Which Legal Basis for Family Law? The Way Forward

NOTE

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NOTE

Abstract

Many of the current features of European family law can be linked to their particular legal basis. This paper evaluates the content and limits of the legal bases of EU family law rules with a view to establishing the optimum mechanism(s) for further legislative progress in view of the Union’s aims in this field. Particular consideration is given to the possible use of the passerelle provision (Art 81(3)) and recourse to enhanced cooperation.
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LIST OF ABBREVIATIONS

AFSJ  Area of Freedom, Security and Justice

EC    European Community

EU    European Union

MS    Member State

QMV   Qualified Majority Voting

TEC   Treaty Establishing the European Community

TEU   Treaty on European Union

TFEU  Treaty on the Functioning of the European Union
EXECUTIVE SUMMARY

Background

Discussing the legal basis for EU action in the field of family law first requires clarification of the meaning of “family law”. Given the core EU principle of conferral of jurisdiction, and the lack of any provisions transferring competence to the EU in the sphere of domestic family law, there can be little doubt substantive family law falls within the exclusive competence of Member States. Shared competence (between Member States and the Union) however exists in the Area of Freedom, Security and Justice, where the Union is tasked by the Treaties to develop judicial cooperation in civil (including family) matters having cross-border implications.

There are three main forms that the exercise of this competence can take.

First, the EU may (in accordance with the provisions of the Treaties) take EU-wide\(^1\) measures (Art 81 TFEU).

Second, the EU may authorise Member States, inter se, to establish family law measures (Art 20 TEU).

Third, it is also be conceivable that this competence might be exercised through the participation of the EU in international family law instruments having a broader scope of application than the EU region (Art 216 TFEU)

All three approaches have been used to date.

- Three Regulations have been based on Art 81 TFEU (or ex Art 65 TEC).

- Council Regulation (EU) No 1259/2010 of 20 December 2010 has harmonised the law applicable to divorce and legal separation, but was adopted on the basis of enhanced cooperation.

- In addition, the EU has ratified the Hague Conference’s Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, and authorised Member States to ratify, or accede to, the 1996 Hague Child Protection Convention. The EU has also established a procedure that Member States can use in certain circumstances to conclude agreements with third States.

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\(^1\) Denmark, Ireland and the UK do not participate in any EU family law measures. However the UK and Ireland may decide to take part.
Aim

This paper evaluates the content and limits of the legal bases of EU family law rules with a view to establishing the optimum mechanism(s) for further legislative progress. To this end, the aims and objectives behind the European regulation of family law are first clarified. Such objectives primarily result from the text of the founding Treaties as well as the political programmes adopted by the European institutions.

The terms of primary law and of the proposals, decisions and recommendations pertaining to the setting of priorities for the Area of Freedom, Security and Justice, clearly focus on the adoption of Regulations that “meet the needs of European citizens”. At the heart of EU action is the position of EU citizens taking advantage of their right to free movement. The situation of other categories of people should however be overlooked and is addressed in a subsequent part of this note.

- EU citizens residing in, and moving within, the EU

This paper assesses the legal bases that may be used to create harmonised rules for the EU citizens residing in, and moving within, the EU on the basis of the current objectives set in this field, in particular improved access to justice through increased legal certainty and the removal of legal barriers.

Such aims can optimally be met through the exercise of internal rather than external competence. Yet the adoption of internal measures in the area of family law has been much slower than in other civil / commercial matters. This is in part because family law measures are normally, and by derogation to Art 81(2) TFEU, to be adopted by special legislative procedure (with unanimity at the Council and consultation with the European Parliament). The latter is linked to the particular sensitivity of such questions as well as the strength of national traditions and cultures in this field.

Existing acts do not cover all core areas of family law and, where they exist, are marked by fragmentation and differentiation, much of which can be linked to the legal basis chosen and associated legislative procedure used.

Consideration is therefore given to the extent to which use of the passerelle (Art 81(3) second indent) or recourse to enhanced cooperation might be considered with a view to facilitating and accelerating the adoption of family law measures.

- Passerelle

Bridging or ‘passerelle’ clauses exist in the Treaties, which enable shifts between legislative procedures and voting requirements. One such clause relates to family law measures. According to Art 81(3) the Council may unanimously and after consulting the European Parliament decide that a cross-border family law measure be adopted by the ordinary legislative procedure.

Any discussion of the passerelle requires clarification of “measures concerning family law with cross-border implications”. The exact scope of this category is uncertain and debatable, as can be exemplified by the different legal bases used to develop the Maintenance and Succession Regulations. Whilst it is not contested that issues relating to both maintenance and succession display a mixed character combining aspects of family law and of the law of obligations or of property law, their treatment has been very different. The mixedness of maintenance was used to justify an attempted recourse to the passerelle. This failed and Council Regulation (EC) No 4/2009 was adopted by special legislative procedure. By contrast, the mixité of the law of succession was denied at the outset allowing for the adoption of the Regulation on the basis of the ordinary legislative procedure.
Bearing in mind that the use of the passerelle is predicated upon a unanimity vote in Council as well as acceptance by national parliaments, it is clear that the mechanism can only be engaged if States are satisfied that the content of the measure contemplated will be acceptable. This will be the case if not only the scope of the instrument is itself uncontroversial but also if the rules contained therein remain neutral. Such preconditions may not easily be met given the declared aims of EU action in the field of family law.

- Enhanced cooperation

Art 20 TEU authorizes enhanced cooperation in accordance with the requirements set out in Arts 326-334 TFEU. This enables a group of Member States to establish measures between themselves (using the institutions and mechanisms of the TEU).

Bearing in mind that Regulations adopted through enhanced cooperation are by definition unable to achieve the aims and objectives assigned to EU action in the sphere of family law as fully as EU-wide measures, is there merit in promoting this mechanism for family law making in the EU? Arguably from the perspective of ambitious objective setting, it may be appropriate to achieve some level of harmonisation among a number of participating States rather than none. However, consideration must be given to the impact that enhanced cooperation may have in the area concerned, not only for the European citizens benefiting from it, but also for those who will not. Furthermore there needs to be a clear understanding of the “last resort” nature of enhanced cooperation.

- Other categories of persons

As regards persons who are not EU citizens taking advantage of their right to free movement, the position is less clear.

First, it must be recalled that rules adopted for the benefit of EU citizens residing in the EU will benefit other categories of persons. Indeed, through the principle of non-discrimination, family law rules will apply to all EU residents, irrespective of their nationality. In addition, the choice and operation of connecting factors in the context of family, rather than individual, disputes implies that these rules may even benefit some EU citizens residing in third States.

However, the situation of other EU citizens residing outside the EU may need to be addressed too if the EU is to meet its objectives, including the requirements set forth in Art 3(5) TEU. Possible recourse may be had to the external competence provisions (Arts 216 ff TFEU) in this context.
1. INTRODUCTION

Given the core EU principle of conferral of jurisdiction (Arts 4-5 TEU), and the lack of transfer of competence in the sphere of domestic family law (Arts 3-4 TFEU a contrario), there can be little doubt substantive family law falls within the exclusive competence of Member States. Shared competence (between Member States and the Union) exists however in the Area of Freedom, Security and Justice (Art 4(2)(j) & Title V of the TFEU), where the Union is tasked by the Treaties to develop judicial cooperation in civil (including family) matters having cross-border implications (Art 81 TFEU).2

1.1 Existing instruments & their legal basis

The exercise of this shared competence may take three main forms.

First, the EU may adopt quasi EU-wide3 cross-border family law measures on the basis of Art 81 TFEU.

Three family law Regulations have thus far been adopted on the basis of Art 81 TFEU or its predecessor, Art 65 TEC:


Second, the EU may authorise Member States to establish enhanced cooperation inter se (Art 20 TEU). Recourse to this mechanism is only possible where it is established that EU-wide measures cannot be achieved within a reasonable period. It is on this basis that Council Regulation (EU) No 1259/2010 of 20 December 2010 harmonised the law applicable to divorce and legal separation7.

Third, the competence could also be exercised through the participation of the EU in international instruments (Art 216 TFEU). As regards the law applicable to maintenance obligations, the EU opted to ratify the Hague Conference’s Protocol of 23 November 20078, as an alternative to developing a bespoke EU solution. As regards the protection of children, the EU has authorised Member States to ratify, or accede to, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of

2 It may also be possible for the EU to rely on Art 21(2) TFEU to adopt international family law measures to attain the objective of free movement of EU citizens.
3 Denmark does not participate in Title V measures; neither do the UK or Ireland but these may decide to opt in to individual measures, see Protocols No 21 & 22, OJ C 326, 26.10.2012, pp. 295 & 299.
5 OJ L 7, 10.1.2009, pp. 1 s.

The EU has also established a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations.

1.2 European family law - state of play

European family law resembles a mosaic, being composed of several individual, fragmented, instruments covering discrete aspects of law.

This mosaic is still incomplete: a number of areas are not covered, e.g. matrimonial property and property consequences of registered partnerships, capacity, existence, validity, effects and recognition of registered partnerships and marriages, names, filiation, adoption, emancipation.

It is also irregular, being made of individual tiles of different sizes (existing instruments are more or less specialised), different forms (existing instruments do not have the same geographical scope and shade (depending on the degree of terminological and methodological coherence between these).

Many of the current features of European family law can be linked to their particular legal basis. This paper evaluates the content and limits of the legal bases of EU family law rules with a view to establishing the optimum mechanism(s) for further legislative progress. To this end, the aims and objectives of the European regulation of family law are first clarified.

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12 Aspects of capacity may be covered by a planned legislative proposal on Special Safeguards in criminal procedures for Suspected or Accused Persons who are Vulnerable. In addition, a number of Member States are parties to the 2000 Hague Convention on the International Protection of Adults and the need for additional proposals as regards vulnerable adults will be assessed by 2014 following a Commission Report on the application of the 2000 Hague Convention.
13 Aspects of all the above might be covered by the planned legislative proposals on mutual recognition of the effect of certain civil status documents & on dispensing the formalities of legalisation of documents between Member States.
15 Some instruments cover just jurisdiction & the recognition and enforcement of judgments; others just choice of law, others all three aspects. Their material scope also vary: for example, Regulation (EC) 2201/2003 applies to divorce, legal separation and marriage annulment (as well as parental responsibility) while Regulation (EU) 1259/2010 only applies to divorce and legal separation.
16 Regulation (EC) 2201/2003 is applicable in 26 Member States; Regulation (EU) 1259/2010 in just 14 of these; Regulation (EU) 650/2012 in 24 Member States and some of the jurisdiction rules of Regulation (EC) 4/2009 potentially apply to 27 Member States (Denmark is bound by them to the extent that they amend those of Regulation (EC) 44/2001), while its choice of law chapter only applies to 25 Member States, thus leading to a differentiated application of the Recognition and enforcement provisions of this instrument.
17 For example, while party autonomy is given effect in Regulation (EU) 1259/2010, it is not the case in Regulation (EC) 2201/2003.
18 The Commission has commented that progress in the field of family law has been slow because this requires “unanimity in the Council, which has often led to long debate with no clear outcome, or to the enactment of legislation that is less ambitious than it might have been”, COM(2009) 262 final, p. 3.
2. AIMS OF EUROPEAN FAMILY LAW

Aside from the traditional aims that the harmonisation of private international law pursues, notably in terms of increased legal certainty, achievement of justice, avoidance of limping relationships and of forum shopping, the development of European family law is also shaped by a number of European objectives.

2.1 Aims under the treaties

2.1.1 Area of Freedom, Security and Justice

The adoption of European family law measures contributes to the creation of the Area of Freedom, Security and Justice (AFSJ) in Europe. The AFSJ is an area without internal borders which benefits EU citizens and their free movement (Arts 3(2) TEU & 67(1) TFEU). In the field of justice, the AFSJ implies a facilitated access to justice for EU citizens, particularly through mutual recognition (Art 67(4)).

2.1.2 Other European constraints and objectives

The Treaties also provide for general aims, such as the promotion of peace, European values and the well-being of Europeans (Art 3(1) TEU) and contain a clear prohibition of any discrimination on the grounds of nationality (Art 18 TFEU). They further define specific aims in relation to third States. According to Art 3(5) TEU: “In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, […] mutual respect among peoples, free and fair trade, […] and the protection of human rights, in particular the rights of the child [...]”.

2.2 Policy Aims

The immediate aims of future EU action, including in the family law sphere, have been adopted in 2009 in the third multiannual programme for the AFSJ. In this, the primary focus is said to be on the “interests and needs of citizens” as well as persons for whom the Union has responsibility. The priority in the area of justice is facilitation of access to justice and elimination of the remaining barriers to the recognition of legal decisions in other Member States. This means furthering the implementation of mutual recognition, including in areas not yet covered.

Further, as Europe has a role to play in a globalised world, it should provide “greater opportunities for citizens of the Union to work and do business with countries across the world” and there should be an increase in the EU’s international presence in the legal field. This includes participation in international Conventions of interest and development of new multilateral or, if necessary, bilateral instruments.

2.3 Realising European family law aims

Two situations must be distinguished.

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19 See TFEU, Title V.
21 Ibid., p. 4.
22 Ibid., pp. 12 s.
23 Ibid, p. 5.
24 Ibid, p. 17.
At the heart of EU action is the position of EU citizens taking advantage of their right to free movement, for whom European family law rules should remove legal borders and other barriers (thus promoting free movement) and facilitate access to justice. Of course, behind these integrationist terms hide more traditional aims of private international law harmonisation. Indeed improved access to justice implies more legal certainty\textsuperscript{25} and less forum shopping, while the removal of legal barriers (notably through mutual recognition) should signal the end of limping situations. In the light of these aims, Part 3 therefore addresses the legal bases that may be used to create rules for the EU citizens residing in, and moving within, the EU.

The EU has assigned itself some responsibilities regarding other categories of people, which call for EU action too, albeit with different objectives. This is discussed in Part 4.

\textsuperscript{25} As magistrally shown by J Carbonnier, Flexible droit, pour une sociologie du droit sans rigueur, LGDJ, Paris 9th ed 1998, p. 193: legal certainty is the expression of an absolute for which justice itself and progress may have to abdicate. Every one of the adopted Regulations (above 1.1) expressly refers to legal certainty as one of its aims, except for Regulation (EC) 2201/2003. However the Borràs report (on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, OJ C 221, 16.7.1998), at para 2, shows that this principle was at the heart of the work in this area too.
3. EU CITIZENS RESIDING IN, AND MOVING WITHIN, THE EU

The current institutional approach is based on the idea that the aims of European family law as regards EU citizens moving within the EU are primarily met through the adoption of European Regulations rather than the conclusion of international instruments. This is because the level of mutual trust within the European area is higher than between Member States and third States. As a result mutual recognition can be more complete, whilst access to justice and the removal of legal barriers can go further within, rather than outwith, the EU.

Despite the importance of family matters for the everyday life of European citizens the adoption of internal measures in the area of family law has been much slower than in other civil/commercial matters. This is in part because of the procedure and voting requirements applicable in this area. Consideration is therefore given to the extent to which use of the Art 81 TFEU passerelle or recourse to enhanced cooperation might be considered with a view to facilitating and accelerating the adoption of family law measures.

3.1 Passerelle

According to Art 81 judicial cooperation in civil matters should normally be adopted under the ordinary legislative procedure (Art 81(2)), except for “measures concerning family law with cross-border implications” which should be established under a special legislative procedure with unanimity at the Council and consultation with the European Parliament (Art 81(3)). This specific treatment of family law is justified by the particular sensitivity of such questions as well as the strength of national traditions and cultures in this field.

3.1.1 Shortcomings of the special legislative procedure

The use of the consultation procedure may first be questioned as regards the democratic principle in an area that is so important to European citizens. Second, the rule of unanimity entails certain disadvantages, the marks of which are borne by current European family law rules. Unanimity considerably slows down the adoption of new measures as any State may block or threaten to block a measure to ensure the protection of a particular national interest. The fate of the first Rome III proposal illustrates this situation: no consensus could be achieved despite two years of arduous negotiations primarily because one of the 24 Member States concerned could not accept the possible application of foreign divorce laws that would be less liberal than its own. In addition, unanimous consent may in some cases be achieved only at the price of compromises which may dilute or contravene the policy objectives underlying the measure. Art 13 of Regulation (EU) 1259/2010 is the prime example of a provision which was introduced to satisfy the demand of one of the participating Member States (Malta), despite the fact that this provision runs counter to the general approach of the instrument to incidental questions and one of its very aims (better access to justice).

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26 On occasion and where relevant, external action is used instead of, or as a complement to, internal action see above 1.1. On external competence, see below 4.
27 Until the Lisbon Treaty, there were also doubts as to the ambit of the Community competence in this field.
29 Denmark does not participate in AFSJ measures and both the UK and Ireland had decided not to exercise their right to opt-in.
30 A. Fiorini, ‘Harmonizing the law applicable to divorce and legal separation – enhanced cooperation as the way forward?’ 2010 ICLQ 1143 at 1144.
It could thus be argued that Art 81(3) may make it more difficult for a measure to achieve its stated objectives or indeed the general aims of European family law fully. These disadvantages could be partly overcome if use were made of the bridging or “passerelle” clause relating to family law measures.

3.1.2 Dangers and benefits of the use of passerelle

According to Art 81(3) the Council may unanimously and after consulting the European Parliament decide that “aspects of family law with cross-border implications” be adopted by the ordinary legislative procedure, which implies greater inter-institutional dialogue, with QMV voting in Council (Art 16(3) TEU).

Should the resulting reduction of the role of Member States in an area as sensitive and as culturally coloured as family law be resisted on the basis that the Union is supposed to develop the AFSJ with respect for the different legal systems and traditions of the Member States (Art 67(1))? The passerelle’s weakening of the sovereignty of Member States should not be exaggerated. The very use of the passerelle requires a unanimous vote in Council and approval by national parliaments, any of which can veto recourse to the mechanism (Art 81(3)). If the proposed measure is perceived to threaten a particularly sensitive Member State policy, that State will have the possibility to prevent the use of the passerelle either through the opposition of its representative in Council or via its national parliament.

Are there any areas of family law where the passerelle should or should not be considered?

The text of Art 81(3) suggests that only certain “aspects” of “family law” might be suitable for use of the ordinary procedure. However both the exact scope of “family law” and the identification of such “aspects” thereof that might be suitable for the passerelle are debatable, as can be exemplified by the different legal bases used in the Maintenance and Succession Regulations, and matrimonial or quasi matrimonial property dossiers. All these areas of law display a mixed character combining elements of family law and of the law of obligations / property law, yet their treatment has been very different. The mixedness of maintenance was used to justify a proposed recourse to the passerelle – this failed. Use of the passerelle was not though considered in the context of the matrimonial and quasi matrimonial property proposals which are now progressing under Art 81(3). By contrast, the mixité of the law of succession was (controversially) denied at the outset and adoption of Regulation (EU) 650/2012 simply proceeded on the basis of Art 81(2). Issues of political strategy aside, this overview shows that characterisation of a particular area of law exhibiting links with both family and civil law is at best uncertain. The classification of an “aspect” as falling within “family law” and the subsequent assessment of its suitability for the passerelle should not depend on a superficial thus questionable characterisation of it being “primarily family related” or not. It may indeed be that undeniably family law areas do not raise particularly sensitive questions, whilst mixed areas of law might indeed be more politically sensitive.

The identification of those ‘aspects’ suitable for the passerelle should first depend on the exact scope of the intended measure – e.g. in the current context use of the passerelle would not be feasible for a measure encompassing the validity and effect of same sex unions (an issue which divides Member States) but might be acceptable for measures on

32 If the UK or Ireland decide not to opt-in to a proposed measure, then the unanimity necessary for the Council to adopt the passerelle is that of members of the Council with the exception of the UK or Ireland.
33 Silence equates consent, Art 81(3) in fine.
34 It is not entirely clear if Art 3(2) Protocol No 21 affects the power to veto the passerelle in case where the UK or Ireland have previously decided to opt-in a measure.
the validity and effect of heterosexual marriages where current Member States positions are much less contrasted.

The suitability of the use of the passerelle and its unanimous acceptance will further depend on the content of the proposed measure. In this the passerelle may be more or less suitable depending on the extent to which an area is already partially harmonised, for example through the case law of the European Court or an international instrument. Furthermore the use of the ordinary legislative procedure should be facilitated where the proposed EU rules embody principles already accepted by (or acceptable to) all Member States. In other words the approval of a passerelle for a specific measure is likely to depend on the extent to which the core principles underlying that measure actually mirror existing national approaches. Nevertheless, approval even as regards apparently “neutral” law reform cannot be taken for granted simply because of the declared respect of the Union for the different legal systems and traditions of the Member States (Art 67(1)). In this it must be acknowledged that alongside the European aims mentioned above, Regulations may implicitly have certain substantive aims or effects. The most notable example in this regard is the liberal approach to divorce inherent in both Regulations (EC) 2201/2003 and (EU) 1259/2010.

3.1.3 Conclusions

Use of the Art 81(3) passerelle should be made where the scope of the measure and its proposed content are both uncontentious and “neutral” (as defined above). Such preconditions will not easily be met where the integrationist aim of a proposed measure is particularly marked (i.e. deviates from classical private international law objectives) or where additional (possibly unsaid) substantive aims permeate it.

A proposal to resort to the passerelle should be carefully reasoned and justified in substance if it is to stand a chance and avoid blind nationalistic reflexes.

3.2 Enhanced Cooperation

The enhanced cooperation mechanism was first activated in 2010, when 14 EU Member States harmonised their rules on the law applicable to divorce and legal separation using the special legislative procedure. Enhanced cooperation is based on the “hope that it will then be a catalyst and that other Member States will subscribe to such initiatives”. This hope has indeed started to materialise with Lithuania recently joining the group of participating Rome III States.

This section considers whether enhanced cooperation should be used in future family law measures.

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36 That the activation of a passerelle depends on the substance of the measure considered appears to be supported by the fact that the recommendation of the Parliament to the Council to make use of the Art 333(2) TFEU passerelle for the implementation of enhanced cooperation in Rome III (OJ C 236 E, 12/08/2011 p. 181) was not adopted by the members of the Council representing the participating Member States.

37 E.g. name: in the Garcia Avello (C-148/02, ECR 2003 I-11613) and Grunkin & Paul cases (C-353/06, ECR 2008 I-7639), based on the notion of citizenship, the European Court required the recognition of surnames conferred in a Member State.

38 E.g. adoption: the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption is in force in all EU Member States.


40 Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia.


3.2.1 **Substantive and procedural conditions**

The Treaties allow Member States to establish enhanced cooperation between themselves under the conditions set out in Art 20 TEU & Arts 326-334 TFEU in the field of European family law as it is an area of “non-exclusive” Union competence “covered by the Treaties”. At least 9 Member States must participate and the enhanced cooperation measure, adopted as a last resort, must further the Union’s objectives, protect its interests and reinforce the integration process (Art 20 TEU). It must also comply with the Treaties and Union law (Art 326 TFEU) and respect the competence, rights and obligations of non-participating Member States (Art 327 TFEU).

Authorisation to proceed with an enhanced cooperation is granted by the Council on a proposal from the Commission and after obtaining the consent of the Parliament (Art 329 TFEU). All Member States participate in the Council vote with enhanced cooperation being granted by QMV43. The adoption of an enhanced cooperation measure on cross-border family law would then proceed under the special legislative procedure, unless the participating Member States decide unanimously to activate the specific bridging clause of Art 333(2) TFEU. This slightly differs from the Art 81(3) passerelle considered above in that its use does not require a proposal from the Commission and does not involve any control by national parliaments44.

3.2.2 **Can enhanced cooperation be used to achieve the objectives of the EU as regards European family law?**

Enhanced cooperation measures cannot by definition attain the aims of European family law (identified above in part 2) as fully as EU-wide Regulations. The removal of legal barriers and increased access to justice are only achieved fully where the family situation is “internal” to the circle of participating States. The benefit of an enhanced cooperation measure may also extend to some family situations with links to both participating and non-participating States (though this will depend on the scope of the individual measure45). However they will obviously not be achieved if the situation has links only to non-participating States.

3.2.3 **Should enhanced cooperation be promoted for future measures of European family law?**

Should a limited cross-border family law harmonisation by way of enhanced cooperation be promoted on the basis that it is better than no harmonisation at all? An affirmative answer seems at first glance to be the premise of the current Treaties’ provisions on enhanced cooperation but it should be remembered that the very activation of this mechanism requires a proposal which is at the discretion of the Commission and must be approved by both the Council and European Parliament.

Leaving aside the political dimensions of the question of the opportunity of enhanced cooperation, the answer, from a legal point of view, chiefly depends on the demonstration that enhanced cooperation in this particular area is adopted “as a last resort” and does “further the objectives of the Union”.

- **Last resort**

Enhanced cooperation can never be the first choice; it can only proceed if it is established as the second best solution. The Treaties however do not define what is meant by last

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44 The considerations and conclusions in point 3.1 above apply mutatis mutandis to the Art 333(2) TFEU passerelle.
45 For example, the harmonised choice of law rules of Regulation (EU) 1259/2010 apply to all divorce proceedings brought in a participating Member State, even if the parties have links (for example by way of residence or nationality) to non-participating Member States.
resort, simply requiring that the objectives of that particular cooperation “cannot be attained within a reasonable period by the Union as a whole”. There may be situations in which the particular objective of a measure could be achieved via several, equally suitable, alternative policy options. For example the reduction of forum shopping in a particular area may be said to be achievable either via the introduction or amendment of jurisdiction rules or, alternatively, the harmonisation of choice of law rules. If the proposed measure chooses policy option 1 and negotiations of this instrument fail, could an enhanced cooperation measure based on policy option 1 really be considered as the second best solution to achieve (part of) the goal of reduction of forum shopping? Or should the adoption of an alternative proposal for an EU-wide instrument based on policy option 2 not be first attempted? And would the answer be the same even if policy option 2 could not quite attain the desired objective as optimally as option 1?

These questions express the underlying tension within enhanced cooperation: should the priority in European family law be to achieve more for some EU citizens or to achieve less for virtually all of them? To answer them it should be recalled that Art 20 TEU refers to two distinct objectives: the objectives of a particular measure and those of the Union. Art 20(2) imposes that enhanced cooperation be considered only where the objectives of a specific measure of cooperation cannot be attained within a reasonable time by the Union as a whole. However these particular objectives are objectives that were themselves chosen to further greater objectives, the objectives of the Union (Art 20 (1)). Arguably the Union’s objectives in the field of European family law might be better served by EU-wide measures with slightly lesser aims than a combination of some EU-wide measures and some measures of enhanced cooperation. This is linked to the consequences of enhanced cooperation in European family law.

- **Impact of enhanced cooperation in cross-border family law and objectives of the Union**

First, in general terms, there is no guarantee that (all) non-participating States will, in time, join the group of participating States. By contrast there is a serious risk that enhanced cooperation in one area will signal the start of greater variable geometry either because it might lead to enhanced cooperation in adjacent areas (for example Regulation (EU) 1259/2010 may in time lead to the abolition of exequatur of divorce decisions within the group of participating States46) or, more generally, because States will have fewer inhibitions to resist political pressures towards consensus as they realise that their veto will not necessarily prevent other States to agree measures between themselves.

Yet the perspective of an ever greater number of enhanced cooperations appears difficult to reconcile with the idea that States have conferred competence on the Union to “attain objectives they have in common”, with the aim of creating “an ever closer Union among the peoples of Europe” (Art 1 TEU).

Second, one of the aims of legislation in European family law is the elimination of the remaining internal borders within the area of justice. Enhanced cooperation does not remove these borders but makes them variable as enhanced cooperation is by definition adopted by a set of Member States that would vary from one measure to the next. Enhanced cooperation does not create concentric circles that would always be the same and where inner circle States would participate in a more fully achieved AFSJ than outer circle States. Rather, if used more than once, enhanced cooperation would lead to the formation of eccentric and partially overlapping circles, the location and size of which vary with each measure, bearing in mind that these measures themselves also have a different personal and material scope. The multiplication of differentiated approaches and the resulting confusion it brings for EU citizens would be antithetical to the objective of (increased) legal certainty without which an area of true justice aimed for by the EU cannot exist.

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3.2.4 Conclusions

Consideration must be given to the impact that enhanced cooperation has not only for the European citizens benefiting from it in one area but also for those who will not, as well as its likely consequences for European family law.

Enhanced cooperation can be seen as one step towards the achievement of the objectives of the Union only if it is considered strictly as a last resort (where it cannot equally be seen as a missed opportunity to achieve slightly lesser objectives for all), and on an exceptional basis.
4. OTHER CATEGORIES OF PERSONS

As regards persons who are not EU citizens taking advantage of their right to free movement, what is the competence of the EU, and its ambitions, in cross-border family law? What legal basis might be appropriate for any legislative action?

As shown above, the situation of EU citizens not habitually resident in the EU may need to be addressed if the EU is to meet the aims set forth in Art 3 TEU. This provision sets out the responsibility of the Union to promote the well-being of its peoples generally (Art 3(1)) and, in its relations with the wider world, to contribute to the protection of its citizens (Art 3(5)).

Although there is no express EU family law competence as regards persons other than EU citizens exercising their right to free movement within the Union, it is important to recall that Union objectives may be seen as potential sources of competence (Art 3(6) TEU and Art 352 TFEU). The necessary legal protection may be offered either by giving EU citizens resident abroad the benefit of internal EU rules, or by concluding conventions with third States.

The first approach has already been used. EU citizens not habitually resident in the EU may already benefit from current EU Regulations.47

This is because both the choice and operation of connecting factors (nationality, domicile, party autonomy, and in certain instances habitual residence) impacts on the geographical scope of individual instruments. This, combined with the fact these connecting factors apply in the context of family (rather than individual) disputes, implies that rules created for EU citizens taking advantage of their right to free movement within the EU may even benefit some EU citizens residing in third States.

As a result of the principles of parallelism and pre-emption, now largely codified in Arts 3(2) and 216 TFEU, the Union has exclusive competence for the conclusion of external agreements insofar as they may affect common rules or alter their scope. In view of the extensive personal scope of EU family law rules, this means that in the areas covered (or likely to be covered) by internal rules, the EU has exclusive external competence to conclude agreements within the scope of which EU citizens living in third States would fall. The same provisions seem to imply that external competence of the EU is also exclusive where the conclusion of an international agreement, although it intervenes in an area where no internal rules exist nor are planned, is necessary in order to achieve one of the treaty objectives, and to enable the Union to exercise its internal competence.

The exercise of such external competence would proceed on the basis of the detailed procedure of Art 218 TFEU.

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47 Through the principle of non-discrimination, family law rules aimed at EU citizens residing in the EU will also apply to all EU residents, irrespective of their nationality.

48 Opinion 1/03 [2006] ECR I 1145, para 126.
CONCLUSIONS

- The EU has competence to develop judicial cooperation in family matters having cross-border implications for the benefit of EU citizens residing in the EU. This competence is exercised in accordance with a special legislative procedure.

- Use of the Art 81(3) passerelle should be made where the scope of the measure and its proposed content are both uncontroversial and “neutral”.

A proposal to resort to the passerelle should always be carefully reasoned and justified.

- Enhanced cooperation can be seen as one step towards the achievement of the objectives of the Union, but only if it is considered strictly as a last resort and on an exceptional basis. Enhanced cooperation should not be undertaken in situations where an alternative solution might be accepted by all Member States.

- The EU should consider the conclusion of international instruments with a view to meeting its objectives regarding EU citizens in the wider world.
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