JUDICIAL COOPERATION AND THE EUROPEAN NEIGHBORHOOD POLICY

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The Brussels Convention of 1968 was a pioneer in several respects: it was the first multilateral convention on the recognition of foreign judgements; the first „double" convention dealing with both recognition and jurisdiction; and also the first convention on recognition that owes its existence to trade policy. I shall focus on the latter point.

Ever since the 19th century foreign trade agreements dealt with customs, quota and all kinds of trade restrictions, so-called non-tariff trade barriers, but not with the recognition of foreign judgments. Foreign trade was considered as a privilege for those who were admitted to it. Where States granted that privilege, private actors would grasp the opportunity to make money. When the founding Member States targeted the creation of a common market in the mid-1950ies, it was for the first time that a Treaty aimed at the *full* liberalization of trade in goods and services. No more customs, no more quota, no more non-tariff barriers – that was the goal. At a late stage of the negotiations, in early 1957, someone became aware of the profound change that this Treaty would confer upon the nature of foreign trade. From now on, the success of the trade policy would depend on the private undertakings. But would they engage in international commerce? Or would they prefer to keep to domestic trade? This depended on a number of factors relevant for them. One of them was the likelihood of cross-border legal protection of their rights. This was the background to Article 220 EEC Treaty and the duty of the Member States to negotiate what later became the Brussels Convention.

Article 220 EEC, later renumbered as Article 293 EC, was deleted by the Treaty of Lisbon. But in substance the link between judicial cooperation and the internal market still surfaces in Article 81 para. 2 which encourages measures, "particularly when necessary for the proper functioning of the internal market." The link is also ensured by the Lugano Convention which is a supplement to the European Economic Area.

However, the link has fallen into oblivion with regard to another group of European countries. I am talking about the partner States under the European Neighborhood Policy. This policy was introduced by the *Prodi* Commission in 2002; it is meant to offer neighboring States "more than partnership and less than membership". In recent years so-called Deep and Comprehensive Free Trade Agreements have been concluded with Georgia, Moldova and Ukraine. The agreements do not only provide for a far-reaching liberalization of the trade in goods, they also put the three countries under the duty of a

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comprehensive harmonization of their laws with EU law. They have to adopt hundreds of regulations and directives within a few years. After the transition period the law of the partner States, at least the law in the books, will resemble EU law in such diverse areas as product regulations, financial services, consumer law, transport law, the law of corporations to mention just a few. The similarities will be greater than those existing in 1957 between the laws of the founding Member States.

However, there is next to nothing in the three agreements about judicial cooperation between the EU and the three partner states. The only provision is not more than a declaration of intent. Let me quote from the agreement with Georgia:

> "The parties agree to develop judicial cooperation in civil and commercial matters as regards the negotiation, ratification and implementation of multilateral conventions on civil judicial cooperation and, in particular, the conventions of the Hague Conference on private international law in the field of international legal cooperation and litigation as well as the protection of children."

As compared with Article 220 EEC, this provision establishes no duty of negotiations on the mutual recognition of judgements. Although at the time when the three agreements were concluded, the Hague Choice of Court Convention of 2005 had already been finalized and the ratification by the Union was imminent, the three agreements do not even mention this convention.

For private undertakings, the only way to ensure cross-border protection of their rights with regards to these countries is commercial arbitration with the view to the enforcement of the arbitral awards under the New York Convention. But arbitration is not a realistic option for non-contractual disputes or where the litigated values are low. Judicial cooperation is indispensable. At present it is put into effect by the national law of Member States which differs strongly thereby distorting the internal market: while Sweden refuses to enforce any foreign judgment in the absence of an international commitment and Germany requires reciprocity, Italy and France only review the basic regularity of the foreign proceedings. As to the undertakings from Ukraine and Moldova, they enjoy a more effective protection of their rights in Russia and other countries of the Community of Independent States (CIS) due to the Kyiv Convention.

How could a better judicial cooperation with those countries be secured for the future? One option would be to wait for the finalization of the Hague judgments project. But the draft provides for many exceptions; moreover, the completion will take some time and the success is far from sure. A second option would be an accession of the three countries to the Lugano Convention. But this would require the approval by those Contracting States of Lugano which are not bound by the partnership agreements with Georgia, Moldova and Ukraine. The Commission would have to convince Iceland, Norway and Switzerland to approve the accession of the three partner States, perhaps with the proviso that the Lugano Convention does not apply in the relation between the aforementioned Contracting States of Lugano and the three partner countries. At least in theory, this appears to be possible under Article 72 of the Lugano Convention. In practice, this solution is rather unlikely to occur. The third solution would then be the negotiation of a

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new multilateral recognition treaty with the three partner countries, along the lines of the Lugano Convention.

Under Article 7 of the Treaty the Union shall ensure consistency between its policies and activities. With regards to the relation between the European Neighborhood Policy and the policy promoting judicial cooperation in civil matters, this obligation has not been honored so far. There is a clear discrepancy between the wish to promote trade with the eastern partners and the absence of legal certainty in cross-border relations. Unless that situation is remedied the three partnership agreements will not achieve the intended results. I suggest that the institutions of the Union make use of the instruments for a political dialogue created by the partnership agreements in order to promote the judicial cooperation with those States. A first step could be a model agreement that could later serve as the basis of negotiations with the three States and with other countries targeted by the European Neighborhood Policy, e.g. the States on the southern shore of the Mediterranean.

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