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## **LEGAL OPINION**

**Re: Possible regulation on limitation periods in cross-border disputes involving injuries and fatal accidents - Legal basis**

### **I. Introduction**

1. By letter dated 19 July 2006<sup>1</sup> and received by the Legal Service on 21 July 2006, Mr Giuseppe GARGANI, Chairman of the Committee on Legal Affairs, requested the opinion of the Legal Service on the question of the legal basis for a possible regulation on limitation periods in cross-border disputes involving injuries and fatal accidents, as proposed in the draft report prepared by Mrs. Diana Wallis as the Committee rapporteur (PE 367.972v03-00).
2. This legislative initiative report, drawn up pursuant to Article 192 EC and Rule 39 of the Rules of Procedure, requests that the Commission present a legislative proposal in the form of a regulation on the subject-matter concerned. It concerns a hypothetical future legal instrument to be adopted by the Community institutions.
3. In accordance with the terms of the request, the present opinion is confined to the question of the legal basis and therefore it will not deal with other aspects of the envisaged instrument, such as subsidiarity and proportionality or the form (regulation or directive) the instrument might take.

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<sup>1</sup> Annexed hereto.

## II. The draft report

4. At its meeting of 28-29 November 2005, the Committee on Legal Affairs (JURI) decided to apply for authorisation to draw up a legislative initiative report (pursuant to Article 192 EC) on "the limitation periods in cross-border disputes involving injuries and fatal accidents".
5. The decision to authorise the drawing-up of the report was announced in the plenary session of 19 January 2006. The file was attributed to the JURI which had named Mrs. Diana WALLIS as the rapporteur.
6. The first draft report became available on 9 February 2006 and a modified version was published on 11 May 2006 (PE 367.972v03-00). Unlike the first draft, which contained an annex with a proposed legislative text that consisted of 33 articles, the second draft only contains a descriptive text on the form and minimum content of the proposal requested from the Commission. Since this is the version of the draft report that is referred to by the letter of Mr GARGANI of 19 July 2006, all future references in this opinion shall be to this latter text.
7. The draft report is composed of two parts. The first part is a "motion for a European Parliament resolution" as its main body, which comprises recitals A-G and four substantive paragraphs. Recital A states that in Europe there is "*a clear and significant divergence in respect of limitation periods*", that within some Member States "*limitation periods differ depending upon whether the action is based in tort or in contract, or upon the type of accident*", and that, moreover, "*in some Member States there are separate limitation periods for criminal cases*". Recital B lists further examples of differences in the legal treatment of this subject in the Member States, such as the commencement date or interruption of the running of time.
8. Recital C goes on to add that "*the extent of such a divergence may give rise to undesirable consequences for the victims of accidents in cross-border litigation, placing obstacles in the way of injured individuals when they are exercising their rights in Member States other than their own*". Recital E accordingly concludes that "*there is sufficient justification for the setting of common minimum requirements at a European level through legislation, at least in relation to cross-border litigation cases*".
9. The first of the substantive clauses of the draft resolution requests the Commission to submit to Parliament on the basis of Articles 65 (c) and the second indent of Article 67 (5) of the EC Treaty, a legislative proposal on the limitation periods in respect of personal injury and fatal accident claims in cross-border litigation.
10. The second part of the draft report is an annex which contains a "detailed recommendation on the content of the proposal requested", consisting of two recommendations that relate to the form and substance of the requested proposal respectively. The first recommendation specifies that the future instrument should take the form of a regulation which should "*harmonise the rules on limitation periods in civil proceedings for damages claims*:"

- arising from or a result of personal injury,
- brought by the victim's heirs, or
- brought by another person where the victim suffered personal injuries or had a fatal accident

where the proceedings involve parties residing or domiciled in different Member States, or a party residing or domiciled in a non-Community State, or a choice between the laws of different countries".

11. The second recommendation provides a series of proposals "as to the minimum content of the instrument to be adopted", such as a general limitation period of 4 years, rules on the computation, starting date, suspension and interruption of the limitation period, as well as special rules in respect of minors and disabled persons. It also calls for "appropriate provisions" on pleading limitation, the discretion of the court in applying the limitation period, the effects of successfully pleading limitation and on multiple claimants/defendants.
12. The proposal for an instrument of this nature and the proposed content has been inspired by the Pan-European Organisation of Personal Injury Lawyers (PEOPIL), whose representatives presented their views at the JURI meeting of 30 May 2006.

### **III. The proposed legal basis of the requested Regulation**

13. According to the case-law of the Court of Justice, the choice of the legal basis for a Community measure must be based on objective factors amenable to judicial review, which include in particular the aim and the content of the measure.<sup>2</sup> It follows from the recitals of the draft report and in particular recital C (see point 8 above) that the objective of the requested instrument would be to harmonise the existing rules on limitation periods that apply in trans-national personal injury litigation in order to eliminate or reduce the obstacles for injured individuals when enforcing their rights in Member States other than their own.
14. As to the material content of the proposal, it may be inferred from the substance of the draft recommendations (see points 10 and 11 above) that a future Regulation should, in essence, establish a special limitation regime for cross-border cases involving injuries and fatal accidents. Such a harmonised legal regime would be applicable only where there was a certain "foreign element", and its scope would be limited to personal injury disputes.
15. The analysis of the correct legal basis must examine whether such an aim and content could be based on the articles proposed by the draft report, i.e. Article 65 (c) and the second indent of Article 67 (5) EC.

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<sup>2</sup> See, *inter alia*, Case C-300/89 *Commission / Council* ("titanium dioxide") [1991] ECR I-2867, paragraph 10, Case C-269/97 *Commission / Council* [2000] ECR I-2257, paragraph 43, and Case C-211/01 *Commission / Council* [2003] ECR I-8913, paragraph 38.

16. It should be observed, at the outset, that technically, Article 65 does not itself provide a legal basis for legislation, but complements Article 61, which reads, in the relevant part:

*"In order to establish progressively an area of freedom, security and justice, the Council shall adopt: ...*

*(c) measures in the field of judicial cooperation in civil matters as provided for in Article 65;"*

17. Therefore, if a measure falls within the ambit of "judicial cooperation in civil matters" as referred to by Article 65 (see point 19 below), the substantive legal basis for its adoption is Article 61 (c)<sup>3</sup>. The procedural basis of such a measure would then be Article 67 (5), second indent, which provides that the procedure of co-decision will apply to *"the measures provided for in Article 65 with the exception of aspects relating to family law"*.

*(a) Criteria for applying Articles 61 (c) and 65 (c)*

18. Articles 61 (c) and 65 EC relate to a field of law that has been transferred by the 1997 Treaty of Amsterdam from the so-called "third pillar", i.e. Title VI of the Treaty on the European Union (Treaty of Maastricht) concerned with (intergovernmental) cooperation in justice and home affairs, to the "first pillar", i.e. the EC Treaty. It is now part of Title IV on "visas, asylum, immigration and other policies related to free movement of persons". In the last few years, several important instruments have been adopted on the basis of Article 61 (c).<sup>4</sup>

19. Article 65 EC was inserted at a late stage of the Intergovernmental Conference leading to the Treaty of Amsterdam. The European Court of Justice has not yet given a ruling on its interpretation.

20. The Article provides, in the relevant part, that:

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<sup>3</sup> Instruments adopted on this basis typically cite Articles 61 (c) and 67 in the visas and Article 65 in the recitals.

<sup>4</sup> See, in particular, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12/1, »Brussels I«), Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338/1, »Brussels II bis«), Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160/1), Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ 2001 L 174/1), Council regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ 2000 L 160/37), Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ 2004 L 143/15), Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (OJ 2003 L 026/41).

*"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: ...*

*(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." (emphasis added)*

21. It can be observed, in the first place, that according to Article 65 EC, measures in the field of judicial cooperation in civil matters "*shall include*" (in French: *visent entre autres*) those listed in its paragraphs (a), (b) and (c). It is clear from this language that the list is non-exhaustive and only exemplifies the range of measures that could be adopted under the article in question.
22. There are two conditions for the application of Article 65 EC as a whole. Firstly, this article only confers powers on the Community to adopt measures having cross-border implications. Given the express limitation to that effect in the annex to the motion for a resolution (see point 10 above), the requested instrument would clearly meet this condition.
23. Secondly, the application of this Article is permitted only "*in so far as necessary for the proper functioning of the internal market*". It must be noted, in that respect, that the Community institutions have a certain margin of discretion in determining the scope of that criterion. The subject-matter of Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility («Brussels II bis») is an example of its extensive interpretation.
24. In the case at hand, it can be argued that the requested instrument would facilitate the proper functioning of the internal market since it would eliminate an obstacle to the free movement of persons (e.g., tourists, business visitors) who are currently faced with problems due to the differences between the national laws with regard to limitation periods in personal injury cases.<sup>5</sup>
25. One further condition is found in Article 65 (c), which speaks of "*good functioning of civil proceedings*" as well as of "*compatibility of the rules on civil procedure*". While it could be argued that the latter phrase clarifies the content of the former, so that measures adopted pursuant to this paragraph would have to fall into the category of "civil procedure", its comprehensive reading as a whole indicates that this is not the case. It is in fact more plausible that this legal basis is not limited to civil procedure rules in the strict sense, but may also extend to measures that otherwise relate to the functioning of court proceedings in the domain of civil law. Given that the two phrases are separated by a comma, it would follow that harmonisation of civil procedure rules is merely one sub-

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<sup>5</sup> Cf. Opinion 1/03 of the Court of Justice, of 7 February 2006, where the Court held that Regulation (EC) 44/2001, the "Brussels I" Regulation, has the objective of eliminating obstacles to the functioning of the internal market that may derive from disparities between national legislations on the subject (paragraph 143, citing C-281/02, *Owusu* [2005] ECR I-1383, paragraph 34).

category of possible measures designed to improve the good functioning of civil proceedings. Other language versions of the article are to the same effect.<sup>6</sup>

26. Legislative practice suggests that the notion of "*civil proceedings*" referred to by Article 65 (c) may be given a broad meaning. For instance, the Directive 2002/8/EC relating to legal aid in cross-border disputes also covers pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings.<sup>7</sup> Likewise, the proposal for a Directive on certain aspects of mediation in civil and commercial matters aims primarily at promoting extra-judicial resolution of disputes.<sup>8</sup>
27. An extensive interpretation of this part of Article 65 has also been espoused by the 1999 Tampere European Council, whose conclusions include, in point 38, the statement that "*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*" (emphasis added). It may thus be inferred that the subject of limitation periods has been understood as forming part of measures in the field of judicial co-operation in civil matters within the meaning of Articles 61 (c) and 65 (c) EC.
28. The criteria provided by the EC Treaty for the application of Article 65 (c) to the proposed instrument appear therefore to be fulfilled.

(b) *Classification of "limitation periods"*

29. Notwithstanding the interpretation of Article 65 (c) outlined above, it may be questioned whether that provision may be applied in spite of the fact that many Member States' laws classify limitation periods for personal injury claims as substantive rather than procedural.<sup>9</sup> In particular, one could argue that the Regulation, if adopted as proposed, would in those Member States become part of their substantive private law, that the regulation would in reality harmonise substantive law, and that such a measure would therefore not be covered by the competence of the EC legislator under Articles 61 (c) and 65.

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<sup>6</sup> French version: "*éliminer les obstacles au bon déroulement des procédures civiles, au besoin en favorisant la compatibilité des règles de procédure civile applicables dans les États membres*". German version: "*Beseitigung der Hindernisse für eine reibungslose Abwicklung von Zivilverfahren, erforderlichenfalls durch Förderung der Vereinbarkeit der in den Mitgliedstaaten geltenden zivilrechtlichen Verfahrensvorschriften*." Italian version: "*l'eliminazione degli ostacoli al corretto svolgimento dei procedimenti civili, se necessario promuovendo la compatibilità delle norme di procedura civile applicabili negli Stati membri*."

<sup>7</sup> See Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, cited in footnote 4 above, Article 3 (2) (a).

<sup>8</sup> See Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, COM (2004) 718 final, 22 October 2004.

<sup>9</sup> See e.g. French law (Article 2219 of the Civil Code: "*La prescription est un moyen d'acquérir ou de se libérer par un certain laps de temps, et sous les conditions déterminées par la loi*") and German law (paragraph 194 (1) of the Civil Code: "*Das Recht, von einem anderen ein Tun oder Unterlassen zu verlangen (Anspruch), unterliegt der Verjährung*").

30. In the view of the Legal Service, it would be inappropriate to take into account the classification under national law of limitation periods as envisaged for the purpose of determining the scope of Article 65 (c). In the first place, the notions in the Treaty and in secondary Community law must, in principle, be given an independent meaning.
31. The principle of autonomous interpretation of Community legislation has recently been reaffirmed by the European Court of Justice in relation to the Insolvency Regulation of 2000<sup>10</sup> and for the Service of documents Regulation of 2000.<sup>11</sup> In particular, concerning the last-mentioned Regulation, the Court has stated:
- "The objective pursued by the Treaty of Amsterdam of creating an area of freedom, security and justice, thereby giving the Community a new dimension, and the transfer from the EU Treaty to the EC Treaty of the body of rules enabling measures in the field of judicial cooperation in civil matters having cross-border implications to be adopted testify to the will of the Member States to establish such measures firmly in the Community legal order and thus to lay down the principle that they are to be interpreted autonomously."*<sup>12</sup>
32. Secondly, there is no uniform classification as substantive in Member States' laws. In English law, for example, "limitation" is essentially a procedural rule relating to remedies, so that even after the expiry of a limitation period, the obligation to pay damages technically continues to exist.<sup>13</sup>
33. It is true that in several international conventions,<sup>14</sup> Member States' rules of private international law<sup>15</sup> as well as in the proposed regulation on the law applicable to non-contractual obligations (Rome II)<sup>16</sup> limitation periods are classified as substantive in order to determine which domestic law governs the limitation periods. However, this classification cannot be decisive in order to determine the proper legal basis in Community law of the contemplated measure which would itself lay down uniform rules of substantive law.
34. Thirdly, it may be noted that certain instruments of international uniform law use neutral formulas to avoid the issue of classification. For example, the UNCITRAL Convention on the limitation period in the international sale of goods is, as its official commentary explains, applicable *"irrespective of the particular theoretical*

<sup>10</sup> Regulation cited in footnote 4, see Case C-341/04 *Eurofood*, Judgment of 2 May 2006, paragraph 31.

<sup>11</sup> Regulation cited in footnote 4.

<sup>12</sup> See Case C-443/03 *Leffler* [2005] ECR I-9611, paragraph 45.

<sup>13</sup> See on English and Scots law, *Discussion Paper on Personal Injury Actions: Limitation and Prescribed Claims*, Scottish Law Commission, Edinburgh, February 2006.

<sup>14</sup> In the field of personal injury claims see, in particular, Article 8 of the 1971 Hague Convention on the law applicable to traffic accidents and Article 8 of the 1973 Hague Convention on the law applicable to products liability.

<sup>15</sup> See among the recent national codifications of private international law, the Belgian Act of 16 July 2004, *Moniteur belge* 27 July 2004, Article 103, 9°. Classification of limitation periods as substantive for choice of law purposes is also found in English private international law, see the Foreign Limitation Periods Act of 1984, and comments in *Dicey and Morris on The Conflict of Laws*, 13th ed., London 2000, paragr. 7-043.

<sup>16</sup> See Amended proposal for a European Parliament and Council Regulation on the Law Applicable to Non-contractual Obligations ("Rome II"), COM (2006) 83 final, 21 February 2006.

*approach or terminology employed by the applicable national law, as long as the period of time in question performs the function" of determining when a claim can no longer be exercised.*<sup>17</sup>

35. It follows that classifications of "limitation periods" under the laws of the Member States or under instruments of international law pertaining to choice of law or to uniform law do not affect the proper legal basis in Community law of the contemplated measure.

#### **IV. Alternative legal bases**

36. It may finally be examined whether the EC Treaty provides for a legal basis outside Title IV EC that may provide a competence for legislative action in the area of limitation periods. Article 95 EC, the "internal market provision", is especially relevant in this respect, since certain instruments that relate to civil justice, such as the Directive 2000/35 EC on combating late payment in commercial transactions, have in fact been adopted on this basis.<sup>18</sup>

37. Article 95 EC provides, in the relevant part, that:

*"[b]y way of derogation from Article 94 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 14. The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market"* (emphasis added).

38. Since we have already demonstrated that the contemplated measure can be based on Article 61 (c), read in conjunction with Article 65 (c) EC, it follows from the cited text that Article 95 EC cannot be taken into account as an alternative legal basis. This interpretation is also in conformity with a view widely held in legal literature to the effect that Article 65 EC may be considered to be *lex specialis* with respect of Article 95 EC.<sup>19</sup>

39. Moreover, to the extent that measures in the area of judicial cooperation in civil matters are interpreted as implementing the principle of free movement of

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<sup>17</sup> See *Commentary on the Convention on the Limitation Period in the International Sale of Goods, done at New York, 14 June 1974 (A/CONF.63/17)*, Yearbook of the United Nations Commission on International Trade Law, Volume X, page 148.

<sup>18</sup> See Directive 2000/35 EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, in particular its' Article 5 (Recovery procedures for unchallenged claims). Another such instrument is the Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (OJ 1998 L 166/51).

<sup>19</sup> See, e.g., Rudolf Streinz (ed.), *EUV/EGV Kommentar* (Beck Juristischer Verlag, München 2003), p. 824 (Leible).



persons, it may be pointed out that the second paragraph of Article 95 excludes measures "*relating to the free movement of persons*" from its scope.

40. As far as Directive 2000/35 EC (point 36 above) is concerned, it may be noted that only one of its provisions, Article 5, is directly related to civil justice. This provision does not alter the character of the Directive as an "internal market" instrument and such instruments must be distinguished from those whose sole or primary aim is to promote the good functioning of civil proceedings within the wider context of creating an area of freedom, security and (civil) justice.
41. It is therefore submitted that in light of the case-law of the Court of Justice, Article 95 could not provide an alternative legal basis for the requested regulation.

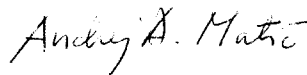
## V. Conclusions

In light of the above, the Legal Service reaches the following conclusions:

1. Assuming that the instrument finally adopted has essentially the same aim and content as described in the draft report on "the limitation periods in cross-border disputes involving injuries and fatal accidents", then such an instrument may be considered to come within the notion of judicial cooperation in civil matters under Article 61 (c) EC.
2. Article 61 (c), read in conjunction with Article 65 (c) EC, provides an appropriate legal basis for such instrument. Its adoption would be governed by the co-decision procedure as referred to by Article 67, paragraph 5, second indent, EC.



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