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# Civil procedure harmonisation in the EU: unravelling the policy considerations

## 1. Introduction

Discussions on civil procedure harmonisation in the EU go back more than two decades when the Storme Report presented the results of a study on the approximation of Member States' rules of civil procedure.[1] As a result, EU measures approximating Member States' private international law rules of civil procedure followed.[2] In addition, autonomous European civil procedural mechanisms for cross-border disputes,[3] and EU instruments harmonising States' civil procedural rules in specific sectors.[4] Despite these developments, the EU still lacks a consistent and clear vision on the function of civil procedural law in the European legal order. This paper contends that the fundamental right to an effective remedy and a fair trial may offer the ethos and the *telos* of civil procedural law harmonisation in the EU. This suggestion is based on three considerations: (a) harmonisation of civil procedural rules is sought as a means to enable fundamental notions of justice to be established in the EU legal order; (b) the association of civil procedure harmonisation with the right to effective access to justice in the EU proves the practical character of the endeavour; (c) effective access to justice in this work embraces Article 47 CFREU provisions on effective legal remedies and focuses on the justice gap currently existing in civil dispute resolution in the EU.

The analysis starts with the fundamental functions of civil procedure law in the society and in the EU legal order in particular. It then identifies and examines basic policy parameters in the regulation of civil proceedings in the EU. Moving on, it assesses examples of EU harmonised rules of civil procedure in the areas of intellectual property, consumer and competition law from the prism of effective access to justice. The final part of the paper looks into the appropriate degree of procedural harmonisation in the EU in accordance with the identified policy parameters.

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[1] M. Storme, *Approximation of Judiciary Law in the European Union,* M. Nijhoff, 1994.

[2] 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 L 12, 16.1.2001, p.1-23; Council Regulation (EC) No. 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil and commercial cases, OJ 2000, L 160/37; 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 and commercial matters, OJ 2001, L 174/1.

[3] Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ 2006 L 399/1; Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ 2007 L 199/1.

[4] Directive 2004/48/EC on the enforcement of intellectual property rights, OJ L 195/16.

## 2. Setting the scene: the fundamental function of civil procedure

This section focuses on the functions of civil procedure in society. It suggests that procedural provisions reflect general political and social ambitions, which influence the construction of civil procedural rules and the approach of legal orders when construing these rules.[5]

To begin with, civil procedural rules play a fundamental role in the functioning of a judicial system: they secure the correctness of a court decision via the application of the law to the facts.[6] For instance, civil procedural rules on, *inter alia,* the initiation of court proceedings, deadlines to provide evidence, and acceptable means of proof have as their objective the correct determination of facts and the correct applicability of substantive rules to the facts of each case.[7]

Moreover, civil procedural rules can ensure that disputes are resolved within reasonable timeframes. Rules on time limits may influence the rectitude of the decision. Quicker court proceedings can reassure that no piece of evidence disappears and that witness testimonies are reliable enough. Additionally, swift judicial proceedings lead more quickly to the finality of the disputed relationship. Only if a litigant can obtain and enforce a judgment within reasonable time, is there a threat to the other party that this avenue constitutes a step to obtain one's rights.[8] On the contrary, too quick proceedings can have a negative impact on the quality of the justice rendered: the time for the collection of evidence or the preparation of the argumentation might be inadequate, increasing the risk of error.[9]

Another fundamental operation of civil procedural rules is to secure access to the courts via litigation at reasonable cost. Procedural rules on, *inter alia,* the height of court and legal representation fees as well as on the recovery of these fees by the winning party may severely affect individual access to the courts. Equally, civil procedural rules on the provision of legal aid for legal fees or on simplified and accelerated proceedings can influence individuals' capacity to enforce their rights.[10] One needs to bear in mind two things: in expensive judicial systems, the high quality of the judicial phenomenon

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[5] For a presentation of the various normative theories on the function of procedural systems see, *inter alia,* E. Storskrubb, *Civil Procedure and EU Law: A Policy Area Uncovered,* OUP, 2008, pp.295-301.
[6] J. Bentham, *The Works of Jeremy Bentham,* published under the Superintendence of his Executor, John Bowring (Edinburgh: William Tait, 1838-1843), Vol. 2, accessed from: http://oll.libertyfund.org/title/1921 on 2010-06-22.
[7] S. Chiarloni, P. Gottwald and A. A. S. Zuckerman, *Justice in Crisis: Comparative Dimensions of Civil Procedure*, Oxford University Press, 1999, Ch. 1, p.4.
[8] Von Freyhold, Vial & Partner Consultants, *The Cost of Legal Obstacles to the Disadvantage of Consumers in the Single Market,* Report for the European Commission DG SANCO, 1998, available online at http://ec.europa.eu/dgs/health_consumer/library/pub/pub03.pdf, last accessed 16/06/11, pp.276-279.
[9] J. Leubsdorf, 'Remedies for Uncertainty', *Boston University Law Review,* Vol. 61, 1981; A. S. S. Zuckerman, 'Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments for Timely Judgments', *Oxford Journal of Legal Studies,* Vol. 14, 1994, p. 360.
[10] Zuckerman, *Justice in Crisis: Comparative Dimensions of Civil Procedure*, pp.9-10.

outweighs considerations on the actual height of court fees. High litigation costs can limit unmeritorious claims[11] and excessive workload for the courts,[12] and as such, constitute a conscious decision for many legal systems. In contrast, lower litigation costs and contingency fees[13] can lead to wider access to justice and dispute resolution via the judicial avenue.[14]

These fundamental functions of civil procedure law correspond to the exigencies of and the procedural guarantees enshrined in the fundamental right to effective remedy and fair trial, as provided for in Article 47 CFREU.[15] These are guarantees of access to courts; of reasonable length of proceedings; of impartiality and independence of the judging court; and of fair trial. This work argues that the EU should promote procedural reforms taking into account the right to effective access to justice.[16] This right incorporates fundamental considerations of procedural and social justice and is not limited to exigencies of procedural economy and efficiency. On the opposite, it vows in favour of a horizontal, systematic and coherent approach to civil dispute resolution.

### *2.1. Civil Procedure in the European Union context*

In the EU supranational legal order, the judicial system of dispute resolution and enforcement of EU rights remains largely decentralised.[17] The adjudication of EU rights takes place primarily before Member States' national courts. In the absence of EU procedural and remedial rules, Member States are responsible to designate the courts having jurisdiction and to determine the rules of procedure according to which national courts will protect EU rights.[18] As a result, the EU legal order depends mainly on Member States' domestic civil procedural rules in order to secure effective access to justice for its citizens. Effective access to justice in the EU refers to a situation where people have a realistic and equal opportunity to obtain redress for the violation of their rights

[11] Especially the Greek civil procedure suffers from an excess of unmeritorious claims since the litigation costs are low in order to facilitate access to justice.
[12] Germany suffers from the high volume of litigation, which places strains on the court system.
[13] Moorhead & Hurst, *Contingency Fees, A study of Their Operation in the United States of America,* Civil Justice Council report: it suggests that the effect may be to narrow access to justice for lower value cases, but to broaden access to justice for multi-party and higher value cases. In addition, there is no evidence that contingency fees provide improper disincentives to settle.
[14] A.J. Duggan, 'Consumer access to justice in common law countries: a survey of the issues from a law and economics perspective', in C. E. F. Rickett and R. T. G. W. Telfer (eds.), *International Perspectives on Consumers' Access to Justice,* Cambridge University Press, 2003, pp.48-49.
[15] One can find this fundamental right in Member States Constitution: see for example Article 111 of the Italian Constitution on *'diritto al giusto processo'* and Article 24 on *'diritto di azione'.*
[16] Already implied in the 'Draft Programme of Measures for Implementation of the Principle of Mutual Recognition of Decisions in Civil and Commercial Matters', OJ C 12/1, 2001, p.5.
[17] Article 19 (1) TEU expressly recognizes this decentralised system: Member States are responsible to provide remedies sufficient to guarantee effective legal protection of EU rights.
[18] The principle of national procedural autonomy: Case 179/84, *Bozetti v. Invernizzi,* [1985] ECR 2301; Case 68/79, *Just v. Ministry for Fiscal Affairs,* [1980] ECR 501, para.25; and joined cases C-6/90 and C-9/90, *Frankovich,* [1991] ECR I-5357, para 42.

guaranteed under Union law,[19] before both the Union and the national courts/tribunals.[20] Access to justice considerations suggests that there should be no barriers or inequalities resulting from either personal or generic reasons, from economic or cultural parameters, or from the intricacies of procedural rules.

This is where the situation becomes rather blurry. Member States' national civil procedural rules that fulfil these fundamental functions of effective access to justice are largely divergent. Still, differentiation of civil procedural systems is not problematic *per se.* To the extent that divergences of civil procedural rules from one Member State to the other do not lead to substantially different performance levels of the procedural systems under scrutiny, the fundamental right to effective access to justice in the EU is not undermined. However, this is not the case with EU Member States' civil procedural rules. For example, the length of civil proceedings and of the individual procedural incidents varies greatly within the EU Member States. Long duration of civil proceedings is famous in Italy, where the average length of first instance proceedings is 3.3 years whereas the appeal process can stretch the final decision by several more years. In contrast, in Holland, local courts reach a final decision in an average of 133 days and district ones in 626 days. On appeal, two thirds of the cases are determined within two years.[21]

In terms of cost to access the courts, in some Member States there are no upper limits to legal fees; in others,[22] the loser in litigation has to pay the winner's costs; and in some other States,[23] lawyers' fees can be very expensive. To the same direction, some Member States provide only for partial recovery of court fees by the winning party;[24] others, impose fixed prices on both court and lawyers' fees,[25] or even allow contingency fees.[26] Such considerable differences may result to a different level of access to justice from one State to the other, having serious implications on the gamut of procedural remedies available, the length of civil proceedings and the general quality of the justice rendered.

Effective remedies and fair trial considerations gain tremendous importance in case of cross-border civil proceedings. Cross-border dispute resolution may involve higher legal costs due to the necessity to employ two lawyers (one from the litigant's

[19] In the context of EU Consumer Law: European Commission, 'Green Paper on Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market', Brussels November 1993, COM(93) 576, final, p.6; See also EU Network of Independent Experts on Fundamental Rights, 'Commentary of the Charter of Fundamental Rights of The European Union', p.359.
[20] EU Network of Independent Experts on Fundamental Rights, 'Commentary of the Charter of Fundamental Rights of The European Union', p.361.
[21] Zuckerman, *Justice in Crisis: Comparative Dimensions of Civil Procedure*, pp.9-10.
[22] The UK, Greece, Germany, Portugal, Holland and Switzerland: for any party confident of victory, the loser-pays-rule promotes access to justice. For litigants uncertain about the outcome, this rule may inhibit access to justice for fear of having to pay both sides' costs. See further: By the Right Honorable Lord Justice Jackson, Review of Civil Litigation Costs: Preliminary Report, May 2009, Ministry of Justice.
[23] The UK, France, Spain, Switzerland.
[24] France, Portugal, Germany.
[25] Germany, Portugal.
[26] The UK, France.

jurisdiction and one from the foreign one). Moreover, diverging procedural rules increase uncertainty as to the litigious outcome and could force litigants to undertake greater legal expenses in order to gather more pieces of evidence and create a robust case that could win even in a foreign jurisdiction. Cross-border civil litigation leads to extra costs also due to the additional time one needs to devote, such as travelling to the foreign jurisdiction, and time off one's work.[27] Harmonisation of national civil procedural rules could thus address the complexities of cross-border civil dispute resolution, guaranteeing equal access to justice of equivalent quality and performance levels. [28] This work suggests that considerations of effective remedy and fair trial do not involve a wholesale unification of Member States' procedural systems. On the contrary, they call for a systematic and holistic evaluation of the various parts of civil procedural law, allowing the consistent incorporation of effective access to justice notions in the EU legal order.

## 3. Towards harmonisation of civil procedure: the policy parameters

The policy considerations behind the harmonisation of civil procedural rules have already started to become apparent. Private enforcement of EU rights and the subsequent effective and uniform application of substantive EU law have been at the centre of any harmonisation incentives at EU level. This section will identify and examine in more detail various policy parameters for the future regulation of civil procedural rules in the EU. On the one hand, the necessity for a fully functioning internal market, for greater legal certainty and efficiencies attached therein, and for limitation of forum shopping point towards the harmonisation of civil procedure. On the other hand, arguments from the field of legal tradition, regulatory competition and lobbyism demonstrate the conflicting interests in the process of procedural harmonisation in the EU. In this highly controversial environment, the fundamental right to effective remedy and fair trial should tie all policy parameters together.

### *3.1. Internal Market Integration*

National civil procedural rules on, for example, service of documents, time limits, commencement of proceedings and obtaining evidence that are differently regulated in each Member State can render cross-border dispute resolution particularly complicated

[27] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure', COM (2005) 87 final, p.3.
[28] M. A. Lupoi, 'The Harmonisation of Civil Procedural Law within the EU', in J. O. Frosini, M. A. Lupoi and Mi. Marchesiello (eds.), *A European Space of Justice,* 2006, p.206.

and lengthy,[29] hampering the smooth functioning of the internal market. Transactions across the borders, in accordance with the four fundamental freedoms, may be discouraged due to the complexities and the fragmented state of access to cross-border civil justice in the EU. What is more, access to judicial systems of considerably divergent quality levels may distort competition in the internal market. Cross-border or domestic operators competing in the internal market are on unequal footing if one of them has access to efficient and effective procedures while the other does not.[30] These parameters constitute serious procedural disincentives, affecting parties' willingness to go to the courts,[31] and rendering the internal market economic freedoms deceptive and unenforceable.

The economic freedoms become illusory for another reason: there are increased transaction costs for companies with transnational commercial activity that need to investigate the civil procedural laws of 27 Member States and draft different contractual terms applicable to transactions in the various Member States. This relates to the estimation of the risks involved in opening up the activity to other national markets in the EU. Such risk management necessarily involves consideration of litigiousness and of actual circumstances and costs of litigation in the various Member States. Harmonisation of civil procedural law could thus bring about greater neutrality and considerable limitation of transaction costs in cross-border commerce in the internal market. [32]

### *3.2. Cost of Legal Uncertainty*

Especially in the cross-border environment, largely divergent procedural systems can increase uncertainty as to the outcome of the litigious act. Such legal uncertainty can lead to economic deceleration. Occasional litigants, such as individual consumers and small and medium sized companies, have a heavier burden when trying to assess the cost of resorting to cross-border civil litigation. This is partly due to limited familiarisation with the general exigencies of the litigious act. It is also due to the procedural diversity in the EU and the subsequent uncertainty as to the rules and results of cross-border dispute resolution.[33] Therefore, citizens will avoid take part in litigation

[29] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure', p.3.
[30] Ibid, p.5.
[31] Duggan, 'Consumer access to justice in common law countries: a survey of the issues from a law and economics perspective'.
[32] In the context of European Contract Law: G. Wagner, 'The Virtues of Diversity in European Private Law', in J. Smits (ed.), *The need for a European Contract Law,* Europa Law Publishing, Groningen 2005, pp.16-17; European Commission, 'Communication from the Commission to the Council and the European Parliament on European Contract Law', COM (2001) 398 final, p.9.
[33] According to Galanter, a repeat player "has and anticipates repeated litigation...and has the resources to pursue its long-run interest". The difference is that repeat players can profit from economies of scale in adjudication simply by splitting litigation costs over various many cases. Even judicial resolution of small claims

across the borders,[34] leaving their EU rights unenforceable, and making themselves an easier prey for sellers and producers.[35] Therefore, reform towards greater approximation of Member States' procedural rules can limit uncertainty and increase access to cross-border civil justice in the EU.[36]

### *3.3. Forum Shopping*

Procedural diversity between EU Member States can have another negative consequence, commonly referred to as forum shopping. By 'shopping' a forum, the litigant chooses the civil procedural rules of that forum. This can have significant influence on the outcome of a judicial dispute, affecting fundamental issues such as the cost and length of the dispute, as well as the available remedial means to redress the injustice. Forum shopping is not problematic *per se,* to the extent that it offers litigants the possibility to choose the most efficient and effective procedural system. However, when litigants abuse this possibility, the situation becomes complicated.[37] For instance, forum shopping could potentially encourage companies to search for those Member States with the least favourable procedural regimes for consumers (in terms of costs, duration and complexity) and transfer all disputes from their commercial activities therein. This may considerably curtail effective enforcement of EU substantive rights, also denying effective access to justice litigants. Approximation of procedural regimes in the EU could sufficiently address these problems.[38]

### *3.4. Legal Tradition*

Member States' legal tradition has been shaped and reshaped over time, being the result of varying social and political influences and fermentation. National civil procedural rules form part of States' legal tradition, reflecting their convictions about

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can be cost-effective for a repeat player, who incurs lower indirect costs. Repeat players can increase legal uncertainty because less wealthy litigants will invest more than they would like, or could really afford, for fear that the financially stronger and more experienced party will have procedural primacy. See M. Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change', *Law and Society Review*, Vol. 9, 1974, p.497; James, Hazard and Leubsdorf, *Civil Procedure, Ch. 6, §6.4.*

[34] European Commission, 'Special Eurobarometer 292: Civil justice in the European Union', April 2008 available online at http://ec.europa.eu/public_opinion/archives/ebs/ebs_292_en.pdf, last accessed on 10/06/2011: 83% of the specimen has never engaged in cross-border litigation and neither believes that they will do so in the future. Moreover, over half of the specimen believes that access to cross-border civil justice is either very difficult (20%), or fairly difficult (35%).

[35] Von Freyhold et al, *The Cost of Legal Obstacles to the Disadvantage of Consumers in the Single Market*, pp.276-279.

[36] See M. Adams, 'The conflicts of jurisdiction – an economic analysis of pre- trial discovery, fact gathering and cost shifting in the United States and Germany', *European Review of Private Law,* Vol.53, 1995, p.79; M. Tartuffo, 'Drafting Rules for Transnational Litigation', *Zeitschrift für Zivilprozess International,* 1997, p.450.

[37] Lupoi, 'The Harmonisation of Civil Procedural Law within the EU', pp.199-200.

[38] P. H. Lindblom, 'Harmony of the legal spheres: A Swedish view on the construction of a unified European procedural law', *European Review of Private Law,* 1997, pp.:23-24.

proper court organisation of the judicial system in delivering timely and fair judgments.[39] Consequently, approximation of procedures could lead to disruption of States' legal culture, depriving procedural systems of their richness and benefit.[40] Nevertheless, national civil procedural rules are not always worth maintaining.[41] For instance, countries opting for class actions and contingency fees promote a culture of litigation. In the cross-border commercial activity, this judicial tradition might off-put businesses due to the unmeritorious claims they might have to face. Moreover, these mechanisms could exert pressure to businesses to settle even when the claim is unfounded, simply to avoid bad publicity.[42] Maintaining national civil procedural rules that impede litigants from having access to effective remedies and fair adjudication of their rights is unacceptable in the EU remit, even if these rules are profoundly embedded in one Member State's legal identity.[43]

### *3.5. Economics of Legal Competition*

The theory of regulatory competition assumes that legal producers are rivals and compete just like producers of goods and services compete in usual markets.[44] Therefore, regulators offer favourable procedural regimes in order to increase domestic industries' competitiveness and attract foreign business activity.[45] As legal competition is a-territorial, both individuals and firms are authorised to choose the jurisdiction whose procedures and principles will apply to a transaction or business.[46] Functional arbitrage can promote competition of legal procedures, allowing people to refer to many diverse and simultaneously existing legal orders. By "voting with their feet",[47] litigants choose specific procedural systems over others, hence signalling their preferences for civil procedure regulation. As a result, national governments have an incentive to promote

[39] K. D. Kerameus, 'Procedural Harmonisation in Europe', *the American Journal of Comparative Law,* 1995, pp.: 404-405; H. Collins, 'European Private Law and the Cultural Diversity', *European Review of Private Law,* Vol. 3, 1995, p.364; Vogenauer, 'The Spectre of a European Contract law', p.26.
[40] See, P. Legrand, 'Against a European Civil Code', *Modern Law Review,* 1997, pp.: 44-63; S. Weatherill, ' Why Harmonise?', in T. Tridimas and P. Nebbia (eds.), *European Union Law for the Twenty-First-Century - Rethinking the New Legal Order,* Oxford, 2004, p.11s; Collins, 'European Private Law and the Cultural Diversity', pp.: 353-365.
[41] S. Weatherill, 'Why object to the Harmonisation of Private Law by the EC?' *European Review of Private Law,* 2004, p.652: two indicative examples of such choices not worth maintaining neither on a local nor on a European level are anti-Semitism and economic bigotry.
[42] The Study Centre for Consumer Law, 'An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings-Final Report'.
[43] A. Ogus, 'Competition between national legal systems: a contribution of economic analysis to comparative law', *International and Comparative Law Quarterly,* Vol. 48, 1999, p.408.
[44] A. Marciano and J. M. Josselin, 'Introduction: Coordinating demand and supply of law: Market forces or state control?', in A. Marciano and J. M. Josselin eds., *From Economic to Legal Competition: New Perspective on Law and Institutions in Europe,* Edward Elgar, 2003, p. 1.
[45] Adapted to regulatory competition in civil procedure: K. Gatsios & P. Holmes, *Palgrave Dictionary of Economics and the Law,* 1998, p.271.
[46] Ogus, 'Competition between national legal systems: a contribution of economic analysis to comparative law', p.408.
[47] C. M. Tiebout, 'A Pure Theory of Local Expenditures', *Journal of Political Economy,* Vol. 64, No. 5, 1956, pp. 416-424.

better procedural rules in accordance with their citizens' expressed choices,[48] sensing and addressing new needs in the society.[49] On the contrary, harmonisation of procedural law could considerably reduce the spectrum of *ex ante* or *ex post* choice of the rules of civil procedure of the *forum* where parties could litigate their disputes in.

Regulatory competition presupposes that litigants are capable of choosing the more efficient procedural system, being aware of the diverse systems of civil procedure available in the EU, understanding fully the impact of the various procedural rules, and making informed decisions.[50] However, this is not an easy and straightforward possibility in the case of 27 competing systems of civil procedure in the EU.[51] More importantly, a distinction between large international companies on the one hand, and individual litigants and small and medium sized companies on the other hand, shows that only the former can realistically profit from legal competition among jurisdictions.[52] Regulatory competition may thus lead to inequality of arms and denial of access to justice at least for one of the parties to a dispute.[53]

### *3.6. Influence of Lobbyism*

Interest or pressure groups operating in all Member States engage in the legislative process, influencing the direction and content of rules, promoting their interests in a certain area.[54] These pressure groups' powers are much more dispersed when they have to operate under distinct national procedural regimes, influencing

[48] H. Siebert & M. J. Koop, 'Institutional Competition Versus Centralisation: Quo Vadis Europe ?' *Oxford Review of Economic Policy,* Vol. 9, No. 1, pp.15-30.
[49] For the applicability of this argument in EU contract law: Wagner, 'The Economics of Harmonisation: The Case of Contract Law'; W. Kerber, 'Inter-jurisdictional Competition within the European Union', July 2008, p. 233, available online at: http://ssrn.com/abstract=1392163, last accessed 16/06/11.
[50] In the context of European Contract law: European Commission, 'Communication from the Commission to the Council and the European Parliament on European Contract Law', COM (2001) 398 final, p. 9. For the role of information intermediaries such as legal journals, pro-bono lawyers and online legal services see: T. F. Cotter, 'Some Observations on the Law and Economics of Intermediaries', *Mich. St. L. Rev.*, Vol. 67, 2006. pp.67-82; S. Grundmann, 'Information, party autonomy and economic agents in European Contract Law', *Common Market Law Review,* Vol. 39**,** 2002, pp. 269–293.
[51] 'Special Eurobarometer 292: Civil justice in the European Union': 'The survey highlights the fact that getting involved in a civil justice matter abroad is a frightening, complicated and unknown prospect for most Europeans'; Kerameus, 'Procedural Implications of Civil Law Unification', p. 155.
[52] See further: F. K. Juenger, 'What's Wrong with Forum Shopping?', *Sydney Law Review,* 1994, pp.: 7-13; B. R. Opeskin, 'The Price of Forum Shopping: A Reply to professor Juenger', *Sydney Law Review,* 1994, pp.: 14-27.
[53]Storme, *Approximation of Judiciary Law in the European Union,* p 48; the principle of equality of arms is inherent in the concept of a fair trial under Article 6 of European Convention on Human Rights: Case of *Feldbrugge v. The Netherlands* (1968), Case of Boenisch v. Austria (1985), Case of *Neumeister v. Austria* (1968). On the discussion regarding the race to the bottom or to the top, see: H. Sinn, 'The Selection Principle and Market Failure in Systems Competition (MS)'*, Journal of Public Economics,* Vol. 66, 1997, pp.247-274; W. L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware, Yale Law Journal,* Vol. 83, 1974, p.663; P. Genschel & T. Plfimper, 'Regulatory Competition and International Co-operation', *Journal of European Public Policy*, Vol. 4, 1997, p. 626.; B. H. Kobayashi and L. E. Ribstein, 'The Economics of Federalism', *George Mason University Law and Economics Research Paper Series,* 2006, p.6.
[54] A. Geiger, 'Lobbyists — the Devil's Advocates?', *European Competition Law Review*, Vol. 24, No. 11, 2003, p. 559; R. D. Tollison, 'Public Choice and Legislation', 74 Va. L. Rev., 1988, p. 339; S. George and I. Bache, *Politics in the European Union,* 2nd ed., Oxford University Press, 2006; Wagner, 'The Economics of Harmonisation: The Case of Contract Law', p.1000.

domestic affairs only. In contrast, the more harmonised civil procedural rules in the EU become, the more imminent and widespread the influence of these groups may get. Instead of lobbying with 27 different legislators, they would only have to lobby with a central, European authority, while affecting simultaneously all Member States.[55] Nevertheless, lacking any approximation of national civil procedural rules at EU level, there is the risk of discrimination in favour of domestic producers. Consumer interests in the formation of the various civil procedural rules usually experience less negotiating power compared to producer interests. The latter have better organisation structure and more effective interest organisation ability at the domestic level, prevailing in the lobby challenge, and causing biased civil procedural rules at the expense of the losers (consumers).[56] More harmonised civil procedural rules in the EU could thus address the effective access to justice problems for the 'losing' interest group.

## 4. Developments in harmonisation of civil procedural law: A sectoral approach?

Divergent national civil procedural rules could hamper the smooth functioning of the Internal Market, leading to legal uncertainty and abuse of forum shopping. Still, harmonised procedural rules could have a negative impact on Member States' legal traditions, diminishing competition among the various judicial regimes and increasing the effect of lobbyism.[57] The choice for an approximated law of civil procedure in the EU is not an easy and straightforward one. Any reform should resolve problems created by divergent civil procedural systems without creating new ones that are even more complex. This is the case with a series of secondary, sector-specific EU pieces of legislation harmonising States' civil procedural regimes via ad hoc rules of civil procedure.

Particularly, directive 2004/48/EC on the enforcement of Intellectual Property Rights (IPRED) provides rules applicable to both domestic and cross-border enforcement procedures for various I.P. rights, such as rules on disclosure of information,[58] on admissible pieces of evidence,[59] and on compensation of legal costs.[60] Disparities among States' I.P. rights enforcement mechanisms could hamper the smooth operation of the

[55] W. Kerber, 'The Theory of Regulatory Competition and Competition Law', July 2008, available online at: http://ssrn.com/abstract=1392163, last accessed 23/08/10.
[56] O. Budzinski, *The Governance of Global Competition: Competence Allocation in International Competition Policy,* Edward Elgar Publishing, 2008, p.106.
[57] W. Kerber, 'Inter-jurisdictional Competition within the European Union', *Fordham International Law Journal,* 2000, pp.: 217, 221, 249; C. Barnard and S. Deakin, 'Market Access and Regulatory Competition', in C. Barnard and J. Scott (eds.), *the Law of the Single European Market,* Oxford, 2002, Ch.8.
[58] Directive 2004/48/EC on the enforcement of intellectual property rights, OJ L 195/16, Article 8.
[59] Ibid, Articles 6-7.
[60] Ibid, Article 14.

internal market, rendering the equal protection of I.P. rights in the EU exceptionally difficult.[61] In the cross-border environment, this situation could allow economic operators to take advantage of diverging national enforcement systems in order to circumvent the application of EU I.P. legislation.[62]

However, IPRED raises problems when seen from the right to effective access to justice perspective. IPRED provides that the winning party be entitled to compensation of the actual legal costs made. This rule follows from the intricacies of the intellectual property litigation, whereby litigants have to undertake considerably high expenses in order to get evidence from technical experts in various Member States.[63] And although this proviso aims at compensating winning litigants, it has nonetheless resulted in a severe drop in the number of I.P. cases in the Netherlands and other Member States where under the previously existing system, parties' legal costs were compensated at a fixed rate. The new rule rendered the estimation of the final costs of initiating a court procedure unpredictable.[64] As a result, parties would hesitate to initiate court proceedings due to higher legal costs in case of defeat.

The White Paper on private enforcement of competition law[65] and the Green Paper on collective actions for damages[66] are worth a closer, critical look, since their future adoption may have a significant impact on EU citizens' effective access to justice.[67] Low value claims, complex and lengthy procedures, inaccessibility of crucial evidence and unfavourable risk/reward balance for claimants render private enforcement of competition and consumer rights particularly difficult.[68] Therefore, both documents propose autonomous procedures for collective redress seen as essential measures to

[61] Ibid, Preamble of the Directive, p. 17, point 8.
[62] The Committee on Legal Affairs in the European Parliament stressed the lack of sufficient indication that the current enforcement framework in the EU is effective and harmonised to the extent necessary for the proper functioning of the internal market with regard to intellectual property rights. It thus asked further research on the issue: European Parliament, 'Draft Report on enhancing the enforcement of intellectual property rights in the internal market', 2009/2178(INI), 13.1.2010, pp.4-5, available online at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-438.164+01+DOC+PDF+V0//EN&language=EN (last accessed on 25 May 2010).
[63] European Commission, 'Staff working document: Analysis of the application of directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights in the member states accompanying document to the report from the Commission to the Council, the European Parliament and the European Social Committee on the application of directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights', COM(2010) 779 final, p.24.
[64] P. M.M. van der Grinten, 'Challenges for the Creation of a European Law of Civil Procedure', *Tijdschrift voor Civiele Rechtspleging* [Civil Justice Review], No. 3, 2007, pp. 65 – 70. The amendments to the Dutch Code of Civil Procedure consisted in the insertion of a new chapter on Intellectual Property Rights whereby they introduced the exceptional rule on cost allocation.
[65] European Commission, 'White Paper on Damages actions for breach of the EC antitrust rules', COM (2008)165 final; see also the Commission Staff Working Document, SEC (2008) 404, that entails the authentic interpretation of the White Paper. A draft directive has also leaked out to the public. However, since the Commission has not published officially this draft directive, I considered it inappropriate to base my analysis on an uncertain document.
[66] European Commission, 'Green Paper on Consumer Collective Redress', COM (2008) 794 final.
[67] Ibid, pp.3-5; European Commission, 'White Paper on Damages actions for breach of the EC antitrust rules', pp.2-3.
[68] European Commission, 'White Paper on Damages actions for breach of the EC antitrust rules', pp.2-3; 'Green paper on Consumer Collective Redress' pp.3-5.

guarantee full applicability of substantive EU competition and consumer legislation respectively. They thus provide, *inter alia,* rules on information disclosure, burden of proof, legal costs, right to bring an action and gathering of evidence. Adoption of these measures could increase the effectiveness of the respective substantive regimes, boosting the smooth functioning of the internal market, and allowing the enforcement of all legally recognised claims and rights in the area of competition and consumer law.[69]

Nevertheless, the adoption of one set of procedural rules for the enforcement of EU competition law rights and another, different one, for EU law consumer rights cannot be easily justified. Collective redress systems are necessary for private enforcement of EU rights in both competition and consumer protection cases. Anti-competitive practices may evoke small losses to many individuals, and so could unfair commercial practices affecting many consumers. Individual private enforcement in both these areas of EU law may not be a realistic option due to, *inter alia,* costs involved. More importantly, there is a possible overlap between consumer and competition law cases, where consumers are the victims of anti-competitive behaviour. In order to produce EU rules of civil procedure in these areas, one needs to take in to account all these commonalities. This will also allow the establishment of EU civil procedure rules that will operate harmoniously with the remaining domestic provisions of States' civil procedures.[70] The paper contends that in this process, the fundamental right to effective remedy and fair trial in the EU should guide harmonisation efforts.

## 5. Identifying the appropriate degree of civil procedure harmonisation: A Coherent Approach

Demands of effective enforcement of substantive EU legislation point towards approximation of Member States' rules of civil procedure. Nevertheless, the EU cannot promote the *effet utile* of harmonised substantive legislation to the detriment of the fundamental right of effective access to justice. Harmonising Member States' civil procedural rules through the backdoor, i.e. via isolated or sector-specific procedural rules, may complicate civil procedural systems, adding a source of fragmentation in civil litigation in the EU, also obstructing effective access to justice.[71] Therefore, this paper argues that the EU should undertake a systematic and consistent approach, carefully balancing all conflicting interests before promoting any approximation measures. In this balancing activity, effective access to justice constitutes the common denominator and

[69] Charter on Fundamental Rights of the European Union, 2000/C 364/01, Articles 47 and 52§3.
[70] This is verified in the recently launched public horizontal consultation entitled 'Towards a Coherent European Approach to Collective Redress', SEC(2011)173 final, pp.4-5.
[71] See M. Tulibacka, 'Europeanization of Civil Procedures: In search of a Coherent Approach', *Common Market Law Review,* Vol.46, 2009, p.1547.

the final regulator for the determination of the scope and form of harmonisation of civil procedural rules in the EU.

### *5.1. Soft Law Approach*

A soft law instrument, for instance in the form of a Recommendation or Opinion or alternatively, a best-practices publication, on certain parts of civil procedural law could hardly address the exigencies of an integrated internal market, as well as of effective access to cross-border civil justice. The main reason is that it completely lacks binding force, having only a guiding, advisory role: Member States' national legislatures have little incentive to undertake reforms in national civil procedural rules in accordance with the mandates incorporated in the soft-law instrument. Even if they take reformative action, the result might be considerably different from one State to the other, as each Member State would interpret and incorporate suggestions in a different way. Member States' procedural systems would thus remain largely divergent and unresponsive to the necessity for more harmonised civil procedural rules in order to promote the realisation of the EU economic freedoms. Similarly, a soft-law solution would not circumvent incentives for abuse of forum shopping, nor increase litigants' certainty as to the litigious act, i.e. the actual risks involved in cross-border dispute resolution. What is more, even if such a soft-law instrument incorporated a fully autonomous set of civil procedural rules, it would still fail to provide a neutral system of civil procedure that businesses and consumers could realistically opt for.[72]

Another form of soft law approach could be the promotion of exchange of information and practices between Member States' judicial authorities. The rationale is that greater familiarisation with the various procedural systems all over the EU will allow for a bottom-up approximation of these systems.[73] One could even theorise that such an endeavour could respect Member States' legal cultural identity, also allowing competition between the various civil procedural systems. However, this is rather misleading. The aim of such a soft law approach is the convergence of States' options on civil procedural law, rather than the maintenance of any divergences therein.[74]

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[72] Lupoi, 'The Harmonisation of Civil Procedural Law within the EU', p.203: even if both parties to a dispute agree to employ the rules incorporated in the soft law instrument, this has hardly any practical repercussion on national civil proceedings, which remain immune from parties' choices. By analogy: Max Planck Institute for Comparative and International Private Law, 'Policy Options for Progress Towards a European Contract Law: Comments on the issues raised in the Green Paper from the Commission of 1 July 2010, COM(2010) 348 final', pp.7-12, available online at: http://ec.europa.eu/justice/news/consulting_public/0052/contributions/247_en.pdf, last accessed on 16/06/11.

[73] Tulibacka, 'Europeanization of Civil Procedures: In search of a Coherent Approach', p.1549.

[74] Storskrubb, *Civil Procedure and EU Law: A Policy Area Uncovered,* p.239.

### *5.2. Minimum Harmonisation Approach*

Introducing minimum procedural standards is problematic from an internal market viewpoint. Although it approximates civil procedural rules to a certain degree, this is not sufficient to tackle diversified levels of access to justice from one Member State to the other, thus obstructing free movement and competition of economic operators, leaving considerable margins for abuse of forum shopping. Nevertheless, minimum standards do not abolish national procedural systems in their entirety, allowing for more protective and effective national procedural rules. One could thus allege that minimum harmonisation is in line with considerations of maintaining Member States' cultural identity, also permitting some competition between different jurisdictions. However, one should also take into account that Member States need to incorporate minimum standards into the national civil procedural system. This may affect the quality of these systems, especially in case minimum standards are isolated, ad hoc provisions that disregard interconnections and interdependences between the various areas of application of civil procedural law.

### *5.3. Full Harmonisation Approach*

Full harmonisation of certain parts of Member States' civil procedural law could promote internal market integration objectives and the creation of a level playing field of access to justice in the EU. Parties coming from different jurisdictions could more easily adopt uniform procedural rules, having the appearance of neutrality that the law of a Member State lacks: as people (either businesspersons or consumers) would need to be familiar with one set of rules of civil procedure, they could be less reluctant to transact across the borders.[75] This last submission presupposes that there is adequate scope for a harmonised EU regime.[76] Additionally, even consumer groups with more limited negotiation power could liaise with the drafters of the uniform European civil procedural rules, promoting their interests all over the EU. However, a full harmonisation approach may hamper national legal cultural diversity and legal competition: uniform civil procedural provisions, applicable all over the EU, would completely substitute national ones for both domestic and cross-border disputes. Such a development would undermine experimentation and adaptability of national civil procedural systems, depriving market players of the slightest possibility to opt for an alternative system.[77]

[75] In the context of civil private law: S. Vogenauer, 'The Spectre of a European Contract law', in S. Vogenauer and S. Weatherill (eds.), *The Harmonisation of European Contract Law – Implications for European Private Laws, Business and Legal Practice,* Hart Publishing, 2006, pp.:14-15.
[76] Van der Grinten, 'Challenges for the Creation of a European Law of Civil Procedure', pp.9-12.
[77] By analogy: Max Planck Institute for Comparative and International Private Law, 'Policy Options for Progress Towards a European Contract Law: Comments on the issues raised in the Green Paper from the Commission of 1 July 2010, COM(2010) 348 final', pp. 20-21.

### *5.4. A 28th regime Approach*

This approach vows in favour of an autonomous European procedural mechanism on specific subjects of civil procedure law, applicable to cross-border and/or domestic disputes, in parallel with Member States' domestic civil procedural rules on that same subject. Such an approach guarantees that Member States' legal cultural identity remains intact. Regardless of the existence of the additional procedural mechanism, national civil procedural mechanisms and rules on the same subject would constitute a simultaneous, alternative option[78] for litigants to choose, either ex ante or ex post. This approach also reinforces competition between national procedural regimes and the alternative European mechanism, allowing variety of procedural options in accordance with litigants' expressed preferences.[79] Finally, it also considerably minimises possibilities for lobbyism, since it creates too many civil procedural fronts with which pressure groups will have a difficulty to liaise systematically and effectively in order to promote their interests.

A distinct European procedural mechanism on certain subjects of civil procedural law could address internal market exigencies, offering greater legal certainty and limiting the prospects of abusive forum shopping under certain circumstances. International players could use such an optional mechanism, in order to secure analogous results regardless of the Member State where dispute resolution takes place. There are two main presumptions in this argument. On the one hand, such a European mechanism needs to be self-contained, largely independent from national civil procedural rules. Otherwise, considerable discrepancies in the application of the European procedural mechanism will infiltrate, leading to different performance levels from one State to the other. There is thus a need for completeness and spherical regulation of the procedural subject under discussion. This may require the adoption of rules, which are not particular to the certain subject matter, but which touch on more general civil procedural law issues, thus creating problems with regard to the proportionality of the initial, more limited in scope European mechanism.[80]

On the other hand, such an additional European mechanism should be applicable to both cross-border and domestic disputes. This is particularly true for cost efficiencies in commercial transactions accruing from greater legal certainty because of the possibility to use a single procedural mechanism both for domestic and cross-border

[78] Dr. X. E. Kramer, 'A Major Step in the Harmonisation of Procedural Law in Europe: the European Small Claims Procedure Accomplishments, New Features and Some Fundamental Question of European Harmonisation', in A. W. Jongbloed (ed.), *'The XIIIth World Congress of Procedural Law: The Belgian and Dutch Reports'*, Antwerpen: Intersentia, 2008, p.281; Van der Grinten, 'Challenges for the Creation of a European Law of Civil Procedure', p.15.

[79] By analogy: Max Planck Institute for Comparative and International Private Law, 'Policy Options for Progress Towards a European Contract Law: Comments on the issues raised in the Green Paper from the Commission of 1 July 2010, COM(2010) 348 final', p.31.

[80] Van der Grinten, 'Challenges for the Creation of a European Law of Civil Procedure', pp.9-12.

transactions.[81] In terms of effective access to justice of comparable quality in the EU, restricting an optional instrument to cross-border disputes may lead to reverse discrimination for domestic litigants, depriving them of the possibility to use the European mechanism for domestic disputes. This would be problematic for the creation of a level-playing field of access to justice in the EU.

## 6. Concluding Remarks

The time has come for a more systematic and coherent approach to European harmonisation of civil procedural law. This involves primarily an understanding and acceptance at the political level of the fundamental functions of civil procedural law in the society and in the European legal order in particular. A single request can encapsulate these functions: equal access to comparable judicial systems all over the EU, in accordance with the procedural guarantees enshrined in Article 47 CFREU. In that sense, civil procedural law constitutes the means for the introduction and incorporation of fundamental notions of justice in the supranational legal order.[82] These fundamental notions of effective remedy and fair trial in the EU should underpin all policy parameters in the regulation of civil procedural law.

Isolated or sector-specific EU procedural provisions, could only marginally respond to requirements of equal access to justice. Similarly, soft law approaches lack the necessary binding force that would allow the establishment of justice systems of equitable performance levels. A minimum harmonisation approach may lead to further fragmentation in national procedural systems and the EU in general, while full harmonisation intrudes heavily into States' legal identity. In this remit, opting for a self-contained and largely autonomous 28th regime for certain parts of civil procedural law appears to be the most balanced solution. Despite its inherent limitations, it could serve as a transitional, free trial system for future regulation of EU civil procedural law.

[81] Ibid, p.36; M. Storme, ' A Single Civil Procedure for Europe: A Cathedral Builders' Dream', *Ritsumeikan Law Review,* No.22, 2005, p.93; Kramer, 'A Major Step in the Harmonisation of Procedural Law in Europe: the European Small Claims Procedure Accomplishments, New Features and Some Fundamental Question of European Harmonisation', p. 280.
[82] H. E. Hartnell, 'EUstitia: Institutionalizing Justice in the European Union', *Northwestern Journal of International Law &Business,* Vol.23, 2002, p.92.