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Civil Procedure Harmonization in the EU: Unravelling the Policy Considerations

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Abstract

This article examines the role and significance of the fundamental right of access to justice in the EU (Article 47 CFREU) in the context of the fragmentation of EU law, as evidenced in the area of civil procedure law. As member states' procedural regimes are considerably divergent, EU institutions intervene, more and more often, to ensure EU law is effectively enforced in an equivalent manner across the EU. This work thus addresses a preliminary question: when should EU institutions provide civil procedure rules that promote effective dispute resolution and enforcement of EU law? In other words, which are the policy parameters that render such a proactive stance on the part of the EU institutions both desirable and feasible? EU institutions will have to answer this question for every legislative proposal in the area of civil justice. Therefore, this article only offers the broad lines along which such *in concreto* justification for legislative action in civil justice will have to take place. It is argued that EU institutions should take into account the various cultural, economic, social, and historical implications of civil procedure law in order to achieve a coherent approach. Against this background, the fundamental right to effective remedy and fair trial should tie all policy parameters together.

Keywords

EU law; civil procedure; access to justice; harmonization; policy perspectives.

Civil procedure [...] challenges regulators. Its importance for the Internal Market may indicate the need for uniform rules and uniform approach, but its essence – the necessary balancing of different policy arguments [...] – may require a more complex solution.¹

Civil procedure rules are mixed-goods, concentrating at the same time features of both private and public goods. They can thus serve as means of private dispute resolution, only affecting the conflicting parties; equally, they contribute to the general implementation and enforcement of law and policies, fulfilling a public function.² In other words, on top of its conflict resolution character, civil procedure regulation has a law enforcement focus.³ It is not only a matter for private parties to regulate the procedure, along the lines of a private justice model,⁴ when individuals turn to the courts, they do not ask the court simply to resolve a dispute but, primarily, to enforce their entitlements according to EU law.

In the EU supranational legal order, the judicial system of dispute resolution and private enforcement of EU rights remains largely decentralised, taking place before member states' courts.⁵ Article 19 TEU suggests that member states are responsible for the provision of remedies ensuring effective legal protection in the fields covered by Union

¹ M. Tulibacka, 'Europeanisation of Civil Procedures: In Search of a Coherent Approach' (2009) 46 *CMLR* 1555.

² S. Delabruyère, 'On 'Legal Choice' and legal competition in a federal system of justice. Lesson for European legal integration' 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 22-23.

³ A. A. S. Zuckerman, 'The principle of effective judicial protection in EU law' (Remedies for Breach of EU Law Revisited, King's College London, June 2010) 1-2.

⁴ W. M. Landes and R. A. Posner, 'Private Enforcement of Law', (1975) 4 *J. Legal Stud.* 1-46. See also S. Shavell, 'The Fundamental Divergence between the Private and Social Motive to Use the Legal System' (1997) 26 *J. Legal Stud.* 575-612.

⁵ Case 26/62 Van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] ECR 1.

law.⁶ As member states' procedural regimes are considerably divergent, EU institutions intervene, more and more often, in member states' national procedural regimes to secure EU law is effectively enforced in an equivalent manner across the EU.

The gradual and steady extension of EU competence in the area of civil justice, traditionally regarded as a bastion of state sovereignty, has met member states' hesitation and resentment as to the desirability and feasibility of EU institutions designating civil procedure rules. Closer examination of the overall approach demonstrates that intervention in member states' procedural systems has taken place in a rather fragmented and incoherent way, lacking systematic planning and clearly set objectives.⁷ This approach results from the lack of a fundamental vision on the role and function of national procedural systems in the EU. There is scarce literature on this topic and this article aims to shed some light on the wider perspectives of procedural law for the functioning of the supranational legal order. It will be argued that civil procedure law constitutes a broad area, with cultural, economic, social, and historical overtones, which need to be given due regard in order to achieve a coherent approach. In this highly controversial environment, the fundamental right to effective remedy and fair trial should tie the range of policy parameters together.

Specifically, I explore the premises of EU intervention in national civil procedural regimes in three steps. At an initial level, I identify and analyse the ways in which effective dispute resolution and enforcement of law – as the primary functions of civil procedure law – are of particular interest to the EU, to justify the harmonization of national procedural regimes. To this end, I look at the traditional arguments put forward by scholars in favour of EU intervention in national legal systems, namely, the functioning of the internal market, economic benefits, and the limitations of forum shopping. At a second stage, I endeavour to detect countervailing considerations that may limit the scope of EU intervention into national procedural regimes. I thus revisit arguments stemming from the economic theory of regulatory competition, the particularities of national legal traditions, as well as public choice theory and political failures. I further examine and test these arguments in the final part of the analysis, offering an overview of the stakes involved in the process of civil procedure law convergence in the EU. In the last part of the article, I adopt a practical perspective, investigating the appropriate form of EU intervention into national procedural regimes, focusing on the need for coherence.

THE DESIRABILITY OF EU INTERVENTION INTO NATIONAL CIVIL PROCEDURAL REGIMES

Traditional justifications for the development of common EU private (substantive) rules focus on the achievement of a level playing field in the internal market, the increase of commercial activity due to greater legal certainty, and the limitation of the negative facets of forum shopping. It is submitted that any efforts to intervene in member states' national civil procedural regimes should be based on the learning outcomes achieved in the remit of private law approximation.⁸ Therefore, this section examines whether the above arguments could yield some valid results in the area of civil procedure law harmonization. This will reveal the actual ramifications and limitations of these parameters in terms of effective dispute resolution and the enforcement of EU law, as well as of any future EU intervention in national procedural regimes.

⁶ M. Claes, *The National Courts Mandate in the European Constitution* (Hart Publishing, Oxford and Portland, Oregon 2006) p 682-683; T. Tridimas, 'The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?', in T. Tridimas and P. Nebbia (eds.): *European Union Law for the 21st Century: Rethinking the New Legal Order*, (Hart Publishing 2004) p 117; T. Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006).

⁷ Tulibacka, (n 1) 1553-1565; E. Storskrubb, *Civil Procedure and EU law: a policy area uncovered* (OUP 2008) p 301-311.

⁸ W Kennett, *Enforcement of Judgments in Europe* (OUP 2000) p 305.

A Level Playing Field in the Internal Market

National civil procedural rules on matters such as service of documents, time limits, commencement of proceedings and obtaining evidence that are differently regulated in each Member State can render in-court dispute resolution particularly complicated and lengthy,⁹ hampering the smooth functioning of the internal market. The presence of 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 an unequal footing if one of them has access to efficient and effective procedures while the other does not. Imagine, for instance, two companies resorting to judicial avenues in order to enforce a commercial contract.¹⁰ Company A does business in Italy, renowned for judicial delays, whereas Company B develops its commercial activity in the Netherlands, with its swift judicial proceedings.¹¹ In this scenario, there is no level-playing field between the companies economically active in the EU, with procedural delays leading to increased uncertainty and transaction costs within the Italian economy. These differences constitute serious procedural disincentives, affecting parties' willingness to go to court,¹² and rendering economic freedoms in the internal market deceptive and unenforceable. The creation of EU civil procedure rules could reduce substantial differences between the various procedural regimes, promoting a level playing field via businesses' equal access to justice.

The European Small Claims Procedure¹³ can be seen as a step in this direction. By introducing a common European procedure, proportional to the value of the litigation, it has contributed to the creation of a level playing field for creditors and debtors throughout the European Union. This EU intervention into national procedural regimes has tackled the previous competitive distortions created by disparities in the functioning of those procedural means available to creditors to pursue low value claims in different member states.¹⁴

The Economic Benefits of Legal Certainty

In the international environment, largely divergent procedural systems can increase uncertainty about the benefits of cross-border commercial activity. Such legal uncertainty can lead to economic deceleration, because the information costs regarding the various procedural regimes might outweigh the benefits from cross-border trade.¹⁵ This relates to the estimation of risks involved in opening up the activity to other national markets in the EU. Risk management requires consideration of litigiousness, the

⁹ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure' [2005] COM (2005) 87 final, 3.

¹⁰ *Doing Business 2011: Making A Difference for Entrepreneurs* (The International Bank for Reconstruction and Development / The World Bank 2010) 70, 75
<<http://www.doingbusiness.org/~media/fpdkm/doing%20business/documents/annual-reports/english/db11-fullreport.pdf>> accessed 3 May 12; K. H. Bae and V. Goyal, 'Creditor Rights, Enforcement, and Bank Loans', (2009) 64 (2) *The Journal of Finance* 823.

¹¹ A. A. S. Zuckerman, *Justice in Crisis: Comparative Dimensions of Civil Procedure*, in S. Chiarloni, P. Gottwald and A. A. S. Zuckerman (eds), *Civil Justice in Crisis* (OUP 1999) p 9-10. In Italy, 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.

¹² 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* (CUP 1999) p 48-49.

¹³ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L199/1.

¹⁴ Commission, 'Green Paper on a European Order for Payment Procedure and on Measures to Simplify and Speed up Small Claims Litigation' COM (2002) 746 final.

¹⁵ In the area of substantive contract law: Commission, 'Communication from the Commission to the Council and the European Parliament on European Contract Law' COM (2001) 398 final, paras. 30-32.

actual circumstances and costs of litigation in the various member states. Common EU procedural rules could thus bring about greater neutrality, limiting transaction costs in cross-border commerce in the internal market.¹⁶

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 can be attributed to their limited familiarisation with litigation processes. It also relates to procedural diversity in the EU and the subsequent uncertainty as to the rules and outcomes of cross-border dispute resolution.¹⁷ Consequently, citizens may avoid litigation across borders,¹⁸ leaving their EU rights unenforced, making themselves easier prey for sellers and producers.¹⁹ In the end, this will result in restrained cross-border commercial activity, limited investment, consumption, and income, and finally limited growth rates, hampering the smooth functioning of the internal market.²⁰

The most recent affirmation of the interrelationship between unitary markets and civil procedure law convergence is that of Switzerland and the application since 1st January 2011 of a unified code of civil procedure.²¹ The rationale behind this enormous reforming initiative was elimination of all artificial impediment-creating dividing lines cutting across the Swiss cantons.²² Empirical evidence supports a correlation between economic growth and the procedural rules of those jurisdictions, which facilitate increased predictability of court decisions. For instance, researchers have found that the timeliness and the predominantly written character of procedures lead to more transactions and higher investment levels.²³

Forum Shopping

Procedural diversity between EU member states can have another negative consequence, commonly referred to as forum shopping. In 'shopping' for 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 remedial means available to redress the injustice. Forum shopping is not a problem per se, to the extent that it offers litigants

¹⁶ 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) p 16-17; European Commission, 'Communication from the Commission to the Council and the European Parliament on European Contract Law' COM (2001) 398 final, 9.

¹⁷ See: M. Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change', (1974) 9 *Law and Society Review* 497.

¹⁸ European Commission, 'Special Eurobarometer 292: Civil justice in the European Union', April 2008 <http://ec.europa.eu/public_opinion/archives/ebs/ebs_292_en.pdf> accessed 10 June 2011.

¹⁹ B Feldman, H von Freyhold, and E L Vial, *The Cost of Legal Obstacles to the Disadvantage of Consumers in the Single Market* (Report for the European Commission DG SANCO, 1998) 276-279 http://ec.europa.eu/dgs/health_consumer/library/pub/pub03.pdf accessed 16 March 2013.

²⁰ J. Smits, 'Diversity of Contract Law and the European Internal Market' in J Smits (ed.), *The Need for a European Contract Law. Empirical and Legal Perspectives* (Groningen: Europa Law Publishing 2005) p 170; H. Wagner, 'Economic Analysis of Cross-border Legal Uncertainty: the example of the European Union' in J. Smits (ed.), *The Need for a European Contract Law: Empirical and Legal Perspectives* (Europa Law Publishing 2005) p 51.

²¹ SR 272 Schweizerische Zivilprozessordnung.

²² T. Domej, 'Switzerland: Between Cosmopolitanism and Parochialism in Civil Litigation' in X. E. Kramer and C. H. van Rhee (eds), *Civil Litigation in A Globalising World* (T.M.C. ASSER PRESS 2012) p 247.

²³ B. Hayo and S. Voigt, 'The Relevance of Judicial Procedure for Economic Growth' (CESIFO Working Paper no. 2514 2008) 1-31 <<http://www.cesifo-group.de/portal/pls/portal/docs/1/1186626.PDF>> accessed 3 May 2012.

the possibility of choosing the most efficient and effective procedural system. However, when litigants abuse this possibility, the situation becomes complicated.²⁴

For instance, forum shopping could potentially encourage companies to transfer all disputes from their commercial activities to member states with the least favourable procedural regimes for consumers (in terms of costs, duration, and complexity). This may considerably curtail effective enforcement of EU substantive rights, circumventing litigants' effective access to justice. The discourse on the race to the bottom is thus relevant since forum shopping can lead to a competition of jurisdictions whereby the one with the lowest enforcement standards survives.²⁵ This situation is often described as the 'Delaware Effect', named after the competition among corporate laws of different U.S. states leading to low quality corporate regulation in the state of Delaware.²⁶ Once again, intervention into member states' procedural regimes might address these problems.²⁷

Striking a Balance?

Without nullifying the validity and importance of these arguments, one cannot fail but notice that certain efficiencies may be overemphasised. To begin with, what facilitates the realisation of a level playing field in the internal market is mainly the substantive EU law introduced to overcome obstacles and uncertainties in the realisation of the four constituent freedoms: free movement of goods, persons, capital, and services. Civil procedure law is auxiliary to substantive law and becomes significant primarily when the enforcement of substantive law is under discussion.²⁸ As already discussed, differing procedural rules across the member states can distort competition among businesses, also complicating risk management for cross-border trade. However, this is true only if the internal market functions as intended, giving rise to diverse rights and obligations.

An additional problem relates to the possibility of unintended costs. The limitation of transaction costs caused by the introduction of EU civil procedure rules in all member states will inevitably be accompanied by the creation of additional implementation and adaptation costs in all legal orders, as well as costs arising from the limitation of the variety of options and of the possibility for learning effects from different procedural paradigms.²⁹ For intervention to be economically rational, the balance between efficiencies caused by the reduction of transaction costs and the creation of an economy of scale on the one hand, and the extra costs of adaptation to newly imposed rules on the other will have to be positive. Currently, there is not extensive empirical data supporting this positive balance.³⁰

²⁴ M. A. Lupoi, 'The Harmonization of Civil Procedural Law within the EU', in J. O. Frosini, M. A. Lupoi and M. Marchesiello (eds), *A European Space of Justice* (Ravenna: Longo, 2006) p 199-200.

²⁵ H. Sinn, 'The Selection Principle and Market Failure in Systems Competition (MS)' (1997) 66 *Journal of Public Economics* 247-274.

²⁶ R. J. Van den Bergh and L.T. Visscher, 'The Principles of European Tort Law: The Right Path to Harmonization?' (2006) 14 (4) *E.R.P.L.* 520; H. Søndergaard Birkmose, 'Regulatory Competition and the European Harmonisation Process' (2006) *EBLR* 1081-1082.

²⁷ P. H. Lindblom, 'Harmony of the legal spheres: A Swedish view on the construction of a unified European procedural law' (1997) 1 *E.R.P.L.* 23-24.

²⁸ J. I. H. Jacob, *The Fabric of English Civil Justice*, (The Hamlyn Trust, Stevens & Sons, London, 1987) p 63-67

<http://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/The_Fabric_of_English_Civil_Justice.pdf> accessed 16 September 2011.

²⁹ See however: J. M. Sun and J. Pelkmans, 'Regulatory Competition in the Single Market' (CEPS Working Document No. 84, 1994) 28-29.

³⁰ See however: Oxford Institute of European and Comparative Law and the Oxford Centre for Socio-Legal-Studies, 'Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law – A Business Survey – Final Results' (2008) <<http://denning.law.ox.ac.uk/iecl/pdfs/Oxford%20Civil%20Justice%20Survey%20-%20Summary%20of%20Results,%20Final.pdf>> accessed 8 May 2012.

Finally, in the area of civil procedural rules the race-to-the-bottom scenario seems less persuasive. The reason is that unlike substantive law, where people can choose in detail the rules applicable to a legal relationship, in procedural matters, parties can only choose the procedural rules of a distinct forum. As a result, a scenario where member states decrease the overall quality of their procedural systems to make them more appealing to foreign litigants does not sound particularly plausible. In the famous Delaware case, the introduction of lenient rules related to companies' incorporation rules only, and had potential to result in economic efficiencies for that state due to inward attraction of foreign companies and the subsequent incorporation fees. However, procedural regimes of low quality standards only generate further costs, for instance due to an increased need for appeal procedures, further impeding effective dispute resolution and the enforcement of rights and obligations.³¹

THE FEASIBILITY OF EU INTERVENTION INTO NATIONAL CIVIL PROCEDURAL LAW

Even if the desirability question in a specific case is answered in the affirmative, the decision to intervene into member states' procedural systems is not an easy and straightforward one. When considering national procedural systems from the perspective of legal judicial tradition, inter-jurisdictional competition, and political failures resulting from lobbyism, what comes to the fore are conflicting interests, which pose feasibility questions for the harmonization of civil procedure law. This feasibility question could offer some initial criteria for EU intervention into national procedural regimes for the facilitation of effective dispute resolution and the enforcement of EU law. These criteria should be further filtered through the prism of the fundamental right of access to justice in order that the final scope of harmonized rules can be established.

Legal Traditions

Member states' legal traditions have been shaped and reshaped over time, the result of varying historical, institutional, social, economic, and political influences.³² National civil procedural rules form part of States' legal traditions, reflecting their convictions about proper organisation of the courts' judicial system in delivering timely and fair judgments.³³ Member States' national procedural regimes differ greatly and the differences can be fundamental.³⁴ Starting with the Civil – Common Law divide, the most crucial differences are threefold: the role of the judge; the function of appellate procedures; and the civil litigation trial.³⁵ Specifically, in civil law countries, professional judges play a primary role in the development of evidence and the legal characterisation

³¹ A. Ogus, 'Competition between national legal systems: a contribution of economic analysis to comparative law', (1999) 48 *ICLQ* 415.

³² M. Taruffo, 'Harmonisation in a Global Context: The ALI/UNIDROIT Principles' in X. E. Kramer and C. H. van Rhee (eds), *Civil Litigation in a Globalising World* (T. M. C. Asser Press 2012) p 209.

³³ K. D. Kerameus, 'Procedural Harmonization in Europe', (1995) 43 (3) *Am. J. Comp. L.* 404-405; H. Collins, 'European Private Law and the Cultural Diversity', (1995) 3 *E.R.P.L.* 364; 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) p 26.

³⁴ See *inter alia*: P. Legrand, 'On the Unbearable Localness of Law: Academic Fallacies and Unseasonable Observations', (2002) 1 *E.R.P.L.* 61; S. Goldstein, 'On comparing and unifying civil procedural systems' in R. Cotterrell (ed.), *Process and Substance* (Butterworths, London, Dublin, and Edinburgh 1995) 3-28; A. Uzelac, 'Reforming Mediterranean Civil Procedure: is there a need for shock therapy?' in C. H. van Rhee and A. Uzelac (eds), *Civil Justice between Efficiency and Quality From Ius Commune to the CEPEJ* (Intersentia, Antwerp-Oxford-Portland, 2008) p 71.

³⁵ See M. Cappelletti and B. G. Garth, *Introduction – Policies, Trends, and Ideas in Civil Procedure* (International Encyclopedia of Comparative Law, J C B Mohr, Tübingen, and Martinus Nijhoff Publishers, Dordrecht, Boston, Lancaster, 1987) p 5-13, 23-42.

of facts, as opposed to common law systems where this responsibility rests initially with the legal advocates. Broadly speaking, chances for a review of both the law and the facts of a case at second instance are higher in civil law regimes as opposed to common law. In the latter, private litigation usually takes place in two stages, namely a preliminary, pre-trial phase followed by the actual trial of the case, as opposed to a single trial in civil systems consisting of many, usually short, court sessions.³⁶

Consequently, cultural sensitivities reflected in the choice of procedural regimes may be so great that EU intervention into member states' civil procedure law may be impossible, or so complicated, that its net results may not render it desirable for individual member states. What is more, it might disrupt member states' legal culture, depriving procedural systems of their richness and benefit. The end result may thus be the disruption of individual civil procedure regimes, compromising potential for effective private enforcement of both EU and domestic substantive rights and obligations.

The Economics of Procedural Diversity

Examining EU intervention into member states' procedural regimes from an economic perspective, legal diversity constitutes a fundamental principle. The theory of regulatory competition assumes that legal producers are rivals and compete just as producers of goods and services compete in usual markets.³⁷ Regulators offer favourable procedural regimes in order to increase domestic industries' competitiveness and attract foreign business activity.³⁸ 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.³⁹

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',⁴⁰ litigants choose specific procedural systems over others, signalling their preference for civil procedure regulation and the private enforcement of EU rights and obligations. In other words, national governments have an incentive to promote better procedural rules in accordance with their citizens' expressed choices,⁴¹ sensing and addressing new societal needs.⁴²

EU intervention into member states' national procedural regimes reduces the spectrum of ex ante or ex post choice of the rules of civil procedure in the fora where parties could litigate their disputes. What is more, it is doubtful whether centrally-imposed procedural rules, even of exceptionally high quality, could remedy the limitation of learning effects associated with procedural diversity.⁴³ Procedural diversity promotes a communication process between different legal orders and regimes whereby convergence occurs gradually and in a balanced way. Local authorities have an information advantage

³⁶ G. C. Hazard, M. Taruffo, R. Stürner, and A. Gidi, 'Introduction to the Principles and Rules of Transnational Civil Procedure' (2000-2001) 33 *N.Y.U. J. Int'l Law & Pol.* 773-774.

³⁷ 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.

³⁸ Adapted to regulatory competition in civil procedure: K. Gatsios & P. Holmes, *Palgrave Dictionary of Economics and the Law*, (1998) p 271.

³⁹ Ogus, (n 31) 408.

⁴⁰ C. M. Tiebout, 'A Pure Theory of Local Expenditures', (1956) 64 *Journal of Political Economy* 416-424.

⁴¹ H. Siebert & M. J. Koop, 'Institutional Competition Versus Centralisation: Quo Vadis Europe?' (1993) 9 (1) *Oxf Rev Econ Policy* 15-30.

⁴² In EU contract law: G. Wagner, 'The Economics of Harmonization: The Case of Contract Law' (2002) 39 *CMLR*; W. Kerber, 'Inter-jurisdictional Competition within the European Union', (2008) 233 <<http://ssrn.com/abstract=1392163>> accessed 16 June 2011.

⁴³ L. Visscher, 'A Law and Economics View on Harmonisation of Procedural law' in X. E. Kramer and C. H. van Rhee (eds), *Civil Litigation in a Globalising World* (T.M.C. ASSER PRESS 2012) p 78.

regarding the specificities and actual needs of their procedural systems and can thus proceed to approximation of their procedural rules with those of other legal orders. At the supranational, EU level, the possibilities for such in-depth knowledge of the various procedural regimes and the possibilities for convergence are particularly limited. The approximating result might thus be less effective, creating more problems in the enforcement of EU rights and obligations before national courts than it purports to resolve.⁴⁴

The Influence of Lobbyism

Public choice theory refers to the role pressure groups play in the creation and introduction of legislation. Interest or pressure groups operating in all member states engage in the legislative process, influencing the direction and content of rules, furthering their interests in a certain area.⁴⁵ These pressure groups only have dispersed powers when they operate in an environment of procedural diversity, solely influencing domestic procedural regimes. In the case of centrally developed civil procedure rules, at a supranational EU level, these interest groups might be able to exercise more imminent and widespread influence on regulators.⁴⁶ Instead of lobbying with 28 different regulators,⁴⁷ they would have to lobby with a central, EU authority, while affecting simultaneously all member states.⁴⁸ This could result in the promotion of the procedural interests of one pressure group to the detriment of other groups across all EU Member States, potentially sapping the enforcement of EU law and the effective legal protection of rights and obligations.

Countervailing Considerations

Although these feasibility criteria encapsulate serious considerations on the actual role and function of national procedural regimes in the EU, they nonetheless rest on some unrealistic assumptions. To begin with, not all rules of civil procedure form part of the member states' legal traditions. For example, rules on calculation of time frames and deadlines in civil litigation, on service of process and on initiation of proceedings by writ, mainly serve the objective of prompt trial administration, providing the infrastructure for organised systems of civil procedure.⁴⁹ Even if the EU alters these technical rules, member states will still have access to another form of juridical administration that might be more efficient and effective than their original one, without impacting negatively on their national legal tradition or the effectiveness of rights and obligations enforcement.

⁴⁴ Ogus, (n 31) 415-416; G. P. Miller, 'The Legal-Economic Analysis of Comparative Civil Procedure', (1997) 45 *Am.J.Comp.L.* 917-918.

⁴⁵ A. Geiger, 'Lobbyists — the Devil's Advocates?', (2003) 24 (11) *ECLR* 559; R. D. Tollison, 'Public Choice and Legislation', (1988) 74 (2) *Va. L. Rev* 339; Wagner, 'The Economics of Harmonization: The Case of Contract Law', (n 42) 1000; Kennett, *Enforcement of Judgments in Europe* (n 8) p 306.

⁴⁶ H. Søndergaard Birkmose, 'Regulatory Competition and the European Harmonisation Process', (2006) *EBLR* 1079; R. Van den Bergh, 'Towards an Institutional Legal Framework for Regulatory Competition in Europe', (2000) 53 (4) *KYKLOS* 448-449.

⁴⁷ Croatia will be the 28th EU Member State as of 1 July 2013. See, Treaty of Accession of Croatia [2012] OJ L122/10.

⁴⁸ W. Kerber, 'The Theory of Regulatory Competition and Competition Law', (2008) <<http://ssrn.com/abstract=1392163>> accessed 23 August 2010.

⁴⁹ Kerameus, 'Procedural Harmonisation in Europe', (n 33) 404-405; C. H. van Rhee, 'Harmonisation of Civil Procedure: An Historical and Comparative Perspective' in X. E. Kramer and C. H. van Rhee (eds), *Civil Litigation in a Globalising World* (T.M.C. ASSER PRESS 2012) p 49.

What is more, civil procedure rules are not always worth maintaining simply because they form part of a state's legal tradition.⁵⁰ By way of illustration, many civil law EU countries have traditionally been hostile to the introduction of collective compensatory relief in their judicial systems, for fear it could promote a culture of litigation. However, in the remit of the European Union, business practices breaching EU law provisions increasingly tend to inflict very small losses on a large number of people. Opting for individual private enforcement of these rights does not constitute a realistic and effective means of redress since the costs and general litigation exigencies are disproportionate to the actual harm caused, usually of only a few tens or hundreds of euros.⁵¹ What is more, in the event that compensation for unlawful business practices affecting large numbers of harmed people could only be resolved via the filing of an equal number of individual lawsuits, member states' national courts would be faced with a backlog and come to a complete standstill, ultimately undermining any possibility of timely and fair justice. Considerations of effective access to judicial enforcement of EU rights and obligations may therefore outweigh concerns regarding member states' legal cultural identity, pointing towards further EU intervention into national procedural regimes.

Additionally, despite considerable divergences in member states' fundamental characteristics of civil procedural regimes, the civil/common law dichotomy becomes less striking over time.⁵² In both English civil procedure and continental European jurisdictions, judges have become more and more active in the management of cases before them, effectively taking up the role of case-managers in civil proceedings.⁵³ Furthermore, the Woolf reforms limited and streamlined pre-trial disclosure in the English judicial system even while. Many continental European jurisdictions have investigated the prospects of introducing limited discovery provisions into their domestic procedural regimes.⁵⁴ As Andrews has put it: '...the Common Law or Civil Law tradition is not an immutable genetic stamp'.⁵⁵ Recent empirical data suggest there are no systematic differences between civil and common-law countries.⁵⁶ Further, for regulatory competition to be a successful option, prospective civil litigants should be able to profit from procedural diversity in the EU through the choice of the more efficient procedural system.⁵⁷ This suggestion presupposes that civil litigants are aware of the diverse systems of civil procedure available in the EU; it also presupposes that litigants have the actual capacity to understand fully the impact of the various procedural rules, making

⁵⁰ S. Weatherill, 'Why object to the Harmonisation of Private Law by the EC?', (2004) *E.R.P.L.*, 652; Kennett, (n 8) 311.

⁵¹ European Commission, 'Commission Staff Working Document Public Consultation: Towards a Coherent European Approach to Collective Redress', 3. See, H W Micklitz and A Stadler, 'The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure' (2006) *European Business Law Review* 1476-1477: The option of joining many individual claims against the same defendant before the same court is not effective either, since courts still treat these cases as a pool of individual lawsuits with procedural actions of each plaintiff leaving the rest of the plaintiffs unaffected. One possible advantage is the option for joint hearings and joint taking of evidence, which can reduce plaintiffs' individual legal costs.

⁵² Lindblom, (n 27) 20; M. Van Hoecke, 'The Harmonisation of Private Law in Europe: Some Misunderstandings' in M. Van Hoecke and F Ost (eds), *The Harmonisation of European Private Law* (Hart Publishing, Oxford-Portland Oregon, 2000) p 7.

⁵³ Lord Woolf, *Access to Justice: Final Report* (1996) <http://www.dca.gov.uk/civil/final/index.htm> accessed 4 May 2012; C. H. Van Rhee, 'The Development of Civil Procedural Law in Twentieth-Century Europe: From Party Autonomy to Judicial Case Management and Efficiency' in Van Rhee (ed.), *Judicial Case Management and Efficiency in Civil Litigation* (Intersentia, Antwerp 2008) p 11-25.

⁵⁴ Lord Woolf, *Access to Justice: Final Report* (n 53); van Rhee, 'Harmonisation of Civil Procedure: An Historical and Comparative Perspective' (n 49) 40-41.

⁵⁵ N. Andrews, 'A modern procedural synthesis: the American Law Institute and UNIDROIT's 'Principles and rules of transnational civil procedure'', (2009) *TCR* 52-58.

⁵⁶ H. Spamann, 'Legal Origin, Civil Procedure, and the Quality of Contract Enforcement' (John M Olin Center for Law, Economics, and Business Fellows' Discussion Paper Series, Discussion Paper No. 31, 2009) 1-21 <http://140.247.200.140/programs/olin_center/fellows_papers/pdf/Spamann_31.pdf> accessed 9 May 2012.

⁵⁷ See *inter alia*: D. C. Esty and D. Geradin, 'Regulatory Co-opetition', (2000) 3 (2) *J Intl Econ L* 240-248.

informed decisions.⁵⁸ However, this is not an easy and straightforward possibility in the case of 28 competing systems of civil procedure.⁵⁹

It is important to make a basic distinction here: large international companies, with the resources to engage legal teams on a permanent basis, can take advantage of the efficiencies of inter-jurisdictional competition. In the case of a dispute with a small business or with individual consumers, they would be able to find out the most beneficial procedural system of dispute resolution and enforcement of rights and obligations. In contrast, individual litigants and small and medium sized companies usually lack the money, time, or legal foundations to make an appropriate choice of procedural rules and thus profit from competition among jurisdictions.⁶⁰ They are not in a position to gain information about different legal systems, assess that information, and then impose their will on their counterparts, especially when these are the above-mentioned large, multinational companies.⁶¹

This last factor could have far-reaching consequences in terms of access to justice: regulatory competition might lead to inequality of arms and denial of access to justice for at least one of the parties to a dispute.⁶² Indeed, in the example of a big company in dispute with a small one, if all the parameters of civil procedure are unregulated, the dispute might end up in the imposition of the least favourable procedural regime for the small company. It is true that this theoretical scenario might entail efficiencies for consumers and SMEs if lower judicial standards are combined with lower prices and lower costs. However, even if, as Ogus suggests, citizens might sometimes prefer lower standards at lower costs, this is not a viable route since low judicial standards violate established ideas of fundamental procedural human rights. In the field of civil procedure, the right to an effective remedy and a fair trial enshrines social policy reflections that are deep-rooted in the constitutions and legal cultures of all EU member states.⁶³ EU intervention into national procedural regimes could thus offer equality of arms in the enforcement of EU law rights and obligations.

Finally, depending on the pressure group and the procedural interests it promotes, member states' national civil procedural regimes could be influenced in a manner detrimental for the enforcement of EU law, the protection of individual rights, and the observance of obligations therein. One could imagine lawyers exerting pressure for a reform that would maintain, if not increase, the level of legal costs, despite resulting in an unnecessarily expensive judicial regime, depriving citizens of the possibility of enforcing their EU rights via the courts. The fact that the judicial avenue will be equally expensive for domestic rights enforcement cannot be used as an excuse for the introduction of procedural rules which render excessively difficult or practically impossible the legal protection of EU law based claims.⁶⁴

⁵⁸ In the context of European Contract law: Commission, 'Communication from the Commission to the Council and the European Parliament on European Contract Law' COM (2001) 398 final, 9.

⁵⁹ 'Special Eurobarometer 292; K. D. Kerameus, 'Procedural Implications of Civil Law Unification', in A. Hartkamp et al. (eds), *Towards a European Civil Code* (4th edn, Kluwer Law International 2011) p 261.

⁶⁰ See further: F. K. Juenger, 'What's Wrong with Forum Shopping?', (1994) *Syd LR* 7-13; B. R. Opeskin, 'The Price of Forum Shopping: A Reply to professor Juenger', (1994) *Syd LR* 14-27.

⁶¹ See: J. T. Johnsen, 'Vulnerable groups at the legal services market' in A. Uzelac and CH van Rhee (eds), *Access to Justice and the Judiciary. Towards New European Standards of Affordability, Quality, and Efficiency of Civil Adjudication* (Intersentia 2009) p 32-34.

⁶² M. Storme, *Approximation of Judiciary Law in the European Union* (M Nijhoff 1994) 48.

⁶³ Ogus, (n 31) 408; M. Cohen, 'Commentary' in E. Eide and R. Van den Bergh (eds), *Law and Economics of the Environment* (Oslo, Juridisk Forlag 1996) p 170; S. Weatherill, 'Why object to the Harmonisation of Private Law by the EC?', (2004) *E.R.P.L.* 656.

⁶⁴ See for instance: Case 199/82 Amministrazione delle Finanze dello Stato v SpA San Giorgio [1983] ECR, 3595, paras 17-18. Italian national evidentiary rules, requiring negative written proof for the taxpayer to establish that an unlawfully (in breach of EU law) imposed charge had not been passed on, should be put aside. In spite of the applicability of the same evidentiary rule to taxpayers' claims arising from national tax law infringements as to those arising from EU rights (principle of equivalence), this

EU intervention into member states' national procedural regimes could thus secure increased access to justice for the more structurally disadvantaged groups. Compared to producers, consumers traditionally have less negotiating power, such that their interests are less likely to be upheld. The latter have better organisational structures and capacities at the domestic level, prevailing in the lobby challenge, potentially causing biased civil procedural rules at the expense of the losers (consumers).⁶⁵ Without EU intervention there is a risk of discrimination in favour of domestic producers.

IDENTIFYING THE APPROPRIATE DEGREE OF CIVIL PROCEDURE HARMONIZATION: A COHERENT APPROACH

The challenge for EU law is not to intervene into member states' national procedural regimes at any cost. The overarching aim is to guarantee the enforcement of EU law rights and obligations under realistic conditions. This suggestion has significant repercussions with respect to both the level of decision-making and the actual scope of the enacted rules. By looking at the three main possibilities for EU intervention into national procedural regimes for the promotion of effective dispute resolution and enforcement of EU law, I will identify whether and to what extent these modes of intervention can accommodate the feasibility concerns for the harmonization of civil procedure law, while also passing the access to justice test. This will put the discussion on the role of national procedural systems for the EU in more realistic and practical premises offering some initial indications as to the right way forward for the harmonization of civil procedure law.

Soft Law Approach

The first possibility, 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 effective enforcement of EU rights and obligations. 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 reforming action, the result might differ considerably from one State to another, as each Member State would interpret and incorporate suggestions differently.

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 across the EU will allow for a bottom-up approximation of these systems.⁶⁶ 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.⁶⁷ What is more, the respect of the fundamental right to an effective remedy and a fair trial contained in Article 47 of the

rule systematically places the burden of proof upon the taxpayer, rendering the reparation of charges levied contrary to EU law excessively difficult (principle of effectiveness).

⁶⁵ In the context of competition law see: O. Budzinski, *The Governance of Global Competition: Competence Allocation in International Competition Policy* (Edward Elgar Publishing, 2008) p 106; D. Geradin and J. A. McCahery, 'Regulatory Co-opetition: Transcending the Regulatory Competition Debate' (TILEC Discussion Paper 2005-020, 2005) 10.

⁶⁶ Tulibacka, (n 1) 1549.

⁶⁷ Storskrubb, (n 7) p 239; 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', 7.

Charter of Fundamental Rights of the European Union (CFREU)) cannot be entrusted to mere soft law. EU intervention into member states' national procedural regimes needs to consider the fundamental right of access to justice, striking a balance between the rights of the claimants and the defence. It is against this background that a soft law approach is deemed far from appropriate and legitimate to provide solution to the interests at stake. As becomes clear from the horizontal provision of Article 52 (1) CFREU, any limitations to fundamental rights can only be achieved through legislative action.⁶⁸

A Minimum Standards Approach

Minimum standards do not abolish national procedural systems in their entirety, allowing for more protective and effective national procedural rules. Minimum harmonization is in line with considerations of maintaining member states' cultural identity, also permitting some competition between different jurisdictions. However, incorporation of these minimum standards in the national legal order might also compromise the overall quality of these systems, especially where minimum standards are isolated ad hoc provisions that disregard the interconnections and interdependencies between the various areas of the application of civil procedural law. Such a scenario could be detrimental for the effective enforcement of EU rights and obligations, rendering recourse to national courts even more problematic and complicated.

By way of illustration, although the Intellectual Property Rights Enforcement Directive (IPRED)⁶⁹ provided, inter alia, the reimbursement of litigants' actual legal costs, it practically delegated the matter to member states' national procedural regimes, without duly considering the right of access to courts. In the remit of intellectual property rights protection, legal costs are often very high, comprising costs for technical experts,⁷⁰ translation costs, and costs associated with 'test purchases'.⁷¹ Overall, increased legal expenses are associated with the need to acquire proper and reliable evidence to initiate infringement proceedings,⁷² and as such are of fundamental importance for access to the courts in intellectual property rights cases. That being said, 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.⁷³ The new rule rendered the estimation of the final costs of initiating a court procedure unpredictable.⁷⁴ As a result, risk-averse parties would hesitate to initiate court proceedings due to higher legal costs in case of defeat.

The final possibility to be investigated in the next subsection, namely the introduction of optional procedural EU rules, is free from the limitations of both the soft law and the minimum harmonization approaches. On the one hand, it creates binding rules that could gradually lead to the establishment of judicial systems of similar quality. On the other

⁶⁸ By analogy from the area of EU Administrative Law: O. M. Puigpelat, 'Arguments in favour of a general codification of the EU administrative procedure' (Note, European Parliament 2011) 17 [http://www.europarl.europa.eu/RegData/etudes/note/juri/2011/432776/IPOL-JURI_NT\(2011\)432776\(PAR00\)_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/juri/2011/432776/IPOL-JURI_NT(2011)432776(PAR00)_EN.pdf) accessed 4 December 2012

⁶⁹ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (IPRED) [2004] OJ L195/16.

⁷⁰ For instance, patent agents or internet investigators.

⁷¹ These are aimed at confirming an infringement of IP rights or at gathering evidence for the establishment of an infringement.

⁷² European Commission, Commission Staff Working Document Analysis of the application of Directive 2004/48/EC 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 [2010] SEC (2010) 1589 final, 24.

⁷³ Such as Poland.

⁷⁴ P. M. M. van der Grinten, 'Challenges for the Creation of a European Law of Civil Procedure', (2007) 3 *Tijdschrift voor Civiele Rechtspleging* [Civil Justice Review], 65 – 70.

hand, it creates optional rules, which exist in parallel with domestic provisions, and which apply only to cross-border disputes, thus hardly interfering with the internal coherence of national judicial systems.

A 29th Regime Approach

This approach consists of the adoption 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, constituting a conservative solution on a trial and error basis.⁷⁵ Regardless of the existence of the additional procedural mechanism, national civil procedural mechanisms and rules on the same subject would offer a simultaneous, alternative option⁷⁶ 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 a variety of procedural options in accordance with litigants' expressed preferences.⁷⁷ Finally, it also considerably reduces possibilities for lobbyism, since it creates too many civil procedural fronts with which pressure groups will have difficulty liaising systematically and effectively to promote their interests.

However, the introduction of optional instruments as a means to intervene in member states' national procedural regimes creates an insurmountable difficulty. Switching between different procedural mechanisms, EU-based and domestic, on a daily basis, would lead to unnecessary complication and burden for the deciding judges.⁷⁸ More importantly, as analysed above, procedural law fulfils a fundamental function in parallel with conflict resolution, that is policy implementation via the enforcement of law. As a result, wasting limited judicial resources solely for the sake of procedural diversity and respect of legal judicial tradition, whatever that tradition maybe, does not conform to the overarching objective of procedural law, which is the effective enforcement of law, here, of EU law.⁷⁹ One should also consider that unlike substantive law, civil procedure law is not an end in itself. It gains value only to the extent that it can lead to the enforcement and protection of legal rights and interests, and through that, to the maintenance of the rule of law in civilised societies.⁸⁰

CONCLUDING REMARKS

In the decentralised judicial system of the EU, national procedural regimes are of tremendous importance for the dispute resolution and enforcement of EU law rights and obligations. The EU is increasingly intervening in national procedural systems to facilitate further effective dispute resolution and EU law enforcement. This is particularly

⁷⁵ J. M. Smits, 'The Practical Importance of Harmonisation of Commercial Contract Law' (Modern Law for Global Commerce Congress to celebrate the fortieth annual session of UNICTRAL, Vienna, July 2007) 5 <http://www.uncitral.org/pdf/english/congress/Smits.pdf> accessed 20 June 2012; Visscher, 'A Law and Economics View on Harmonisation of Procedural law' (n 43) 86.

⁷⁶ 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.

⁷⁷ Visscher, 'A Law and Economics View on Harmonisation of Procedural law' (n 43) p 86.

⁷⁸ J. J. Fawcett, J. M. Carruthers, and Sir P. North, *Private International Law* (14th edn, OUP 2008) p 79.

⁷⁹ G. Wagner, 'Harmonisation of Civil Procedure: Policy Perspectives' in X. E. Kramer and C. H. van Rhee (eds), *Civil Litigation in a Globalising World* (T.M.C. Asser Press 2012) p 100-101.

⁸⁰ See: J. Engström, *The Europeanisation of Remedies and Procedures through Judge-made Law: Can a Trojan Horse achieve Effectiveness? Experiences of the Swedish Judiciary* (PhD Thesis, European University Institute 2009) 34-35.

important in the European Union remit, seen as a supranational economic and political union of States.⁸¹ EU intervention into member states' civil procedural rules could tackle the distortion of competition due to economic operators' access to judicial systems of diverging quality and efficiency. Additionally, it could increase businesses and consumers' commercial activities in the EU via greater visibility of litigation costs and overall certainty as to the procedural rules and expected litigation results. Finally, it could also minimise incentives for abuse of forum shopping and the subsequent race to the bottom.

However, divergences in member states' enforcement regimes do not constitute the sole source of distortion of competition in the internal market. Equally, though common procedural rules have been correlated with increased economic growth, the overall economic benefit when considering the costs of implementation of these common rules is yet to be empirically established. Finally, a race to the bottom because of the proliferation of forum shopping pursuant to national procedural divergences would most likely cause additional costs for the 'competing' judicial systems.

Despite the necessity for harmonization of civil procedure law, there are some further parameters to be considered for the final scope of EU intervention to be established. These feasibility criteria could considerably compromise the value of procedural law harmonization effort. Specifically, EU intervention in national procedural regimes could have a negative impact on member states' legal traditions, diminishing procedural diversity, competition among the various jurisdictional regimes, and potentials for regulatory innovation and experimentation.⁸² Be that as it may, efficiencies from the competition of procedural systems presuppose considerable information and choice capacities, generally lacking in the case of individual consumers and SMEs. This could compromise equal access to justice for the resolution of disputes and the enforcement of EU law rights and obligations for such groups. Additionally, national rules on the administration of trials and general court infrastructure can easily be harmonized, whereas even fundamental procedural choices may have to be revised in light of the right of access to justice. This becomes more realistic as the civil/common law divide gradually fades. Finally, considerations on the power of lobbying groups could actually support EU intervention in national procedural systems to secure 'losing' interest groups' effective access to justice.

Against this backdrop, soft law approaches for the harmonization of civil procedure law lack the necessary binding force that would allow the establishment of enforcement systems of equitable performance levels. What is more, a minimum harmonization approach may lead to further fragmentation in national procedural systems and the EU in general. Finally, the duplication and maintenance of several procedural regimes, essentially promoting the same value, makes little sense, complicating the situation, furthering inequalities and discrimination, and compromising the timely, at reasonable costs, and accurate application of EU law to individual cases.⁸³

The time has come for a more systematic and coherent approach to EU intervention into member states' civil procedural law. This involves primarily an understanding and acceptance at the political level of the fundamental functions of civil procedural law in 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

⁸¹ H. C. Gutteridge, *Comparative law: an introduction to the comparative method of legal study and research* (CUP 1946) p 35; K. D. Kerameus, 'Some Reflections on Procedural Harmonisation: Reasons and Scope', (2003) 8 *Uniform Law Review* [*Revue de Droit Uniforme*] NS 447.

⁸² W. Kerber, 'Inter-jurisdictional Competition within the European Union' (2000) *Fordham Int'l L.J.* 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); Goldstein, 'On comparing and unifying civil procedural systems' (n 34) p 43.

⁸³ See *inter alia*: Zuckerman, 'The principle of effective judicial protection in EU law' (n 3) 2; Wagner, 'Harmonisation of Civil Procedure: Policy Perspectives' (n 79) 101.

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 into the supranational legal order.⁸⁴ These fundamental notions of effective remedy and fair trial in the EU should underpin all policy parameters in the regulation of civil procedural law.

⁸⁴ H E Hartnell, 'EUstitia: Institutionalizing Justice in the European Union' (2002) 23 *Nw. J. Int'l L. & Bus.* 92.