provision, is unlikely to generate individual rights of the type which may form the subject of an action against the authorities of a member State for compensation within the meaning of Francovich. By contrast, a trader suffering loss caused by violation of Article 30 would be able to pursue a Francovich claim for compensation before national courts. Accordingly, the accommodation of omissions within the scope of Article 30 by the Court in Commission v. France correspondingly improves the potential of private enforcement against public authorities where disorder persistently disrupts trade. The Court has supplied the Commission with allies in the policing of the internal market.

STEPHEN WEATHERILL*

II. EUROPEAN COURT OF JUSTICE AND JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

A. Intergovernmental Conference

The last time this column appeared there was considerable discussion about the proposals being considered at the then ongoing intergovernmental conference (IGC). Not surprisingly the proposals of the UK government in its Memorandum on the Court of Justice were not adopted in the Treaty of Amsterdam. No institutional changes have been made in relation to the Court of Justice and the Court of First Instance. So the approval of their Rules of Procedure is still subject to the approval of the Council and their terms of office are still six years but can be renewed.

A. Locus Standi

The wording of the provision on locus standi in actions for judicial review (Article 230, ex 173 EC) is unchanged. This leaves open the possibility of a gap in the system of judicial remedies. In the recent Greenpeace decision a Court of 13 judges decided that Greenpeace did not have locus standi. Part of the Court's defence for this decision was that Greenpeace could bring proceedings in the national courts to defend its Community law rights and such courts might refer the issue to the European Court for a preliminary ruling. In this case Greenpeace was arguing that the Commission acted unlawfully in continuing to subsidise the construction of two power stations in the Canary Islands because an environmental impact assessment had not been undertaken in accordance with Directive 85/337. The Court of Justice replied that Greenpeace and the individual applicants bringing the case with it were not individually concerned by the Commission's decision to grant the subsidy because it affected them "in a general and abstract fashion ..."

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like any other person in the same situation." In addition, the Court pointed out that the applicants were not directly concerned by the Commission's decision to subsidise the construction of the power stations because the decision which may violate the need for an environmental impact assessment is the one taken by the relevant Spanish authorities to use the subsidy to build the power stations. This is a return to pre-Codorniu orthodoxy on *locus standi.* It is clearly designed to stop the Court of Justice and Court of First Instance (CFI) being flooded with actions for judicial review of the validity of EC acts and to encourage a trend towards national courts being responsible for dealing with issues of Community law. Can one detect shifting majorities in the Court of Justice on this issue?

One can understand the Court's practical concern with docket control given that at the end of 1997 the Court of Justice had 683 cases pending having disposed of 456 cases that year whereas the Court of First Instance had 1,106 cases pending having disposed of only 182 cases. Clearly the latter Court is already overloaded with business and could not cope with a new flood of actions from non-privileged applicants seeking judicial review of Community acts—a matter firmly within the CFI's jurisdiction. Docket control needs to become more sophisticated and based more on the substantive importance and merits of an action for review rather than on procedural admissibility rules. The next IGC should tackle this.

In the meantime can we be sure that Greenpeace and the individuals bringing the action with that organisation and others like them in the future can be confident that their complaint about the way the Community institutions have acted unlawfully will be dealt with in the national courts? Is there not a risk that in at least some countries the national court will say that the action is against the national decision-maker and it is not competent to call into question whether the decision by the Community institution is lawful because it only indirectly affects the national decision. Thus the very reason Greenpeace was not directly concerned by the Community's decision to subsidise the building of the power stations may be the reason the Spanish courts do not allow that decision to be called into question in an action reviewing the lawfulness of the Spanish

5. See *Proceedings of the Court of Justice and Court of First Instance of the EC* No 36/97.
6. One partial solution to the problem of the CFI's backlog of cases has been proposed by the ECJ and the CFI to the Council to permit the CFI to allow single judges to hear certain cases. Single judges would not be able to hear cases involving competition, State aid, anti-dumping and cases on the validity of Community legislation of general application. It would allow single judges to deal, *inter alia*, with actions by non-privileged applicants challenging the validity of Community decisions. This is a worthwhile proposal which has gained the support of the House of Lords Select Committee on the European Communities. *The Court of First Instances: Single Judge* (Session 1997–98, 25th Report). However, it has proved controversial and can only come to pass if it obtains the unanimous approval of the Council.
7. H. Rasmussen suggests docket control for the ECJ by giving it the power to vet appeals from the CFI by a system of leave to appeal and by giving the CFI jurisdiction over preliminary rulings; see *European Court of Justice* (1998), pp.166–168. He also suggests liberalising *locus standi* for private applicants (see chap.6) but has little or nothing to say about how the CFI is supposed to cope with its burgeoning case load.
authorities’ decision to build the power stations. As it happens, in this case it may be that the Spanish authorities were obliged by Community law to conduct an environmental impact assessment and therefore the substantive issue may be dealt with. However, it is surely possible to imagine a scenario where the alleged unlawfulness taints only the Community act and does not directly affect the national act. In such circumstances the absence of any means of challenging the lawfulness of the Community act leaves the rights of individuals unprotected and, equally importantly, may leave the Community institution able to act unlawfully without an adequate mechanism for judicial control.

C. Treaty of Amsterdam—Community Competence in Private International Law

The IGC did lead to the creation of a significant new competence in private international law in the European Community. Article 65 (ex Article 73m) of the EC Treaty brings measures in the “field of judicial cooperation in civil matters having cross-border implications” within the scope of the Community “insofar as necessary for the proper functioning of the internal market”. The specific areas covered by this provision 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.

The Treaty prescribes in Article 67 (ex Article 73o) that for five years after the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a member State and after consulting the European Parliament when adopting any measures under Article 65. Once the five years are over the Commission has the sole right of initiative and the Council may, acting unanimously, transfer some or all of the measures covered by Article 65 to the system of co-decision under Article 251 (ex Article 189b) of the Treaty. This implies that the Council would act by qualified majority when adopting any measures under the Article 251 procedure so transferred by the Council but it is possible that the Council would use the Article 251 procedure but maintain unanimity in the Council.

During the first five years after the entry into force of the Treaty of Amsterdam the Court of Justice’s power to give a preliminary ruling on the interpretation of Article 65 and on the validity and interpretation of any acts passed thereunder is

8. (1997) O.J. C340/203. This is part of the new Title IV of the EC Treaty inserted at Amsterdam on Visas, Asylum, Immigration and other policies related to Free Movement of Persons, but for the purpose of this note the focus is on the private international law competence only.
9. Art.251 can be combined with unanimity in the Council, e.g. Art.18(2) (ex Art.8a(2)) EC.
limited to references from national courts or tribunals hearing a case in which there is no judicial remedy against their decision, i.e. Article 234(3) (ex Article 177(3)) references. 10 In addition, however, the Commission, Council and member States are given a major new power to request the Court of Justice to give a ruling on the interpretation of Article 65 or any acts adopted thereunder. 11 Such rulings do not affect judgments of national courts which have already become res judicata. It is noteworthy that the validity of a Council measure taken under Article 65 cannot be challenged by this mechanism. The idea of this kind of general request for interpretation not tied to a specific case may be derived from the 1971 Protocol to the Brussels Convention, Article 4, but it at least was restricted to situations where a conflict of interpretation had arisen in real cases. This new provision forces the Court of Justice to give rulings on questions of interpretation in the abstract, divorced from the facts of a real case: something it has become increasingly unhappy about doing in the context of Article 234 (ex Article 177). 12 Thereafter the Council may, acting unanimously, adapt the provisions relating to the powers of the Court of Justice. 13

A further complicating feature is that the application of Articles 65, 67 and 68 of the EC Treaty is subject to the provisions of the Protocol on the position of the United Kingdom and Ireland and to the Protocol on the position of Denmark. 14 The former Protocol, 15 in Articles 1 and 2, gives a clear opt out to the United Kingdom and Ireland from Articles 65, 67 and 68. Article 3(1) gives those States the discretion to opt back in on a case-by-case basis, provided they do so “within three months after a proposal or initiative has been presented to the Council”. However, the United Kingdom and Ireland do not thereby recreate their veto because Article 3(2) of the Protocol provides that if, after a reasonable period of time, a measure cannot be adopted with the United Kingdom or Ireland taking part, the Council is free to adopt such a measure without their participation. 16 Another means by which the United Kingdom or Ireland may choose to opt in on a case-by-case basis is to notify to the Commission and to the Council that it intends to accept a particular measure which has already been adopted. 17 The Danish Protocol constitutes a complete opt out. 18 This leaves Denmark in the awkward

10. See Art.68(1) (ex Art.73p) EC.
11. See Art.68(3) EC.
13. Art.67(2) EC.
14. Art.69 (ex Art.78q) EC
16. If qualified majority voting is used, some time after the five-year transitional period, it is sufficient to get the same proportion of weighted votes as are required under Art.205(2) (ex Art.148(2)) EC with the UK and/or Ireland votes removed.
17. See Art.4 of the Protocol. The provisions as to how the UK or Ireland then become bound by that measure are very vague because the procedures established for opting in to an area of closer co-operation under Art.11 (3) (ex Art.5a) EC are to apply mutatis mutandis but those procedures are not a model of clarity.
18. See (1997) O.J. C340/101. Denmark can choose under Art.5 of the Protocol, within six months of the Council deciding on a proposal or initiative building on the Schengen acquis, to implement that measure into Danish law. However, the Schengen acquis does not relate to private international law issues.
position of moving from one of the most active players in private international law negotiations within the European Union\(^\text{19}\) to the prospect of being totally out in the cold. Denmark can opt in to Title IV of the EC Treaty completely\(^\text{20}\) but it does not have the luxury of being able to opt in and out selectively like the United Kingdom and Ireland.

So where are we? After the Treaty of Amsterdam enters into force, sometime in 1999, private international law will cease to be relevant in the third pillar of the European Union because it will be restricted to provisions on police and judicial co-operation in criminal matters.\(^\text{21}\) For 12 member States the European Community will have competence to take measures in private international law but only “insofar as necessary for the proper functioning of the internal market”. Previously, judicial co-operation in civil matters was not tied in to the internal market but, rather, to the much broader objectives of the European Union.\(^\text{22}\) This implies that prior to the entry into force of the Treaty of Amsterdam it would be possible to adopt measures on private international law of family law\(^\text{23}\) of limited

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20. See Art.7 of the Protocol. This may present serious political problems in Denmark because some of the issues in Title IV are politically sensitive and were implicated in the Edinburgh European Council Decision of December 1992 which turned around the referendum decision in Denmark on the Treaty on European Union; see Weatherill and Beaumont, *EC Law* (1st edn, 1993), pp.773–779, esp. p.777.
22. See Art.K.1 of the TEU.
23. Of course the Brussels II Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters was adopted under Art.K of the TEU on 28 May 1998 (1998) OJ. C221. It will come into force when ratified by all 15 current member States, however all the provisions of the Convention, apart from the jurisdiction of the Court of Justice, can be applied between member States who make a declaration allowing for this pending the entry into force of the Convention (Art.47) France and Germany have made a political commitment to give bilateral effect to the Brussels II Convention as soon as possible. The ECI will have jurisdiction to give rulings on the Convention when it comes into force (Art.45) but only in relation to those States which ratify the Protocol on the interpretation of the Convention by the ECI: (1998) O.J. C221/20. The Protocol will enter into force once the Convention has entered into force and the Protocol has been ratified by three States. States ratifying the Protocol have the option to allow only the highest courts in the country to refer cases to the ECI (such a reference being mandatory) or to follow the 1971 Protocol to Brussels I and also allow courts sitting in an appellate capacity to refer (such a reference being discretionally even if permitted). Art.6 of the Protocol also contains a provision just like Art.4 of the 1971 Protocol to the Brussels Convention discussed above. One of the main concerns about this Protocol is the delay in getting a preliminary ruling from the ECI (at the end of 1997 the average length of time was 21.4 months). Such a delay can be conclusive of the outcome of a custody dispute, which falls within the scope of the Convention, because a court will, in all but the most extreme cases, no longer be in a position to upset the interim custody arrangements at the end of litigation which has gone to the highest court in the member State and then waited 21 months to be decided in the ECI because it will not be in the best interests of the child to disrupt the arrangements which have been in place for such a long period of time. The drafters of the Convention were aware of the problem and a declaration was annexed to the minutes of the Council meeting on 28 and 29 May 1998 which commits the Council, together with the ECI, to examine possible ways of reducing the length of such delays (see (1998) OJ. C221/18). One must be sceptical about the likelihood of an appropriate fast-track system being discovered; see the House of Lords
or no relevance to the internal market whereas after the entry into force of that Treaty neither the Union nor the Community will have competence to adopt such a measure. If the matter does come within Article 65 does it create an exclusive Community competence for the 12 member States and, therefore, would those 12 States have to be represented by the Commission in the Hague Conference on Private International Law? This is a very difficult question.\(^\text{24}\) Unlike Article 95 (ex Article 100a) of the EC Treaty there is no provision spelt out in Articles 65–68 of the Treaty for what happens if member States adopt more rigorous standards than those adopted by the Community for the internal market. It is possible that the Community could legislate on private international law matters in a way which leaves member States free to retain more generous rules of recognition or to adopt stricter jurisdictional standards (e.g. allowing some States to decline to exercise jurisdiction provided a more appropriate forum is able and willing to hear the case, along the lines of forum non conveniens). This would mean that the Community competence was not exclusive even in matters which are necessary for the proper functioning of the internal market. Even if jurisdiction and recognition are regulated exclusively within the Community, as in the Brussels Convention, there may be no prospect of such exclusive regulation externally at The Hague, as in the Worldwide Judgments Convention being negotiated up to the year 2000,\(^\text{25}\) and therefore there is a strong case for saying that the external competence of the Community in private international law should be a mixed one. In any case, for Denmark there is no Community competence in this area and it would have to speak for itself at The Hague, and for the United Kingdom and Ireland their competence to speak at The Hague remains unfettered unless they choose to enter into a particular internal legislative measure which is deemed to create exclusive Community competence in an area subject to negotiation at The Hague. Article 293 (ex Article 220) of the EC Treaty, the legal basis for the Brussels Convention, still exists and provides a framework for all the member States to negotiate with one another on recognition and enforcement issues. The complete lack of a legal


24. A partial answer to the question was given by Beaumont, “A United Kingdom Perspective on the Proposed Hague Judgments Convention” (1998) XXIV Brooklyn J. Int’l L. 75–109 at n.13, for the purpose of the Hague Judgments Convention negotiations which are due to conclude in 2000. Whatever the legal analysis it seems that it would be politically inept for the Commission at the last stages of the negotiations to try to assert a new Community competence to negotiate at The Hague on behalf of the 12.

25. See Beaumont, idem, n.23. It is recognised that an external Community competence can be implied from the express provisions of the EC Treaty. In particular, “whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community is empowered to enter into the international commitments necessary for attainment of that objective even in the absence of an express provision to that effect”. Opinion 2/94 [1996] E.C.R. 1-1759, 1787. However, the objective of Art 65 EC is to take measures in the field of judicial co-operation in civil matters which are “necessary for the proper functioning of the internal market”. The phrase “internal market” points towards internal measures as the logical route to achieve this objective. External treaties on private international law, particularly at the Hague Conference on Private International Law, are likely to regulate things which go well beyond the proper functioning of the community’s internal market.
basis in the European Communities of 1980 did not deter member States from signing the Rome Convention on the law applicable to contractual obligations. In 1998 the Council has begun work negotiating a Rome II Convention on the law applicable to non-contractual obligations. This work is currently under Article K of the Treaty on European Union but when the Treaty of Amsterdam comes into force it will have no place there. The work could be transferred to Article 65 of the EC Treaty and transformed into a regulation or a directive but this would exclude Denmark and force the United Kingdom and Ireland to opt in or out. Alternatively, all the member States could go ahead and conclude a Rome II Convention, using their general powers in international law to agree treaties, and use the same unsatisfactory Community legal basis as was used for the Rome Convention by saying that the Rome II Convention “builds” on the work of the Rome Convention. Suitably worded protocols could extend the jurisdiction of the Court of Justice to interpret the Rome II Convention as was done by the adoption of protocols in 1988 to allow for the Court to give preliminary rulings on the Rome Convention.

III. TRANSPORT

Since the last note on this subject, developments have focused on continuing problems: financing new infrastructure; allocation of the true costs of transport among those who generate them; and external relations. In addition, further more detailed legislative measures have been adopted for each mode of transport.

A. Infrastructure: Trans-European Transport Networks (TENs)

In November 1997 the Council emphasised the importance of the TENs as one of the major ways of supporting growth in the European Community and an essential component of the single European market. The Commission reported that the TENs had fallen below initial expectations, due mostly to financing difficulties. Although the Community has assisted the financing of priority projects set out in Annex III of the Community's Guidelines for the development of the transport TENs, more public–private partnerships need to be encouraged. The Commission encourages the creation of companies for the ownership,