

A Bird's Eye View of the EU's Civil Justice Policy Field: Discursive and Institutional Dimensions

Professor Helen E. Hartnell¹

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This paper provides a macro-level view of the EU's civil justice policy field. More concretely, it traces discursive patterns and examines policy-making institutional dimensions of 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 judiciaire Européen*”).² 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 new ‘Area of Freedom, Security and Justice’ (AFSJ).³ From 1999 on, the newly communitarized AFSJ field was “transformed ... into a huge ‘building site’ ” (Weyembergh 2000).⁴ Figure 1 provides an overview of legislative development in the civil justice field since 1999.

¹ Emerita Professor of Law, Golden Gate University School of Law (San Francisco); FUBiS Faculty (Freie Universität Berlin. Please send comments to hhartnell@ggu.edu or at helen.hartnell@fu-berlin.de.

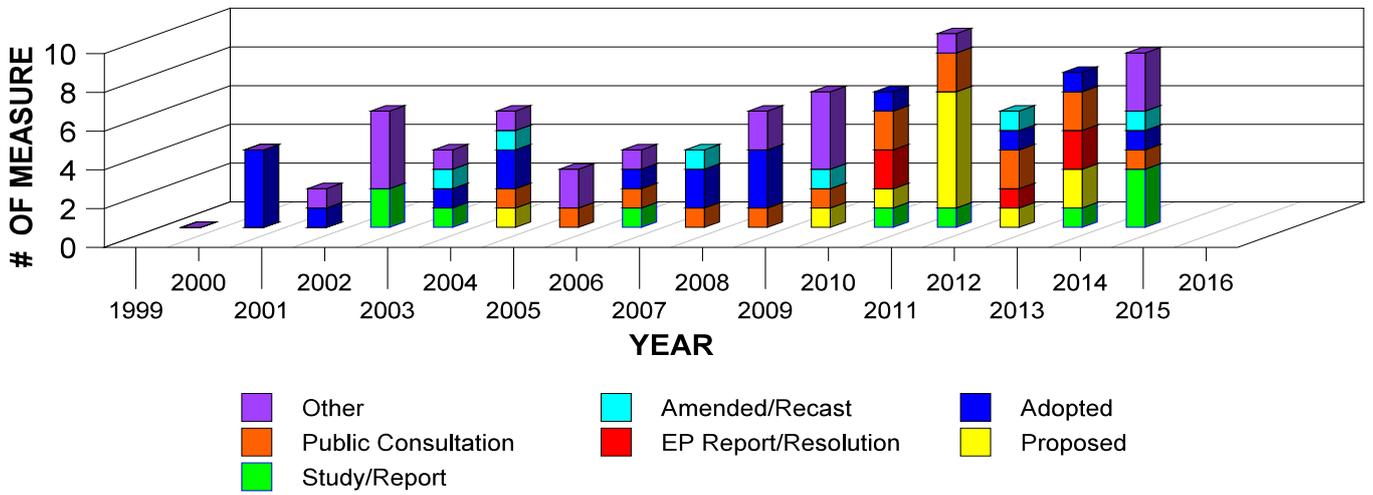
² This term was first used by (then) French President Valéry Giscard d'Estaing in the 1970s, notably in a European Council meeting in December 1975, as well as in a well-publicized television speech in December 1977 (<http://www.ena.lu>), both of which involved efforts to coordinate responses to terrorism (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).

³ 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 sub-field, is examined later in this paper. 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 Program, and the third the Stockholm Program, 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 2.3.2.6 below.

⁴ Developments in other AFSJ sub-fields have followed different trajectories and logics since 1999, but are beyond the scope of this paper.

Figure 1

EUstitia - Legislation 1999-2015



[Insert Figure 1 about here]

1. Preliminary Matters

1.1 Labels

Given wide variance in the literature on how particular labels are used and concepts bundled, as well as the fact that the varying approaches often conflict with one another, some attention to terminology is required at the outset. The focus here is on academic usage, in contrast to official EU usage, which is discussed in subsection 2.2 below. 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, academic writers tend to avoid using 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 emerging 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 sub-field into unnatural subordination to another. Second, this is the term that the EU itself uses, as seen most prominently on the website of, as well as in the documents prepared by, the Commission’s Directorate-General (DG) Justice.⁵ And third, this term resonates with the overarching concern for justice that animates the broader AFSJ project.

1.2 Scope

The current scope and content of the EU’s civil justice field are defined by multiple parameters.

⁵ 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?”

First, 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).⁶ 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.⁷ Figure 2 provides a temporal roadmap to orient the reader.

[Insert Figure 2 (JHA-AFSJ Timeline) about here]

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 and noting the shifting official labels that have been applied to this policy field, subsection 2.3 scrutinizes the EU's rhetoric, as a first step towards mapping the civil justice terrain.⁸ The discussion here necessarily also elucidates the roles of different institutional actors within the EU.

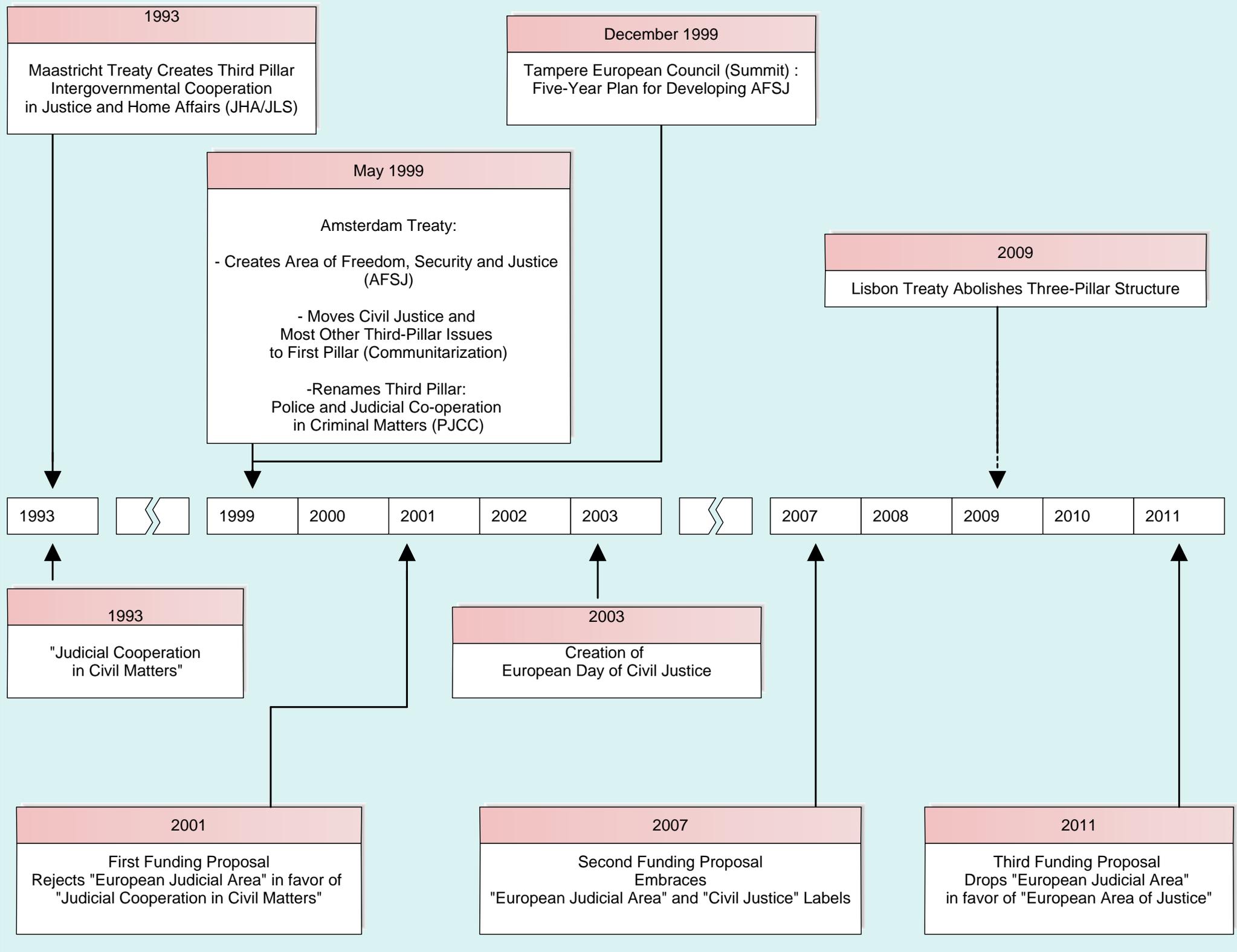
2.1 The Treaty Language

The EU's expansionist tendencies in the civil justice field appear today as a *fait accompli*, and yet were by no means inherent in the circumscribed language introduced by the Amsterdam Treaty

⁶ Recall that this base of competence was first staked out by the 1997 Amsterdam Treaty (effective 1999), and expanded a decade later by the 2007 Lisbon Treaty (effective 2009). The 1997 Lisbon Treaty contains a large number of the provisions that were first found in the ill-fated 2004 Constitutional Treaty, including those pertaining to civil justice.

⁷ Analysis of the Court's jurisprudence in the civil justice field is beyond the scope of this paper.

⁸ Hartnell (2015a) examines this terrain in greater detail.



(1997/1999), which 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.”⁹ To some degree, the revisions wrought by the Lisbon Treaty (2007/2009) a decade later *codify* the expansive interpretation of ‘judicial cooperation in civil matters’ that had occurred since the EU first occupied this policy field.

The current civil justice treaty provision, Article 81 TFEU,¹⁰ altered the original treaty framework in two respects. First, it formally extended EU competence into three additional and far-reaching policy sub-fields: 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

⁹ Article 65 ECT (emphasis added). The original Article 65 of the EC Treaty (ECT), which was inserted by the Amsterdam Treaty, which entered into force in May 1999, 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.”

¹⁰ Article 65 of the EC Treaty was replaced a decade later by Article 81 of the Treaty on the Functioning of the European Union (TFEU), pursuant to the 2007 Lisbon Treaty, which entered into force in December 2009. Article 81 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. ... ”

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.”¹¹ Rather, Article 81 TFEU empowers the EU institutions¹² 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.” The authority conferred on the EU by this new 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” (Article 65(1) EC Treaty) procedures in the civil justice field.

2.2. What’s in a Name? Labels, Revisited¹³

Another *fait accompli* since 1999 is the gradual displacement of the crabbed label¹⁴ ‘judicial

¹¹ 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 so-called ‘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. The new procedure introduced by the Lisbon Treaty has resulted in two ‘yellow cards’ to date: first, the ‘Monti II’ proposal to establish EU-level rules on labor unrest and the right to strike, and second, the 2013 proposal to establish a European public prosecutor’s office (Franssen 2013). The Commission withdrew the Monti II proposal in late 2012, albeit without conceding that the proposal violated the subsidiarity principle, which prompted some optimism that the ‘yellow card’ procedure would in time function as an effective constraint against EU over-exuberance (Brady 2013, citing examples where the of pre-emptive modification of Commission proposals in order to avoid ‘yellow card’ challenges). This example notwithstanding, the ‘yellow card’ procedure is a weak constraint, and the subsidiarity constraint on EU legislative activity remains weak in practice (*see* Teffer 2014, summarizing the results of a study commissioned for the Dutch national assembly). The example of the proposal to establish a European public prosecutor’s office (EPPO) seems to bear this out. In response to the yellow card, the Commission concluded that the EPPO proposal 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).

¹² This statement pertains especially to the Commission, which is has traditionally had the exclusive right of legislative initiative. Its rights are no longer exclusive, but the Commission still plays a dominant role as the originator of legislation.

¹³ The following discussion focuses on official EU usage, rather than academic usage, which is discussed in subsection 1.1 above.

¹⁴ Ideally, this analysis would compare changing English terminology to changes (if any) in other official EU languages. This is impractical, given that the EU has 24 official working languages, most of which I am unable to read.

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’.¹⁵ While some academic commentators embraced broad labels early on (e.g., Barrett 1997),¹⁶ 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” (Article 17(1) TEU) 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, which embodies 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,¹⁷ it was suppressed on others. Today, the ambitious labels have become prominent in virtually all official EU sources, including the web sites 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*’ 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

¹⁵ 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, in force since 1 November 1993, which merely provided for intergovernmental cooperation in ‘Justice and Home Affairs’ (JHA or JLS, the latter of which is the commonly used French acronym) in the so-called ‘Third Pillar’.

¹⁶ 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 opts for 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 judiciaire européen*).

¹⁷ E.g., the phrase ‘European judicial area’ is found in the 1998 Vienna Presidency Conclusions at ¶ 84.

day-to-day life of people.”¹⁸ 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 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 – Civil Justice (2007).¹⁹ The broad vision advanced by the Commission has gradually prevailed over more circumspect visions for the EU’s Area of Freedom, Security and Justice, in general, and for the civil justice 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 the competitive collaborative relationship between the EU and the Strasbourg-based Council of Europe.²⁰ 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.²¹ This usage, in turn, provided leverage for using the term in internal EU discourse. Over time, the term ‘civil justice’ has become firmly

¹⁸ First Funding Framework Proposal 2001: ¶ 1.2, Explanatory Memorandum (emphasis added).

¹⁹ The title of the Second Funding Framework – Civil Justice 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).

²⁰ 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 non-EU, Strasbourg-based 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 (Antonio Vitorino) endorsed the idea (Press Release IP/03/699 of 16 May 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.

²¹ The EU is the newcomer to the civil justice field. 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.

entrenched in EU institutional²² 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 for Justice (DG-Justice) prominently announces the as building a ‘European Area of Justice’²³ (*see* Annex A at the end of this chapter).²⁴ Until the end of the second Barroso Commission, the justice mandate was divided into four pillars: Civil Justice, Criminal Justice, Fundamental Rights and Union Citizenship, and Equality (*see* Annex C at the end of this chapter).²⁵ This discursive shift is also visible in the Justice Program for 2014-2020,²⁶ which completely abandons the term ‘European Judicial Area’, for which the Commission fought a decade ago, in favor of the more generic ‘Area of Justice’.

What might appear at first glance as either a cosmetic shift that brings the funding terminology

²² But not, as noted in subsection 1.1 above, in academic discourse, most of which tracks disciplinary boundaries rather than policy domains.

²³ To be sure, the term ‘European Area of Justice’ has not been newly minted. It 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.

²⁴ The website continues to embody key aspects of the vision of former EU Commissioner for Justice, Fundamental Rights and Citizenship (and Commission Vice-President), Viviane Reding of Luxembourg, who served three terms as a member of the European Commission. From 1999-2004, she was Commissioner for Education and Culture, during which term she established *inter alia* the Erasmus Mundus program. From 2004-2010, during the first Barroso Presidency, she served as Commissioner for Information Society and Media, during which term she pushed through popular legislation to cap mobile roaming charges. She served as Commissioner for Justice, Fundamental Rights and Citizenship from February 2010 until July 2014, during the second Barroso Presidency. 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.

²⁵ This visual representation tracks the conceptual structure of the Second Funding Framework – Civil Justice (2007).

²⁶ The European Council approved the overall Multiannual Financial Framework for 2014-2020 on 7-8 February 2013 (Conclusions on MFF). 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.”

into line with the Commission's public face presented on its website, or as a retreat to treaty language,²⁷ appears upon closer analysis (also) to reflect another expansive move by the EU. In 2009, the Lisbon Treaty formally added "support for the training of the judiciary and judicial staff" to the EU's remit (Article 81(2)(h) TFEU) in the civil justice field.²⁸ The Justice Program for 2014-2020 defines "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 goal of drawing so many actors further 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. Here again, the shift from 'judicial' to 'justice' points towards the broader conceptual scope of EU activities.

The new Juncker Commission, which took office on 1 November 2014 and will serve until 2019, did not change the label per se, although it has made substantial changes to the Commission structure, including a number that affect DG Justice. Some of the major portfolios that comprised the work of DG Justice under Commissioner Reding – Justice, Fundamental Rights and Equality – have been broken apart and redistributed, while some new mandates have been added. Commissioner Reding is succeeded by a low-profile Commissioner for Justice, Consumers and Gender Equality, Věra Jourová.²⁹ First, overarching questions relating to *fundamental rights* and *rule of law* have been 'traded up' to Commission First Vice-President Frans Timmermans, whose portfolio encompasses Better Regulation, Inter-Institutional Relations, the Rule of Law and the Charter of Fundamental Rights. Indeed, one of his

²⁷ Article 3(2) TEU 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."

²⁸ Article 82(1)(c) TFEU adds the same responsibility in the criminal justice field.

²⁹ Věra Jourová (Czech Republic) was confirmed as the Commissioner for Justice, Consumers and Gender Equality in 2014. She received her law degree in 2012, and most of her work experience is in the field of regional development and as an EU funds consultant. She has limited experience in the legal world as such, having only worked for a period of time as a trainee solicitor with a Czech law firm in 2013.

express responsibilities is to guide the work of the Commissioner for Justice, Consumers and Gender Equality. Second, the overarching topic of *citizenship* has also been transferred out of DG Justice. The initial proposal was to bundle it with Education, Culture, and Youth, but this engendered controversy when this portfolio was assigned to the Hungarian Commissioner. In the end, citizenship was transferred to the renamed DG Migration and Home Affairs. Third, DG Justice's *equality* portfolio has been disaggregated, with the rights of persons with disabilities and equal treatment at work moved to DG Employment, Social Affairs and Inclusion. Gender equality, on the other hand, remains in DG Justice. Fourth, DJ Justice gains a number of new portfolios, notably consumer and marketing law, data protection, and the monitoring of "effective justice".

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 that underpins 'judicial cooperation in civil matters' and 'civil justice' from inception until the present. I trace the rhetorical elaboration of Europeanized civil justice in two phases. The first phase (subsection 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. The second phase (subsection 2.3.2) corresponds to the period *after* the Tampere Summit in October 1999. Taken as a whole, these policy statements reveal not only the 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.³⁰

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

³⁰ My modest ambition in this paper is merely to describe developments, not to explain how they came about, which is the task undertaken in my forthcoming dissertation, "Institutionalizing Civil Justice (EUSTITIA) in the European Union: Legal Elites in Transnational Governance" (University of California, Berkeley – Program on Jurisprudence and Social Policy).

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 EU³¹ – 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. 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 sub-fields). To some degree, the Commission's work during this period was an extension of the work it had begun after the Maastricht Treaty swept 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 sub-fields. 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)

³¹ 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.

- Commission AFSJ Communication (July 1998)
- European Council: Vienna Action Plan (December 1998)³²
- European Parliament: EP Resolution on the Draft Action Plan (April 1999)
- European Council: Tampere Milestones (October 1999)

The Vienna Action Plan (December 1998)³³ was the blueprint for a five-year plan, which the European Council – under Finnish leadership – later forged into 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 sub-fields), but also the driving vision behind the profusion of new measures that have been adopted since the Amsterdam Treaty entered into force in May 1999. 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 has become part of 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 the Europeanization of civil justice (i.e., 'EUstitia').

³² The Vienna Action Plan was, in turn, built on the foundations of an earlier 'draft' Commission document, the AFSJ Communication (July 1998).

³³ 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.

Civil justice is not linked to movement of goods, but rather to free movement of persons,³⁴ which is the “cornerstone of ... freedom and democracy” in the EU (EP Resolution on Democracy and Liberty 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*” (Article 61 EC Treaty). 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 that have been proposed and adopted since 1999. 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.³⁵ 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).³⁶ Such deficiencies are problematic in “an integrated area,” where “all ought to

³⁴ 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). After the Lisbon Treaty revisions, Article 81 is located in Title V of the TFEU, which encompasses the “Area of Freedom, Security and Justice”.

³⁵ 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).

³⁶ 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).

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*,³⁷ and later added *certainty* to the roster.³⁸ 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, emphasis added). 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),³⁹ 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

³⁷ 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).

³⁸ Vienna Action Plan (1998: ¶ I.16). *See also* later elaborations, 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”).

³⁹ 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).

“genuine European area of justice” – including civil justice – is part of a “sustained effort ... to bring the Union closer to people”⁴⁰ 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).⁴¹ The idea embraced by the Member States in Cardiff, acting in their capacity as the European Council,⁴² 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

⁴⁰ 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 sub-fields.

⁴¹ 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 sub-fields; rather, that meeting was concerned with crime, fraud, drugs racism and xenophobia. Cardiff Presidency Conclusions, ¶¶ 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.

⁴² According to Article 15(1) TEU, 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.”

..., 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,⁴³ and agreed on a detailed five-year plan for making the newborn AFSJ a reality in short order. 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.”⁴⁴ 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) (emphasis added). And second, Tampere imagined the end-point (*telos*) of the dawning era – a “genuine European area of justice” – in which people

⁴³ Notably, the Commission’s 1998 Vienna Action Plan and the European Parliament’s 1999 Resolution.

⁴⁴ 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.

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:

1. Better access to justice
2. Mutual recognition of judicial decisions, and
3. 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 reach 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.⁴⁵ 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

⁴⁵ “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.

the ECJ's decision in the *Cassis de Dijon* case.⁴⁶ 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.⁴⁷ Despite some delays along the road mapped out in Tampere, the pace of change has been, at times, breakneck.

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 EC Treaty.⁴⁸ 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 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-

⁴⁶ 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 European Court of Justice.

⁴⁷ 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 was an artifact of the plan laid out in Tampere.

⁴⁸ I refer here to the legislative procedures and related measures contained in the EC Treaty (‘First Pillar’ of the EU).

year) policy agendas for the AFSJ field.⁴⁹ 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.⁵⁰ 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.

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.⁵¹ 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 2007-2013 and 2014-2020 periods, which are discussed below – are important sources of general statements about policy priorities in the civil justice field,⁵² and 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 TFEU. As a matter of

⁴⁹ These documents are too many and too detailed to examine closely. Rather, the analysis here emphasizes path-changing innovations and paradigm shifts.

⁵⁰ 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 sub-field. 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).

⁵¹ 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.

⁵² 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 – *Civil Justice* (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).

fact, the EU quickly surpassed the three core tasks identified in the 1999 Tampere Milestones as constituting the core of the “genuine European area of justice,” namely, 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.⁵³

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 was hammered out by the EU Heads of State and Government at the Tampere Summit. The First Funding Framework thus leaves no doubt that ‘judicial cooperation in civil matters’ is just the core 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,⁵⁴ and extends into the realms of government officials, legal professionals, and civic education. These are small steps, but

⁵³ 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).

⁵⁴ 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).

take on a life of their own in ensuing years.

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” (Article 68, TFEU). However, the European Council’s process has been 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 10 new (mostly post-Communist) countries to the EU (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 seems inevitable 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 sub-field 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 cohabitation).⁵⁵ 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 contexts⁵⁶ – 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 is not to say, however, that the EU averts its gaze from the enforcement of judgments. On the contrary, this agenda item is pushed forward. The 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

⁵⁵ 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).

⁵⁶ 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).

that “progress with mutual recognition depends on greater mutual trust between Member States,” which in turn requires the “adoption of certain minimum procedural standards” (*id.*).⁵⁷ 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” (Tampere Assessment 2004: ¶2.7). This dilemma is not new to European integration, but is starkly presented in the civil justice context, where the 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,⁵⁸ 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).⁵⁹ 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 (section III.3, pp. 36-42), behind ‘freedom’ and ‘security’ (sections III.1 and III.2, respectively).

The Hague Program addresses both institutional and normative aspects of the civil justice sub-field. On the *normative* side, it emphasizes that “civil law, including family law, concerns citizens in their everyday lives” (¶ III.3.4.1), and “attaches great importance to the continued development” of

⁵⁷ 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.

⁵⁸ Technically speaking, the Hague Program is Annex I to the Dutch Presidency Conclusions (2004).

⁵⁹ 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 Treaty’, which we know today as the Lisbon Treaty.

judicial cooperation in civil matters, as well as “full completion” of the Commission’s ambitious 2001 Mutual Recognition Program. 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” (¶ 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” (Hague Program 2004: 12).⁶⁰ 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,⁶¹ 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 sub-field, the Hague Program calls for work on choice of law rules for contractual and non-contractual (e.g., tort-based) obligations.

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 – property, family, and inheritance law – over which the EU has no legislative jurisdiction in regard to substantive law. And second, the EU deepens its work in the civil justice field by means of measures that aim to make the existing rules – such as those pertaining to

⁶⁰ In particular, the Hague Program calls for further procedural efforts in regard to small claims, alternative dispute resolution, and the so-called European Payment Order (2004: 12).

⁶¹ 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.

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” (¶ 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 become all the rage. 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.⁶²

At the request of the European Council (Dutch Presidency Conclusions 2004: ¶17), the Commission presented its priorities for an action plan to translate the Hague Program into action (2005 Hague Program Priorities), which resulted in the joint conclusion by the Council and the Commission of 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 (¶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

⁶² “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).

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 strive towards “progressive creation of a ‘European judicial culture’,” as well as 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 – *Civil Justice* 2007). Finally, the Commission expands the list of civil law issues on its agenda by adding “substantive contract law”⁶³ 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 sub-fields. Once again, civil justice (¶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 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

⁶³ 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)).

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.

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.⁶⁴ In particular, it spells out mechanisms for building the trust and mutual understanding that were fore-grounded in the Hague Program, and calls for more systematic

⁶⁴ 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.

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)).

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 (2009) and its 2009 Hague Assessment⁶⁵ – 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 ‘on line’, 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 that are used to organize the ever-growing welter of legal instruments, have grown in length and complexity, as the conceptual headings and sub-headings shift with each programmatic

⁶⁵ The Commission’s report was supported by extensive studies, including the Hague Implementation Scoreboard (2009) and the Hague Extended Evaluation Report (2009).

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 sub-fields, without altering its content. Figure 3 provides a summary overview of the schema introduced by the Stockholm Program.

[Insert Figure 3 about here]

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

FIGURE 3

**OVERVIEW OF 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

the EU's strategy for the justice arena.⁶⁶ Finally, it bears mention that the Stockholm Program *does not* pick up the 'quality of justice systems' trope that the Commission had put on the table in its Hague Program Priorities (2005: ¶2.3(9)), and reiterated in its review of the Hague Program and proposals for the next policy cycle (Commission Priorities for Stockholm Program 2009:¶ 2.3).⁶⁷ It 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).⁶⁸

As in prior five-year plans, the Stockholm Program continued the process of expanding the scope of EU policy activity. 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" (¶3.2.2). The Stockholm Program also takes an important conceptual

⁶⁶ 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.").

⁶⁷ 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).

⁶⁸ 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.

step by devoting more systematic attention to the “benefits for citizens of the European judicial area” (¶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” (¶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 (¶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 2014: 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.⁶⁹ 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).

⁶⁹ The European Parliament has been ‘Lisbonized’ since 2009, which means its institutional powers in the AFSJ have been ratched 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’ ...”).

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 2013.⁷⁰ 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,⁷¹ including civil justice.⁷² The European Council states, in its February 2013 Conclusions on MFF (¶ 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 a part. However, the Commission's statement does mention civil justice first – in itself a first – and yokes the familiar objectives more closely than before to the overarching goal of growth. It is worth noting, however, that the Commission's conception of “economic, cultural and social

⁷⁰ 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.

⁷¹ 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.”).

⁷² 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.”

growth” is – consistent with past practice – noticeably broader than the European Council’s formulation, which is to “support growth, employment, competitiveness and convergence” (Conclusions on MFF 2013: ¶ 1).

Figure 4 (Conclusions on MFF 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, both external and internal security, as well as measures in the field of justice.⁷³ 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, and with the priorities articulated in the Rights, Equality and Citizenship Program for 2014-2020 and in the Justice Program for 2014-2020, respectively.⁷⁴

[Insert Figure 4 about here]

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

⁷³ Also crammed under the ‘Security and Citizenship’ heading are public health, consumer protection, culture, youth, information, and dialogue with citizens.

⁷⁴ These two programs have the formal status of legislation, since they are both 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. Uncertain, however, is how the redistribution of portfolios by incoming Commission President Juncker in November 2014 affects the distribution of funding.

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%

FIGURE 4.4: EU BUDGETARY ALLOCATIONS FOR 2014-2020¹

For Rights, Equality and Citizenship:²

57% of financial envelope:	<ul style="list-style-type: none"> • <i>implementation of the principle of non-discrimination</i> 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:	<ul style="list-style-type: none"> • 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; • <i>promote and enhance the exercise of rights deriving from citizenship of the Union</i> • <i>enable individuals in their capacity as consumers or entrepreneurs in the internal market to enforce their rights</i> deriving from Union law, having regard to the projects funded under the Consumer Programme

For Justice:³

30% of financial envelope:	<ul style="list-style-type: none"> • <i>facilitate and support judicial cooperation in civil and criminal matters</i>
35% of financial envelope:	<ul style="list-style-type: none"> • <i>support and promote judicial training</i>, including language training on legal terminology, with a view to fostering a common legal and judicial culture
30% of financial envelope:	<ul style="list-style-type: none"> • <i>facilitate effective access to justice for all</i>, including to promote and support the rights of victims of crime, while respecting the rights of the defense
5% of financial envelope:	<ul style="list-style-type: none"> • 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

¹ Emphasis is added in order to highlight civil justice policy goals.

² Source: Rights, Equality and Citizenship Program for 2014-2020 (2013).

³ Source: Justice Program for 2014-2020 (2013).

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 Treaty on the Functioning of the European Union (TFEU) and the Treaty on European Union (TEU). 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* Article 2). The specific measures envisioned are those denoted in Figure 4. 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 TEU, 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 “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 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 a large 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). 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.⁷⁵

In order to 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” (Article 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 the following:

- (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

⁷⁵ 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’.

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 has happened 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 synch with the five-year policy cycle that has characterized the AFSJ field since Tampere (1999).⁷⁶ Moreover, as discussed in subsection 2.3.2.6 below, the five-year policy cycle became disrupted and lagged behind. Under these unusual conditions, the MFF itself became the more forward-looking policy document, and the EU budget and the specific funding programs concluded at the end of 2013 are ‘cart’ that came before the ‘horse’ of the ‘normal’ policy process.

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).⁷⁷ Proponents of new strategic guidelines, on

⁷⁶ 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).

⁷⁷ Wagner (2014: 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.

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 sub-fields 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 2014.⁷⁸ 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 2014: 470).⁷⁹ 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 TEU,⁸⁰ which is to “define the strategic guidelines for legislative and operational planning

⁷⁸ 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.

⁷⁹ Wagner (2014: 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.

⁸⁰ This provision was added in 2009, pursuant to the Lisbon Treaty.

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 Review⁸¹ – 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 Viviane Reding’s leadership during the final years of her term. 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.⁸²

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. Figure 5 contains an excerpt that illustrates the Commission’s creatively ambitious agenda for knitting the EU legal order more tightly together.⁸³

⁸¹ 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 2014: 471).

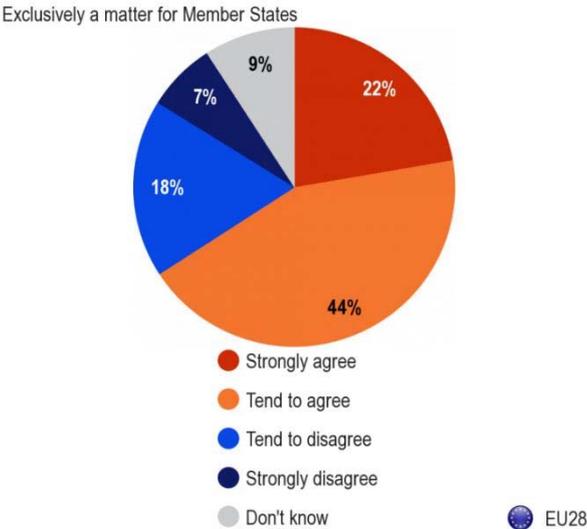
⁸² *Assises de la Justice* Press Release (2013).

⁸³ The Commission offers the following interpretation of the results shown in Figure 5: “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

Annex 1: GOVERNANCE OF NATIONAL JUDICIAL SYSTEMS

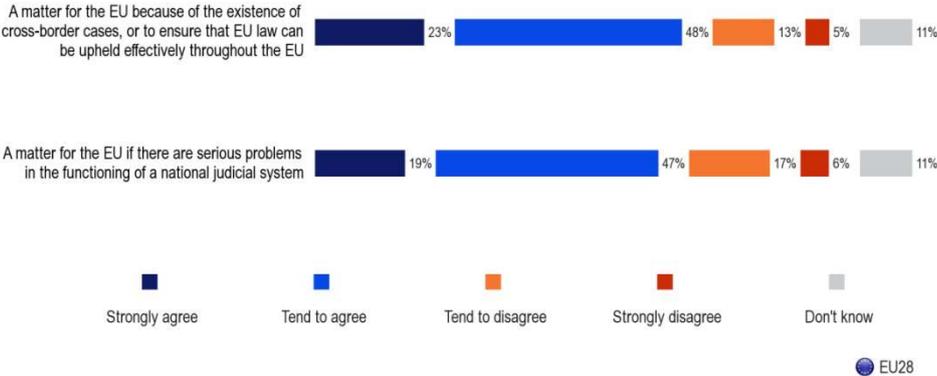
Only 22% of respondents strongly agree that the functioning of a national judicial system is exclusively a matter for Member States

Q13.1. Do you agree or disagree that the functioning of national judicial systems is ...



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.

Q13. Do you agree or disagree that the functioning of national judicial systems is ...



Base: respondents who do not 'strongly agree' that the functioning of national judicial systems is exclusively a matter for Member States (N=20866)

[Insert Figure 5 about here]

The Commission's second major innovation at the tail end of the second Barroso Commission was the new *Justice Scoreboard* program,⁸⁴ which gathers and analyzes data on the "quality, independence and efficiency of *national* justice systems," in order to ensure the "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 did not 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 concern.

⁸⁴ 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.

European Council, it is clear that the Member States – or at least some of them⁸⁵ – were miffed by the EU's move into the 'quality of justice' arena, as were some at the Council of Europe in Strasbourg.⁸⁶ 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,⁸⁷ as well as in the Council of Europe and its 'Commission on the Efficiency of Justice' (CEPEJ).⁸⁸

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.⁸⁹ It "sets out the political priorities that should

⁸⁵ 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. 2014 Justice Scoreboard (2014: 5, fn. 21). See Council Recommendations in 2013 O.J. C 217, volume 56 (30 July 2013).

⁸⁶ In addition, according to informal conversations at Harvard Law School in September 2013 with high-level representatives of the Council of Europe, some CoE personnel are 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. However, the Commission's 2013 Justice Scoreboard (2013: 3) does acknowledge CEPEJ's contribution to the EU report.

⁸⁷ 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).

⁸⁸ 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" (¶ 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" (¶ 19).

⁸⁹ 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).

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).

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 (¶¶ 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" (¶ 39).⁹⁰ 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,⁹¹ at least in some of the AFSJ

⁹⁰ 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.

⁹¹ 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 sub-fields, such as migration and

policy sub-fields, 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.).⁹² 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 sub-fields.

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).⁹³ As Wagner (2014: 472) notes, this reference to the different legal systems and traditions of the Member States could not have been uttered "in polite company" (*salonfähig*) during EUtitita's early years, but was added to the TFEU by the Lisbon Treaty.⁹⁴ 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

criminal law, rather than at civil justice.

⁹² 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).

⁹³ To what extent does the strategy of relying on economic arguments to justify far-reaching developments in the civil justice field narrow the ambitions for the civil justice field, by retreating from rights-oriented rationales to the earlier internal market rationale?

⁹⁴ Article 67(1) 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."

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 hoped for. Seen in conjunction with incoming Commission President Juncker’s proposed reorganization of the Commission, it is hard to escape the conclusion that DG Justice’s wings have been severely clipped. Yet how civil justice and other AFSJ policy sub-fields 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*), 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 Commissioners⁹⁵ on a short leash. It is too soon to assess how Timmermans, a Social Democrat, has fulfilled 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 2014: 473). Institutionally speaking, the Commission emerges 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.

2.4 Conclusions

Viewed as a whole, the rhetoric of ‘judicial cooperation in civil matters’ reveals that civil justice is expected to play a key 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 proposals surveyed above

⁹⁵ 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 Avramopoulos (Commissioner for Migration, Home Affairs, and Citizenship).

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 retrenchment, which is embodied in the European Council's Strategic AFSJ Guidelines for 2015-2020, will effectively curb the hitherto widening spyre of developments in the civil justice field, or whether the field will continue to grow along the lines envisioned by the Commission and the European Parliament. While no legal scholar "could underestimate the importance" of developments in the EU's burgeoning civil justice field (Biavati 2001: 92), their implications have, until very recently, gone largely unnoticed outside the legal field.⁹⁶

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. The analysis offered here takes a first step towards exploring the larger import of the EU's emerging civil justice field.⁹⁷

⁹⁶ For early explorations of the significance of these developments, *see* Basedow (2000); Remien (2001); Hartnell (2002); Heß (2002). For more recent explorations, *see* Storskrubb (2008); Tulibacka (2009); Kelemen (2011); Kramer (2012); Van Den Eeckhout (2013); Vernadaki (2013). With the exception of Kelemen, all authors are legal scholars.

⁹⁷ For further analysis along these lines, *see* Hartnell (2015a).

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