instrumentality," SI posits that an institutional form or practice is adopted because it "enhances the social legitimacy of the organization or its participants" in a way that is "valued within a broader cultural environment" or that may reflect the "cultural authority" of a particular professional community (id. at 949-50), i.e., the "logic of appropriateness" (March & Olsen 2015). Finally, SI shares with neofunctionalism the attention to feedback effects, as discussed in connection with the supranational governance variant of neofunctionalism above (subsection 9.2.2.1.3 above).

This brief survey of key features of sociological institutionalism reveals a number of ways in which SI is complementary to neofunctionalism, and one additional way in which it can contribute towards an explanation of my case studies. By expanding Selznick's earlier moral focus to include a cognitive element, SI provides a tool for a richer understanding of the agency of legal elites, whose preferences not only reflect their norms and values but also the "beliefs and self-images that together make up the implicit outlooks or 'worldviews'" of most professional groups, including legal professionals (Ziegler 1997: 19). I return to this argument below (subsection 9.2.2.4).

While sociological institutionalism attends to how an institution "adapts to incremental change" (Ziegler 1997: 20), the third variant of institutional theory – historical institutionalism (HI) – focuses on how "large organizational structures are created amidst the key turning points in a society's development" (id. at 19). HI calls for taking "cognizance of the historical development of an institution, and the original, distinct culture and problems in which it arose" (Sanders 2006: 39), and typically emphasizes state power (Ziegler 1997: 19), which other institutionalisms often downplay. Overall, HI views causality as contextual, and outcomes as resulting from "dense interactions among economic, social and political actors that work according to different logics in different contexts" (Immergut 1998: 17-18). In this sense, HI is eclectic, insofar as it encompasses the different logics and mechanisms favored by RCI and SI (Hall & Taylor 1996: 940). However, HI is also characterized by its particular historical and holistic approach, notably its close attention to the long-term processes, the sequence of developments, and "critical junctures" (Pierson & Skocpol 2002; Pierson 1996 & 2004), rather than just looking at "slices of time or short-term maneuvers" (Pierson & Skocpol 2002: 693). HI – like other institutionalisms, on occasion – accords great weight to the notion that social change is path-dependent, i.e., that the effect of forces for change "will be mediated by the contextual features of a given situation often inherited from the past," which features include institutions themselves (Hall & Taylor 1996: 941). Path-dependence implies that "once actors have ventured far down a particular path, they are likely to find it very difficult to reverse course," and that the "'path not taken' or the political alternatives that were once quite plausible may become irretrievably lost" (Pierson & Skocpol 2002: 10).

HI's emphasis on path-dependency is particularly valuable in the context of preference formation. HI does not stop at the insight that social interests may not be "efficiently transmitted to political leaders via interest groups and political parties," but adds the insight that preferences are "shaped by ... *institutions that bear traces of their own history*" (Immergut 1998: 16-7, emphasis added). Thus, HI not only insists that institutions "provide the context in which individuals interpret their self-interest" (id. at 21), but draws attention to the fact that institutional contexts are "historically generated" (id. at 23) and that the choices actors make also establish the "context for their future action" (id. at 27). The path dependency of institutions is "shaped by their political mandate, as well as by the organizational formats, normative preferences and professional balances inscribed in them" (Madsen & Christiansen 2016: 21).

My empirical analysis in Chapters 6, 7, and 8 fits comfortably within the historical institutionalist tradition in many respects. In particular, the long history leading up to what was perceived as the 'sudden' and 'unexpected' communitarization of civil justice in Amsterdam in 1997 traces a complex itinerary of ideas, actors and institutions in which both Member State and EU institutional preferences were "produced by historically specific institutional arrangements" (Lizardo & Stoltz 2017: 2) in which actors were reacting to a legacy of previous policies (Weir &

Skocpol 1985). However, this long process gives the appearance of gradual change, which is somewhat at odds with HI's tendency to focus on critical junctures of a more revolutionary nature. In this context, Kingdon's (1984: 173-204) concept of "windows of opportunity" – which has, along with his entire "multiple streams approach," been adapted to the study of EU policy-making by Zahariadis (2007 & 2008) and others (e.g., Zohlnhöfer, Herweg & Rüb 2015; Béland & Howlett 2016) – provides a more congenial way to understand the moments when national and supranational actors had opportunities to express their preferences (see also Huneeus 2006: 185-6). While I have argued that the communitarization of civil justice is revolutionary in terms of its effects on the European legal order, this is a far cry from arguing that either Amsterdam or Tampere were revolutionary moments.

HI's path-dependency thesis warrants further examination in connection with another dimension of my case studies. On the one hand, both Amsterdam and Tampere were path-dependent in the sense of being shaped by earlier developments, debates, and proposals.[157] As Chapters 6, 7, and 8 demonstrate, the preferences of national and supranational actors were highly responsive to what had been said and done before, not just within the EU context, but also in subregional settings (i.e., Nordic cooperation). Moreover, the Third Pillar, which had been created in Maastricht some years earlier, had already set the EU on a formal (albeit intergovenmental) path towards greater coordination of "judicial cooperation in civil matters." The status quo as of the mid-1990s, when the Intergovernmental Conference was convened to revise the treaties according to the pre-agreed schedule, was the 'path-not-taken' along which the Member States could stand still or move forward. However, moving backwards – in the sense of dis-integration in regard to civil justice matters – was not perceived to be an option at the time.

Finally, my case studies present another context in which path-dependency is relevant, namely, in connection with the posture of national legal elites who might be expected to resist Europeanization of core elements of legal sovereignty (Kagan 1997: 180 ff., 2007: 107 ff.). From this perspective, long-established institutional arrangements create path-dependencies that can be expected to serve as impediments to pressures coming from outside the national legal order, whether from Europe or from another source, such as the USA (Kagan 2007: 108). Given that some powerful national legal elites would "lose influence or income" (id.) or be otherwise "disadvantaged or philosophically disturbed" by the proposed legal changes (id. at 100), why was there no push-back from national legal elites? Why did lawyers, judges and legal scholars not point out how the proposed changes might "clash with long-established laws, legal principles, and institutional practices, or ... have unpredictable and probably unwelcome consequences" (id. at 108)? The main answer, as noted earlier, is simply that legal elites in civil society were largely unaware of what was in the works, and the few who knew were hard pressed to gain access to relevant information.

As for governmental legal elites, such as the civil servants who played a central role in national preference formation, the answer to this question is more complex. First, as discussed above, many of these persons – including key actors in Finland – were by definition in a role where their mandate was to find viable European solutions, rather than to protect their national legal order from European intrusion. The UK insistence on mutual recognition as an alternative to deeper integration constitutes a major exception. However, the UK simultaneously called for developing minimum standards of procedural fairness for the EU, which is a fairly far-reaching pro-integration step in itself, even if one that falls short of unrestrained harmonization of civil procedure laws. A second reason why national governmental legal elites did not resist that the

key actors were *not* themselves experts in the affected legal fields. (Recall also that ministry experts were excluded from negotiations in Tampere, as a way to keep discussions at the summit on the level of political goals and generalities, and to avoid descending into expert nit-picking.) Thus, to some degree, the key legal elites involved in making crucial decisions simply lacked sufficient specific expertise on civil justice matters to foresee the "unpredictable and probably unwelcome consequences."[158] My argument is *not* that they did not know what they were doing, because in fact I believe that they knew exactly what they were doing. In Amsterdam, for example, a pro-integration expert civil servant who understood the far-ranging implications of communitarizing civil justice did not raise the alarm with his/her head of state when pointedly asked, but rather gave a green light, indicating that it was no big deal. Governmental legal elites were caught up in the larger enterprise of creating a pan-European 'area of justice,' and cared more about the big picture than the details. Third, recall that the Tampere process entailed assembling a pan-European mosaic of legal institutions that should be part of the emerging European legal order, not zero-sum bargaining. As such, some Member States expressed preferences that included unique national legal institutions that they deemed appropriate for pan-European use. Indeed, a number of Member States supported adoption of *another* country's unique legal institution – viz., German debt-collection procedures – at EU level. In this sense, the policy-making process in Tampere was open-ended and inclusive (in terms of topics), rather than exclusionary. The package-deal approach taken by lead negotiators aimed to ensure that everyone got something they wanted. And fourth, the proposed changes were not antithetical to the "ideals of bureaucratic legalism" that typically undergird the attitudes of European (or at least Continental) legal elites, but largely consistent with them (Kagan 2007: 108; Damaška 1986).

Finally, institutionalist approaches compel attention to the notion of the organizational field (Scott 1991), which reflects contemporary institutionalism's emergence from organizational sociology. According to this concept, institutional action reflects "perspectives defined by the group of members that comprise the institutional environment" (Wooten & Hoffman 2017: 55), with the result that the environment itself is viewed as a unit of analysis (Warren 1967). In the context of organizational sociology, a field was seen as consisting of a "community of organizations that partakes of a common meaning system and whose participants interact more frequently and fatefully with one another than with actors outside the field" (Scott 1995: 56). An organizational field may thus include "constituents such as the government, critical exchange partners, sources of funding, professional and trade associations, special interest groups, and the general public – any constituent that imposes a coercive, normative or mimetic influence on the organization" (Wooten & Hoffman 2017: 56). Seen more broadly, an organizational field – sometimes called an "inter-organizational field" (Warren 1967) or an "institutional sphere" (Fligstein 1990) or an "institutional field" (Powell & DiMaggio 1991) – is a "political, economic, or cultural arena ... structured by ... the network of relationships within which it was embedded" (Wooten & Hoffman 2017: 56; see also Bourdieu 1990). This perspective has been broadened to encompass virtually any "recognized area of institutional life" (Wooten & Hoffman 2017: 56).

Rather than examine particular institutions in isolation, the dynamic 'field' approach examines complex, relational constellations. Work on organizational (or institutional) fields has recapitulated familiar developments within institutional theory more generally. Thus, there has been a gradual shift from primary emphasis on rational/structural explanations, towards concern with normative and regulative dimensions, and next towards "understanding the *cultural and cognitive processes* that guided field members' behavior" (id. at 58). This approach entails

uncovering "field-level 'logics' " or "schemas" that consist of "material practices and symbolic constructions" to guide behavior (id.). This research tradition has gradually moved away from an "over-socialized view" (Granovetter 1985) that "depicted recipients of field-level influence as a homogeneous collection" of zombie-like actors, "each behaving according to a social script designed by the institutional environment" (Wooten & Hoffman 2017: 59). Increasingly, the field has come to be seen as a contested arena – a "field of struggles" (Bourdieu & Wacquant 1992) – rather than one of "isomorphic dialogue" (Wooten & Hoffman 2017: 60). It is a place of strategic action (Fligstein & McAdam 2012) where actors "relate to one another out of shared, though not necessarily consensual, understandings about the field" (Wooten & Hoffman 2017: 63). The contemporary understanding of fields is thus "as much about the relationship between the actors as ... about the effect of the field on the actors" (id. at 64).

The organizational field research tradition was initially oriented towards explaining convergence or isomorphism,[159] such as by reference to the drive for legitimacy (Powell & DiMaggio 1991: 3, Edelman et al. 1991 & 1999). Some scholars have suggested that mimetic processes may be relevant in European integration. Katzenstein (1997), for example, has argued that Germany supports federal arrangements at EU level, since "institutional isomorphism makes life so much easier for German policy-makers and bureaucrats to function within the Brussels framework" (Risse 2005: 300). Jachtenfuchs (2002) provides an alternate explanation for the observed correlation between a Member State's constitutional tradition – i.e., federal in Germany vs. unitary in the UK – and its preference for federal (sovereignty-sharing) or intergovernmental (sovereignty-preserving) institutional solutions at the EU level (Risse 2005). Like Katzenstein, Jachtenfuchs also relies on what is familiar, but explains this in terms of what is "deeply ingrained in the German collective identity pertaining to their state" (Risse 2005: 301), rather than what is most convenient. If what is deeply ingrained in Jachtenfuchs's sense were all that mattered, we would expect to see Finland pushing Nordic principles of administration (which it did during its Presidency), but would not expect to see civil servants from a unitary and state-centric Member State like Finland pushing for far-reaching federal solutions for civil justice. The fact that the Finnish Ministry of Justice did so appears to call Jachtenfuchs's isomorphism explanation into question. However, his argument can be rendered consistent with the collective identity explanation I offered above (subsection 9.2.2.1.5) in connection with the Finnish Ministry of Justice's preference for EU solutions that resemble those already known in the context of Nordic cooperation, by conjoining the two arguments. Collective identity, in other words, can be anchored in constitutional traditions, as in Jachtenfuchs's case studies, or in subregional practices and identities, as in mine (Risse 2005).

This extended discussion of the 'field' concept is warranted by the fact that it is increasingly used to analyze European integration (Fligstein 2008, Vauchez 2008a, Vauchez & de Witte 2013, Kauppi & Madsen 2013a & 2014, Vauchez 2015, Madsen & Christensen 2016). From this perspective, the EU can be understood as a "spatial context" for action involving the "inseparable interaction of ideational and material elements" (Parsons 2010: 144). Parsons goes so far as to argue that the theory of fields has become a valuable and unique sociological contribution to EU studies, because it has the potential to overcome traditional analytical dichotomies that pose "obstacles to a concrete and nuanced understanding of European integration (id. at 150). As suggested earlier, however, what makes the 'field' approach particularly useful is how it can be used to "track actors' concrete perceptions and practices in an open-ended way, whatever mix of objective and subjective (or material and ideational) may be at

work" [sic] (id.).[160] As this general formulation suggests, the theory of fields has much in common with the historical variant of institutionalism, insofar as both approaches situate particular institutions in their larger social, political, economic, and cultural environments, and track what happens there. Yet while HI "hinges analytically on the relations between institutions and their environment," the study of fields entails close attention to the "relations between stakeholders," including elites and other social groups (Madsen 2011, see also Parsons 2010: 148). It is this turn towards elites and their modes of action that makes the 'field' approach especially congenial for my dissertation.

I wish to end this excursion through institutions and fields by borrowing Ziegler's (1997: 18) notion of a knowledge-based "institutional order for science and technology" – which I see as related to the notion of 'field,' but broader insofar as it incorporates the crucial element of expert knowledge as a defining parameter – and extending this notion into the realm of legal expertise. The relevant actors in my case studies operate within a field oriented towards creating the EU's Area of Freedom, Security and Justice (AFSJ), which includes civil as well as criminal justice.[161] Analytically, however, it is not the identification of a field that matters, but explaining what happens in that notional arena. My case studies take place in a sparsely populated field, consisting almost entirely of legal elites who work in national and supranational bureaucracies and are largely insulated from pluralist pressure from citizens or civil society actors. As my empirical findings have shown, such civil servants do not only act if interest group pressure is present. When unconstrained by pluralist forces, elites can pursue "idiosyncratic goals" according to reasoning that is "symbolic and ideological, rather than calculated and concrete" (Moravcsik 1993: 494-5). In such a context, legal elites have discretion, although they are also subject to the autonomous influence of "internal institutional norms" (Shapiro 1990: 936–37, see also Gillman 2004: 373). Their agency, while not unconstrained, matters greatly to the outcomes that I seek to explain. In the final analysis, the national and supranational institutions within this field cannot be understood without examining the persons who "animate" them (Ziegler 1997: 208). As Max Weber noted long ago, it is problematic to assign agency to institutions, since "only individuals can have intentions" (Madsen & Christiansen 2016: 17). Seen in this context, the growing focus on European elites in recent scholarship reflects the goal of coming to grips with agency, while at the same time accounting for the forces that shape and constrain their choices.

9.2.2.4 Widening the Theoretical Lens: (Legal) Elites

Neither the power and authority of institutions, in general, nor the particular outcomes examined in Part III above, in particular, can be grasped fully without coming to terms with the elites and networks that inhabit and interact with them (Ziegler 1997: 198, Madsen & Christiansen 2016: 21). While there is a large body of court-centric work that includes some attention to legal elites (subsection 9.2.2.4.1 below), legal elites remain overlooked in the theoretical literature about institutions, in general, and European (dis)integration, in particular. Multidisciplinary studies have begun to fill this gap in the EU context (e.g., Jettinghoff & Schepel 2004, Kauppi & Madsen 2013a, Vauchez & de Witte 2013).[162] A full understanding of the Member State and EU institutional actions examined in Chapters 6, 7, and 8 above can best be understood in terms of the "professional identities of policy makers and elites" involved in my two case studies (Ziegler 1997: 197).[163] While approaches oriented towards elite networks – such as transnational advocacy communities or epistemic communities – are often useful to explain transnational governance outcomes (id.; see also Slaughter 2004, Madsen & Christensen 2016:

22-3), these approaches are of limited usefulness in explaining my two case studies (subsection 9.2.2.4.2 below). Institutionalist approaches that focus on the role of knowledge-bearing elites (Ziegler 1997) provide the best explanation for the role of legal elites in my case studies (subsection 9.2.2.4.3 below).

Before turning to theories oriented towards explaining the role of elites in institutions, I begin by clarifying what I mean by legal elites. Most of the civil servants who played a significant role in Amsterdam and Tampere in regard to civil justice had studied law, and many of them went on to careers in private practice, business, academia, government service, or some combination of these. Among the civil servants in national and supranational settings, some had worked in one or the other setting, while others had worked in both. Some civil servants worked in ministries or other settings where their role was explicitly legal (e.g., courts, ministries of justice, legal service), while others worked in settings where their work was more political or administrative in character (e.g., foreign ministries, parliaments, EU institutions). I draw the category of legal elite broadly enough to encompass all such public- and private-sector actors, even the ones who might – at a later stage in their careers – identify more with the political or administrative side of their roles than with a more narrowly legal role. In this sense, legal elites are persons who by their education[164] and, in most cases, by their career path have been socialized in the values, traditions, vocabularies, and self-images of the law. My goal is not to argue that all have something unique in common that differentiates them from other bureaucratic actors – that is, to construct an idealized legal elite – but rather to distill from my interviewees' statements about their work what appears to reflect their legal worldview, which has, in turn, influenced the shape and contours of Europeanized civil justice. My goal is not simply to assert that the interests of legal elites are oriented towards legal things, which would be tautological, but rather to take a step towards understanding what appears to be characteristic of legal elites acting in transnational settings. This endeavor *supplement*s my earlier analysis of collective identity (i.e., in the Nordic examples noted above) and of political orientation (i.e., in regard to Finnish concern that joining the neoliberal EU would undermine Nordic welfarist values), and is not presented as an alternate explanation. As I have argued above (subsections 9.2.2.1, 9.2.2.2, and 9.2.2.3), leading traditional and contemporary theories contribute much towards explaining my case studies but do not capture the full picture. My goal here is to fill that gap on the basis of findings that point, albeit tentatively, towards future research possibilities.

9.2.2.4.1 Law and European (Dis)Integration

The important role played by law in European integration has long been recognized. Walter Hallstein (1972: 30) observed that the "European Community is a remarkable legal phenomenon. It is a creation of law; it is a source of law; and it is a legal system." More crucially for present purposes, law has been seen as an agent of integration (Dehousse & Weiler 1990: 243). Indeed, lawyers looking through "their disciplinary lenses" tend to see it as the "agent par excellence" (Hunt & Shaw 2009: 93), as is apparent from the influential body of scholarship on "integration through law" (Cappelletti et al. 1986; see also Augenstein 2012, Azoulai 2016, Saurugger 2016). The federalistic *telos* inherent in the seminal works in this tradition has yielded, in recent years, to more searching (and often empirical) analyses of the "mobile and mobilized group of people" involved in the early years of the 'integration through law' movement (Azoulai 2016: 453), who made no bones about their view that "it is a legal order that we are expounding" (Cappelletti et al. 1986: 10). From the lofty heights of early scholarship on the heroic Court of

Justice (e.g., Stein 1981, Weiler 1981), the discourse on law in European integration has increasingly come under critical scrutiny (Hunt & Shaw 2009: 94). As one scholar has recently proclaimed, the "narrative of an intimate and positive relation between law and integration is over" (Azoulai 2016: 45).

Legal scholars and political scientists have devoted a great deal of attention to the role of legal institutions and elites in European integration.[165] For the most part, this body of literature focuses on the role of national and EU courts, litigation, and legal actors in creating the EU legal order. Seminal intergovernmentalist work on the Court of Justice (Garrett 1992 & 1995; see also Garrett, Kelemen & Schulz 1998, and Tsebelis & Garrett 2001) prompted interventions by neofunctionalists (Burley & Mattli 1993; see also Mattli & Slaughter 1995 & 1998),[166] and the 'grand debate' replayed in the narrower legal context. Together, these scholars "brought the role of legal actors in the integration process clearly into the framework of integration theory" (de Búrca 2005: 312). Neofunctionalism "resonates well with legal scholarship" (Börzel 2006: 18), and this approach has been dominant in court- and litigation-centric research (Stone Sweet 2012: 22).[167] Yet, according to one prominent political scientist, the "neofunctionalists have tended to change their dependent variable from political to legal integration," with the result that the "role of law in political integration has been largely neglected" (Börzel 2006: 18).

The 'integration through law' and the court- and litigation-centric literatures make important contributions toward understanding the role of law in European integration, as well as that of some legal actors. Yet these bodies of work do not advance my theoretical argument beyond the discussion of the 'grand debate' between neofunctionalism and intergovernmentalism (in subsection 9.2.2.1 above). For that reason, they are not considered further here.

9.2.2.4.2 <u>*Networks, Epistemic Communities, and Advocacy Coalitions*</u>

The academic landscape is crowded with analyses of networks, epistemic communities, and advocacy coalitions or transnational advocacy networks (TANs). This subsection considers this body of theoretical literature in order to ascertain whether it can contribute to explaining my case studies. My conclusion is that these bodies of literature offer valuable insights into our understanding of transnational (as well as national) governance, but are not well-suited to the task of explaining my case studies, which involve legal elites acting within the highly structured institutional context of EU treaty-revision and summitry, rather than voluntaristic activity by legal elites oriented towards a particular goal. My argument on this point is not that network, epistemic community, and transnational advocacy approaches are *only* suited to action that occurs outside or tangential to government activity, but rather that their contributions are *most useful* there. For instance, when applied more broadly to encompass the work-related activities of government officials (e.g., Cross 2013), the epistemic communities approach overlaps with other theoretical frameworks that are, in my view, better suited to the task. This is not to assert that they have *nothing* to contribute to my explanation, but merely that they add little theoretical leverage to the explanation that I have already developed in this chapter. As explained below, these approaches can enrich a neofunctional explanation, but provide no substitute for it. To a large extent, however, the ways in which they can enrich a neofunctional explanation – by drawing attention to the structures and strategies of civil society involvement in policy processes – are irrelevant to my case studies, where civil society actors are virtually absent, and the actors who matter are merely civil servants who are doing their jobs enthusiastically. More broadly – and more usefully for my purposes – the epistemic communities literature can enrich the broader

institutional and field approaches.

Some words about how these approaches relate to each other are in order, before I proceed to explore each one.[168] I see *networks* as the overarching broad phenomenon, of which *epistemic communities* and *transnational advocacy networks (TAN)* are more sophisticated sub-types[169] that have been adapted from earlier general network approaches to the particular contexts of regional, transnational, and global governance (Madsen & Christensen 2016: 5-11). These are powerful and appealing metaphors, with networks signaling openness and variegated linear linkages, and the two sub-types suggesting a kind of closure around knowledge, values, ideals, goals, or other institutional commitments. I consider network approaches first, then turn to epistemic communities. My discussion of transnational advocacy network (TAN) approaches is relegated to the endnotes.

In his trenchant critique of policy network analysis, which by the mid-1990s had become a "dominant paradigm for the study of the policy-making process" in some places, British regulatory policy scholar Keith Dowding argued that what "began as a metaphor ... may only become a theory by developing along the lines of sociological network analysis" (Dowding 1995: 136; see also Börzel 2011). He was skeptical, however, that network policy analysis could "take us further" than cataloging the "policy world into different types of network," even after "introducing 'ideas' in the form of 'epistemic communities' or 'advocacy coalitions' " as a motor to "drive network analysis" (Dowding 1995: 136-7). Dowding argued that such efforts would "fail to produce fundamental *theories* of the policy process," because "the driving force of explanation, the independent variables, are not network characteristics per se but rather characteristics of components within the networks" (id. at 137). In his view, analysis should focus on the "properties of the components" rather than the "properties of the network" itself (id.).[170] Dowding's recommendation is consistent with a focus on elites as "components" in a network.

Despite doubts about their limited usefulness for explanatory purposes, such as those expressed by Dowding in the mid-1990s, networks remain at the core of much contemporary scholarship work by scholars of international law, international relations, and European governance.[171] One attractive feature of the network concept is that it so neatly captures what many observe and "comport[s] with deep-seated intuitions about how globalization really works" (Slaughter & Zaring 2007: 218); another is its flexibility. The network concept can be used, on the one hand, to analyze (i) "direct bureaucratic contacts among governmental sub-units"[172]; (ii) broader "government networks" in which "functionally distinct" parts of the state – such as "courts, regulatory agencies, executives, and even legislatures" – disaggregate and network "with their counterparts abroad" (Slaughter 1997: 184)[173]; and (iii) more mixed coalitions of state and non-state actors.[174]

What explanatory insights can be gleaned from this cursory tour of the network literature? First, network literature emphasizes "pattern[s] of regular and purposive relations among like government units working across ... borders" (Slaughter 2004: 14), which frequently consist of unsupervised and "loosely structured, peer-to-peer ties developed through frequent interaction rather than formal negotiation" (Raustiala 2002: 1).[175] Such a network may exert a "compliance ... pull as [it] develops and grows" (Slaughter & Zaring 2007: 215), because the "existence of a network strengthens incentives for jurisdictions to seek convergence because [it] allows for deeper and broader cooperation" (Raustiala 2002: 68). Second, a network's "ability to disseminate and interpret new information" can contribute to a causal explanation of change

(Powell 1990: 325).[176] Third, networks may offer an alternative to a "regulatory race to the top or bottom," which can help to explain cooperative outcomes (Slaughter & Zaring 2007: 217, citing Esty & Géradin 2000).[177] Fourth, networks help to explain "continuing diversity in implementing common standards" – in lieu of "homogenization and centralization of power" – particularly where they "combine central authority and decentralized actors" (Slaughter & Zaring 2007: 218-19). Finally, networks are widely hailed as a "vibrant and growing norm-creating phenomenon" (id. at 216).

Some of these insights reinforce arguments I have made previously, while others are not relevant to my case studies. The first insight regarding patterns of regular and purposive relations among like government units working across borders is more relevant to some outcomes of communitarization – i.e., creating judicial networks and fostering connections among legal actors from Member States – than it is to explaining how communitarization happened in the first place. Granted, my findings show the importance of cross-border collaboration – particularly among legal elites involved with internal security matters, such as crime, policing, and terrorism – but this was at most a very indirect causal factor in my case studies. The national legal experts on civil justice matters who represented their countries in EU (and international) fora were utterly engrossed in the legalistic task of drafting conventions to deal with particular civil justice issues (Interview #14), rather than trying to move the EU and its Member States towards more political goals. The second insight about how networks channel information reinforces my argument that ideas and ideologies spread through academic networks, serving as an alternative setting in which national actors might be socialized to supranational goals, as well as through hybrid (public-private) conferences oriented towards specific policy matters, but does not add to it. Yet, my findings also show that the leading network of academic experts – GEDIP – was sidelined from the EU treaty-reform and summit processes that I seek to explain, which suggests that other factors (i.e., access to inside information and decision-making processes, role conceptions of network members) matter more than the mere existence of a bustling network. The third and fourth insights are simply not relevant to the processes involved in my case studies, except at the descriptive level. Finally, the fifth insight regarding norm-creation is also generally consistent with my arguments, but adds nothing new. Overall, the transnational network approach is more useful for explaining transnational patterns outside (or parallel to) the highly structured EU processes (or institutional fields) that my case studies involve. It is less apt in situations like my case studies, where actors are not simply collaborating across borders in a more- or less organized way, but rather performing their elaborate roles in a complex and path-dependent play that incorporates national as well as supranational actors.

By the 1990s, the network literature had come to overlap with the literature on epistemic communities, to which I now turn. Overall, the epistemic communities framework offers a more rigorous explanatory approach than anything I have found in the network literature, not least because it is driven by a more systematic analysis of the "properties of the actors" rather than by the structural characteristics of the network itself (Dowding 1995: 68).

The epistemic communities (EpiCom) framework extends the transnationalism trend noted in the foregoing discussion of networks and combines it with a turn to ideas in political science.[178] In a seminal article, Peter Haas defined an epistemic community as "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue area" (Haas 1992: 3). This approach was developed by " 'soft' constructivist scholars of international relations

[who were] concerned with agency" (Haas 2005: § 2.1)[179] and who saw that "[a]ctors' understanding of the world and the formulation of alternative actions are shaped by belief systems, operational codes, and cognitive maps" (Haas 1992: 28). In the influential framework he laid out in 1992, Haas' main goals were to "understand the actors associated with the formulation of causal ideas, and the circumstances, resources and mechanisms by which new ideas or policy doctrines get developed and are introduced to the political process" (Haas 2005: § 2.1), and – crucially – to understand how this knowledge gets translated into power.[180] One core insight of the approach is how "belief systems" can lead to policy convergence (Dowding 1995: 148).[181] While early studies tended to focus on the interaction between epistemic communities and government, later studies show that they "not only seek to persuade states, but also a wide variety of non-state actors."[182]

In recent years, the EpiComs approach has attracted renewed attention, notably through the work of Mai'a Davis Cross, who deems it a "promising approach," albeit one that "has not evolved much beyond its original conceptualisation" and has thus been "somewhat marginalised" (Cross 2013: 137-8). Cross offers a number of specific critiques and innovations, with the aim of reviving use of the EpiComs approach as a tool for understanding the "progressively more numerous and influential" transnational actors who constitute "a major means by which knowledge translates into power" (id.).

One key problem in the EpiComs literature is the propensity to engage in border skirmishes over whether a particular group of actors *is* or *is not* an epistemic community.[183] To take a key example, Haas (2005: § 3.0) has taken great pains to *exclude* legal elites from his epistemic community framework. Haas (id. at § 2.1) insists that epistemic communities are "important actors who are responsible for developing and circulating *causal ideas* and some associated normative beliefs, and thus help to create state interests and preferences,"[184] in contrast to "other types of policy networks and groups active in politics and policy making." The crucial distinction, he suggests, is between members of a "knowledge-based group [who] may share criteria of validity and a policy enterprise," on the one hand, and members of such a knowledge-based (i.e., epistemic) group who "in addition share principled (normative) and causal beliefs," on the other (Haas 1992: 35).[185] Haas stated firmly in 2005 that international environmental lawyers "remain a policy community" and "do not themselves constitute an epistemic community," insofar as their "shared beliefs take a different form from ... and ... lack the social authority enjoyed by the ecological epistemic community." Indeed, Haas (2005: § 3.1) has insisted that

> "[i]nternational law as a field lacks the social authority or legitimacy of the technical authority commanded by epistemic communities. Legitimacy rests on the internally consistent substantive nature of the ideas put forth for policy makers by experts, and the transparent way in which such ideas are developed and gain consensus. ... International environmental law, and international law more generally, is philosophically and epistemologically different from the social domain of ecological science. Whereas ecology and the technical domains in which epistemic communities operate are the realms of hybrid and brute facts, where claims about physical phenomena may be evaluated by recourse to mechanisms independent of the subject of study, law is a different activity. Law operates in the domain of social facts ... . The substantive domain of law is not subject to the type of shared tangible understandings that characterize the political

domain in which ecological facts are identified for public policy."[186]

Haas' clarification has been either overlooked or ignored, and scholars have cheerfully gone ahead using the EpiComs approach (or at least the label) in their analyses of domestic and transnational law- and policy-making. But Haas's effort to bound 'his' field should give pause. Cross (2013: 137) rightly criticizes the EpiComs literature for unduly restricting the empirical scope of its applicability by focusing too narrowly on groups of scientists, since – in her view – the approach has much more to offer. But Haas, in his turn, has a point, though his way of making it may be misguided. By drawing battle lines between 'real scientists' and 'mere lawyers,' he has misdirected attention to the classificatory exercise: Who deserves, and who does not, deserve to bear the label *epistemic community*? This should not be, as Dowding once insisted, an exercise in lepidoptery.

There are more interesting questions to ask about the operation of knowledge-based groups. As Cross (2013: 148) has noted, it is "important to recognise that epistemic communities do not simply exist or not exist, as has been the assumption in much of the literature. They can be strong or weak in relation to each other as well as in relation to other actors." It is far more fruitful to focus on the sources of the power and the strategies of such collectives.

The crucial points behind Haas's effort to fortify the boundaries of his concept against interlopers is that the *type of knowledge* matters,[187] as does the *degree of consensus* within the community (or network of experts and other interested persons) (Haas 1992: 20).[188] In her updated version of the EpiCom approach, Cross (2013) builds on Haas's core insights. First, she observes that epistemic communities vary in terms of their *internal cohesiveness*[189] and their *professionalism* (Cross 2013: 147), and posits that these are key factors in their ability to translate their knowledge into policy outcomes.[190] This provides a workable framework for empirical study of different epistemic communities, including those involving legal elites. Cross goes on to link the internal cohesion of a group to its *episteme* (id. at 147),[191] which she defines as the "shared worldview that derives from their mutual socialisation and shared knowledge" (id.).[192] In this sense, Cross is true to the constructivist roots of epistemic communities, such as Ruggie's 1975 argument that epistemic communities "share intentions, expectations, symbols, behavioural rules, and points of reference" (id. at 141) and can arise from "bureaucratic position, technocratic training, similarities in scientific outlook and shared disciplinary paradigms."[193]

While Cross's updated version of the EpiCom approach is broad insofar as it insists that the actors in epistemic communities "can be governmental or nongovernmental, scientific or non-scientific" (id. at 147),[194] it does not go so far as to claim that all types of knowledge are equal (id. at 142).[195] This is an empirical question, not merely a matter of classification. Rather than diverting attention to whether a group is or is not an epistemic community, Cross wisely points towards more productive lines of inquiry. Thus, in addition to the matters noted above regarding the *internal cohesiveness* and *professionalism* of the community in question, she argues that future research should "account for a number of things, including: domestic politics (why some epistemic communities' ideas gain traction over others); competition among epistemic communities or with other actors; the context within which epistemic communities operate, especially the major political interests of a given time period; the varying *degrees* of power that epistemic communities might have; and the relationship between scientific knowledge and political preferences" (id. at 146, emphasis in original). Cross' synthesis of earlier writings also draws attention to the importance of scope conditions, political opportunity structures, policy phase, coalition building, and the coherence of the policy field in explaining the persuasiveness

of epistemic communities (id. at 144). Finally, Cross calls for more comparative analysis of epistemic communities as a path towards more generalizable knowledge, arguing in particular that comparative studies are needed to "assess *relative* influence" of EpiComs in particular contexts (id. at 148).[196] A recent contribution calls attention to factors explaining why EpiComs fail, and emphasizes the useful of national-level studies for developing the theoretical approach (Löblová 2018).

Given this brief and selective overview, what can the epistemic community approach contribute to explaining my two case studies? As a preliminary matter, the relationship between professions, professionals, and epistemic communities must be clarified. Only then is it possible to ascertain what the EpiCom literature might contribute to my own research, or to the study of legal elites more broadly, despite Haas's apparent wish that the lawyers would steer clear of his framework.

Haas' and Cross' versions of the epistemic communities approach are somewhat incongruous in regard to their treatment of professions/professionals in general, and legal elites in particular. Beginning with his first major statement of the approach in 1992, Haas defined an epistemic community as a "network of professionals,"[197] but insisted that *epistemic communities* and *professions* are distinct, if not mutually exclusive.[198] Moreover, Haas (2005) has argued that environmental lawyers amount to nothing more than a "policy community" in his view.[199] Indeed, Haas appears inclined to subordinate legal elites – at least the international environmental lawyers with whom he is familiar – to the role of handmaidens to the epistemic communities (or their clients), thus denying them any agency of their own.[200] This would be a mistake, in my view, if intended as an across-the-board generalization. Seeing them as "mere 'transmission belts' ... misses their deeper role as 'brokers' decisively acting between groups, institutions and sectors" (Vauchez 2013: 5).

Cross is clear about her intention to embrace *professionals* as key to epistemic communities. She defines epistemic communities as "professional networks with authoritative and policy-relevant expertise" and asserts that "the central attribute of epistemic communities is their *professionalism*, which can be measured according to a number of factors" (Cross 2013: 137-8).[201] Cross parts ways with Haas by claiming that professionalism is more important in explaining the strength or weakness of an epistemic community than the nature of knowledge itself (id. at 149).[202] Indeed, she argues that the "process of professionalisation" – that is, the way "members of a profession continuously establish, refine, and re-establish the role and status of their profession" – is one way for an epistemic community to establish internal cohesion, which, in turn, influences its legitimacy and effectiveness (id.).[203] Cross also points to sociological work on the professions that emphasizes the importance of gaining exclusive domain "over a particular kind of expertise and the work that goes with it" (id., citing Abbott 1988).[204]

Ultimately, Cross identifies four continuous variables for operationalizing the internal cohesiveness – and hence also for helping to explain the strength or weakness (i.e., persuasiveness or effectiveness) – of an epistemic community: "(1) selection and training; (2) meeting frequency and quality; (3) shared professional norms; and (4) common culture" (id. at 150).[205] The first and second structural variables lend themselves readily to empirical investigation, while the third and fourth call upon researchers to enter the murkier depths of qualitative analysis and process-tracing. Cross's framework combines analysis of structure and agency, while recognizing that the two are intertwined. Clearly both "selection and training" and "meeting frequency and quality" can help to explain "shared professional norms" and "common

culture" (id. at 150).[206] Her emphasis on "common culture" – i.e., the "sense of purpose, identity, symbolism, and heritage within the community" – arises from her research on EU diplomats and military attachés, who develop a "sense of identifying with one another" more than with their principals back home in their national capitals (id. at 150-1).[207] This is *engrenage* (subsection 9.2.2.1.1 above) by another name.

As the last comment suggests, there are striking parallels between the theoretical preoccupations of the epistemic community and other theories examined earlier – notably neofunctionalism and theories about institutions and fields (subsections 9.2.2.1 and 9.2.2.3 above, respectively). It comes as no surprise that some neofunctionalists incorporate networks or epistemic communities into their theoretical framework (e.g., Schmitter & Lefkofridi 2016), since these mid-level theoretical frameworks offer a useful set of tools, particularly for understanding the role of non-governmental actors, which play a central role in most neofunctional analyses[208] – albeit not in mine. As Cross (2013: 147) notes, EpiComs are "making an increasing contribution to the development of preferences and worldviews" of states and others. Epistemic communities – whether composed of state-insiders or -outsiders, and whatever the type of knowledge involved – can be important sites of preference formation, along with norm-generation, agenda-setting, and compliance pressure. Sites for the social construction of knowledge and values, for developing ideas and arguments or transmitting ideologies or worldviews – whether called 'networks' or 'epistemic communities' or something else – may be a crucial feature of the European as well as the global landscape.

Two questions must be addressed. First, as an empirical matter, do my case studies provide any evidence for concluding that epistemic communities played an important role in preference formation or otherwise? And second, even if they do not, are there elements of the network or epistemic community approaches that can enrich my theoretical analysis, even if I opt for another theoretical framework?

On the first question, my answer is a qualified no. Epistemic communities in Haas' traditional sense, whose role consists in bringing scientific knowledge into policymaking and using that to push for political (or legal) change, are not significantly present as causal actors in my case studies on civil justice. Moreover, the assumption seems to be that the persons involved actually meet (Cross 2013). While this might be too limited an understanding, in the age of virtual communication and relationships, I see little to be gained by imposing the label "community" on a set of national and supranational civil servants, most of whom never met each other or had any kind of direct communication. Doing so would impose a false sense of collaboration or *esprit d'corps* that existed among some, but by no means all of the key actors in my case studies. Rather like the contemporary tendency to refer to co-workers as members of one's family, labeling something a 'community' where personal contact is absent can debase the concept and obscure the real relations among the civil servant actors in my case studies. While I do not deny that there were such social formations, such as among national and supranational civil servants in Brussels or in academic gatherings, or that such formations were sites of *engrenage*, doing so detracts from the fact that some of the key actors in my case studies never met or collaborated directly, but merely engaged with the ideas that others expressed in official documents that became part of the EU's lengthy treaty-revision and summitry processes. The EpiComs approach insists on a measure of intersubjective ties between actors, a (presumably) dense web of connections among the actors. Being influenced by the ideas in a report submitted by, for instance, the EP or the Commission, does not an epistemic community (or even a

network) make. The concepts can be stretched this far, but their value becomes attenuated by doing so.[209]

My reluctance to impose the 'network' or 'epistemic community' label to capture the dynamics does not, however, translate into a refusal to consider that these approaches – particularly the EpiComs approach – might contribute to explaining the agency of legal elites. The EpiComs literature draws particular attention to the role of professions in explaining policy outcomes, and suggests that either the nature of the knowledge involved (Haas 1992) or the degree of professionalism (Cross 2013: 149) might help to explain the strength or weakness of a group or social formation. Even taking away the notion of 'group' or 'community,' my sense is that the EpiComs literature raises important questions for understanding the agency of legal elites. Moreover, Cross's dalliance with the sociology of professions literature provides a valuable signpost along the way. With these exceptions, I conclude that the EpiComs approach, like the network approach, captures some significant features of the landscape in its lens, but is still too limited to explain the agency of legal elites. The following subsection develops a broader theoretical framework that aligns with neoinstitutional approaches in political science, but also incorporates some insights from the epistemic communities literature.

9.2.2.4.3 Legal Elites, Experts and Other Professionals

Government lawyers have been understudied, at least in the transnational context, unlike private lawyers, who are subject to the logic of the marketplace.[210] Philip Lewis' (2005a & 2005b) work on government lawyers in the UK provides the rare exception, but is of dubious relevance to my case studies. Lewis investigated the "relationships *between* lawyers and administrators in policy-making" (Lewis 2005b: 3, emphasis added), which is different from the questions my research raises. Lewis' analytical framework fits poorly with my case studies, where legal elites occupying civil service positions are *themselves* involved in formulating legal policy,[211] and do so in regard to matters best understood as "lawyer's law" – matters on which there is "no popular consciousness, ... no social attitude one way or the other" – and that are consequently perceived as involving pure expertise (Graveson 1968: 130). It is not a new insight that policymakers tend to view law as "mostly technical" (Stein 1981: 3), and thus give legal elites a "more or less free hand to speak" on behalf of national governments and EU institutions (Burley & Mattli 1993: 44). My aim is not to explain deference or even how legal elites manage to assert their preferences, as an epistemic community approach might dictate.

Rather, my inquiry is guided by the intuition that legal elites in national or supranational civil service positions share some characteristics in common with other expert civil servants who bring different forms of epistemic knowledge or professional socialization to their service, but also differ from their colleagues in some characteristic ways. My findings provide an inadequate basis for answering this question fully, but can contribute to the search for an answer. The "role of the civil servant" in contemporary society is, moreover, "characterised by a multitude of expectations" that generate "different archaeological layers" of demands (Poulsen 2007: 469, 470-1 & Table 1). Whether the key legal elites, whose work I documented in Part III above, faced such conflicting demands – such as between their professional norms and the values of the government for whom they work – is an empirical question. In the face of my findings that different sets of legal elites within different units of a single national government harbored different preferences – such as for communitarization of civil justice but against communitarization of criminal or police matters – it would be folly to assume that the values and

interests of legal elites are uniform and uncontested. Rather, legal culture is rife with "internal inconsistencies, conflicts and contradictions" (Huneeus 2006: 24).

My case studies pose the concrete challenge of explaining the agency of legal elites in the context of European integration. I ask simply whether their status as legal elites helps to explain the preferences expressed by key actors. My findings provide support for this argument, and thus complete the argument made throughout this chapter that a full explanation of my case studies requires coming to terms with the agency of legal elites. To make this argument, I return to the neoinstitutionalist framework mapped out above (in subsection 9.2.2.3).

My argument about legal elites relies on Ziegler's notion of "knowledge-bearing occupational groups" – often, but not universally, called "professions" – whose "livelihood and status depend on their use of specialized or expert knowledge" (1997: 2, 23). Such groups are "characterized not only by a high degree of systematic knowledge, but also by a primary orientation towards community interest, a code of ethics internalized through socialization, and a system of rewards based on 'symbols of work achievement' that are 'ends themselves' rather than 'means to some end of individual self-interest' " (id. at 22, quoting Barber 1963: 672). This is not to deny that professional groups have economic interests (e.g., Larson 1977), but rather to claim that such persons tend to "define their career aspirations according to historically derived commitments and prestige hierarchies rather than strictly material rewards" (Ziegler 1997: 15). Rudolf von Ihering, the late nineteenth legal scholar from whom Weber borrowed the distinction between material and ideal interests (Lizardo & Stoltz 2017: 8),[212] cites professionals as the prototypical example of persons motivated by ideal interests – "the artist, the scientist, or the state bureaucrat, for whom monetary reward is only a secondary motivation for their labor," whose "interest in social honor and estimation by peers outweigh interest in economic accumulation" – in contrast to persons who "labor for a mere wage to satisfy organismic imperatives" (id. at 9, quoting von Ihering 1968: 140-2). Such elites are granted a considerable degree of "autonomy to define and impose their values on certain aspects of social life"[213] and to "think reflectively about the values and purposes of their work" (id. at 23).[214] They are "key groups in the transmission of the larger culture" (id.), and their status places them in a "privileged position to influence global politics or law" (Madsen & Christensen 2016: 11).

The particular knowledge that legal elites bring to positions of (national as well as EU) government service renders them partly autonomous, in the sense that the knowledge that constitutes them is external to the institutions in which they work (Ziegler 1997: 21, quoting Selznick) and the fields in which they act. Indeed, legal elites tend to enjoy "high autonomy in most societies" (id. at 23). They are thus somewhat, but not fully constrained by the organizational structure in which they find themselves. Rather, their professional identities themselves constitute "a critical part of the institutional infrastructure" (id. at 206). Such elites have an important role to play in institutions, insofar as they "generate the ideas that dominate the symbolic aspect of any institutional order" (id. at 21), and the "beliefs and self-images of ... professional elites within ... organizations ... animate [their expert] knowledge" (id. at 17). Moreover, attention to occupational worldviews provides a way of "analyzing the cultural self-understandings of the different groups involved in public life," while simultaneously avoiding "blanket generalizations about 'national character' " (id. at 25).

The prism of "values, programs of action, and frames of reference that comprise a profession's worldview are distinct from but closely linked to the substance of that group's expertise" (Ziegler 1997: 24). Unlike technology, which represents a "different [sphere] of

human endeavor" from politics, whereas "law and politics go hand in hand" (id. at 9), but entail different rationalities that may operate in a single actor. Law, like science, is "much more than an instrumentality," insofar as justice "represents norms about political order that are "central to the modern worldview" (id.). From this perspective, legal elites can be seen as occupying the middle range of a spectrum – alongside "applied science professionals" and "administrators" – and falling somewhere between "the freedom of pure [scientific] expertise" and the "political responsibility demanded of elected figures" (id. at 10-11, quoting Price 1965 & 1985).

Ziegler's central argument (1997: 14) is that "status, self-image and other non-material characteristics ... shape the identities of those knowledge-bearing occupations," and that the "symbolic and ideational elements of occupational identity" are important for explaining outcomes. Indeed, sociological institutionalists argue that professional identity and values can have causal force (Fligstein 1990, Hall & Taylor 1996: 949). Given that occupational worldviews provide a "cultural toolbox" for social action (Swidler 1986), these can be "linked quite closely to the political efforts of particular groups" (Ziegler 1997: 25). And, as the epistemic communities literature (subsection 9.2.2.4.2 above) suggests, the nature of the actors' specialized knowledge can influence the perceived legitimacy and effectiveness of their efforts to shape policy (Haas 1992).

Worldviews are "not complete or perfectly logical sets of beliefs to which all members of an occupation subscribe," but consist rather of "persistent sets of self-images, specialized vocabularies, and moral commitments that help the members of a given ... expert occupation to recognize one another and to interpret their place in the world" (Ziegler 1997: 19, citing Geertz 1973). These worldviews may include, for example, legitimizing frames of reference (Ziegler 1997: 24, 204), "analytic beliefs about the way the world functions," and an "ethos or set of ethical values that justify particular forms of action" (id. at 37). They may include particular notions about the appropriate blend between "academic knowledge and political intuition" (id. at 25), as well as "postures toward the external world [and] ways of thinking about their own work" (id. at 19, citing Geertz). They may also include a "collective sense of mission based on public needs" (id. at 19), or an "attempt to define [an] institution's mission in ways that serve their own goals," which might "reflect non-materials interest in promoting justice, peace or other social values" (id. at 26).

Ziegler's argument – like those of other sociological institutionalists – does not stop at identifying the professional worldview, but rather begins there. He predicts that policy strategies and programs will be fashioned in a way that renders them "consistent with the self-images of the [relevant] knowledge-bearing groups" (Ziegler 1997: at 17). Ziegler's argument is in accord with identity theory research in social psychology, which shows that individuals "engage in activities that correspond in meaning to the meaning of their identity" (Burke & Stets 2009: 188). This means, in practice, that they "act in ways that are consistent with the perceptions they bring to their professional role" (Schott et al. 2016: 22).[215] In this research tradition, the self is understood as a "multidimensional construct consisting of role identities, each being based on the occupation of a particular role in social intercourse" (id. at 24, quoting Stryker & Burke 2000).[216] Cultural factors – such as professional role identity – are especially likely to come into play when officials face "dilemma situations" involving trade-offs when core values are in conflict (Schott et al. 2016: 22) or when they "confront [situations] characterized by great uncertainty or ambiguity" (Ziegler 1997: 15). In the latter situation, elites "often rely on custom as well as professional judgment" (id. at 16), that is, they fall back on traditional ways of seeing the problem or

fashioning solutions.

Sociological institutionalist research further suggests that a policy may be embraced if it "enhances the social legitimacy of the organization or its participants" (Hall & Taylor 1996: 949), if the broader cultural environment makes it seem more legitimate than the alternatives (Soysal 1994), or if it validates the broader roles or worldviews of key actors (Fligstein 1990).

Yet, it is one thing to assume that institutional action – such as the articulation of preferences – reflects or embodies the "values, programs of action, and frames of reference that comprise a profession's worldview" (Ziegler 1997: 24), and quite another to demonstrate that there is a "relationship ... between beliefs and institutional conduct" (Haas 1958: 18). The question driving empirical research is, thus, how professional elites "perceive their interests" and "use their influence" (Ziegler 1997: 16), and to what extent ideational factors "impose constraints on public policies because they inform the strategies that appeal to policymakers and delimit the range of policy instruments" that are deemed "acceptable" (id. at 19). The policymaking culture "shapes the means people can envision ... when they think about solving a problem" (id. at 205, quoting Dobbin 1994: 230). Moreover, their level of "professionalism" – which Cross (2013: 149) links to the role, status, and internal cohesion of a profession – can influence the perceived legitimacy and effectiveness of their efforts to shape policy.

Institutions – such as the national Ministries of Justice and the EU institutions – should not be seen as "just reward matrices within which actors make choices motivated by self-interest," but also as "repositories of the beliefs, values, historical memories, judgments and customs that comprise part of the larger cultural context" (Ziegler 1997: 15). The "ideational predispositions" (id. at 16) of the elites that inhabit these institutions "impose very real constraints on policy strategies and instruments" (id. at 19), which may "enter into policy formation" (id. at 16). Such constellations of institutions, elites, and possibly also networks or other formations are key "engines that drive globalization" (Madsen & Christiansen 2016: 22), as well as European (dis)integration.

Lastly, Ziegler argues that it is necessary to understand how members of a knowledge-bearing occupational group are "identified, recruited and socialized," since these are the "processes that provide insight into inherited beliefs, self-images and goals" (Ziegler 1997: 16). At this point, my research parts ways with Ziegler's project, since I do not seek to explain why the legal elites in my case studies have the beliefs, self-images and goals that are documented in Chapters 7 and 8 above. This may be seen as a shortcoming of my research, but I would like to suggest an alternate way to think about it. Unlike Ziegler's study, which focused on national engineering elites in the technology sector in order to explain variation between French and German technology policies, my study is not comparative. Nor is my study historical in the sense of uncovering the roots of legal elites in different national settings, though I accept the argument that the preferences expressed by key legal elites in my case studies – such as those articulated by the Finnish Ministry of Justice – were "produced by historically specific institutional arrangements" (Lizardo & Stoltz 2017: 2), which includes the European institutional environment in the 1990s as well as the personal trajectories of particular individuals.

My goal is not to identify differences among key actors that might be rooted in their particular education and socialization, but rather to contribute towards a broader understanding of how legal elites think and act in the context of European integration. It is more telling in the EU context that some key actors split their careers between national and supranational service[217] – in most cases sequentially, such as in the case of Charles Elsen who, after years of service in the

Ministry of Justice in Luxembourg, went to a leadership role at the Council Secretariat in Brussels, but in some cases simultaneously, such as in the case of supranational civil servants who continue to advise their national governments on particular matters – than that key legal elites in the Council Secretariat hailed from different EU Member States. The (possibly different) legal worldviews that stem from their national culture might manifest themselves in concrete policy proposals, but might also be submerged in the supranational culture of Brussels or trumped by the specific institutional culture of their workplace. These are empirical questions.

Rather than searching for deeply rooted *national* differences among legal elites that might differentiate them from one another, I have focused on other theoretically significant characteristics. I first tried to disentangle the extent to which their orientations were nationally or supranationally oriented (neofunctionalism vs. intergovernmentalism), and discovered that they might also be oriented towards subregional values or identities (subsection 9.2.2.1). I now seek to identify other logics – particularly those stemming from their profession – that might contribute towards explaining the communitarization of civil justice in Amsterdam and Tampere.

Sociologists of law have argued that the European legal field is "homogenous" and "strongly cohesive" (Jettinghoff 2004: 5),[218] insofar as the "European legal community ... identifies with the project of European integration both intellectually and socially, and that identification expresses itself in a widely shared conception of law and of what law can and should do" (Schepel & Wesseling 1997: 176). Legal elites have "been among the influential players among the forces of political centralisation" or state-building in Europe (Jettinghoff 2004: 4, see also van den Berg 2004 & 2007). They have not only used the traditional occupational roles as judges and lawyers to push European integration forward, but have also created the European legal field by writing it into existence (Schepel & Wesseling 1997, Schepel 2004 & 2007).

The edited volume by Alex Jettinghoff and Harm Schepel (2004) focuses on the "entrepreneurial quality" of governmental and non-governmental legal actors who aimed to advance a "centralist legal innovation at the EU level" in the form of a European Civil Code (Jettinghoff 2004: 4). As such, the movement that is the focus of their study differs substantially from mine, which encompasses almost exclusively legal elites in civil service positions. Entrepreneurial activity is possible in both settings but may take different forms or follow different paths. Legal elites, once 'inside' a national or EU institution in a civil service position, become "organisation people," and these organizations often depend on their "entrepreneurial attitude" to get things done (id. at 11). Civil servants may be more constrained in their range of movement by the political and bureaucratic environment in which they must operate. At the same time, however, this environment also provides them with access, opportunities, and resources that 'outside' legal elites, such as those in the high-profile academic GEDIP network, might crave.

What, then, do my findings suggest about the professional worldviews and identities, and the ideational predispositions of the legal elites who were key actors in my case studies? My research reveals five dimensions, which supplement but do not challenge the insights of sociolegal studies of European law and lawyers. First, legal elites take seriously the missions of promoting justice and building a more perfect European legal order. Second, they are, at the same time as being idealistic, also pragmatic problem solvers. Third, Continental legal elites have a professional distaste for incoherence. Fourth, they care greatly about language and precise formulation. And fifth, some European legal elites have limited role conceptions that make them

wary of crossing the line between law and politics.

First, key legal elites in my case studies were idealistic about the twin goals of building the European legal order and promoting justice within it. As Feeley (2013: iii) has noted, European integration "shares a commonality with other forms of political integration; it was imagined, the imagination was acted upon, and the imagination was realized." This teleological orientation is particularly strong among the legal elites in my case studies who – ever mindful of Cappelletti's clarion call that "it is a legal order that we are expounding" (Cappelletti et al. 1986: 10) – saw themselves as engaged in a collaborative effort to imagine concretely what a more perfect European legal order should look like.[219] Despite the formally intergovernmental settings in Amsterdam and Tampere, key national legal elites who were called upon to formulate national preferences did not stop at making a few concrete suggestions, but mapped out a comprehensive and holistic vision of a more just and interlocking European legal order. While this imagined construct might embody a particular feature from a particular national legal order (e.g., Germany's debt collection procedure), the notion of national heritage was predominantly seen as a resource from which to draw, rather than an interest to be defended. A number of my interviewees described themselves as apolitical experts who act in the interest of the rule of law, rather than in either national or European interest. Concrete proposals reflected these worldviews, from the Commission's 1998 Communication on Judgments and later Mutual Recognition Program (2001), to Finland's ambitious and holistic proposals. The idea of European legal order – the justice component of the Area of Freedom, Security and Justice – was an ideal that united the actors engaged in the treaty-revision and summitry processes, even when they disagreed about details. Far from zero-sum bargaining, the process was more akin to piecing together a mosaic or mandala, creating an aesthetically pleasing whole from collected fragments to enclose the European legal field. Yet, unlike the Tibetan Buddhist sand mandala tradition, this construction was not only meant to last, but was also meant to work.

While partly the work of "uprooted civil servants" in the EU bureaucracy (Legrand 1997: 51), this was equally the work of national civil servants rooted in their national legal cultures. That this is so, does not prove that the "tenacity of European national legal cultures" has weakened (Kagan 1997: 180), or that European legal elites have shed their identification with the national legal cultures that produced them or forsaken their role as "guardians of socio-legal diversity" (Olgiati 1995). My case studies show, rather, that national and supranational legal elites joined cause in Amsterdam and Tampere, when called upon – and given the opportunity – to do so, and wielded their "expert power" (Madsen & Christensen 2016: 12) with gusto. These were situations in which their professional ideals were in alignment with the demands placed by the institutional environments in which the key legal elites found themselves. The occupational identities of Member State legal elites were not exclusively national, but also European.

Second, legal elites are pragmatic problem solvers.[220] An orientation towards pragmatic problem solving appears to be inherent in the worldviews of the key legal actors in my case studies. I deduce this conclusion from two sources. First, even in civil law countries such as France and Germany, where *ex cathedra* teaching remains the norm, students are expected to solve cases as part of their legal education. Second, this characteristic is ubiquitous in the statements made by my interviewees and in the documents and proposals produced for Amsterdam and Tampere, which strongly emphasize the need for greater efficiency in the operation of the legal system. Unlike in U.S. legal education, where problem solving and clinical legal education are prominent and even gaining ground (e.g., Menkel-Meadow 2000, Singer &

Rakoff 2015, Davis-Laack 2017), (Western) Europe has been described as the "last holdout in the worldwide acceptance of clinical legal education" (Wilson 2009). There are, however, signs of change. The 'Menu for Justice Project' brought a wide range of EU (and some other European) scholars together to examine the state of legal education and judicial training (Piana et al., eds, 2013) and discuss proposals for innovation (Policastro, ed., 2013). Problem-based learning, which has found some acceptance in Nordic legal education (Hammerslev 2013) and elsewhere (e.g., the Netherlands and the UK), was among the innovations discussed.

There is, however, a difficulty with identifying problem solving as part of a legal worldview, since this characteristic is deeply embedded in EU governance as well. Speaking in a different context, Svetiev (2016: 662) has argued that if the EU "has any underlying rationality, it is a problem-solving one." Indeed, pragmatic problem solving is the logic of functional spillover. As Haas (1958: 297) noted, civil servants in the steel sector "constantly found it necessary to 'harmonise' their separate policies in order to make it possible for the integrated sectors to function." This tendency did not "necessarily [imply] any ideological commitment to the European idea"; rather, Haas (id. at 300) argued, "simple concern for the proper functioning of the integrated sector" sufficed as a non-ideological pressure, given the "practical need for co-operation ... merely in order to make the common market for steel a reality" in the context of supranational structures. Given the impossibility of disentangling a national propensity towards pragmatism (e.g., in Finland) from problem solving as part of a legal worldview or as a characteristic of persons working in the EU's supranational context, I argue that these tendencies have multiple sources, which reinforce one another, making the tendency stronger.

Third, European (and particularly Continental) legal elites have a professional distaste for incoherence. Stated more positively, "European legal education and scholarship emphasize ... logical coherence" (Kagan 1997: 170). This is most characteristic of civil law systems, where the notion of the complete and gapless code (Weber 1978: 655-6) is linked to the overarching goal of ensuring legal certainty (e.g., Stinchcombe 2002) and the urge to constrain judicial discretion. This characteristic is often attributed to the tradition of Roman law. Kitchin (1873: 287) notes, for instance, that the Pandects of Justinian were discovered in Italy in 1135, where they became the basis of learning in Bologna, and later passed to the "new-born kingdom" of France, where they were "welcomed eagerly: the exactitude and logical coherence of the Roman Law were what society was craving for in its attempt to establish itself on more secure foundations." Much later, nineteenth-century German Pandectists used the Roman texts to "construct a legal system where all particular rules could be derived from and classified under a set of clearly formulated juridical categories and abstract propositions," and approached law "as a form of logic, a coherent assembly where everything can be reduced to general principles, concepts and conceptual categories" (Mousourakis 2015: 292).

What these traditions mean, in practical terms, is that Continental legal elites are prone to think about law as a well-designed system – rather than as an evolutionary body of malleable and constantly changing law, as in the common law tradition – and expect that system to be coherent and complete and to function smoothly. A number of my findings suggest that this instinct was at play in Amsterdam and Tampere: the notion of an encompassing legal area; the Commission's highly detailed proposals regarding the development of a frictionless and efficient system for enforcement of judgments; the drive to avoid the use of any contingent or under-specified categories; and the holistic Finnish proposals that aimed to ensure that nobody would "fall through the cracks" because the parts of the European legal area failed to dovetail perfectly.

Fourth, precise language and details matter greatly to legal elites, who tend to fight endlessly over every turn of phrase and nitpick every detail. Legal elites are prone to think about the consequences of language; the great (obsessive) care that they take with language reflects the expectation that legal texts will be interpreted, along with some sense of how they might be interpreted. These tendencies can be seen, for instance, in the long struggle to draft Article 65 of the EC Treaty, in regard to which one participant described that provision as "one of the most carefully drafted articles" in the Amsterdam Treaty, and noted that it reflects "not a peace treaty" but rather a "kind of no-fire situation" (Interview #4). Another example – in this case a negative one – was the decision to exclude line Ministers (i.e., of Justice or Interior) from attending the Tampere summit, in order to facilitate political agreement by keeping legal experts from getting in the way.

Fifth, some European legal elites – particularly academics – have limited role conceptions that make them wary of crossing the line between law and politics. This was most apparent in connection with the legal experts in the GEDIP network, who would like to have been heard in Amsterdam and Tampere, but who were simply out of the loop. This is not to say that legal academics are never entrepreneurial (see, e.g., Jettinghoff & Schepel, eds, 2004, Kauppi & Madsen 2013a, Vauchez & de Witte 2013), but merely that they *were not* in the context of treaty-revision in Amsterdam and long-term policy planning in Tampere. The secrecy and lack of transparency that are vestiges of the diplomatic nature of treaty-revision and summitry in the EU denied legal experts working outside of government the opportunity to have a say in the momentous changes that were made (largely) without their input. Dependent already on friendly relations with civil servants to gain access to EU documents, the experts were hardly in a position to demand knowledge of what was being discussed in EU circles.

Rather than agitate, the activities of European legal academics in the context of European integration – in the civil justice field, at least – has tended to be oriented more towards the traditional role of providing expertise to political actors than to engaging in more direct political activities, establishing journals, and securing third-party funding for their research and other activities. This orientation has begun to change, however. Shortly after the Amsterdam Treaty communitarized civil justice in the EU, prominent German scholar Jürgen Basedow (1998: 125) declared that the time had come for legal scholars to "transcend the traditional limits of the analysis of legal development and try to shape the future European law for themselves." How quickly this academic culture will change remains open to question. A large group of more than 100 academics met in Berlin in March 2018 to discuss "How European is European Private International Law." At the end of a truly impressive multi-day conference, the organizers proposed to establish a new pan-European academic association, with the aim of providing more and better expertise to the EU legislator. Yet even when prodded, they refrained from engaging in a political discussion about how the changed institutional environment in Brussels (under Commission President Juncker) has limited the chances of achieving further legislation in the field, and appeared content to bemoan the situation rather than to strategize a response to it.

9.2.3 Conclusions

Traditional theories about European integration – the 'Grand Debate' between neofunctionalism and intergovernmentalism – posit that Member State preferences in the context of intergovernmental bargaining, such as is involved in my two case studies, seek to advance the national interests of Member States, while Brussels-based Eurocrats and supranationally-

socialized national actors seek to advance the broader European interests of the EU. This simplistic set of assumptions provides an apt starting point for explaining the dynamics that led to communitarization of civil justice in Amsterdam and long-term policy planning for developing the "genuine European area of justice" in Tampere, but cannot bear the full weight of explaining my two case studies. While some key actors – virtually all of whom are legal elites – change hats regularly, representing their national government one day and an EU institution the day after, they was no contradiction in their multiple roles. Rather, they described themselves as experts loyal to the rule of law, rather than to one or the other political master. My case studies in Part III – particularly the examination of national preference formation – show that legal elites who occupy civil service positions in their national capitals can be equally enthusiastic supporters of the larger European interests, in some instances even equating national with European interests. My findings on national preference formation largely (but not wholly) undermine an intergovernmentalist explanation, insofar as intergovernmentalism – like neofunctionalism – generally assumes a pluralistic process in which non-governmental actors and national political contestation play a role. These theories are less well-equipped to explain cases like mine, where these key assumptions do not hold.

In early work, Moravcsik (1993: 494-5) anticipated cases like mine, which involve "political, institutional or redistributional policies," such as those aimed at providing "non-socio-economic collective goods" or "general institutions which exist for their own sake or to facilitate other policies." In regard to such cases, Moravcsik argued that "mobilization of social interests and ultimate determinants of state action" depend on whether the "implications are calculable" (id. at 495). In cases like mine, where the "costs and benefits to societal actors" are "weak, uncertain or diffuse, governments will be able to pursue broader or more idiosyncratic goals," and policy will be left "almost exclusively to ... elites," who will justify their policies using "symbolic and ideological, rather than calculated and concrete" reasoning (id. at 494). My findings have born out this prediction in regard to the preferences articulated by national legal elites in connection with Amsterdam and Tampere, and provide evidence of the sources of their articulated preferences.

Neofunctionalism, with its emphasis on 'spillover' mechanisms, also contributes in important ways towards explaining the outcomes in Amsterdam and Tampere. Haas (1958) drew attention to political elites, including higher civil servants in national bureaucracies, to explain European integration, noting that such persons might develop multiple loyalties or identities and see themselves as simultaneously national and European. The core logics of neofunctionalism – particularly functional and social, but also cultivated spillover – contribute towards explaining my case studies.

Neither intergovernmentalism nor neofunctionalism, however, can fully account for my case studies. For this reason, my explanation reaches beyond them and draws on both postfunctionalism and neoinstitutionalism to account for the outcomes in Amsterdam and Tampere. Postfunctionalism draws attention to the potential role of identity as a logic driving integration (Hooghe and Marks 2009a:1) and to the "sociality of governance," which includes the "geographical, cultural, and historical sources of group distinctiveness" (Hooghe & Marks 2016: 151). My findings the postfunctionalist argument that collective identity can play a role. Notably, Finnish preferences were guided in numerous respects by identification with the traditions of Nordic legal cooperation.

The neoinstitutionalist work of Nick Ziegler (1997: 2) offers a theoretical framework for

understanding more deeply the role of "knowledge-bearing occupational groups," such as the legal elites who were the key actors in my case studies. My findings show that occupational worldviews influenced their concrete policy proposals, and are important sources of the "symbolic and ideological" reasoning they deployed to justify their preferences (Moravcsik 1993: 494). Moreover, my findings support Ziegler's claim (and that of sociological institutionalists more generally) that elite actors are prone to advance policy proposals that are consistent with their professional self-images. Moreover, the legal elites in my case studies exercised their agency not only on behalf of their principals, but in some cases pursuant to what they perceived as their inherent interest in the legal order itself.

Finally, while not addressed in the preceding discussion, it bears mention that personal attributes of actors, such as persistence and strong personality, can play a role in explaining outcomes (Kingdon 1984). I argue that they did matter in both Amsterdam and Tampere, particularly in the Council Secretariat and in Finland. While the roles of particular actors in the Council Secretariat are less visible, owing to the formal limits on that institution's leadership role, my interviews revealed that legal elites there exercised a strong influence over outcomes. The role of personal attributes is more visible in the case of Finland, where Kirsti Rissanen – the strong civil servant leading the Ministry of Justice – pushed relentlessly to realize a holistic vision that placed civil justice at the heart of the EU's emerging European area of justice. Unlike some civil servants in the Council Secretariat of the EU, who were quick to claim credit for their achievements, Rissanen has expressed the view that she did not originate the ideas she was pushing (despite evidence that she was responsible for a number of the innovative – even if ultimately unsuccessful – proposals that Finland put forward), but was merely able to use her position to keep ideas in play that came from other actors whose political capabilities were more limited, particularly the Commission.

Ultimately, my explanation draws upon an eclectic theoretical framework (Verdun 2002). I have no ambition to offer a theoretical synthesis, but argue that my case studies reveal some of the constraints and limitations of the traditional theories of European (dis)integration. Neoinstitutional and field approaches offer workable theoretical frameworks, as does new work on epistemic communities (Cross 2013) and the role of legal elites in European integration (Kauppi & Madsen 2013a, Vauchez & de Witt 2013). New tools are needed for understanding the EU's "compound executive order, which entails a "compound set" or "multidimensional mix" of the "supranational, departmental and/or epistemic dynamics" that have largely – albeit not entirely – "transcended" intergovernmentalism and transformed the Westphalian order (Trondal 2010).

9.3 Implications for Further Research

My research suggests four avenues for future research:

- First, my findings case casts some light on the agents – in my case studies, legal elites – who "develop multiple social identities, collective identifications, and shared multiple purposes" (Lewis 1998: 44), but greater attention is needed to the "entrepreneurs of alternative political identities" (Ruggie 1993: 172) who "internalize and practice these identities" (Lewis 1998: 44). My findings draw attention to the possibility that subregional identities may also play a significant role in transnational governance.
- Second, my findings raise questions about the agency of government lawyers, in general, and legal elites in transnational (e.g., EU) governance, in particular. A number of

different avenues of future research can be identified. In what ways are legal elites in civil service positions like or unlike other civil servants? Do theoretical approaches developed in studies of public administration adequately explain their agency, or is it necessary to know more about the identities of this professional group? To what extent can the actions of legal elites be explained by reference to the national traditions in which they were trained (Ziegler 1997: 208-9)? Are these national occupational identities converging, or are national differences persistent (Kagan 1997 & 2007)? Is there consistency or variation within national professional role identities (Schott et al. 2016: 34-5)?

- The role of gender in justice politics has come under increasing scrutiny (e.g., Schultz & Shaw 2003, 2012 & 2014, Schandevyl 2014), but remains understudied. Most studies focus on the judiciary and the legal profession. My research has uncovered no studies of the role of women in high-level civil service positions, such as national Ministries of Justice, or as politically-appointed Ministers of Justice. Such women played an important role in my case studies. What explains the relative prominence of women in the justice field, in comparison to other policy fields?
- In a different vein, what is the relationship between procedural and other legal reform in the civil justice arena at European level and at national level? The important changes at EU level that are the focus of my research did not displace legal reform at the national level. Indeed, a number of Member States have carried out far-reaching civil justice reforms during the last two decades since the EU communitarized civil justice for transnational cases.
- Finally, what has been the impact of communitarizating civil justice in the EU? To what extent have the intended benefits of this course of action come to pass? What have been the unanticipated consequences? A broad range of legal academics and practitioners complain about mind-boggling complexity, while recent sociolegal research (Beaumont et al. 2017) points toward far-reaching structural changes in the administration of justice.

Endnotes to Chapter 9

1. Notably, France and Spain in 1995, Italy and Ireland in 1996, and the Netherlands in 1997.

2. The Commission Task Force was deeply involved in the process of preparing for the IGC and the Tampere summit, and its views were influential. In addition, a handful of Commission staff members were intimately involved with drafting in the context of the Amsterdam summit.

3. I am aware of no published accounts of the events that I have studied, though some authors have published pieces of the story. These are cited in Part III above.

4. The Netherlands had the Presidency of the Council during the first half of 1997, and the Treaty of Amsterdam was adopted at the meeting of the Amsterdam European Council meeting on 16-17 June 1997.

5. The EU developments studied here overlap temporally with a major round of multilateral negotiations within the framework of the Hague Conference on Private International Law (1996-2005), which aimed – but ultimately failed – to reach agreement on a global treaty addressing some important civil justice issues: jurisdiction and the recognition and enforcement of civil and commercial judgments. The U.S. government proposed the negotiation of a global judgments convention in 1992, and formal negotiations began in 1996. These negotiations involved a large group of countries, but essentially pitted the U.S. against the EU in a lengthy and heated battle to embed their respective model in the foundations of a new global procedural order. O'Brian (2003: 492) summarizes the difficult negotiations and inability to reach consensus in the Hague, which he attributes to American unwillingness to go along with the Hague Draft, which was "too much like the European approach to jurisdiction, and not enough like the US system of jurisdiction." Compare the U.S. view, as expressed by von Mehren (2001: 192): "The United States delegation believed ... that the [Hague] Conference's traditional diplomatic session procedures, with their strong majoritarian bias, were incapable of producing a convention that would be acceptable world-wide." The negotiations were concluded in June 2005 with the adoption of a considerably scaled down treaty, i.e., the Convention on Choice of Court Agreements. As of July 2018, this Convention has been ratified by more than 30 countries.

6. In other words, one side-effect of communitarizing civil justice issues for the purposes of *internal* or 'domestic' EU legislation is to give the EU *external* competence to negotiate treaties with non-EU countries on these same issues as well, in lieu of the Member States. So long as the issues being negotiated in The Hague fell outside the scope of Community competence, each EU Member State retained sovereignty (with some limitations) to negotiate at the Hague Conference and to conclude any treaty that might result from those negotiations. Yet once civil justice was drawn into the scope of Community competence, treaty negotiating authority over the affected issues shifted from the Member States to the EU institutions, pursuant to the Court's 1971 ruling in the *ERTA* case, which holds that external competence (i.e., foreign affairs power) automatically follows from internal competence. See Van Elsuwege (2018); Weiler (1981). In practical terms, authority to negotiate with non-EU countries shifted to the EU's main executive body, the Commission, once the Amsterdam Treaty entered into force in May 1999. Article 300(1) of the EC Treaty (now TFEU art. 218) states: "Where this Treaty provides for the conclusion of agreements between the Community and one or more States or international organisations, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with special committees appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it."

7. Stein (1981: 1) (the Court of Justice "has construed the European Communities Treaties in a constitutional mode"); see also Weiler (1981, 1991, 1994). Stone Sweet (2004: 1) argues that the EU has displaced the traditional, state-centric international regime through the "constitutionalization of the treaty system."

8. As Jupille (2005: 220) has noted, it is difficult to sort out theories of European integration, because "scholars are not always explicit about [their] metatheoretical commitments, which makes it hard to identify what is on offer, what is being rejected, and what is at stake."

9. The predecessor of the EU was the European Coal and Steel Community (ECSC), which was founded pursuant to the 1951 Paris Treaty, for the purpose of regulating industrial production in these sectors under a centralized authority. The later treaties establishing the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) were both signed by the same founding countries on 25 March 1957.

10. In the early years, the focus was on each community's executive institution: the High Authority of the European Coal and Steel Community (Haas 1958), and the respective Commissions of the EEC and of Euratom. The 1967 Merger Treaty combined the executive bodies of all three communities into a single institutional structure, the European Commission.

11. In addition, these terms are also used to describe particular modes of EU decision-making. Thus, intergovernmental decision-making entails unanimous voting by Member States, such as by the Council of the EU or the European Council within the EU's institutional framework, while supranational decision-making entails the exercise of delegated authority, such as by the Commission, the EP, and the Court of Justice. In this context, 'intergovernmental' implies preservation of a national veto, allowing Member States to agree "in situations and conditions they can control, [to] cooperate with one another on matters of common interest" (Nugent 2003: 475), while 'supranational' implies loss of the national veto. Supranationalism thus "takes inter-state relations beyond cooperation into integration, and involves some loss of national sovereignty" (id.). In Haas's early formulation (1958: 59), supranationality means "in structural terms, ... the existence of governmental authorities closer to the archetype of federation than any past international organization, but not yet identical with it."

12. De Gaulle, who served as President of France from 1958 until 1969, repeatedly blocked closer relations with the UK during most of his term in office, and boycotted decision-making for six months in 1965 (the "empty chair crisis"), thereby preventing the EEC from acting on matters requiring unanimity.

13. Thus, intergovernmentalism can explain integrative outcomes, and neofunctionalism can explain disintegrative outcomes.

14. In terms of his particular case study, Haas's core finding (1958: 286) was that "acceptance of [the] ECSC is best explained by the convergence of demands within and among the nations concerned, not by a pattern of identical demands and hopes."

15. Haas (1958: 17) argued that the focus on elites was justified by the "bureaucratised nature of European organisations of long standing, in which basic decisions are made by the leadership, sometimes over the opposition and usually over the indifference of the general membership."

16. Risse (2005: 293) has described Haas as a "Weberian 'soft rationalist' insofar as he assumed values and ideas as being an intrinsic part of actors's interests," but that he "never assumed that collective identification with European institutions was the starting point of integration."

17. The idea here is that institutions, once created, take on a life of their own, and cannot be fully controlled by their creators (e.g., Pierson 1996). For the record, Pierson is identified as a historical institutionalist, rather than as a neofunctionalist (see discussion in subsection 9.2.2.3 below).

18. The concept of spillover came in time to be stretched to "denote any kind of neofunctionalist explanation for political change" and to "cover the of different mechanisms and patterns of causation that seemed to have been involved in the expansion of tasks" (Niemann 2006: 29).

19. Haas (1958: 297) argued that sector integration "begets its own impetus toward extension to the entire economy even in the absence of specific group demands and their attendant ideologies. Thus, ECSC civil servants speaking for national governments have constantly found it necessary to 'harmonise' their separate policies in order to make it possible for the integrated sectors to function, without necessarily implying any ideological commitment to the European idea." The automaticity implicit in this claim led neofunctionalism into troubled waters when the political climate changed and integration balked, prompting Haas (1975) to declare the theory obsolete.

20. In a more recent formulation, Niemann (2006: 17) explains that "some sectors within industrial economies are so interdependent that it is impossible to isolate them from the rest. Thus, the regional integration of one sector would only work if followed by the integration of other sectors, as the functional integration of one task inevitably leads to problems which can only be solved by integrating yet more tasks."

21. Haas (1958: 313) pointed to growing "concern over political techniques appropriate for the control of new and larger problems."

22. Haas (1958) identified it, while Tranholm-Mikkelsen (1991: 5) assigned this label to it.

23. In a later refinement, Niemann (2006: 34) criticized the 'political spillover' factor as "excessively broad" and conceptually muddy, and reformulated it. In his reformulation, he retains the label 'political spillover' to denote the "development of organized interests at European level, mainly (but not exclusively) relating to non-governmental elites which change their perceptions largely because of incentive-based learning," and re-labels as 'social spillover' the "processes of elite enmeshment, socialisation and learning, including, but going beyond, incentive-based learning among primarily (but not exclusively) governmental elites."

24. As Haas (1958: 313) put it, the "spill-over process asserts itself in the relations among civil servants, national government offices, central banks and technical advisers. ... [T]he logic of intergovernmental relations ... can lead only to more collective decision-making in the effort to overcome the inevitable crises and unforeseen contingencies."

25. Tranholm-Mikkelsen (1991: 18) argued persuasively that integration is better characterized as a dialectic process, which occurs under certain conditions, than an automatic process. As Tranholm-Mikkelsen (id.) put it, "we can discern pressures, constraints, tendencies and trends, [but] European integration, like politics in general, ultimately depends on intentional acts by individual human beings. Integration cannot, therefore, be reduced to anonymous processes whose inexorable 'laws' it is for academics to discern."

26. These assumptions are not limited to neofunctionalists. For example, influential IR scholars Keohane & Nye (1977) have advanced the notion of complex interdependence among states, which is based on transnational connections and interdependence. Those authors (id. at 129-30) identified two phenomena that are closely linked to core concerns of supranationally minded neofunctionalists: transnationalism, in which nationally-based interest groups make contact with similar groups in other countries, and transgovernmentalism, in which government departments forge links with their counterparts in other states.

27. Schmitter (1969: 165) also noted further possible links between internal and external developments. He argued that once European integration was underway in a particular field, "participants will find themselves compelled – regardless of their original intentions – to adopt common policies *vis-à-vis* non-participant third parties," which creates an "incentive ... to increase the collective bargaining power of the [EU] *vis-à-vis* the outside world" (Niemann 2006: 34).

28. This occurred during the strong Delors Commission (1985-1994) (Tranholm-Mikkelsen 1991: 12 ff; see also Ross 1995; Sandholtz & Zysman1989: 107-8). Some scholars have emphasized the role played by executive leaders of international organizations in generating governance changes (e.g., Wouters & Odermatt 2016). In a seminal article, Cox (1969: 229) argued that the "executive head plays a key role in converting an international organization conceived as a framework for multilateral diplomacy into one which is an autonomous actor in the international system."

29. Lindberg (1963) stressed the role of government elites and the process of *engrenage*, by which interactions among governmental elites can socialize them, over time, to perceive common interests and even forge European identities, with the result that elite perceptions become increasingly European. See also Lindberg & Scheingold (1970: 119). As a practical matter, *engrenage* tends to "induce consensus formation amongst member governments and ... lead to more integrative outcomes" (Niemann 2006: 18).

30. The “Council framework” refers to participation by national elites in Council Working Groups, particularly in the context of EU legislation.

31. Haas (1958: 66) suggested that decision-making entails “a cumulative pattern of accommodation in which the participants refrain from unconditionally vetoing proposals and instead seek to attain agreement by means of compromises upgrading common interests.”

32. This formulation builds on Lindberg (1963: 6), who argued that elite political actors would shift their “expectations and political activities” to the “new centre,” but not necessarily transfer their loyalties from the national to the supranational level, as Haas (1958) had claimed.

33. Niemann (2006: 38-9) goes on to argue that socialization and learning are affected not only by the “duration, quantity and intensity of interaction,” but also by the quality of interaction.

34. Burley & Mattli (1993: 54-5) have noted that one of neofunctionalism’s “important contributions ... is the introduction of an unambiguously utilitarian concept of interest politics that stands in sharp contrast to the notions of unselfishness or common goods that [pervaded earlier] functionalist writing. ... Ruthless egoism does the trick by itself. ... The supranational actors are likewise not immune to utilitarian thinking.”

35. In later work in which he described his ontology as “soft rational choice,” Haas (2004b: xv) explained that “social actors, in seeking to realize their value-derived interests, will choose whatever means are made available by the prevailing democratic order. If thwarted, they will rethink their values, redefine their interests, and choose new means to realize them. ... The ontology is not materialistic: values shape interests, and values include many nonmaterial elements.”

36. Niemann (2013: 639) readily acknowledges that Haas (1958) conceived the possibility that European institutional structures – including supranational structures – could “have an effect on how actors understand and form their interests and identities.”

37. Faber (2005: 127) identifies spillover and certain aspects of interdependence and security as belonging to the logic of integration, and nationalism, the diversity of Member States, and other aspects of interdependence and security as belonging to the logic of integration.

38. Domestic constraints “may substantially circumscribe governments’ autonomy to act” (Niemann 2013: 642), as Moravcsik (1993: 483-94) previously noted, which can lead to “disintegrative outcomes, as domestic constraints may lead to national vetoes or prevent policies above the lowest common denominator” (Niemann 2013: 642). Scholars have identified different sources of constraint. For example, Héritier (1999) has identified actors (e.g., lobby groups, opposition parties, media, public pressure) and structural factors (e.g., the national economy, geography, or administrative structure) as potential sources of constraint (Niemann 2013: 642). “Adverse bureaucratic pressures” can also serve as domestic constraints, when they are “not so much ideological in nature (sovereignty-consciousness), but [rather] when bureaucrats limit governmental autonomy of action in order to protect their personal interests or to channel the preferences of their ‘constituencies’ ” (id.).

39. Sovereignty-consciousness may be, but is not necessarily linked to outright nationalism; in any case, it “tends to be linked to national traditions, identities and ideologies and may be cultivated through political culture and symbolisms” (Niemann 2013: 462-3, citing Callovi 1992 and Meunier & Nicolaïdis 1999: 485).

40. Some of the theoretical literature on legal integration and legal elites considered in this chapter is explicitly neofunctional in its approach.

41. My account leaves exogenous spillover out, since geographical expansion of the EU was not at issue in my case studies.

42. Hoffmann's analysis (1966) incorporated Member State worries about sovereignty, coalition formation, and relative gains among States.

43. Milward (1992) went one step further and argued not only that Member State governments were the primary actors, but also – contrary to predictions that they would become obsolete – that they were strengthened rather than weakened by the process of European integration.

44. Thus, "the initiators, promoters, mediators, legislators and promulgators of deepening and broadening European integration are the national governments in general, the governments of the major EU countries in particular, and heads of government, heads of state and powerful ministers most specifically" (Puchala 1999: 319).

45. Thus, rather than being at the mercy of the supranational institutions – the Commission, the EP and the Court of Justice – EU Member States "remained very much in control of the process of integration through its intergovernmental bodies, namely the Council of Ministers and the European Council, thereby limiting the ability of supranational organizations to drive forward the integration process" (Pollack 1997: 1). Pollack (id.) analyzed the EU's supranational institutions through a principal-agent lens.

46. Integration was revitalized after the 1984 Fontainebleau Summit, which broke through a debilitating financial deadlock. In 1986, Member States signed the Single European Act, which institutionalized the drive to complete the internal market by 1992, and a few years later, the Maastricht Treaty. Both of these treaties brought matters of high politics – such as monetary union and creation of the European Common Foreign and Security Policy – into the framework of European integration.

47. "Groups articulate preferences; governments aggregate them. For liberals, the relationship between society and the government is assumed to be one of principal-agent; societal principals delegate power to (or otherwise constrain) governmental agents" (Moravcsik 1993: 483).

48. "The most fundamental influences on foreign policy are, therefore, the identity of important societal groups, the nature of their interests, and their relative influence on domestic policy. Groups that stand to gain and lose a great deal per capita tend to be the most influential. The identity, interests, and influence of groups vary across time, place and, especially, issue-area, according to the net expected costs and benefits of potential foreign policies" (Moravcsik 1993: 483).

49. In cases of this first type involving tariffs and quotas or agricultural price policy, Moravcsik (1993: 495, Figure 2) predicted overt pressure from producers with expected gains or losses, depending on their "competitive position in international markets, levels of intra-industry trade, and the certainty of policy outcomes," with state action determined by producer interest where they are "unified and certain," otherwise governments are "more likely to risk liberalization when faced with overt and intractable policy failure ... ."

50. In cases of this second type involving monetary, environmental, social and regulatory policies, Moravcsik (1993: 495, Figure 2) predicted "two-dimensional pressure" from producers, as in the first type of case, and from the public in favor of public goods.

51. According to Moravcsik (1993: 495, Figure 2), this type includes more sweeping measures such as European Political Cooperation, parliamentary affairs, or structural funding.

52. Moreover, Moravcsik (1993: 494) argues, the "inherent incalculability of gains and losses in these policy areas accounts for a troubling neo-functionalist anomaly, namely the manifest importance of ideologically motivated heads of state ('dramatic-political' actors) in matters of foreign policy and institutional reform." Tranholm-Mikkelsen (1991: 16) defined "dramatic-political" actors as persons who "hung onto symbols of national sovereignty and tried to preserve them."

53. "Agents associated with European institutions, exercise only marginal influence at best" (Puchala 1999: 319).

54. See Dehousse (2011) for a fuller exploration of the "Community method," which was typically understood to entail the "transfer of lawmaking power to the European level, an expansion in the initiating powers of the Commission and the enforcement powers of the CJEU, and the resort to majority voting to pass legislation binding on Member States" (Bickerton et al. 2015: 706). In the new intergovernmentalists' view, the "Commission and the CJEU have been reshaped in the post-Maastricht era and are no longer the 'engines of integration' that they once were" (id. at 717).

55. "In their place has arisen a volatile and indeterminate sort of politics, where individuals seek direction and guidance from a range of actors, many of whom do not last long on the political scene. Anger and frustration co-exist alongside more traditional organized interests, the legitimacy of which is increasingly contested by domestic publics" (Bickerton et al. 2015: 710).

56. Thus, the new intergovernmentalists hypothesize that the EU "is in a state of disequilibrium," and that "instability" in the relationship between "national elites and their domestic constituencies ... lies at the core of European integration in the post-Maastricht period" (Bickerton et al. 2015: 716).

57. Multi-level governance "conceives regional integration as part of a more general phenomenon, the articulation of authority across jurisdictions at diverse scales" (Hooghe & Marks 2009a: 2), where "authority on a broad swathe of issues has come to be shared across EU institutions, national, and subnational governments" (Hooghe & Marks 2009a: 114). MLG departed from traditional approaches to European integration after noticing the existence of "direct connections between domestic groups and European actors," which undermined the claim that Member States monopolized the "representation of their citizens in international relations" (id.). For an early statement, see Marks, Hooghe & Blank (1996).

58. Postfunctionalism posits "that the 'permissive consensus' in mass public opinion supporting the EU integration project has been gradually replaced by a 'constraining dissensus' that limits decisions of EU friendly élites seeking to deepen European integration" (Börzel & Risse 2018: 84).

59. "Functional pressures are one thing, regime outcomes are another" (Hooghe & Marks 2009a: 23).

60. Börzel & Risse (2018: 85) identify three dimensions of politicization: increasing "issue salience of European affairs in the various public domains; ... levels of polarization pertaining to the EU in general, EU institutions, or EU policies; [... and] mobilization and expansion of actors in the various public domains."

61. This is not to assert that politics were irrelevant to my case studies, only that the pressures visible there – Member State keenness to see particular issues on the agenda, tensions over communitarization, the felt urgency to achieve some results in Amsterdam that ultimately pushed civil justice onto the communitarization side of the ledger – were not of the democratic type of contested politics that Hooghe and Marks have in mind.

62. These three logics are explored in greater depth in Hooghe & Marks (2009b), where the authors argue that "government is shaped by factors that have nothing to do with efficiency" (id. at 226).

63. Postfunctionalism does not, however, entirely abandon functional logic. "In common with functionalists and neofunctionalists we explain the existence of multiple levels of governance as a response to functional pressures arising from the need to provide public goods at diverse scales" (Hooghe & Marks 2016: 151).

64. In this context, postfunctional theory criticizes the "economic utilitarian approach to governance based on the assumption that society is composed of individuals with egocentric preferences who have a rational interest in creating government to provide themselves with public goods," which is a "thin understanding of individual preferences and their genesis" that ignores "the question of where community and the desire for self-rule come from" (Hooghe & Marks 2016: 151).

65. Deutsch's "sense of community" was a "matter of mutual sympathy and loyalties; of 'we-feeling,' trust, and mutual consideration; or partial identification in terms of self-images and interests" (Deutsch et al. 1957: 36).

66. Haas (1958: 16) defined political integration as a "process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states," and identified shifting loyalties as a key variable to explain whether integration would be successful (id. at 14-15). Such identification was not, however, a prerequisite for integration, but would serve to drive further integration if it did in fact emerge.

67. Identity, including socialization and learning, emerged as an important focus of the work of social constructivists in the field of International Relations in the 1990s, and soon found its way into European integration studies (Checkel 1999; Christiansen, Jørgensen & Wiener 1999; J. Lewis 1998 & 2005; Risse 2003 & 2005).

68. Near the end of his life, Haas revisited neofunctionalism and sought to reframe it as "pragmatic constructivism" (Haas 2004). While there is a "familial resemblance between constructivism and neofunctionalism" (Rosamond 2005: 243), they are ontologically different and potentially irreconcilable, given that neofunctionalism is a rationalist theory, whereas constructivism is "a 'first principles' claim about the social (as opposed to rationalistic) status of interaction" (id. at 250).

69. Risse (2005: 295-6) proposes two models: "First, identities can be *nested*, conceived of as concentric circles or Russian Matruska dolls, one inside the next. ... There is a second way of conceptualizing the relationship between European and national identities which people might hold. We could call it a 'marble cake' model of multiple identities," where the "various components of an individual's identity cannot be neatly separated on different levels as the concept of nestedness implies. What if identity components influence each other, mesh and blend into each other? What if my self-understanding as German inherently contains aspects of Europeanness? Can we really separate a Catalan from a European identity? Most empirical work on European identity does not explicitly deal with such 'marble cake' concept. Yet, most of the evidence is actually consistent with it, starting with the 'nation first, Europe second' identification found in the Eurobarometer data."

70. "Supranational governance" refers to the EU's "capacities to create, interpret, and enforce rules" (Stone Sweet 2012: 5).

71. Stone Sweet (2012: 6) has explained that the supranational governance approach incorporates the "essential logic" of Haas's theory, while "updating" it and "modifying some concepts. What we consciously chose not to do was to obfuscate our debt to Haas."

72. The SNG approach incorporates concepts and theoretical arguments – notably, "institutionalization" and "path dependency" – that were "not available to Haas but that ... strengthened Neo-functionalism and clarified its logic" (Stone Sweet 2012: 9).

73. That is, the "migration of rule-making authority from national governments to the European Union" (Stone Sweet 2012: 5).

74. Like Haas (2004a: 13), the SNG approach posits that the "interests and values" of an emerging transnational society would be "defended by major groups involved in the process" (Stone Sweet 2012: 6-7).

75. "Supranational bodies become the locus for a new kind of politics, spurring the formation of transnational associations and interest groups" (Stone Sweet 2012: 8).

76. Thus, as supranational institutions "begin to deliver the coordinative solutions that societal groups want, those groups increasingly seek to influence supranational rules and policies" (Stone Sweet 2012: 8).

77. In particular, the Commission "acts as a political entrepreneur, mobilizing and organizing private-sector groups to support its policy objectives. [It] regularly creates – and sometimes funds – roundtables, working groups, and committees composed of firms and other non-state actors. The working groups help the Commission design programs and draft legislation; these same groups then become advocates of the Commission's proposals vis-à-vis national governments and other actors" (Stone Sweet 2012: 14). In other words, the Commission occasionally builds

EU-level "lobbying and interest groups, which then become its political allies" (id.; see Mazey & Richardson 2011).

78. SNG scholars argue that "the empirical record is decisive: the Court and the Commission have routinely produced rules and policies that the member governments would not have adopted through intergovernmental bargaining" (Stone Sweet 2012: 12; see also Sandholtz & Stone Sweet 1998). Even more important is that the "Commission and, especially, the Court shape not just policy outcomes but also the 'constitutional' rules that govern policymaking" (Stone Sweet 2012: 33).

79. To a substantial degree, the select (but by no means comprehensive) bodies of theory considered below reflect the disciplinary broadening of integration studies beyond IR to comparative politics, sociology, and law.

80. The neofunctionalist family, according to Verdun (2002: 14, Figure 2.2) includes *inter alia* neofunctionalism, historical institutionalism, constructivism, epistemic communities, advocacy coalitions, policy networks, multilevel governance, and fusion theory, while the intergovernmentalist family includes intergovernmentalism, liberal intergovernmentalism, two-level games, and domestic politics approaches.

81. Verdun (2002: 16) argues that her "eclectic approach ... combines elements of both traditions to appreciate the full richness of the process" and "can take seriously all elements of the integration process."

82. Structuration "dismisses both structural determinism and agency-centred voluntarism," and "emphasises the interdependence of structures and agency" in which "structure and agency mutually constitute each other" (Niemann 2013: 637-8). This approach, which "assigns agency and structure an equal ontological status" (id. at 638), is consistent with some key insights of new institutional theory (subsection 9.2.2.3 below). Niemann (id.) explains that structure "has a dual nature. It enters simultaneously into the constitution of the agent and social practices, and exists in the generating moments of this constitution. Agency, however, is not reduced into servants of structure. They have created structural properties in the first place and can potentially change any aspect of structure. Agents act upon both structures and their own preconceived interests. Structures in the revised neofunctionalist framework are, for example, the EU and the international system of states, the EU institutional order, domestic constellations/ institutional balances and functional-economic interdependencies and necessities."

83. Moravcsik later relaxed his skeptical views on the role of the EU's supranational institutions, but even the mature version of LI sees the institutions' "entrepreneuership role ... as marginal" and suggests that their efforts tend to be "futile and redundant, and even sometimes counterproductive" (Moravcsik 1998: 8, 490-4). His initial view of the EU's supranational institutions as "perfectly reactive agents" (Moravcsik 1995: 616) later yielded to the view that Member States might delegate independent authority to the Court of Justice to enforce incomplete contracts, as a way to enhance the credibility of their commitments (Moravcsik 1998).

84. In an early statement of liberal intergovernmentalism, Moravcsik (1991) predicted that Member State governments – in particular the powerful ones – would keep a tight leash on European integration, which would proceed from one punctuated equilibrium to another, via bargaining oriented towards "least common denominator" outcomes.

85. In addition, neofunctionalism's concern with values, norms and identities brings it close to sociological institutionalism, as can be seen in Haas's later work (2001 & 2004b), as well as in the supranational governance approach, which imports key ideas from new institutional theory – notably path-dependency and the logic of institutionalization of rules – to elaborate the dynamics of spillover (feedback loops).

86. Liberal intergovernmentalism has a strong affinity with rational choice institutionalism. Pollack (2001: 222) has argued that "realist, liberal and institutionalist approaches in IR show signs of convergence around a single rationalist model which assumes fixed preferences and rational behaviour among all actors in the EU (including individuals as well as member governments and supranational organizations) and examines the ways in which member governments adopt institutions which subsequently constrain and channel their behaviour." Further, Moravcsik's liberal intergovernmentalism provided intergovernmentalist theory with a "clearer set of microfoundations" and "refined intergovernmentalism into an explicitly rationalist theory in which actors were

clearly specified and predictions about outcomes were made at various levels of analysis. Specifically, Moravcsik (1998: 9) nests three complementary middle-range theories within his larger rationalist framework: (1) a liberal model of preference formation, (2) an intergovernmental model of international bargaining and (3) a model of institutional choice (drawn largely from the [rational choice institutionalism] literature ...) stressing the importance of credible commitments" (Pollack 2007: 36).

87. Pollack (2007: 45-7) provides a crystal clear explanation that dispels confusion over usage of the terms 'endogenous' and 'exogenous' in the literature on EU integration. The key distinction is whether the terms are used in regard to a theory, or to the international institutional context. Preferences may be treated as exogenous to a theory, if the theory adopts "simplifying assumptions about actor preferences (and hence ... makes no effort to explain them)," or they may be treated as exogenous to the international institutions in question, which reflects the belief "that national preferences are formulated domestically and are unaltered by interaction at the international level" (id. at 46). Conversely, preferences may be endogenous to a theory, if the theory treats those preferences as "the explanandum or dependent variable of the study" and hence places "actors' identities and interests at the center of the analysis," or endogenous to the international institutions in question, which reflects the belief "that actor preferences are shaped (at least in part) by interaction and socialization at the international level" (id.). I use these terms solely in the *second* sense, that is, in regard to the international institutional context.

88. Intergovernmentalist approaches have been frequently criticized for focusing too narrowly on economic factors as the primary determinant of national preferences (e.g., Wincott 1995: 601; Caporaso 1999: 162).

89. There are two major exceptions to this assertion: first, the body of court-centric literature (examined in subsection 9.2.2.4.1 below), and second, the literature on legal (and other) elites (examined in subsection 9.2.2.4.3 below).

90. The only civil justice issue where money was a factor was legal aid. Recall that only the UK expressed reservations about the prospects of harmonizing the rules of legal aid at EU level in Tampere (Chapter 8 above).

91. Amsterdam was not the first time that the EU "obscured" difficult political decisions "by focusing on the mission and by reducing the issues to a series of apparently technical steps. Advocates of ... unification could emphasize highly specific, concrete, seemingly innocuous, and long overdue objectives rather than their consequences. In a sense, the tactic is to move above and below the level of controversy. The broad mission is agreed to; the technical steps are unobjectionable" (Sandholtz & Zysman (1989: 114-15, referring to the EU's tactic in the context of the 1985 Commission White Paper on Completing the Internal Market).

92. The Dutch interest in keeping criminal justice out of the First Pillar, at least in part to protect that country's liberal drugs policies, may well have been partly motivated by economic concerns. This indirectly affected the Dutch position on communitarization of civil justice, which was sacrificed to the EU in order to retain Member State control over criminal justice. According to the website of the Dutch government, the country's liberal drugs policy is oriented principally towards public health and safety concerns (Dutch Drugs Policy). The 2013 decision to limit use of soft drugs to Dutch residents undermines the economic argument, but this decision was later in time than the events under consideration here, hence not persuasive.

93. Kirsti Rissanen, the very active and pro-civil justice Finnish Secretary-General in the Ministry of Justice, drew substantially upon Commission documents when preparing her proposals for Tampere during the Finnish Presidency in 1999, while at the same time recognizing that the Commission proposals went too far and had for that reason been largely sidelined in the lead-up to the Tampere Summit (see subsection 8.5.2.1 in Chapter 8 above).

94. As noted by Ginsberg (2007: 183), the Council Secretariat "consists of permanent staff who take an oath to the EU and thus provide institutional memory and expertise that is more supranational than intergovernmental."

95. More recently, Nugent and Rhinard (2015: 3-4) have observed that organizational reforms under the leadership of Commission President Junker since 2014 have resulted in numerous measures aimed at modernizing and formalizing the Commission's operations, including "stronger bureaucratic restrictions on the behaviour of its

officials" which may ultimately reduce the "Commission's capacities for policy entrepreneurialism and innovative leadership."

96. In order to avoid unnecessary repetition, I defer my discussion of the important role of Council Presidencies to subsection 9.2.2.1.5 below, in connection with preference formation.

97. Admittedly, the Council Secretariat was more concerned with criminal and other AFSJ matters than with civil justice, but this limitation does not gainsay that its role in Tampere surpassed the usual scope of its authority.

98. One could argue that magistrates are governmental, rather than non-governmental actors, given their status as civil servants. I characterize them as civil society actors in this context on account of their behavior rather than their status, because they organized their transnational efforts privately, as a means to influence government policy, rather than focusing their efforts on internal bureaucratic discussions on the national plane.

99. Recall that the EP had put the idea of creating a "European legal space" on the table as early as 1991 (EP Resolution on Intergovernmental Cooperation). This idea was fleshed out further during the 1995 pre-negotiation phase leading up to the Amsterdam Treaty, notably in the EP's LIBE Committee Opinion (European Parliament 1995b: 120-5), as well as in the JURI Committee Opinion ((European Parliament 1995b: 50-4), the LIBE Committee Opinion (European Parliament 1995b: 120-30), and the LIBE Committee Report (European Parliament 1995c: 30-5). My research has not uncovered any direct links between EP activities and the work of the magistrates behind the 1996 Geneva Appeal.

100. A European Judicial Network in Civil and Commercial Matters (EJN Decision-Civil) was created in 2001, long after the Tampere Summit.

101. EJN Decision-Criminal (1998). This Decision refers to an earlier Third Pillar measure – the 1996 Exchange of Liaison Magistrates Decision, which as taken pursuant to an Italian initiative – as well as to seminars organized by the Belgian Ministry of Justice in Brussels in 1996 and 1997, and to proceedings of the EP and the European Commission. However, neither document refers to the Geneva Appeal or related initiatives.

102. Real-Dato et al. (2013: 76) argue that it is "logical for national elites (mostly economic elites) to favour Europeanization" – in view of how international economic interdependence "undermines national governments' ability to control economic actors and transactions in their own territory" – as a means to ensure "the same conditions of market participation with respect to the structure of regulation, incentives, and the like."

103. This is not to say that competition with other nations (e.g., the United States) or multi-lateral organizations (e.g., the Council of Europe or the Hague Conference on Private International Law) is never a factor in explaining EU decision-making, only that there is no evidence to support it in my case studies.

104. In his revised statement of neofunctionalism, Niemann (2006: 30) calls this "functional 'pressure from within'."

105. Even in regard to the highly salient issues of immigration and asylum, which were also communitarized as part of the AFSJ package, Niemann (2006: 276-7) observed in his analysis of "political spillover" in Amsterdam that the (plentiful) civil society actors exerted only "modest pressures ... in favour of a more supranational decision-making set-up," but did have a "more significant impact" on a couple of "smaller issues" (i.e., anti-discrimination and the rights of third-country nationals).

106. As explored further below (in subsection 9.2.2.4.3), legal elites from academia and other professional settings have for years tried to push forward reform or harmonization projects, and have looked to EU institutions for support, financial an otherwise (Jettinghof & Schepel 2004; Schepel 2007; see also subsections 2.2.4 and 2.2.5 in Chapter 2 above on the Storme and Lando Commissions). However, in the explicitly political context of treaty-revision (Amsterdam) and long-term policy-planning (Tampere), such actors – even the heavy hitters among them – were sidelined. The notion that legal experts in civil justice matters should understand their role as en explicitly *political* one has emerged since the communitarization of civil justice (e.g., Basedow 2000).

107. I return to this argument below, in the discussion of neofunctionalism, which provides a more convincing explanation of the nature of national preferences in regard to civil justice issues.

108. In Finland, for example, Rissanen's communitarian commitments aligned with Nordic political culture and with the policy orientation with the Social Democratic government she served, but her own party affiliation remained undisclosed during our interviews, because she considered it irrelevant and inappropriate for me to ask. Justice Ministers Guigou (in France) and Däubler-Gmelin (in Germany) were prominent members of their parties, the Socialist Party (PS) in France, the Social Democratic Party (SDP) in Germany. Austria, which was also a strong supporter in the civil justice arena, was governed by the Social Democratic Party (SPÖ) from 1970 until 2000. However, my data is not sufficiently detailed on party in power and degree of support for communitarization or specific civil justice priorities to draw any conclusions along these lines.

109. Lizardo and Stoltz (2017: 3-9) distinguish between two basic types of theory of interest in social science: "general interest theory" (GIT), which derives from fundamental (invariable) characteristics of human beings, and "historically constituted interest theory" (HIT), which derives from social interaction and organization, and presumes that "interests are produced by historically specific institutional arrangements."

110. It was a factor, but my findings do not reveal whether it was the only factor behind the UK's reluctance.

111. I develop this argument in the following discussion of neofunctionalism, as well as in subsection 9.2.2.4.3 below.

112. Haas (1958: 17) defined political elites to include the "leaders of all relevant political groups who habitually participate in the making of public decisions, whether as policy-makers in government, as lobbyists or as spokesmen of political parties."

113. While Haas never paid any close attention to legal elites, other neofunctionalists have done so – albeit primarily in the court-centric context – as noted in the earlier discussion of the supranational governance approach (subsection 9.2.2.1.3), and below in the discussion of theories about 'integration through law' (subsection 9.2.2.4.1).

114. Neofunctionalism's fourth type of spillover – exogenous spillover, which refers to the impact of "factors that originate outside the integration process itself, ... in ... the external political and economic environment" (Niemann 2006: 32) – was discussed already (in subsection 9.2.2.1.4 above).

115. Finland was not the only Member State that invested considerably effort into thinking about or supporting communitarization of civil justice, but played – as argued in Chapter 7 above – the key role in this context. Austria, France, Germany, and Italy also expressed ambitious commitment to building the AFSJ.

116. As noted in section 8.4 (Chapter 8 above), the notion of "space" (*espace*) was first mentioned by French President Giscard d'Estaing in the 1970s, elaborated in the EP's LIBE Committee during the IGC (European Parliament 1995b), advanced by France and Germany (Joint Letter from French President Chirac and German Chancellor Kohl) in December 1995, proposed in more concrete terms in the 1996 Geneva Appeal and the 1998 Avignon Declaration, and strongly endorsed by the EP in its 1999 Resolution on the Vienna Action Plan/AFSJ (European Parliament 1999d).

117. Recall that the major changes added during the Finnish Presidency to the EU's first five-year program for civil justice were structured around three conceptual headings: access to justice, enforcement of judicial decisions (based on the logic of mutual recognition), and greater convergence in civil law (including measures aimed at harmonizing civil procedure for cross–border cases, as well as the possibility of measures aimed at harmonizing "substantive law in civil matters in order to eliminate obstacles to the good functioning of civil proceedings") (subsection 8.5.1 in Chapter 8 above; see also Appendices I and J). My dissertation thus seeks to explain the conceptual architecture itself, the enriched notion of what access to justice should entail, the reliance on mutual recognition, and the surprising (if somewhat lackadaisical) reference to harmonization of substantive law.

118. It bears repeating, however, that Ministry of Justice officials were not invited to participate in the Tampere summit (Chapter 8 above), and thus that the influence wielded by these powerful supporters occurred primarily in the context of preference-formation.

119. Jeffrey Lewis's research (1998, 2005) is on Coreper, i.e., the Permanent Representatives Committee, which consists of Member State ambassadors who serve their Member States in the EU context in Brussels.

120. In their classic study on the Council of Ministers, Hayes-Renshaw & Wallace (1997: 278-9) argue that Member State representatives who become "locked into the collective process" of Council decision-making have not necessarily "transferred loyalties to the EU system," but rather "acknowledge themselves ... as being part of a collective system of decision making"; they are members of an "identifiable cohort of decision makers, albeit with primary affiliations to the member governments, who have specific common concerns and shared commitments to the collective arena." As Jeffrey Lewis (1998: 43-4) describes it, this is not the same as "going native" in Brussels – which "only makes sense where the cognitive boundaries between the national and [EU] levels are clearly separable and sharply drawn" – but rather a situation in which the "cognitive boundaries between the two levels have become blurred."

121. On this point, see the discussion of the Finnish Presidency (subsection 9.2.2.2 below).

122. For example, the October 1994 seminar at the University of Helsinki, which was held on the eve of Finnish accession to the EU, led to the influential volume *Principles of Justice and the Law of the European Union* (Paasivirta & Rissanen 1995) (Chapter 8 above).

123. During its 1998 Presidency, the UK convened a Multidiscipliary Conference of Experts on Resolving Small Claims Across European Borders at Down Hall in Hertfordshire (UK Non-Paper on Access to Justice 1999: 1). The Down Hall Conference brought academics and practitioners together with policy-makers to discuss the problems faced by EU citizens and consumers "in their day-to-day lives," and called the "development of a special European procedure for consumer and other claims of low value" (id. at 2). The discussions in Down Hall subsequently influenced the UK's preferences in Tampere (subsection 8.5.2.2 in Chapter 8 above).

124. Rissanen is, in this sense, not so much an exception to my earlier assertion about academics being hamstrung by their predominantly apolitical conception of their role, as a case involving an academic who acts politically when occupying a senior civil service position in her national government, and sees value in trying to bridge that divide.

125. Gilles de Kerchove, a key official in the Council General Secretariat, also remained active as an academic while working for the EU institution. He "regularly organized conferences where he got together academics and other interested parties," with the twin aims of soliciting ideas for EU action and planting ideas that he hoped would be picked up and diffused (de Kerchove Interview).

126. As noted in Chapter 7 above, Secretary-General Rissanen viewed both the French (Guigou) and the Germann (Däubler-Gmelin) Ministers of Justice as very supportive allies.

127. The 1962 Helsinki Treaty formalized an extensive program of legal cooperation, and was based on long-standing practices in the field (Bernitz 2000). Nordic countries have met regularly to discuss and coordinate law-making since 1872. The 'Nordic Law Meeting' or 'Meeting of Nordic Jurists' is held every three years (Blomstrand 2000: 59-60). Nordic cooperation is discussed extensively above (subsection 2.2.3 of Chapter 2).

128. In particular, Nordic cooperation led to agreement in the early 20th century on uniform legal texts in core areas of private law, such as contract and family law, as well as to "general conformity" in regard to other dimensions of the law of obligations (including tort), family law, maritime law, debt instruments, intellectual property law, bankruptcy, company law, and even citizenship law (Bernitz 2000: 34; Blomstrand 2000: 59-60). In addition, measures aimed at enabling free movement of persons have been on the Nordic agenda since the 1950s.

129. "Met lov skal man land bygge." Note that the aphorism is in the Swedish, and not the Finnish language.

130. I use the term 'subregional' to mean subsets of EU Member States, and not to mean small geographical territories in Member States (Hartnell 1997). Thus, my usage sees the EU as an example of regional integration, consistent with the perspective of international economic law (WTO).

131. The experience of Nordic legal cooperation is at odds with Tiilikainen's (2003: 105) views about Finnish reluctance to become involved with "alternative political communities." As a foreign relations scholar, however, Tillikainen's work is primarily concerned with Finland's historically conditioned concerns security issues, rather than with the more pragmatic meshing of national legal orders that Nordic legal cooperation entails.

132. In this assertion, I do not generalize from Nordic countries to Benelux. I believe, based on personal experience and much time spent in both places – rather than systematic observation – that subregional identity is quite strong in the Nordic countries, and weak in the Benelux countries. In both subregions, the strength of shared identity varies from one country to another.

133. Niemann (2006: 43) has broadened "cultivated spillover" to include the "intrinsic propensity of supranational institutions to advance the European integration process more generally."

134. Moreover, the Court of Justice is the source of the notion of 'mutual recognition,' which was developed in connection with free movement of goods, and extended in Tampere to the circulation of judgments.

135. As the UK explained it in connection with Tampere, "civil legal co-operation" is "vitally important to the proper functioning of the single market" (UK Position Paper 1999: ¶ V, at p. 6), insofar as the "inability economically to obtain redress in other countries discourages trade and consumer confidence and represents a serious obstacle to the functioning of the internal market" (id. at 1).

136. France was perhaps the strongest supporter of the need to "do everything possible to ensure that the procedures that apply to cross border disputes, in particular family disputes, are simplified and explained, so that citizens know their rights and how to go about enforcing them" (French Tampere Proposals 1999: 5).

137. As noted earlier, civil justice issues are most closely associated with intra-EU movement of persons, rather than pressure on the EU's external borders. This is not to say that civil justice issues are irrelevant to third-country nationals, but merely to claim that those problems were not major drivers in Amsterdam or Tampere.

138. The Commission Directorate-General then responsible for accession talks with prospective new Member States (DGX) described the problem in this way: "Imagine being asked to build a state-of-the-art spacecraft using nothing more than a cheap screwdriver and a handful of nails. This is the scale of the task facing many of the [applicant countries in Central and Eastern Europe which] need to put in place an efficient public administration system capable of coping with EU legislation. ... All applicants have theoretical programmes in place for taking on the *acquis,* but that is not necessarily the point. It is relatively easy to adopt legislation in national parliaments. Making it function on the ground is another matter" (quoted in Hartnell 1997: 167-8).

139. Haas (1968: xix) claimed it was not the "politician, the scholar, the poet, or the writer" who advanced the movement. Yet he was talking about coal and steel. He surely would not denied scholars etc. their due in an appropriate case.

140. In this regard, Elgström's (2003a) theoretical approach departs from the view that conceives of "European governance as a *sui generis* phenomenon, which can only be analysed in EU-specific terms, using EU-specific theories" (Elgström & Tallberg 2003: 191).

141. Some scholars call this the "Institutional Logics Approach" (Skelcher & Smith 2015: 433).

142. In this approach, actors are "imagined to follow rules that associate particular identities to particular situations, approaching individual opportunities for action by assessing similarities between current identities and choice dilemmas and more general concepts of self and situation" (March & Olsen 1998: 951).

143. The Elgström (2003a) volume also contains a case study of the UK Presidency in 1998, during the interim period between Amsterdam and Tampere. I have left the UK Presidency out of my explanation, because "Blair ... was presented with an agenda preordained to be largely uneventful" (Manners 2003: 88). Agenda-shaping efforts "focused on the 'third way' themes of economic reform and employment, as well as crimes, drugs and the environment" (id. at 91). Manners (id. at 98) notes, however, that this Presidency was different from previous ones involving "naked pursuit of British national interest," and tried to "involve the British people," which helps to explain the Multidiscipliary Conference of Experts on Resolving Small Claims Across European Borders at Down Hall in Hertfordshire, which was held just before the end of the UK Presidency in June 1998, and which aimed to address civil justice problems "relevant to European citizens in their day-to-day lives and understood by them as being directed to their needs and interests" (UK Non-Paper on Access to Justice 1999: 2).

144. However, Elgström & Tallberg (2003: 204) point out that the sociological perspective provides a different explanation for reputational concern. I return to this point below.

145. Tiilikainen (2003: 108, 115-6) cited two examples in support of these claims: first, the Northern Dimension Initiative, a foreign policy program aimed at drawing the EU's attention to "the territories and problems around its northern borders," and second, the effort to introduce "Nordic principles of administration" – openness, efficiency, and coherence – into EU administration.

146. According to Dutch Foreign Minister Hans van Mierlo, the Dutch Presidency in 1997 "was restrained because we are ambitious" (van Keulen & Rood 2003: 82).

147. In regard to norm adherence, the two approaches provide different explanations. The sociological approach claims that Presidencies follow norms because they have "internalized the values expressed by the norm and take them for granted," while the rationalist approach "predicts that Presidencies conduct cost-benefit analyses and follow norms when the gains prevail over the costs" (Elgström & Tallberg 2003: 204). This is the first instance in which these two theoretical approaches offer competing rather than complementary explanations. Insofar as my empirical findings reveal no evidence of cost-benefit considerations, I find the sociological explanation more persuasive.

148. Reputational concern is the second issue on which the rationalist and sociological approaches provide competing rather than complementary explanations of the same outcome. Both interpretations seem equally plausible to me, thus I would argue on this issue that both mechanisms are present.

149. Elgström (2003b: 14) explains four role ideals for the Presidency: leader, entrepreneur, broker and bureaucrat.

150. Parsons (2010: 144) provides an enlightening synthesis (and critique) of sociological approaches to EU studies.

151. Gillman (2004: 365) argues that Martin Shapiro's use of historical-interpreteive case study methods "lays the groundwork for the claim that he was a progenitor of what later emerged as the so-called 'new institutionalism' in public law scholarship."

152. Other institutionalisms have been identified, such as "constructivist institutionalism" (Hay 2006) and "network institutionalism" (Ansell 2006).

153. To be sure, Haas's early formulation of neofunctionalism is also rationalist in orientation, but much less strictly so than contemporary RCI.

154. Some rational choice scholars also consider the role of ideas (e.g., Garrett & Weingast 1993; Goldstein & Keohane 1993). For example, Garrett & Weingast (1993: 176) acknowledge that there may be "many stable paths to cooperation that cannot readily be differentiated in terms of their consequences for aggregate welfare," and propose that ideas or shared beliefs may serve as "focal points" around which actors' preferences can converge in such choice situations. Even Douglas North has stated that we have "ignored the importance of cognitive processes and need to develop a 'cognitive social science' to correct this deficiency" (North 2001, cited in Campbell 2004: 16).

155. In this sense, sociological institutionalism comes close to social constructivism (Risse 2009).

156. While important, the distinction between normative and cognitive factors is "often blurred" and it is "not clear when norms becomes so taken-for-granted that they become part of a cognitive structure" (Campbell 204: 20).

157. As noted in Chapter 8 above (Tampere), a number of Member States were careful in their written submissions to refer to work previously done on civil justice issues, notably in the Commission Communication on Judgments (January 1998) and the Vienna Action Plan (December 1998), and to express their intention to carry on in the spirit of that preparatory work. In addition, a number of Member States – notably Austria, the Netherlands and the UK – invoked preparatory work related to civil justice issues that was carried out during *their own* Presidencies, or even earlier, as in the case of Belgium. While it is possible to write off such assertions as mere assertions of national pride or 'ownership' of particular issues, I believe that this reading would miss an important dimension of policy-making in the EU. Such assertions acknowledge the way complicated policy issues are often managed at EU level, via longstanding collaboration involving experts, whose views may filter into political discussions via irregular conferences as well as via the regular technocratic meetings of civil servants in the framework of EU structures like the K4/Article 36 Committee. Seen in this context, such Member State positions express notions of efficiency: why reinvent the wheel? This reading squares with written submissions of other Member States, which also point to Commission preparatory documents, without invoking any particular national contributions to the debates.

158. In one Member State, a senior civil justice official asked more expert colleagues for more detailed input, but found that they were "not that interested" (Interview #46).

159. Some scholars conceive of isomorphism as evidence of a type of cultural power (Madsen & Christensen 2016: 12).

160. There is more to field theory than this brief overview suggests. For an overview of Bourdieu's work in regard to the sociology of law, see Dezalay & Madsen (2012).

161. As discussed in Chapter 7 above, the communitarization of civil justice in Amsterdam is causally inextricable from parallel discussions of whether to communitarize criminal justice and police cooperation as well. Resistance to the latter gave a formidable causal push to the former.

162. Time constraints prevent me from thoroughly incorporating non-EU related literature in this discussion. For important contributions, see, e.g. Dezalay & Garth (1996, 1997 & 2002), Carruthers & Halliday (1998 & 2006); Quack (2007 & 2010); Kennedy (2016).

163. Unlike Ziegler's (1997) research, which examined the relationships between policy-makers and professionals in the context of technology policy in France and Germany (id. at 13), my case studies involve primarily *hybridized* actors who bring their professional worldviews into their work as civil servants working within national government or an EU institution. Also unlike Ziegler's research, my study is not structured as a comparison oriented towards explaining variation in policy outcomes, but rather looks more generally at the "ideational predispositions" of the elite actors involved in the AFSJ field, and seeks to understand the relationship between these factors and their articulated preferences (Ziegler 1997: 16).

164. Jettinghoff (2004: 7) defines "lawyers" as "people with an academic legal education."

165. For important examples, see Stein (1981), Rasmussen (1986), Keohane & Hoffmann (1991), Weiler (1991 & 1994), Shapiro (1992), Garrett (1992), Burley & Mattli (1993), Alter & Meunier-Aitsahalia (1994), Mattli & Slaughter (1995 & 1998), Alter (1996 & 2001), Stone Sweet (2000 & 2004), Shapiro & Stone Sweet (2002a), Conant (2002), Slaughter (2004), de Búrca (2005), Slaughter & Zaring (2007), Cichowski (2007), Davies (2012), Dawson (2013), Davies (2016), Blauberger & Schmidt (2017), and Beaumont, Danov, Trimmings & Yüksel (2017).

166. For synthetic analyses of this literature, see Caporaso & Keeler (1995: 40-8), de Búrca (2005), Stone Sweet (2012), and Niemann (2013: 640).

167. Stone Sweet (2012: 22) argues that intergovernmentalism, "as a body of theorizing about integration and EU governance, has failed to produce a theory of law and courts in the EU capable of surviving empirical tests" (citing among others Cichowski 2001 & 2007; Jupille 2004; McCown 2003; Stone Sweet 2004).

168. As is often the case in academic discourse, one rarely encounters definitive and uncontested definitions of a theoretical concept, although occasionally the genealogy of a concept can easily be traced from a seminal formulation to later iterations. The fact that these concepts are used across a variety of disciplines complicates the task of defining them, since different concepts may take shape in different disciplinary settings. Given my modest ambition in this subsection, which is to explain why I do not find these theoretical approaches compelling in view of my findings, I rely to a large extent on what I deem to be persuasive or influential statements.

169. Dowding (1995), Madsen & Christensen (2016: 5-11).

170. Further, he argued that "[i]n order to produce a *network* theory, where the properties of the network rather than the properties of its members drives explanation, political science must utilize the sociological network tradition, borrowing and modifying its algebraic methods. This I argue is of limited potential" (Dowding 1995: 137).

171. My overview of this literature draws heavily from Slaughter & Zaring (2007).

172. Keohane & Nye (1974). These authors began to "unpack the state ... into its constituent parts" in the 1970s (Slaughter & Zaring 2007: 212), defining 'transnational relations' as "contacts, coalitions, and interactions across state boundaries that are not controlled by the central foreign policy organs of governments" (Nye & Keohane 1972: xi). They later expanded on this definition, noting that transgovernmental relations "are not controlled or closely guided by the policies of the cabinets or chief executives of those governments" (Keohane & Nye 1974: 39-42).

173. In her initial formulation, Slaughter (1997: 184) explained that this networking creates "a dense web of relations that constitutes a new transgovernmental order." In a revised statement, Slaughter (2004) emphasized that networks do not replace the state or international organizations, but rather complement them: "[G]overnment networks and traditional international organizations fit together in three principal ways: Although the networks can stand alone, they can also complement the efforts of traditional international institutions by facilitating convergence, or 'deeper cooperation through more formal international agreements,' by enhancing compliance with existing treaties and other international agreements, and by improving 'the quality and depth of cooperation across nations' " (Slaughter & Zaring 2007: 224). See also Madsen & Christensen (2016: 4-5) (re: Manuel Castells' contribution to network analysis in the context of globalization).

174. Slaughter and Zaring (2007: 213) argue that this international relations scholarship is linked to earlier work in the 1950s and 1960s by legal process theorists who looked "at the entire web of state and nonstate actors involved in international legal incidents." For a contemporary version of this approach, see the work on transnational advocacy networks (TANs) by Keck & Sikkink (1998), along with the insightful précis of this approach offered by Dowding (1995) and by Madsen & Christensen (2006: 9-11). Dowding (1995: 150) prefers the 'advocacy approach' to the 'epistemic community' approach, which is examined below, because the TAN approach zeroes in on "two primary causes of policy change, the values of coalition members and exogenous shocks to the system," which he considers "one of the most useful theories of the policy process," when combined with an "institutional rational choice" analytical framework. For even more contemporary approaches, see Adler & Pouliot (2011) ("communities of practice"), and Djelic & Quack (2010) (examining the role of transnational professional communities, including epistemic communities).

175. Slaughter & Zaring (2007: 215) point out that networks have "in many cases ... become more formal" as they have "grown in size and importance and taken on increasingly more important tasks."

176. For Powell, this feature was key to explaining why networks were "particularly good at coping with change" (Slaughter & Zaring 2007: 219). Networks are "based on complex communication channels," and thus serve to "generate new meanings and interpretations of the information transmitted" (id.).

177. The argument behind this assertion is that "regulators who participate in networks work to create common standards among the diverse jurisdictions with regulators through agreement and copying," in lieu of "competing with one another" (Slaughter & Zaring 2007: 217).

178. Dowding (1995: 150) explains that "concentrating on beliefs as a generator of policy change [forces] attention away from seeing public policy simply as a battle between groups," although he hastens to add such approaches are "perfectly compatible with bargaining models of the policy process."

179. In fact, the idea epistemic community concept precedes Peter Haas's influential work by a number of decades, going back to Ludwig Fleck's 1935 book (Fleck 1980), which discusses *Denkkollektiv*e or 'thought collectives.'

180. The analysis "focuses on [the] process through which consensus is reached within a given domain of expertise and through which the consensual knowledge is diffused to and carried forward by other actors. Its primary concern is the political influence that an epistemic community can have on collective policymaking, rather the correctness of the advice given" (Haas 1992: 23).

181. "[T]he fundamental ideas behind epistemic communities are to see the emergence of belief systems leading to policy convergence rather than seeing international agreements as the result of power bargaining games between self-interested nation-states" (Dowding 1995: 148). Dowding believes, however, that the "advocacy coalition literature has a more developed account of belief systems, which are thought to be composed of a set of core beliefs which will remain unchallenged; for example the primacy of the environment over economic growth for environmentalists, and the primacy of growth over the environment for capitalists; and a set of policy beliefs about how best to protect one's core beliefs" (id.). At the same time, however, the advocacy coalition framework posits that these beliefs "change over time given the external environment around people. Issues emerge through changes in the environment, often as a shock or crisis, ... [which] causes a re-evaluation of the belief system about public policy and new interest groups emerge. These groups form coalitions which over time may agree on a policy solution, not simply, though sometimes, through the give-and-take of bargaining, but also because their beliefs about the correct solution converge. Professionals working in a given area may come to dominate the thinking of virtually all interested parties, though rival advocacy coalitions may use different expert advice (id. at 147). Thus, in contrast to Haas's epistemic communities, which presuppose a more objective kind of scientific knowledge, the advocacy coalition approach is more flexible and encompasses a broader range of socially constructed (and contested) knowledge. See generally Sabatier (1987 & 1988, Sabatier & Jenkins-Smith 1993; see also Madsen & Christensen (2016: 6-11).

182. "They are not only underpinning specific government policies, but also shaping *governance* more broadly" (Cross 2013: 139). In the classic policy setting that was Haas's starting point for analysis, epistemic communities were "called in" to advise governments (Haas 1992: 16). Today we are more likely to think of them as composed of 'insiders,' 'outsiders,' or some combination of the two.

183. In fairness to Peter Haas, he takes great pains to bound his field because he aims to provide a robust theoretical framework (Haas 1992: 16-20).

184. Haas (2005: §2.1) claims that epistemic communities "will be found in substantive issues where scientific disciplines have been applied to policy oriented work. Thus, epistemic communities arise in disciplines associated with natural science, engineering, ecology and even economics." In this reformulation, Haas asserts that epistemic communities are "a group of professionals, often from a number of different disciplines, who share all of the following characteristics:

> (1) Shared consummatory values or principled beliefs ... [which] provide a value-based rationale for social action by the members of the community.
> (2) Shared causal beliefs or professional judgment [which] provide analytic reasons and explanations of behavior, offering causal explanations for the multiple linkages between possible policy actions and desired outcomes. ...
> (3) Common notions of validity: intersubjective, internally defined criteria for validating knowledge.
> (4) A common policy enterprise: a set of practices associated with a central set of problems which have to be tackled, presumably out of a conviction that human welfare will be enhanced as a consequence.

This combination of factors – particularly the socialized truth tests and common causal beliefs – distinguish

epistemic communities from other types of policy networks and groups active in politics and policy making. Unlike other organized interest groups active in politics and policy making, epistemic communities are bound by the truth tests to which they were socialized, and thus are more likely to provide information that is politically untainted, and thus more likely to 'work', in the political sense that it will be embraced and followed by political authorities concerned about the need for appearing impartial. Their advice is also more likely to be technically effective, in the sense of obtaining the desirable goals, than would be policies derived by political compromise. Politically their reputation for expertise and impartiality provides a social provenance, in the sense of the pedigree imparted by antiques appraisers, that confers confidence in their advice by potential consumers" (id.).

185. Haas (1992: 20) distinguishes between 'causal' and 'principled' beliefs. EpiCom members share both causal (i.e., analytic) and principled (i.e., normative) beliefs, whereas members of a discipline or profession share causal but not principled beliefs. "Although members of a given profession or discipline may share a set of causal approaches or orientations and have a consensual knowledge base, they lack the shared normative commitments of members of an epistemic community. An epistemic community's ethical standards arise from its principled approach to the issue at hand, rather than from a professional code. Unlike members of a profession or discipline, who seldom limit themselves to work that is closely congruent with their principled values, members of an epistemic community tend to pursue activities that closely reflect the community's principled beliefs and tend to affiliate and identify themselves with groups that likewise reflect or seek to promote these beliefs" (id. at 19). I struggle to make sense of Haas' distinction in the context of legal elites, who have a consensual knowledge base and probably also some shared normative commitments, but who do not (in my view) share a set of causal approaches.

186. Haas (1992: 23) noted clearly at the outset of his enterprise that "epistemic communities provide consensual knowledge," but do "not necessarily generate truth."

187. "Epistemic communities need not be made up of natural scientists; they can consist of social scientists or individuals from any discipline or profession who have a sufficiently strong claim to a body of knowledge that is valued by society" (Haas 1992: 16). In view of this broad early definition, it is difficult to avoid the conclusion that Haas simply changed his mind about lawyers over time.

188. Haas (1992: 20) noted that the "solidarity of epistemic community members derives not only from their shared interests, which are based on cosmopolitan beliefs of promoting collective betterment, but also from their shared aversions, which are based on their reluctance to deal with policy agendas outside their common policy enterprise or invoke policies based on explanations that they do not accept."

189. "Moreover, when a group of professionals with recognised expertise is able to speak with one voice, that voice is often seen as more legitimate because it is based on a well-reasoned consensus among those in the best position to know" (Cross 2013: 147).

190. Indeed, Cross (2013: 148-9) hypothesizes that a "strong epistemic community ... has a greater potential for influence [if it] not only possesses a high degree of recognised expertise, but is also internally cohesive. The original conceptualisation of epistemic communities focuses more on establishing the presence or absence of expertise and the validity of the shared knowledge across a group. By contrast, I argue that socialisation, relationships, and persuasive processes within the epistemic community are even more important in ultimately determining its strength or weakness."

191. Cross (2013: 147, note 53) draws attention to Adler & Bernstein (2005: 296), who define *episteme* as "the 'bubble' within which people happen to live, the way people construe their reality, their basic understanding of the causes of things, their normative beliefs, and their identity, the understanding of self in terms of others."

192. "[C]onstructivist scholars brought back an emphasis on the logic of socialization as an alternative to the rationalist insistence on the logic of calculation. The processes of socialization, persuasion, and ideation can be identified and observed far more readily among actual state officials operating on behalf of parts of states rather than among states as aggregate actors, providing a fertile climate for a renewed focus on government networks in specific issue areas" (Slaughter & Zaring 2007: 214).

193. Ruggie (1975: 569-70) argues that the *episteme* "delimits ... the proper construction of social reality" for the members of a community. For the genealogy of *episteme* see Foucault (1994).

194. Cross sees empirical questions involving continuous variables, where Haas appears to prefer dichotomous ones.

195. Cross (2013: 142) insists that the group's "policy goals must derive from their expert knowledge, not some other motivation, otherwise they lose authority with their target audience, usually elite governmental decision-makers. Their reliance on expert knowledge, which they validate within their group, is what differentiates them from other actors that seek to influence policy. For example, other transnational actors may rely on shared values deriving from idealism (advocacy networks), self-interest (multinational corporations), a fixed agenda (lobbying groups), methods of interpretation (interpretive community), argumentation (argumentative or rhetorical community), or shared practices (communities of practice)" (citations omitted).

196. Further, Cross (2013:148) argues that "[o]nce the context is established for a particular geographic region or issue, it is possible to isolate the independent impact of epistemic communities through case studies, process-tracing, and interviewing."

197. It may simply be that Haas wanted to avoid equating professions with epistemic communities, without excluding the possibility that *some* professionals might form epistemic communities. I am in agreement with Cross' understanding on this point. She argues that "epistemic communities cannot be comprised of whole professions. There may be competing epistemic communities from the same profession, advancing different goals. In addition, many groups within a profession may not be motivated by their knowledge-based expertise and desire to support the public interest, thus precluding them from being epistemic communities. But professionalism is at the heart of the internal dynamics of any epistemic community" (Cross 2013: 150).

198. Haas's typology suggests an either-or classification, depending on whether "principled" knowledge is shared (epistemic community) or not shared (profession) (Haas 1992: 18) ("The epistemic community members' professional training, prestige, and reputation for expertise in an area highly valued by society or elite decision makers accord them access to the political system and legitimize or authorize their activities."). Yet, in a later statement, Haas clearly states that members of at least *some* professions can become epistemic communities: "The point to be stressed here is that while economists as a whole constitute a profession, members of a particular subgroup of economists – for example, Keynesians or followers of one of the schools of development economics – may constitute an epistemic community of their own and systematically contribute to a concrete set of projects informed by their preferred views, beliefs, and ideas" (id. at 19).

199. He might as well have called them 'hired guns.' Haas did not use the term 'policy community' in his 1992 article, except in footnote 39 to refer to something that is "broader" than an epistemic community, but it appears that they would overlap with what he called "interest groups" in 1992 (or possibly a "social movement"). Haas (1992: 18) explained that epistemic communities "differ from interest groups in that the epistemic community members have shared causal beliefs and cause-and-effect understandings. If confronted with anomalies that undermined their causal beliefs, they would withdraw from the policy debate, unlike interest groups." Krebs (2001: 225-6) raises a tricky question in this context: What if EpiCom members are "just be after their own personal or professional self-interest. ... what if they are simply reflecting their own domestic cultures and strategic interest rather than professional expertise?"

200. International environmental lawyers do, however, play "a key role in institutionalizing ecological epistemic communities in the formation of international environmental law and regimes" (Haas 2005: § 3.0).

201. Cross appears to equate professionals with experts. See also Djelic & Quack (2010), who argue that professional communities – including epistemic communities – are growing in importance through increasing transnationalisation in the context of globalisation.

202. According to Cross (2013: 149), this "leads to variation in the legitimacy of expert groups as they compete with each other for their own niche and status as professional groups."

203. Borrowing from Larson (1977), Cross argues that professions "endlessly define and redefine the common vision, shared standards, and professional identity that mark them as a recognisable, coherent whole. This can be achieved to varying degrees of success" (Cross 2013: 149).

204. Larson (1977: xvi) also made this point in connection with her historical analysis of "how the occupations that we call professions organized themselves to attain market power."

205. In Cross's approach, these are to be understood as arrayed along a "strong-weak continuum" (Cross 2013: 150). She is careful to point out that these are not the only variables that could help to explain strength or weakness of an epistemic community.

206. "Frequent meetings solidify a body of *shared professional norms* that concern the protocol, procedure, and standards of consensus-building within an epistemic community. These professional norms arise early on through training, and evolve as individuals encounter various circumstances" (Cross 2013: 150, emphasis in original).

207. "They work on the basis of instructions from their capitals, which have significant powers to sanction wayward diplomats. However, the ambassadors' strong common culture prevents them from engaging in bargaining. Rather, they tend to sell their national capitals on the benefits of common action and stress that arguments that smack of national self-interest would not be persuasive. Similarly, senior EU military officials will often not even show up at a meeting if their capitals have given them firm negotiating positions which they know will run afoul of an existing consensus. In these circumstances, they send their deputies to read out instructions, rather than opposing the sense of common culture that typically prevails" (Cross 2013: 150-1). While these are significant findings in the context of European integration, one might argue as well that consensus-seeking is the nature of diplomacy.

208. One of the useful features of the epistemic communities literature is that it bridges the state-society divide, which makes it a useful adjunct to neofunctionalism as well as institutional and field approaches. However, this feature is not unique to the epistemic community framework, but can also be found in the network literature, as well as in a broad range of public policy literatures (see, e.g., Dowding 1995: 137-39) (noting that a "policy community is understood in all the literature in some sense as a common culture and understanding about the nature of the problems and decision-making processes within a given policy domain).

209. More useful is the notion of "fusion" or "administrative interaction" developed by Wolfgang Wessels (1990), which looks at how participation in EU decision-making affects national civil servants. Wessels argues (id. at 230) that this interaction "creates a major dynamic for European integration leading not to a transfer of loyalty by national officials to a new centre but to cooperation of officials into a new system of shared government. This stage of State evolution is characterized by an increasing degree of cooperation, in vertical terms between different government levels, and in horizontal terms, among several groups of actors. The 'multi-level' interactions of civil servants of several national and international administrations thus reinforce trends towards specific forms of 'sharing' or 'fusion' of powers between 'bureaucrats and politicians' which non-EC-related studies have identified."

210. Dezalay (1995: 5) claims that "the logic of the market, of which [law firms] are the agents, gradually submerge the national cultures of which they are the inheritors; but to construct an international market, they rely on the very state structures they are undermining."

211. This is not to claim that legal elites have no need of persuading administrative colleagues of a course of action. In my case studies, however, the legal elites were themselves part of the administration, and were primarily faced with the need to persuade political actors, who my findings show generally trusted and deferred to the legal elites, or – as my findings on Finland show – with the need to push their government's negotiators to pursue a particular course of action.

212. According to Lizardo & Stoltz (2017: 8), "ideal interests were for Weber the best example of how cultural forces could constitute historically specific patterns of interest-driven action." For Weber, "material interests play the role of quasi-generic, usually ahistorical interests found in all times and places, [while] ideal interests play the role of historically constituted interests, which over time are subject to variation and modification by cultural symbols" (id. at 10).

213. In the globalization context, Carruthers & Halliday (2006: 574) examine the power occupied by legal professionals who occupy the "position of intermediary" and "stand at the intersection of the local and global," which position provides them with a "unique opportunity to shape the field of power in directions that benefit professional ideologies and interests." See also Carruthers & Halliday (1998). While these authors are particularly interested in how such actors use their position in support of their economic interests, their argument is equally applicable to situations in which legal actors use their positions to vindicate non-material or ideological interests.

214. "Every profession considers itself the proper body to set the terms in which some aspects of society, life or nature is to be thought of, and to define the general lines, or even the details, of public policy concerning it" (Hughes 1963: 657).

215. Schott et al. (2016: 23) have noted that the behavior of professionals "has been studied in the field of sociology for a long time (sociology of professionalism), but it is also central to the public administration literature."

216. Role identity is similar to, but not identical to Ziegler's notion of an occupational identity. Role identities are "self-conceptions, self-referent cognitions, or self-definitions that people apply to themselves *as a consequence of the structural role positions they occupy*" (Hogg et al., 1995: 256) (emphasis added). By taking on a role identity, individuals "accept certain self-meanings and expectations accompanying the role, and then behave to preserve and represent these expectations and meanings" (Stets & Burke 2000). In contrast, Ziegler (1997: 16) takes care to differentiate occupational identity from the person's structural position in an organization, and to anchor it in how the members are "identified, recruited and socialized."

217. In such a situation, an individual's role identity (Hogg et al., 1995: 256) may well differ (see preceding endnote), but not his or her occupational identity.

218. Kelemen (2013: 246-9, at 246), in contrast, draws attention to the dramatic growth and diversification of the "community of actors deeply engaged in the European legal field." See also Kelemen (2011).

219. Whether the actors brought this mindset with them when they became civil servants, or it first developed after they entered their position, is beside the point. My findings suggest that most brought some measure of it with them, and that this mindset tended to strengthen over time.

220. Pragmatism may also be seen as a national characteristic, as in the case of Kirsti Rissanen's self-description as a "pragmatic Finn."

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Appendix A

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https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/civil-justice_en
(accessed 20 May 2018)

CIVIL JUSTICE

The EU has put in place a number of measures designed to help citizens with cross-border litigation.

Family Law

Overview of family matters

Divorce and separation

Children's wellbeing

Marriage, civil partnerships and property issues

Successions and wills

Civil status documents

Civil and Commercial Law

Civil and commercial matters

Contractual and non-contractual obligations

Insolvency proceedings

Assignment of claims

Access to Justice

Information on access to judicial systems, collective redress, mediation and legal aid

Appendix B: Schematic Overview of Selected Civil Justice Measures

	Regulation	Directive	Decisions and Other
Mutual Recognition	Insolvency [1] Brussels I [2] (civil & commercial) Brussels II (family) [3] European Enforcement Order (EEO) – Uncontested Claims [4] European Order for Payment (EOP) [5] Maintenance [6] Succession [7] Civil Protection Measures [8] European Asset Preservation Order (EAPO) [9] Marital Property [10] Public Documents [11]		
Procedure	Service of Process [12] Evidence [13] Small Claims [14]		*Late Payments* [20]
Access to Justice		Legal Aid [18] Mediation [19]	
Choice of Law (Conflict of Laws)	Contracts [15] Torts [16] Divorce [17]		
Judges & Legal Professionals			Judicial Network [21] Judicial Training [22]
Other			European Day of Civil Justice [23]

Endnotes to Appendix B

1. Council Regulation 1346/2000/EC of 29 May 2000 on insolvency proceedings (Insolvency Regulation); Regulation 2015/848/EU of 20 May 2015 on insolvency proceedings (recast) (Insolvency Recast Regulation).

2. Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation); Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels I Recast Regulation).

3. Council Regulation 1347/2000/EC of 29 May 2000 on the jurisdiction, recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for joint children (Brussels II Regulation, sometimes referred to as Brussels II bis); Council Regulation 2201/2003/EC of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation No 1347/2000/EC (Brussels II bis Regulation).

4. Regulation 805/2004/EC of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (European Enforcement Order (EEO) for Uncontested Claims Regulation).

5. Regulation 1896/2006/EC of 12 December 2006 creating a European order for payment procedure (European Order for Payment (EOP) Regulation).

6. 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 (Maintenance Regulation).

7. Regulation 650/2012/EU of 4 July 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 (Succession Regulation).

8. Regulation 606/2013/EU of 12 June 2013 on mutual recognition of protection measures in civil matters (Civil Protection Measures Regulation).

9. Regulation (EU) No 655/2014 of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (European Account Preservation Order (EAPO) Regulation).

10. Regulation 2016/1103/EU of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (Marital Property Regulation).

11. Regulation 2016/1191/EU of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union (Public Documents Regulation).

12. Council Regulation 1348/2000 of 29 May 2000 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service of Documents Regulation); Regulation 1393/2007/EC 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 No 1348/2000 (Service of Documents Recast Regulation).

13. Council Regulation 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 (Evidence Regulation).

14. Regulation 861/2007/EC of 11 July 2007 establishing a European Small Claims Procedure (Small Claims Regulation).

15. Regulation 593/2008/EC of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation).

16. Regulation 864/2007/EC of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation).

17. Council Regulation (EU) 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III Regulation Implementing Enhanced Cooperation).

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 (Legal Aid Directive); Commission Decision of 9 November 2004 establishing a form for legal aid applications under Council Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such dispute (Decision on Legal Aid Form); Commission Decision of 26 August 2005 establishing a form for the transmission of legal aid applications under Council Directive 2003/8/EC (Decision on Legal Aid Transmission).

19. Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters (Mediation Directive).

20. Directive 2000/35 of 29 June 2000 on Combating Late Payment in Commercial Transactions, 2000 O.J. (L 200/35) (Late Payments Directive). This example is anomalous, since it was not adopted pursuant to Articles 61 and 65 of the EC Treaty.

21. Council Decision 2001/470 of 28 May 2001 establishing a European Judicial Network in Civil and Commercial Matters (EJN Decision - Civil); Decision 568/2009/EC of 18 June 2009 amending Council Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters (Decision Amending EJN).

22. Bordeaux Charter Establishing the European Judicial Training Network (October 2000), as amended in Copenhagen (December 2002); Initiative of the French Republic with a view to Adopting a Council Decision setting up a European Judicial Training Network; Resolution 2008/C 299/01 of the Council and of the Representatives of the Governments of the Member States meeting within the Council on the training of judges, prosecutors and judicial staff in the European Union (Council Resolution on Judicial Training); Second Council Conclusions on European Judicial Training (October 2011).

23. Launch of the "European Day of Civil Justice," IP/03/699 (16 May 2003).

Appendix C

Table of Interviewees

NAME OF INTERVIEWEE	YEAR[1]	NATIONALITY	POSITION (AT THE TIME OF THE INTERVIEW)
Aalto, Mari	2006	Finnish	Finnish Civil Servant (Ministry of Justice); Delegate to EU during Finnish Presidency
Astola, Tiina	2007	Finland	Finnish Civil Servant (Ministry of Justice); now EU Commission (DG Justice)
Audit, Bernard	2005	France	Legal Academic
Baltazar, Telmo	2009	Portugal	EU Commission (DG Justice)
Basedow, Jürgen	2010	Germany	Legal Academic
Beaumont, Paul	2006	UK (Scotland)	Legal Academic
Blankenburg, Erhard	{2002}	German/NL	Academic (Sociology & Law)
Borrás i Rodríguez, Alegría	2016	Spain	Legal Academic
Bucher, Andreas	2005	Switzerland	Legal Academic
Burbaum, Klaus	{2002}	Germany	Judge/Ministry of Justice (Northrhein-Westphalia)
Charbonnier, Gilles	2006	France	European Judicial Training Network; former French Judge
Coninsx, Michèle	2007	Belgium	EU Civil Servant (Eurojust); former Belgian Judge
de Kerchove, Gilles	2008	Belgium	EU Council Secretariat; former Belgian Civil Servant; Legal Academic
de Moor, Stefan	{2002}	Belgium	EU Civil Servant (Eurojust); former Belgian Judge
Den Boer, Monika	{2002}	Netherlands	Academic (Law & Politics)
Drobnig, Ulrich	2005	Germany	Legal Academic
Duintjer Tebbens, Harry	2007	Netherlands	EU Civil Servant (European Parliament); former Dutch Civil Servant; Legal Academic

[1] Interviews in which the year is {bracketed} were conducted prior to obtaining human subjects clearance, and are not cited in the dissertation or otherwise relied on, except for background information.

Elsen, Charles	2008	Luxembourg	EU Council Secretariat; former Luxembourgisch Civil Servant (Ministry of Justice)
Fallon, M. Marc	2007	Belgium	Legal Academic
Fonseca Morillo, Francisco	2008	Spain	EU Commission (DG Justice); Legal Academic
Francq, Stéphanie	2007	Belgium	Legal Academic
Freudenthal, Mirjam	2008	Netherlands	Legal Academic
Goldsmith, Jonathan	2006	UK	Secretary General of the Council of Bars and Law Societies of the European Union (CCBE); formerly Director of the Law Society of England and Wales
Graf, Carola	{2002}	Germany	Judge/Ministry of Justice (Northrhein-Westphalia)
Heliskosi, Joni	2006	Finland	Finnish Civil Servant (Ministry of Justice); Delegate to EU during Finnish Presidency
Jääteenmäki, Anneli	2007	Finland	Member of European Parliament; former Finnish Prime Minister
Jaskalainen, Jana	2007	Finland	Finnish Civil Servant (Ministry of Justice)
Jastrow, Serge-Daniel	2005	Germany	German Ministry of Justice & Judge
Jekewitz, Jürgen	2007	Germany	Senior Civil Servant (Federal Ministry of Justice)
Jesserun d'Oliveira, Hans-Ulrich	2008	Neetherlands	Legal Academic & Practitioner
Jour-Schroeder, Alexandra	{2002}	Germany	EU Commission (DG Justice)
Joutsen, Matti	2007	Finland	Finnish Civil Servant (Ministry of Justice)
Kaila, Heidi	{2002}	Finland	Finnish Civil Servant (Foreign Affairs, PM's Office)
Kessedjian, Catherine	2005 & 2006	France	Legal Academic; International Civil Servant (Hague Conference)
Kohler, Christian	2007	German	EU Civil Servant (Court of Justice)
Korpinen, Inga	2007	Finland	Lawyer; former Finnish Civil Servant (Ministry of Justice)
Ladenburger, Clemens	2008	German	EU Commission
Lagarde, Paul	2007	France	Legal Academic

Letto-Vanamo, Pia	2007	Finland	Legal Academic
Mansel, Heinz-Peter	2005 & 2006	Germany	Legal Academic
Möller, Gustav	2007	Finland	Finnish Judge
Möller, Tia-Maaret	2015	Finland	Finnish Civil Servant (Ministry of Justice)
Odlum, Ché	{2002}	UK	Senior Staff at NGO – Joint Brussels Office of the (U.K.) Law Societies
Partsch, Philippe-Emmanuel	{2002}		EU Civil Servant (Court of Justice)
Peltomäki, Antti	2007	Finland	EU Commission; former Finnish Civil Servant (Ministry of Justice, PM's Office)
Pereira, Fernando Rui Paulino	2008	Portugal	EU Council Secretariat
Puumalainen, Mikko	2007	Finland	Finnish Civil Servant (Ombudsman; formerly Ministry of Justice, Finnish Permanent Representative to the EU, PM's Office)
Ratliff, Pascale	{2002}	France	Brussels-based NGO (notaries); French Notary
Rissanen, Kirsti	2007 & 2009	Finland	Finnish Civil Servant (Ministry of Justice); Legal Academic
Rouchaud-Joet, Anne-Marie	2008	France	EU Commission (Legal Service; formerly DG Justice)
Seïte, David	{2002}	France	EU Commission (DG Justice)
Soveroski, Marie	{2002}	USA (Luxembourg-based)	EIPA (European Institute of Public Administration) – Director of the European Centre for Judges and Lawyers
Storme, Marcel	2006	Belgium	Legal Academic
Struycken, A.V.M. (Teun)	2007	Netherlands	Legal Academic; former President of Dutch Staatscommissie voor het internationaal privaatrecht
Sundbäck, Veli	2012	Finland	Finnnish Civil Servant (Foreign Ministry)
Tenreiro, Mario	2008	Portugal	EU Commission (DG Justice)
Tichadou, Evelyne	{2002}	France	EU Civil Servant (Court of Justice)
van der Velden, F.J.A.	2008	Netherlands	Dutch Civil Servant (Ministry of Justice); Legal Academic

van Erp, Sjef	{2002}	Netherlands	Legal Academic
van Gerven, Walter	{2002}	Belgium	Legal Academic; former EU Civil Servant (Court of Justice)
van Houtte, Hans	{2002}	Belgium	Legal Academic
van Loon, Hans	2007	Netherlands	International Civil Servant (Hague Conference)
Vernimmen, Giselle	2009	Belgium	Legal Academic; former EU Civil Servant (Commission Task Force)
Verschraegen, Michael	{2002}	Belgium	EU Commission (DG Justice)
von Hoffmann, Bernd	2006	Germany	Legal Academic
Wagner, Heiko	{2002}	Gerrmany	German Judge (German Institute for Judicial Training)
Wagner, Rolf	2008	Germany	German Civil Servant (Federal Ministry of Justice)
Walz, Stefan	{2002 & 2004}	Germany	German Civil Servant (Federal Ministry of Justice)
Weyemberg, Anne	2006 & 2009	Belgium	Legal Academic
Wilderspin, Michael	2008	UK	EU Commission (Legal Service; former DG Justice)

MULTIANNUAL FINANCIAL FRAMEWORK (EU-28)

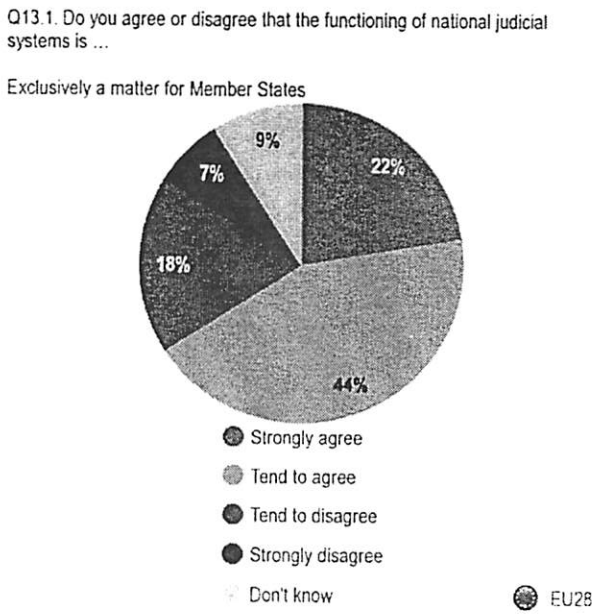
(EUR million - current prices)

COMMITMENT APPROPRIATIONS	2014	2015	2016	2017	2018	2019	2020	Total 2014-2020
1. Smart and Inclusive Growth	**63.972**	**66.812**	**69.304**	**72.342**	**75.270**	**78.751**	**82.466**	**508.918**
1a: Competitiveness for growth and jobs	16.457	17.553	18.345	19.794	21.095	22.927	25.026	141.197
1b: Economic, social and territorial cohesion	47.434	49.171	50.864	52.447	54.065	55.707	57.316	367.005
2. Sustainable Growth: Natural Resources	**59.304**	**59.598**	**59.908**	**60.191**	**60.267**	**60.344**	**60.422**	**420.035**
of which: Market related expenditure and direct payments	44.130	44.368	44.628	44.863	44.889	44.916	44.942	312.737
3. Security and citizenship	**2.179**	**2.246**	**2.378**	**2.514**	**2.655**	**2.801**	**2.950**	**17.723**
4. Global Europe	**8.335**	**8.750**	**9.142**	**9.432**	**9.824**	**10.269**	**10.509**	**66.261**
5. Administration	**8.721**	**9.076**	**9.483**	**9.919**	**10.346**	**10.787**	**11.254**	**69.585**
of which: Administrative expenditure of the institutions	7.056	7.350	7.678	8.008	8.360	8.700	9.071	56.224
6. Compensations	**29**	**0**	**0**	**0**	**0**	**0**	**0**	**29**
TOTAL COMMITMENT APPROPRIATIONS	**142.539**	**146.482**	**150.215**	**154.398**	**158.363**	**162.952**	**167.602**	**1.082.551**
as a percentage of GNI	1,03%	1,02%	1,00%	1,00%	0,99%	0,98%	0,98%	1,00%
TOTAL PAYMENT APPROPRIATIONS	**135.866**	**141.901**	**144.685**	**142.771**	**149.074**	**153.362**	**156.295**	**1.023.956**
as a percentage of GNI	0,98%	0,98%	0,97%	0,92%	0,93%	0,93%	0,91%	0,95%

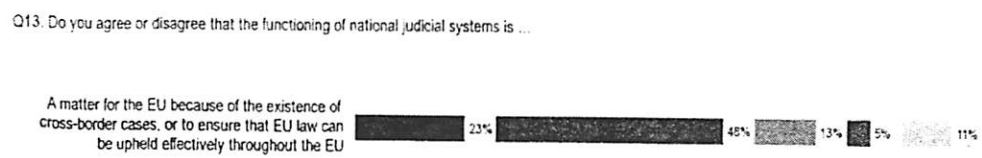
OUTSIDE THE MFF	2014	2015	2016	2017	2018	2019	2020	Total 2014-2020
Emergency Aid Reserve	297	303	309	315	322	328	335	2.209
European Globalisation Fund	159	162	166	169	172	176	179	1.184
Solidarity Fund	531	541	552	563	574	586	598	3.945
Flexibility instrument	500	510	520	531	542	552	563	3.719
EDF	3.132	4.187	4.318	4.463	4.622	4.796	4.988	30.505
TOTAL OUTSIDE THE MFF	**4.752**	**5.839**	**6.003**	**6.182**	**6.375**	**6.585**	**6.812**	**42.548**
as a percentage of GNI	0,03%	0,04%	0,04%	0,04%	0,04%	0,04%	0,04%	0,04%
TOTAL MFF + OUTSIDE MFF	**147.291**	**152.321**	**156.219**	**160.580**	**164.738**	**169.537**	**174.414**	**1.125.099**
as a percentage of GNI	1,06%	1,06%	1,04%	1,04%	1,03%	1,02%	1,02%	1,04%

Annex 1: GOVERNANCE OF NATIONAL JUDICIAL SYSTEMS

Only 22% of respondents strongly agree that the functioning of a national judicial system is exclusively a matter for Member States



Two thirds of the rest think that the functioning of national judicial systems is a matter for the EU because of the existence of cross-border cases, to ensure that EU law can be upheld effectively throughout the EU or if there are serious problems in the functioning of a national judicial system.



Appendix F

Draft Mutual Recognition Program: Work Plan for Implementing the Principle of Mutual Recognition of Judgments (2001 O.J. C 12/9)

Brussels I	Brussels II and family situations arising through relationships other than marriage	Rights in property arising out of a matrimonial relationship and the property consequences of the separation of an unmarried couple	Wills and succession	Ancillary measures
First stage: European enforcement order for uncontested claims Small claims Abolition of exequatur for maintenance claims	First stage: Abolition of exequatur for judgments on rights of access Instrument on family situations arising through relationships other than marriage (separate instrument or revision of Brussels II) Extension of the scope of any instrument(s) adopted to judgments modifying the conditions under which parental responsibility is exercised, as fixed in judgments made at the time of the divorce or separation	First stage: Drafting of one or more instruments on mutual recognition with regard to rights in property arising out of a matrimonial relationship and the property consequences of the separation of unmarried couples: adoption of the Brussels II machinery	First stage: Drafting of an instrument on mutual recognition with regard to wills and succession: adoption of the Brussels II machinery	Instrument on the taking of evidence Establishment of the European Judicial Network on civil and commercial matters Minimum standards of civil procedure Harmonisation of rules on, or minimum standards for, the service of judicial documents Measures to facilitate the enforcement of judgments, including those allowing identification of a debtor's assets Measures for easier access to justice Measures for easier provision of information to the public Measures relating to harmonisation of conflict-of-law rules
Second stage: Revision of the Brussels I Regulation: — incorporation of previous developments — extension of abolition of exequatur — measures to strengthen the effects in the requested State of judgments made in the State of origin (provisional enforcement, protective measures, including the attachment of bank accounts)	Second stage: For every previously adopted instrument: — application of simplified recognition and enforcement procedures in the Brussels I Regulation — measures to strengthen the effects in the requested State of judgments made in the State of origin (provisional enforcement and protective measures)	Second stage: Revision of the instrument(s) drawn up at the first stage: — application of simplified recognition and enforcement procedures in the Brussels I Regulation — measures to strengthen the effects in the requested State of judgments made in the State of origin (provisional enforcement and protective measures)	Second stage: Revision of the instrument(s) drawn up at the first stage: — application of simplified recognition and enforcement procedures in the Brussels I Regulation — measures to strengthen the effects in the requested State of judgments made in the State of origin (provisional enforcement and protective measures)	
Third stage: Abolition of exequatur for all the areas covered by the Brussels I Regulation	Third stage: Abolition of exequatur for the areas covered by the Brussels II Regulation and for family situations arising	Third stage: Abolition of exequatur for the areas covered by the instrument(s) drawn up	Third stage: Abolition of exequatur for the areas covered by the instrument drawn up	

Appendix G

Opening Positions of Member States in regard to Communitarization of Justice and Home Affairs (JHA) Issues[1]

Member State	**Position on Full Communitarization of Third Pillar (from 3rd –> 1st)**	**Position on Civil Justice (JCCM)**	**Position on Criminal Justice and/or Police Cooperation**
Austria *Länderpositionen zur Regierungskonferenz* 4 May 1996	No clear position	No explicit mention	No explicit mention
Austria Government *Document for Turin Summit* 26 March 1996	Yes; for visas, asylum, residence right of 3rd country nationals, drugs, fraud, border control, customs cooperation	Ambiguous : calls for communitization of "a number of" 3rd Pillar policies "particularly ...visas, asylum, external border controls, immigration, ... third- country nationals ..., drug trafficking ... international fraud, and customs cooperation"; civil justice neither included nor excluded	The "work of judicial and police authorities ... in tackling all questions relating to [communitarized areas] should ... be coordinated at supranational level," but "criminal issues should remain in the sphere of intergovernmental cooperation"
Belgium 28 July 1995	Yes, but only for visas, asylum, drugs, customs cooperation (cf. den Boer 1996: 3-4, who states that Belgium was for "complete communitarization")	Partial: improve efficiency in 3rd Pillar; grant Commission the right of initiative; ensure right of international access to justice for citizens	No (remain in 3rd Pillar)

[1] The information in Appendix G is drawn from a briefing prepared by the European Parliament for the IGC. (European Parliament 1996a – EP - JHA Briefing for IGC). This document provides summaries of the original documents, most of which are not available to me. Hence, the information presented here is incomplete. In particular, I cannot wholly exclude the possibility that some Member States discussed civil justice in their reports, since it may simply be that the persons who prepared the briefing documents for the EP did not consider this issue important enough to mention. By the same token, however, the fact that the briefing document does mention civil justice issues on a number of occasions implies that some attention was paid to whether they were mentioned at all. The document was prepared by Antonio Caiola from the Legal Service of the European Parliament.

Denmark *Agenda for Europe: the Intergovernmental Conference 1996* Date unknown	Yes, but unclear about which issues: "supports the proposals to transfer certain areas out of the" 3rd and into the 1st Pillar (without identifying which areas)	No explicit mention	No (remain in 3rd Pillar, and 3rd Pillar should remain intergovernmental in nature)
Finland *Memorandum from the Ministry for Foreign Affairs* 18 September 1995	Communitarization "should be considered pragmatically and openly, case by case. However, Finland expresses reservations in relation to important basic questions that affect the national sovereignty of Member States, believing that such matters should continue to be dealt with through inter-governmental cooperation"	Issue not explicitly addressed, but Finland supports: "establishing a system of mutual (legal and administrative) assistance; ... creating a European judicial area; ... [and] ensuring that family law judgments are applied ..."	Position not clearly stated, but apparently prefers intergovernmental cooperation
France French Presidency *Statement* January 1995	No (maintain unanimity rule for JHA issues; seems to rule out the possibility of transferring 3rd Pillar areas into the 1st Pillar	No explicit mention	No explicit mention
France National Assembly *Report on preparation of the 1996 IGC* 12 & 13 May 1996	Unclear (improve effectiveness of 3rd Pillar)	No explicit mention	No explicit mention

France Internal government document, published in *Le Figaro* 20 February 1996	Doubts about communitarizing asylum or immigration	Member States "should be encouraged to align their civil ... legislation" in the "area of judicial cooperation"	Considers intergovernmental cooperation as "the most suitable and effective formula for cooperation on policing and should continue to apply in this area"; but Member States "should be encouraged to align their ... criminal legislation" in the "area of judicial cooperation"
Germany Foreign Minister Kinkel 21 February 1995	Position on communitarization unclear, except for creation of Europol	No explicit mention	No explicit mention of judicial cooperation, but supports creation of a "genuine European policy authority" (Europol)
Germany CDU/CSU Parliamentary Group (Bundestag) 1 September 1994	Need to establish a "common immigration policy" and "strengthen ... political and legal tools for combating organized crime"	No explicit mention	No explicit mention
Germany Government *German objectives for the IGC* 26 March 1996	Ambiguous: "need for significantly stronger cooperation on justice and home affairs both in practical terms and as regards the decision-making process"	Ambiguous: the German Government is "alone among the Member States in having listed the *harmonization of civil* and criminal *legislation* among the most important issues to be addressed" in the 3rd Pillar	Ambiguous: the German Government is "alone among the Member States in having listed the harmonization of civil and criminal legislation among the most important issues to be addressed" in the 3rd Pillar

Greece *Memorandum on the IGC*, 24 January 1996	No, but "wishes to see certain wishes certain elements of third pillar communitized"; "even if full communitization proves impossible, a degree of communitization is essential"; no details re: Greece's position on particular areas	No explicit mention	No explicit mention
Ireland White Paper: *Challenges and Opportunities Abroad* 26 March 1996	Unclear; "supports consideration of proposals to transfer certain matters" from 3rd to 1st Pillar, "in order to facilitate the decision-making procedure and accelerate progress in these areas"; "would include in particular those concerning immigration policy and the right of asylum"	No explicit mention	No explicit mention
Italy Foreign Minister Martino *Memorandum* 12 October 1994	Stressed the need to consolidate measures to protect human rights and fundamental freedoms	No explicit mention	No explicit mention
Italy Government *Statement on Foreign Policy* 23 February 1995	Stressed importance of promoting police and judicial cooperation and adopting legislation to harmonize national provisions on freedom of movement for persons; combat corruption	No explicit mention	Calls for coordination of police and judicial systems in Central/Eastern Europe
Italy Parliament (Chamber of Deputies & Senate) *Resolution* 23 May 1995	Communitarize asylum, external borders, immigration, and measures to combat organized international crime	No explicit mention	Ambiguous (would communitarize measures to combat organized international crime)

Italy Foreign Minister Agnelli *Communication* 23 February 1995	Improve functioning of 3rd Pillar	No explicit mention	No explicit mention
Italy Parliament (Chamber of Deputies) 12 December 1995	Yes, in principle, "so that justice, home affairs and immigration issues can take on a real Community dimension; "need to establish the *European judicial area* suggested by" the 3rd Pillar; essential that "key elements of justice and internal security policy ... be transferred into the sphere" of the 1st Pillar, including immigration and action to combat organized crime	No explicit mention	Communitarize "action to combat organized crime," including the creation of a European police force
Italy Italian Government *Position on the IGC* 18 March 1996	Supports the "gradual transfer of certain matters to the Community sphere, particularly immigration policy, the right of asylum and the legal status of aliens residing legally in the European Union"	No explicit mention	No explicit mention
Luxembourg Minister of Foreign Affairs, External Trade and Cooperation Poos to Parliament (Chamber of Deputies) 16 February 1995	Unclear; calls for "substantial progress to be made on the third pillar, given the operational difficulties encountered"	No explicit mention	No explicit mention
Luxembourg Government *Aid-mémoire* 30 June 1995	Unclear; calls for improving decision-making in 3rd Pillar	No explicit mention	No explicit mention

The Netherlands Government *Note to Houses of Parliament* 14 November 1994 (discussed in plenary on 14 February 1995)	No call for communitarization, but notes the need to address immigration policy and cooperation between national judicial authorities (both *civil* and criminal) in the context of enlargement	No explicit support for communitarization	No explicit support for communitarization
The Netherlands Government *Report on Cooperation in the fields of JHA* of 23 May 1995	Identified full communitarization of all JHA areas as one option for IGC, alongside full intergovernmentalism and a matrix of intermediate options	No explicit mention	No explicit mention
The Netherlands Government *From Madrid to Turin: Dutch priorities on the eve of the 1996 IGC* March 1996	Yes, for visa and asylum policies, otherwise make it easier to use passarelle clause as a means of transferring some areas from 3rd to 1st Pillar	No explicit mention	No explicit mention
Portugal Ministry of Foreign Affairs March 1996	Yes, for asylum and combating illegal immigration; also, there should be an "option to do likewise with the rules on crossing external borders, the conditions for allowing aliens to move freely in the Union, and those aspects of visa policy ... not yet ... communitized"	Ambiguous: no explicit mention, but "police and judicial cooperation" should remain in 3rd Pillar	Police and judicial cooperation to remain in 3rd Pillar, but "existing mechanisms for intergovernmental cooperation should be significantly strengthened"

Spain Government Date unknown	Spain has "many reservations about ... the possibility of communitarization," but "... would probably vote in favour of moving from unanimity to qualified-majority voting" in the area of "drug addiction ... if such a proposal were put forward"	Spain "... would probably vote in favour of moving from unanimity to qualified-majority voting" for the "harmonization of civil legislation ... if such a proposal were put forward"	Spain "... would probably vote in favour of moving from unanimity to qualified-majority voting" for the "harmonization of criminal legislation ... if such a proposal were put forward"
Spain Minister for Foreign Affairs 28 March 1996	"... supports communitizing some aspects of the issues covered by Title VI of the TEU", namely "all matters concerned with the crossing of external borders"	Ambiguous: "On police and judicial cooperation, Spain envisages closer intergovernmental collaboration and favours streamlining" passarelle provision	Remain in 3rd Pillar (but calls for "closer inter-governmental collaboration" and streamlining the passarelle provision
Sweden Government *Communication to Parliament* (Riksdag) 30 November 1995	Yes, for asylum and immigration	No clear call for communitarization, but proposes "a rationalization and strengthening of police and *judicial cooperation* (which must, of course, take place between Member States)" (unclear whether civil justice is meant)	No clear call for communitarization, but proposes "a rationalization and strengthening of police and judicial cooperation (which must, of course, take place between Member States)"
United Kingdom Foreign Secretary Hurd *Speech to French Institute for International Relations* 12 January 1995	Reaffirmed the UK Government's wish to "maintain the present division of powers between the [1st] and [3rd] pillars" and that intergovernmental cooperation is preferable to any "involvement of the Community institutions" in JHA affairs	No explicit mention	No explicit mention

United Kingdom Government White Paper: *An Association of Nations* 12 March 1996	No: opposed to the "transfer of certain matters" from the 3rd to the 1st Pillar; "all issues related to combating terrorism, organized crime, drug trafficking and illegal immigration" should remain in the 3rd Pillar; the roles of EU institutions (i.e., the EP, Commission and Court) "must remain strictly limited in this sphere"	No explicit mention	Remain in 3rd Pillar
BeNeLux Joint Memorandum 7 March 1996	Yes, but only for immigration (particularly visas & asylum)	Unclear – no explicit mention	Remain in 3rd Pillar; improve efficiency & democratic accountability
Joint Letter from French President Chirac and German Chancellor Kohl 6 December 1995	Call for the "completion of a common European area in which the free movement of citizens is guaranteed"; that is, a "*homogenous area* in which the free movement of persons will have to be underpinned by joint actions, particularly in the areas of asylum policy, immigration policy and improved cooperation to protect people effectively against the scourges of terrorism, organized international crime and drugs"	No explicit mention	No explicit mention

Appendix H

Finnish Ministry of Justice Brochure (1999) –
450-Year Old Judicial Instructions - "The Good of the Common Man is the Supreme Law"

450-YEAR-OLD JUDICIAL INSTRUCTIONS

"THE GOOD OF THE COMMON MAN IS THE SUPREME LAW"

What is neither just nor equitable, cannot be the law; it is for the equity in the law that it is accepted.

—

All law shall by applied with wisdom, because the greatest justice is the greatest injustice, and mercy shall be included in all justice.

—

The good of the common man is the supreme law; and therefore, what is found useful for the common man shall be deemed the law even if the words of a written law would seem to order otherwise.

These extracts date back to the very beginning of the New Age, the Instructions for a Judge, to be found on the first pages of the Laws of Finland. The main theme of these instructions, comprising a few pages, is that the laws and authorities are for the good of the people and that power must not be abused.

The Instructions for a Judge are a collection of legal principles, drafted by Olaus Petri, reformer, minister and legal scholar, in the 1530s. "Some general rules which the judge shall comply with" were first printed in 1616. Since 1635 – i.e., for more than 360 years – they have formed

Tuomarin pitä enſiſti perän
että hän on Jumalan Käſk
että ſe wirca, jota hän
Jumalan, ja ei hänen on
tähden ſe tuomio cuin hän t
myös Jumalan, ſillä että ſe ulosſanotan
Jumalan wiraſa ja Jumalan puoleſta,
on totiſeſti Jumalan tuomio, ja ei ihmiſt
tähden macaa ſuuri woima ſen päällä, e
wiſſaſti eteens catzo, ettei hän Jumalan
mitze wäärää tuomiota, jolla hän tuomitz
caickiſehen cadoturehen, ſillä että hän w
Jumalan tuomion ja käſkyn, wäkiwallari
ri, cuin oikeuderi Jumalalda aſetettu on
hänellä on tahto oikein tuomita, ja wiſu
parhan ymmärryxens jälken, oikeudeſta,
gan taida ymmärtämättömpdens tähden
oikeus on, ja langetta niin wäärän tuom
hänellä jonguncaldainen eſtelys, että hä
wäärin tuomitzeman waſtoin tahtoans ja te

and still form the introduction of the collections of laws published annually both in Sweden and in Finland.

At the time Olaus Petri collected the Instructions, Finland was part of the Kingdom of Sweden. These instructions are, in fact, part of the common 700-year-old history of Finland and Sweden, which lasted until the beginning of the 19th century.

During the centuries, the Instructions for a Judge have become an essential part of the Nordic, both Finnish and Swedish, legal tradition. The general principles and practical advice of the Instructions still contain a lot of valid and acceptable wisdom to guide the interpretation of the laws.

4

No one can give another a better right than he has himself.

—

A wrongful acquisition is no acquisition.

—

He who has no goods shall suffer a corporeal punishment.

—

The law does not approve everything not ordered punishable, because all crimes cannot be listed in the book.

—

Not everything that look true, is true.

—

What is gained through sin, is lost through sorrow.

—

He who acts against the purpose of the law acts against the law even if he seems to comply with the words of the law.

The roots of the Instructions for a Judge are deep in the Middle Ages, in ancient times and even in the days of the Old Testament. In the form of separate rules, the Instructions contain guidelines based on the Bible, Roman and Canon law, German legal principles and Swedish law, and most of them have become generally accepted legal principles. They also include old Swedish popular sayings, proverbs.

Although the Instructions have never been confirmed as the law, they have, as the introduction to the Collection of Laws, had quite a profound influence on judicial practice. As time has gone by, a large number of these rules on civil, criminal and procedural law have also found their way into the laws.

A guarantee is a promise to pay.
Reproach shall go unpunished, although not always.
An enemy may not give testimony.
A contract supersedes the law.
Evil shall not be corrected by a greater evil.
No one may be a judge in his own case.
No one shall be sentenced for the words of one man only.
Hitting someone is breaking the law.
Arbitrary rule or violence is not the law of the land.
Associating with others shall be governed by the law, not by fists.
Confession equals proof.
What has been done cannot be undone.
What you hurt with, you better with.
The words of a stranger are inadmissible.
If you abuse your freedom, you deserve to forfeit it.

The Instructions for a Judge are not the only ones of their kind, but what is exceptional is that the principles attributed to Olaus Petri have maintained their significance all the way to our days.

The main reason for this is thought to be the fact that the contents are in harmony with the general Swedish and Finnish sense of justice.

The language of the Instructions is simple and to the point; the principles have been accepted as general. Also common people have been able to understand these simple rules.

6

A wrongful fine will not make a lord rich,
But the law and justice are for the
glory of God.

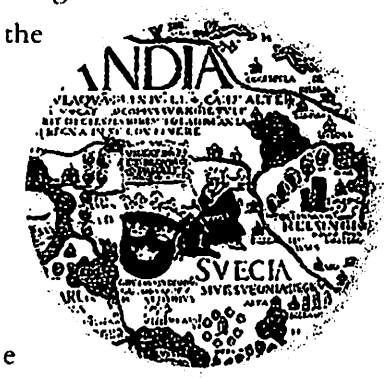
—

All the laws have been enacted for the sake of justice and equity and not for fines. For a fine is to punish those who break the law; but the law prefers not to be broken and would willingly go without fines.

—

What the judge needs most is wisdom so that he knows when to be strict for the law and when to be lenient, for all punishment shall promote betterment, and where possible, no punishment shall prevent the punished one from bettering himself. ... Therefore the judge shall, in such matters, act wisely so as not to make bad doubly worse: but the law always demands betterment, and for betterment it shall be used.

Some of the Instructions for a Judge deal with false fines, which refers to King Gustavus Vasa of Sweden, who sentenced people to death and then allowed them to buy their freedom with fines. This also happened to Olaus Petri himself in 1540; he was charged with publicly criticising the King's way of ruling.



Olaus Petri also interfered with other arbitrary rules and harshness in the application of justice. The Instructions for a Judge start with binding admonitions to judge correctly. He invokes God to make a judge beware of arbitrary rule and injustice.

7


GEORGII am Waldt/ JURIS
Liceat. Phil. & Med. Ut. Doct.
Rättegångz Oordning/
Hwaruthinnan förhandlas och tilkenna
giffs/ Huru then ledhe Sathan igenom Dommare-
ner/ Kärande och Swarande/ Advocaterne/ Procuratorerne/

Och ther brede widh en Christeligh Underwijsning/
På nytt öfwersedt och publicerat aff
ERICO SCHRODERO. Stockholms
Slotz Secretario.

Widh endan äre ock här insatte the Swenske Dommare
Regler/ som alment hwars stedhe vthi Laghböckerna.

What has been considered unique is the idea of the 'betterment' of a criminal already contained in the Instructions – this was, after all, an era in which punishments became harder, the powers of the kings were becoming absolute and even quite cruel punishments to scare people and to revenge a wrong were generally considered acceptable.

Olaus Petri already said what was otherwise not said until the legal scholars of the Age of Enlightenment said it a few centuries later.

8

A judge shall not be hasty to punish before he has carefully thought the matter through; because a hasty punishment is seldom good and just.

Similar crimes call for similar punishments, and therefore you must not look whether one is rich or poor, but punish one like the other when the crimes are equal.

The judge shall also remember that his office is for the benefit of the common people and not for the benefit of the judge himself, and therefore he must look after the good of the common people and not of himself, even though it is also good for him when he acts correctly. His goal in office shall, however, be the common good and not his own good. Because the judge is for the common people and not the people for the judge.

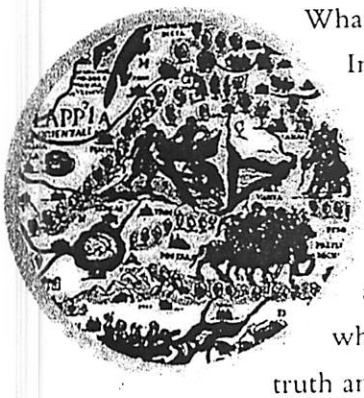
The Instructions attempt at solving what the law is and how the law should be interpreted, they contain ethical guidelines for the judge.

The goal of Olaus Petri was the interest of the ordinary man. His sympathies lay with the common people, not with the nobility. He saw punishment to be necessary to maintain social peace.

The significance of the Instructions in the defence of the people has always been emphasised. The Instructions underline the obligations of the judge, but also the legal protection of the people as well as social and judicial equality.

9

The Instructions for a Judge reflect their own time and contain a lot that is out-dated and even conflicting. However, we can find in them something timeless, something that is as essential to judicial practice today as it was centuries ago.



What characterises the Instructions from beginning to end and forms their spirit and the deepest core of their message is an absolute obligation to do what is right, to serve the truth and in all ways to repel what is wrong.

A good and wise judge is better than a good law, for he can measure everything with equity. But where there is an evil and wrong judge, a good law is of no avail, because he will twist and distort it as he pleases.

The text is mainly based on the writings of Finnish legal historian Heikki Ylikangas.

Olaus Magnus, Carta Marina, Venice 1539. Photo: Fredrikson Map Collection, original map in Bibliotheca Carolina Rediviva, Uppsala.

On page 4 Instructions for a Judge, first Finnish edition, Turku 1759, on page 8 title page of the first Swedish edition, Stockholm 1616.

10

Appendix I

Presidency Conclusions, Tampere European Council (15-16 October 1999) (excerpt)

...

B. A GENUINE EUROPEAN AREA OF JUSTICE

28. In a genuine European Area of Justice individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States.

V. *Better access to justice in Europe*

29. In order to facilitate access to justice the European Council invites the Commission, in co-operation with other relevant fora, such as the Council of Europe, to launch an information campaign and to publish appropriate "user guides" on judicial co-operation within the Union and on the legal systems of the Member States. It also calls for the establishment of an easily accessible information system to be maintained and up-dated by a network of competent national authorities.

30. The European Council invites the Council, on the basis of proposals by the Commission, to establish minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union as well as special common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims, as well as maintenance claims, and on uncontested claims. Alternative, extra-judicial procedures should also be created by Member States.

31. Common minimum standards should be set for multilingual forms or documents to be used in cross-border court cases throughout the Union. Such documents or forms should then be accepted mutually as valid documents in all legal proceedings in the Union.

32. Having regard to the Commission's communication , minimum standards should be drawn up on the protection of the victims of crime, in particular on crime victims' access to justice and on their rights to compensation for damages, including legal costs. In addition, national programmes should be set up to finance measures, public and non-governmental, for assistance to and protection of victims.

VI. *Mutual recognition of judicial decisions*

33. Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities.

34. In civil matters the European Council calls upon the Commission to make a proposal for further reduction of the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgement in the requested State. As a first step these intermediate procedures should be abolished for titles in respect of small consumer or commercial claims and for certain judgements in the field of family litigation (e.g. on maintenance claims and visiting rights). Such decisions would be automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement. This could be accompanied by the setting of minimum standards on specific aspects of civil procedural law.

35. With respect to criminal matters, the European Council urges Member States to speedily ratify the 1995 and 1996 EU Conventions on extradition. It considers that the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU. Consideration should also be given to fast track extradition procedures, without prejudice to the principle of fair trial. The European Council invites the Commission to make proposals on this matter in the light of the Schengen Implementing Agreement.

36. The principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there.

37. The European Council asks the Council and the Commission to adopt, by December 2000, a programme of measures to implement the principle of mutual recognition. In this programme, work should also be launched on a European Enforcement Order and on those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States.

VII. *Greater convergence in civil law*

38. The European Council invites the Council and the Commission to prepare new procedural legislation in cross-border cases, in particular on those elements which are instrumental to smooth judicial co-operation and to enhanced access to law, e.g. provisional measures, taking of evidence, orders for money payment and time limits.

39. As regards substantive law, an overall study is requested on the need to approximate Member States' legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings. The Council should report back by 2001.

Civil Justice Issues - Vienna Action Plan and Tampere Milestones Compared[1]

	Vienna Action Plan	Tampere Milestones
Title	Judicial Cooperation in Civil Matters	A Genuine European Area of Justice
		The European Council invites the Council and the Commission, in close co-operation with the European Parliament, to *promote the full and immediate implementation of the Treaty of Amsterdam on the basis of the Vienna Action Plan*[2] and of the following political guidelines and concrete objectives agreed here in Tampere. (¶ 9)
Chapeau	The aim is to make life simpler for European citizens by improving and simplifying the rules and procedures on cooperation and communication between authorities and on enforcing decisions, by promoting the compatibility of conflict of law rules and rules on jurisdiction and by eliminating obstacles to the good functioning of civil proceedings in a European judicial area. It will be necessary to improve the coordination of Europe's courts and the awareness of Member States' laws, particularly in cases with important human dimensions, having an impact on the every-day life of the citizens. (¶ 39)	In a genuine European Area of Justice individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States. (¶ 28) The enjoyment of freedom requires a genuine area of justice, where people can approach courts and authorities in any Member State as easily as in their own. ... Judgements and decisions should be respected and enforced throughout the Union, while safeguarding the basic legal certainty of people and economic operators. Better compatibility and more convergence between the legal systems of Member States must be achieved. (¶ 5).

[1] Items dealing solely with criminal justice issues, including victim's rights, are omitted.

[2] The Tampere Milestones take on board the concrete proposals from the Vienna Action Plan. Where these are not specifically identified in the Tampere Milestones, I have added them **in bold text** in the Vienna Action Plan column that best corresponds to the location of that item in the Tampere Milestones.

Provisions related to 'Access to Justice' (Tampere Milestones, B(V))	It will be necessary to improve the ... awareness of Member States' laws ... (¶ 39)	In order to facilitate access to justice ... to launch an information campaign and to publish appropriate "user guides" on judicial co-operation within the Union and on the legal systems of the Member States. It also calls for the establishment of an easily accessible information system to be maintained and up-dated by a network of competent national authorities. (¶ B.29)
	Identifying the rules on civil procedure having cross-border implications which are urgent to approximate for the purpose of facilitating access to justice for the citizens of Europe and examine the elaboration of additional measures accordingly to improve compatibility of civil procedures. This could include the ... granting of legal aid as well as other possible obstacles of an economic nature. (¶ 41(d))	... establish minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union ... . (¶ B.30)
		... establish ... special common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims, as well as maintenance claims, and on uncontested claims. (¶ B.30)
	Examine the possibility of drawing up models for non-judicial solutions to disputes with particular reference to transnational family conflicts. In this context, the possibility of mediation as a means of solving family conflicts should be examined. (¶41(b))	Alternative, extra-judicial procedures should also be created by Member States. (¶ B.30)
		Common minimum standards should be set for multilingual forms or documents to be used in cross-border court cases throughout the Union. Such documents or forms should then be accepted mutually as valid documents in all legal proceedings in the Union. (¶ 31)
	Examine the possibility of extending the concept of the European judicial network in criminal matters to embrace civil proceedings. (¶ 40(d))	[double check ... mentioned in numerous ms papers, but not in final tampere milestones?]

Provisions related to 'Enforcement of Judicial Decisions' (Tampere Milestones, B(VI))		Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore *endorses the principle of mutual recognition* which, in its view, should become the *cornerstone of judicial co-operation* in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities. (¶ 33)
		... further reduction of the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgement in the requested State. As a first step these intermediate procedures should be abolished for titles in respect of small consumer or commercial claims and for certain judgements in the field of family litigation (e.g. on maintenance claims and visiting rights). Such decisions would be automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement. This could be accompanied by the setting of minimum standards on specific aspects of civil procedural law. (¶ 34)

		The principle of mutual recognition should also apply to *pre-trial orders*, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; ... *evidence* lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there. (¶ 36) ... adopt ... a programme of measures to implement the principle of mutual recognition. In this programme, work should also be launched on a *European Enforcement Order* and on *those aspects of procedural law on which common minimum standards are considered necessary* in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States. (¶ 37)

Provisions related to 'Greater Convergence in Civil Law' (Tampere Milestones, B(VII))	**Finalisation, if it has not been completed, of work on the revision of the Brussels and Lugano Conventions** (¶ 40 (a)) **Drawing up a legal instrument on the law applicable to non-contractual obligations (Rome II)** (¶ 40 (b)) **Begin revision, where necessary, of certain provisions of the Convention on the Law applicable to Contractual Obligations, taking into account special provisions on conflict of law rules in other Community instruments (Rome I)** (¶ 40 (c)) **Examine the possibilities to draw up a legal instrument on the law applicable to divorce (Rome III)** (¶ 41(a)) **Examine the possibility of drawing up a legal instruments on international jurisdiction, applicable law, recognition and enforcement of judgments relating to matrimonial property regimes and those relating to succession.** (¶ 41(c)) **Identifying the rules on civil procedure having cross-border implications which are urgent to approximate for the purpose of facilitating access to justice for the citizens of Europe and examine the elaboration of additional measures accordingly to improve compatibility of civil procedures. This could include the examination of the rules on deposition of security for litigation costs and expenses of the defendant in a civil procedure, ... as well as other possible obstacles of an economic nature.**(¶ 41(d)) **Improving and simplifying cooperation between courts in the taking of evidence.** (¶ 41(e))	... prepare new *procedural legislation* in cross-border cases, in particular on those elements which are instrumental to smooth judicial co-operation and to enhanced access to law, e.g. provisional measures, taking of evidence, orders for money payment and time limits. (¶ 38)
		As regards *substantive law*, an overall study is requested on the need to approximate Member States' legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings. (¶ 39)